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EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

Report of the Panel

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B

EXECUTIVE SUMMARIES OF THE WRITTEN SUBMISSIONS OF THIRD PARTIES

ANNEX C

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

ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR
EXECUTIVE SUMMARIES THEREOF

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN
SUBMISSIONS OF THE PARTIES

ANNEX F

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

ANNEX G

REQUEST FOR CONSULTATIONS AND
REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

ANNEX H

DECISION CONCERNING EXHIBIT CHN-65

TABLE OF CASES CITED IN THIS REPORT

WTO DISPUTE SETTLEMENT REPORTS

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
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EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077
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
EC – Bed Linen (Article 21.5 – India)	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*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269

Short Title	Full Case Title and Citation
EC – Chicken Cuts (Brazil)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Guatemala – Cement I	Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as modified by Appellate Body Report WT/DS60/AB/R, DSR 1998:IX, 3797
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, 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
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
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Short Title	Full Case Title and Citation
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Korea – Certain Paper (Article 21.5 – Indonesia)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia*, WT/DS312/RW, adopted 22 October 2007, DSR 2007:VIII, 3369
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
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Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, 10225
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 – 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 WTDS244/AB/R, DSR 2004:I, 85
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
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

Short Title	Full Case Title and Citation
US – FSC	Appellate Body Report, *United States – tax treatment for "Foreign Sales Corporations"*, WT/DS/108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US - Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
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 – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
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
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
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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 (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295
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 - Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*US – Underwear*"), WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11
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 – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299

Short Title	Full Case Title and Citation
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
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 (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

GATT PANEL REPORTS

Footwear from Brazil ("*US – MFN Footwear*"), 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)
DSU	Dispute Settlement Understanding
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
IA	Investigating Authority
IT	Individual Treatment
MET	Market Economy Test
MFN	Most Favoured Nation
NME	Non-market Economy
PCN	Product Control Number
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Chinese Taipei	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
WTO	World Trade Organization

I. INTRODUCTION

1.1 On 31 July 2009, the People's Republic of China ("China") requested consultations[1] with the European Communities[2] (the "EC") pursuant to Articles 1 and 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 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement") with respect to, but not necessarily limited to, Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995 on Protection against Dumped Imports from Countries not Members of the European Community, as amended, and Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

1.2 On 12 October 2009, China requested, pursuant to Articles 4 and 6 of the DSU, Article XXIII:2 of the GATT 1994 and Article 17.4 of the AD Agreement, that the Dispute Settlement Body ("DSB") establish a Panel[3] with regard to the following measures:

(a) Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the EC, as amended.

(b) Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China.

1.3 At its meeting on 23 October 2009, the DSB established a panel pursuant to the request of China in document WT/DS397/3, in accordance with Article 6 of the DSU.

1.4 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/DS397/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 30 November 2009, the European Communities requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the

[1] WT/DS397/1, Annex G-1.

[2] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[3] WT/DS397/3, Annex G-2.

composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 9 December 2009, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Luiz O. Baptista

Members: Mr. Michael Mulgrew
Mr. Arie Reich

1.7 Brazil, Canada, Chile, Colombia, India, Japan, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), Thailand, Turkey, and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 23-24 March and on 2-3 June 2010. It met with the third parties on 24 March 2010. The Panel issued its interim report to the parties on 10 August 2010. The Panel issued its final report to the parties on 29 September 2010.

II. FACTUAL ASPECTS

2.1 China's request for the establishment of a panel challenged two measures introduced by the European Union: (1) Article 9(5) of Council Regulation (EC) No. 384/96, as amended on protection against dumped imports from countries not members of the European Community (the "Basic AD Regulation") and (2) Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (the "Definitive Regulation"). Council Regulation (EC) No. 384/96 was repealed and replaced by Council Regulation (EC) No. 1225/2009 after the establishment of this Panel, and China's submissions address Council Regulation No. 1225/2009.[4] China's claims with regard to Council Regulation 1225/2009 challenge that measure "as such", while its claims with regard to Council Regulation 91/2009 challenge the specifics of that measure, which include aspects of the Basic AD Regulation "as applied".

2.2 China challenged Article 9(5) of the Basic AD Regulation, the provision that deals with the individual treatment of producers from non-market economy ("NME") countries, including China, in the context of dumping determinations in anti-dumping investigations, as well as the application of that provision in the fasteners investigation at issue in this dispute.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CHINA

3.1 China requests the Panel to find that:

(a) With respect to Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not Members of the EC and its amendments, as codified and replaced by Council Regulation (EC) No. 1225/2009:

[4] The European Union considers that Council Regulation No. 1225/2009 is not before the Panel in this dispute. The description of the contested measures here should not be taken to have any significance for the Panel's consideration of the European Union's objection in this regard, which is addressed in the Panel's findings at paragraphs 7.32 to 7.39.

(i) The EC violated Articles 6.10, 9.2, 9.3, and 9.4 of the AD Agreement, Articles I:1 and X:3(a) of the GATT 1994 and Article XVI:4 of the Agreement Establishing the WTO as well as Article 18.4 of the AD Agreement.

(b) With respect to Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron and steel fasteners from China:

(i) The EC violated Articles 6.10, 9.2, 9.4 of the AD Agreement since it made the benefit of an individual margin of dumping and the imposition of an individual anti-dumping duty dependent on compliance with the conditions listed in Article 9(5) of Council Regulation (EC) No. 384/96 as amended;

(ii) The EC violated Article 5.4 of the AD Agreement because it failed to properly examine before initiating the investigation whether the standing thresholds were met and because the complainants did not meet the standing thresholds;

(iii) In its definition of the domestic industry, the EC violated Articles 4.1 and 3.1 of the AD Agreement because:

- it improperly excluded from the outset producers that did not make themselves known within 15 days following the publication of the notice of initiation and those producers that did not support the investigation from the scope of the EC's industry;

- the domestic industry, as defined by the EC, did not include domestic producers whose collective output of the products constituted a major proportion of the total domestic production;

- the domestic industry was not defined in relation to the investigation period;

- the EC improperly made an injury determination on the basis of a sample of producers that did not constitute or represent a major proportion of the total domestic production;

- the EC improperly included in the domestic industry companies that were related to Chinese exporting producers of the like product or were themselves importers of the allegedly dumped product;

- As a consequence, the EC also violated Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement since the injury determination was not made in relation to a properly defined domestic industry.

(iv) The EC violated Articles 2.1 and 2.6 of the Anti-Dumping Agreement since it erroneously considered fasteners produced and sold by EC's industry, fasteners produced and sold on the domestic market in India and fasteners produced in China and sold to the EC as being "alike";

(v) The EC violated Article 2.4 of the AD Agreement since it failed to make a comparison of the normal value and export price on the basis of the full

product control number (PCN) and because it failed to make the necessary adjustments for differences that affect the price comparability;

(vi) The EC violated Articles 3.1 and 3.2 of the AD Agreement by failing to make a product comparison on the basis of the full PCNs and by comparing standard fasteners without making any adjustments for the differences affecting price comparability when determining the price undercutting margin;

(vii) The EC violated Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement in its examination of the volume of dumped imports;

(viii) The EC violated Articles 3.1 and 3.4 of the AD Agreement in its examination of the impact of the dumped imports on domestic producers of the like product;

(ix) The EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to properly demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry and because it failed to ensure that injury caused by other factors, in particular the increase in raw material prices and exports by the EC producers, was not attributed to the alleged dumped imports;

(x) The EC violated throughout the investigation the following procedural obligations:

- Articles 6.5, 6.5.1, 6.2, and 6.4 of the AD Agreement because it failed to disclose the identity and volume of production of the complainants;

- Articles 6.5, 6.2, 6.4, and 6.9 of the AD Agreement since it failed to disclose information concerning the normal value determination and the comparison with export prices including adjustments affecting price comparability;

- Articles 6.5, 6.2, and 6.4 of the AD Agreement since the non-confidential versions of the EC's producers' questionnaire responses and of the analogue country producer's questionnaire response were largely deficient;

- Articles 6.5, 6.2, and 6.4 of the AD Agreement by failing to disclose Eurostat data as well as any explanations on how it had estimated the EC production;

- Articles 6.2, 6.4, and 6.9 of the AD Agreement by failing to disclose information concerning the domestic industry;

- Article 12.2.2 of the AD Agreement by failing to indicate all relevant information concerning the individual treatment ("IT") determinations;

- Article 6.5 of the AD Agreement by disclosing the document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC" while confidential treatment had been requested;

- Article 6.1.1 of the AD Agreement by limiting the time period for the submission of the responses to market economy treatment and/or individual

treatment questionnaires to 15 days as of the date of publication of the notice of initiation.

3.2 China requests that the Panel recommend that the DSB request the EC to bring the contested measures into conformity with its obligations under the AD Agreement and the GATT 1994.

3.3 In addition, 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 EC could implement the recommendations and rulings of the DSB. China considers that both measures should be withdrawn. As to the first measure, given the "as such" nature of the violation, it should be withdrawn. As to the second measure, China considers that the nature and scope of the violations of the AD Agreement and of the GATT 1994 are such that it is inherently vitiated and devoid of any legal basis. Thus, China requests the Panel to suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.

B. THE EUROPEAN UNION

3.4 The European Union requests the Panel to reject all of China's claims and arguments, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the AD Agreement, the GATT 1994, and the WTO Agreement.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and their oral statements, or executive summaries thereof, are attached to this report as annexes (see List of Annexes, page v).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Brazil, Canada, Chile, Colombia, India, Japan, Norway, Chinese Taipei, Thailand, Turkey, and the United States reserved their rights to participate in the Panel proceedings as third parties. Canada, Chile, Thailand, Chinese Taipei, India did not submit third party written submissions and Brazil, Canada and Thailand did not submit third party oral statements. The arguments of Colombia, Japan, Norway, Turkey, and the United States are set out in their written submissions and oral statements, the arguments of Brazil are set out in its written submission, and the arguments of Chile, India, and Chinese Taipei are set out in their oral statements. Executive summaries of the third parties' written submissions, and third party oral statements, or executive summaries thereof, are attached to this report as annexes (see List of Annexes, page v).

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 10 August 2010, we issued our Interim Report to the parties. On 24 August 2010, China and the European Union submitted written requests for review of precise aspects of the Interim Report. On 7 September 2010, 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 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 a change 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 unchaged from the Interim Report. We have also corrected typographical and other non-substantive errors throughout the Report, including those identified by the parties, which are not referred to specifically below.

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

B. GENERAL COMMENTS

6.4 The European Union observes that the name of this case, as set out on the first page of the Interim Report, is "*European Communities – Definitive Anti-Dumping Measures on certain Iron or Steel Fasteners from China*", although the European Union requested that, in the interest of clarity, the name of the case be changed to "European Union – Definitive Anti-Dumping Measures on certain Iron or Steel Fasteners from China".[5] The European Union notes that several third parties have referred to the case in this fashion, and that China did not oppose the European Union's request. The European Union requests that, as both parties seem to be in agreement on this issue, the Panel modify the name accordingly, or provide adequate explanation as to why it has decided to reject the European Union's request. China did not comment on the European Union's request.

6.5 At the time the underlying investigation took place, the European Communities was the relevant authority and WTO Member. Both the request for consultations and the request for establishment, as well as the decision of the DSB establishing the Panel, therefore appropriately referred to the European Communities, and the title of the dispute was correct as of the date of establishment. As set out in footnote 2 of the Final Report, the European Union replaced and succeeded the European Community as of the date of entry into force of the Treaty of Lisbon, 1 December 2009. Our Report refers to the European Communities where appropriate as a matter of historical fact, for instance in describing the investigation process, the requests for consultations and establishment, and the establishment and composition of the Panel, all of which occurred prior to the effective date of the Treaty of Lisbon. However, all the submissions in this panel proceeding were made by the European Union after that date, and our Report refers to the European Union in that context. The title of the dispute has no legal consequence, and indeed, the European Union does not argue otherwise. To our knowledge, the name of a dispute has never been changed in the past, and several Panel reports have issued since the entry into force of the Treaty of Lisbon without incorporating European Union in the title, or in the body of the report.[6] We consider that, rather than being in the interest of clarity as asserted by the European Union, it would be confusing to change the name originally assigned to this panel proceeding, as different documents pertaining to the dispute would refer to different names for the dispute, and would moreover be inaccurate as a matter of historical fact. We therefore deny the European Union's request.

6.6 China notes that "TPKM" is not an official abbreviation and therefore requests that the Panel refer to "Chinese Taipei".[7] The European Union did not comment on this request.

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[5] European Union request for interim review, p. 1, citing, European Union, first written submission, fn 1; and European Union letter dated 29 June 2010.

[6] In this regard, we note that in DS316 - *EC and certain member States – Large Civil Aircraft*, the report was circulated on 30 June 2010, after the entry into force of the Treaty of Lisbon, but the name of the dispute was not changed, and references in the body of the report are to the European Communities. In that case, all submissions were made before the entry into force of the Treaty of Lisbon. In DS375, *EC – IT Products*, the report was circulated on 16 August 2010, after the entry into force of the Treaty of Lisbon, but the name of the dispute was not changed, and most of the references in the report are to the European Communities, despite the fact that the interim review submissions were made after the entry into force of the Treaty of Lisbon.

[7] China, request for interim review, para. 3.

6.7 In the absence of any objection, and in light of the sensitivities of Members, we grant China's request.

C. SPECIFIC REQUESTS

6.8 **Paragraph 2.1**: The European Union requests the Panel to take into account the comments made by the European Union on this paragraph in its comments on the descriptive part of 29 June 2010.[8] China submits that paragraph 2.1 should not be modified for the reasons explained in its letter commenting on the European Union's comments on the descriptive part of the Panel's Report.[9]

6.9 We note that we did, in fact, take the European Union's comments on the descriptive part into account, amending paragraph 2.1 from the original as sent to the parties for comment, so as to be factually accurate. The European Union has not specified what additional changes it considers should be made. Therefore, having already taken the European Union's original comments into account insofar as we deemed it appropriate, and in the absence of any new or additional arguments in this regard, we deny the European Union's request.

6.10 **Paragraph 7.11**: The European Union requests the Panel to modify this paragraph to use the same wording as in paragraph 7.15 when referring to the European Union's arguments.[10] China did not comment on this request.

6.11 Given that the requested modification reflects the European Union's arguments as presented to the Panel, we have granted the European Union's request and modified this paragraph accordingly.

6.12 **Paragraph 7.41**: China requests the Panel to amend this paragraph to more accurately reflect China's arguments.[11] The European Union did not comment on this request.

6.13 Given that the requested modification reflects China's arguments as presented to the Panel, we have granted China's request and modified this paragraph accordingly

6.14 **Paragraph 7.43**: The European Union requests that the Panel amend this paragraph in order to properly reflect its arguments.[12] The European Union notes that it argued that (1) the individual or country-wide determination of dumping margins, (2) the calculation or how dumping margins are calculated, and (3) how the proper level of anti-dumping duties is established (e.g., equal or lower than the dumping margin found) are three separate issues. China did not comment on this request.

6.15 Given that this request concerns the European Union's arguments as presented to the Panel, we have granted the European Union's request, and have modified the paragraph accordingly. We note that, to ensure consistency, we have also modified paragraph 7.44 as a result of our modification of this paragraph.

6.16 **Paragraph 7.44**: The European Union requests the Panel to reconsider its conclusion in the final sentence of this paragraph.[13] In the European Union's view, even if the scope/operation of the measure at issue is a disputed matter between the parties, this does not imply that the Panel can find that the legal claims "are within its terms of reference". At most, the European Union argues, the

[8] European Union, request for interim review, p. 2.
[9] China, Comments on the European Union's request for interim review, para. 2, citing China's letter dated 12 July 2010.
[10] European Union, request for interim review, p. 2.
[11] China, request for interim review, para. 4.
[12] The European Union refers in this regard to references in footnote 54 of the Interim Report.
[13] European Union, request for interim review, p. 2.

Panel may come to that conclusion "on a preliminary basis, subject to the substantive analysis of the measure at issue". Otherwise, this approach may lead to odd results (e.g., accepting claims within the panel's terms of reference and then, once examined the substance, rejecting them as not falling within its mandate). In this respect, the European Union considers that the Panel should examine first the scope/operation of the measure at issue as part of the preliminary objections and then decide whether the claims raised by China are properly within the Panel's terms of reference.

6.17 China argues that the European Union confuses the issue of whether certain matters are within the Panel's terms of reference with the substantive question of the scope of Article 9(5) of the Basic AD Regulation.[14] China is of the view that the scope of Article 9(5) of the Basic AD Regulation is a substantive issue discussed elsewhere in the Report, and that such substantive discussion is not relevant for the determination of the Panel's terms of reference. China also disagrees with the European Union's argument that the approach followed by the Panel "may lead to odd results".[15] In China's view, the only thing that matters for purposes of Article 6.2 of the DSU is whether the panel request identifies the specific measures at issue and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. China contends that this is the only issue that the Panel must determine in order to assess whether certain claims are within its terms of reference, and the fact that the scope of the measure at issue may not be in line with some of the claims does not make these claims fall outside the Panel's terms of reference. China thus considers that the Panel properly examined the issue of the scope of Article 9(5) of the Basic AD Regulation, the measure at issue, as part of its substantive analysis and that the Panel should therefore reject the European Union's request.[16]

6.18 With respect to this paragraph, China itself requests that the Panel amend the penultimate sentence, which China considers is not clear.[17] The European Union considers that that sentence is clear and asserts that China has not indicated why it is not so.[18]

6.19 The European Union's request concerns the analytical approach we followed in resolving China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement concerning Article 9(5) of the Basic AD Regulation. It is our view that the order in which different aspects of these claims should be addressed in our analysis is a decision that is within our own discretion. In this case, we considered it important to first resolve the jurisdictional issues raised by the European Union and then address the substantive aspects of the claims that we concluded were within our terms of reference. We therefore deny the European Union's request.

6.20 We have granted China's request and modified the penultimate sentence so as to clarify, without changing, its meaning.

6.21 **Paragraph 7.47 – footnote 58**: China suggests that the Panel modify the description of the MET criteria in footnote 58 in order to more accurately reflect the text of Article 2(7)(c) of the Basic AD Regulation.[19] The European Union suggests that the Panel reproduce the text of Article 2(7)(c) of the Basic AD Regulation in order to address China's concerns.[20]

6.22 We have granted China's request, and modified footnote 58 (now footnote 226) accordingly.

[14] China, Comments on the European Union's request for interim review, para. 4.
[15] China, Comments on the European Union's request for interim review, para. 6.
[16] China, Comments on the European Union's request for interim review, para. 8.
[17] China, request for interim review, para. 5.
[18] European Union, comments on China's request for interim review, p. 1.
[19] China, request for interim review, para. 6.
[20] European Union, Comments on China's request for interim review, p. 1.

6.23 **Paragraph 7.48**: The European Union requests the Panel to add the phrase "in general" after "(2)" in this paragraph in order to better reflect the wording of Article 9(5) of the Basic AD Regulation. China argues that the wording of Article 9(5) is quoted *in extenso* in this paragraph and that therefore it is not necessary to add the words "in general" as requested by the European Union.[21]

6.24 We have granted the European Union's request, and modified this paragraph accordingly.

6.25 **Paragraph 7.49**: China requests that the Panel amend the last two sentences of paragraph 7.49 in accordance with the findings of the Panel at paragraphs 7.68 to 7.77 of the Interim Report.[22] The European Union requests the Panel to reject China's requested change. The European Union points out that in paragraph 7.49, the Panel refers to the text of Article 9(5); however, China wants the Panel to anticipate its analysis of how the measure operates (which comes later and is an issue disputed by the parties) in this paragraph, which is merely descriptive.[23]

6.26 The European Union itself requests the Panel to amend this paragraph in order to respect the wording of Article 9(5).[24] China did not comment on this request.

6.27 We have granted the European Union's request and modified this paragraph accordingly. However, since paragraph 7.49 comes before paragraphs 7.68 and 7.77, and the scope/operation of Article 9(5) of the Basic AD Regulation is a contested issue, we have denied China's request.

6.28 **Paragraph 7.50**: China asserts that the description of how the export price is determined for non-IT producers is not entirely correct, referring in this respect to paragraph 302 of its second written submission as well as to paragraph 3 of the European Union's answer to Panel question 4.[25] In particular, China considers it essential to mention that in case cooperation is deemed to be low, the weighted average export price of cooperating non-IT producers is further weighted with the export prices based on other sources, e.g. import statistics. The European Union requests the Panel to reject China's requested change. The European Union has proposed specific changes to address this issue in its comments on the Interim Report and requests the Panel to follow them. In addition, the European Union observes that China's description is also incorrect. Indeed, China insisted in the course of the proceedings to equate "low cooperation" with "below 80%". China has not adduced any evidence of the existence of a European Union practice on the basis of that precise threshold of cooperation. There is none, as the European Union clarified *inter alia* in its response to Panel question 4.[26]

6.29 The European Union itself requests that the Panel modify paragraph 7.50, asserting that the description contained in (b)(ii) is inaccurate and confusing, and proposes text in this regard.[27] China disagrees with the wording proposed by the European Union.[28] China considers that it is not correct to state that the country-wide duty rate is "generally" calculated on the basis of the export prices of the cooperating non-IT suppliers, asserting that in most cases, the country-wide duty rate is calculated on the basis of the export prices of cooperating non-IT suppliers and facts available. Second, China maintains that it is not correct to describe the determination of the export price, when cooperation is deemed to be low, as being based on the export prices of cooperating non-IT suppliers and "*the results found for non-cooperating suppliers*". According to China, this gives the erroneous impression that the export price is based on the export prices of all NME suppliers, when in fact, the export prices of

[21] China, Comments on the European Union's request for interim review, para. 9.
[22] China, request for interim review, para. 7.
[23] European Union, Comments on China's request for interim review, p. 1.
[24] European Union, request for interim review, pp. 2-3.
[25] China, request for interim review, para. 8.
[26] European Union, Comments on China's request for interim review, p. 2.
[27] European Union, request for interim review, pp. 3-4.
[28] China, Comments on European Union's request for interim review, paras. 10-11.

the cooperating non-IT producers are simply averaged with best information available such as the highest margin of dumping or EU import statistics.[29] Therefore, China contends, it is simply incorrect to refer to the "results found for non-cooperating suppliers".

6.30 While the parties disagree as to how the export price for non-IT suppliers is determined, particularly in investigations where cooperation is low, both refer to the European Union's reply to Panel question 4 as providing an accurate description of the determination of the export price for non-IT suppliers. We have granted the parties' requests and have modified this paragraph accordingly.

6.31 **Paragraph 7.51**: China requests the Panel to modify this paragraph in order to more accurately reflect its arguments.[30] The European Union requests the Panel to reject the proposed changes, asserting that it is clear that the Panel correctly summarized the most relevant elements of China's argument, and that China has not provided any citations to its submission to show the contrary.[31]

6.32 While China does not refer to its submissions in support of the requested modification, since the request does reflect China's arguments as they were presented to the Panel, we have granted China's request, modified this paragraph accordingly and indicated where in China's submissions those arguments are found.

6.33 **Paragraphs 7.51 – 7.59**: The European Union observes that in these paragraphs, as well as in other sections of the Interim Report[32], there is no citation to the relevant submissions of the parties where the arguments were made. The European Union considers that some of those paragraphs misrepresent the arguments as made by the parties. The European Union notes that, in other sections of the Report, citations to the arguments raised by the parties and third parties are made. The European Union requests the Panel to insert footnotes where appropriate to the relevant submissions where the parties allegedly made the stated claims and arguments. China did not comment on this request.

6.34 We have granted the European Union's request to the extent that we have reviewed the parts of the Interim Report where parties' arguments are summarized, particularly the part specifically cited by the European Union in this regard, and added footnotes referring to the parties' submissions, where we deemed it appropriate.

6.35 **Paragraph 7.53**: China asserts first that paragraph 7.53 does not accurately reflect what China said on how the export price is determined for non-IT exporting producers, referring in this regard to paragraph 302 of its second written submission and paragraph 3 of its answer to Panel

[29] China refers in this regard to anti-dumping investigations cited in China, second written submission, footnote 221.

[30] China, request for interim review, para. 9.

[31] European Union, Comments on China's request for interim review, p. 2.

[32] European Union, request for interim review, p. 4. The European Union observes, at fn. 1, that it: "cannot find the relevant citation to the statements in para. 7.105 ("China argues that there is a parallel in this regard between Articles 6.10 and 9.2 which would mean that "impracticable" under Article 9.2 refers to investigations where, because of the large number of producers, *it would be difficult to manage the implementation of the measure if each supplier is named individually*" (*emphasis added*)); or para. 7.129 ("The European Union asserts that Article 9(5) of the Basic AD Regulation provides for a *methodology* for determining anti-dumping duties in investigations against NMEs. It does not contain any rules on how such *methodology* should be administered" (*emphasis added*)). As regards para. 7.129 specifically, the European Union has not asserted anywhere that Article 9(5) provides for a "methodology" for determining anti-dumping duties against NMEs."

question 1, and therefore requests that the Panel modify the first sentence.[33] Second, China requests that the Panel modify paragraph 7.53 in order to more accurately reflect China's arguments in relation to its claim in connection with Article 9.3 of the AD Agreement.[34]

6.36 The European Union notes that China's request for a change of the first sentence accurately reflects its arguments as stated in China's Second Written Submission, paragraph 302 and its reply to Panel question 1, paragraph 3. However, the European Union asserts it could not find any reference in China's submissions with the suggested language concerning China's other requests. Since China has failed to provide specific references to its submission, the European Union requests the Panel to reject the proposed changes.[35]

6.37 While China does not refer to its submissions in support of the requested modification, since the request does reflect China's arguments as they were presented to the Panel, we have granted China's request, modified this paragraph accordingly and indicated where in China's submissions those arguments are found.

6.38 **Paragraph 7.80**: In line with its comments concerning paragraph 7.50, China requests that paragraph 7.80 be modified to accurately describe how the export price is determined for non-IT exporting producers.[36] For the same reasons as given in respect of China's request concerning paragraph 7.50 of the Interim Report, the European Union requests the Panel to reject the change proposed by China.[37]

6.39 With respect to this paragraph, the European Union considers that the description of how the country-wide margin is calculated is inaccurate, and for the same reasons as expressed with respect to paragraph 7.50, the European Union requests the Panel to amend this paragraph.[38] China disagrees with the modification requested by the European Union, as it did with respect to the European Union's request regarding paragraph paragraph 7.50. According to China, it is not correct to describe the export price as being based either on the weighted average export prices of all cooperating producers or the weighted average export prices of all NME producers. China submits that if cooperation is deemed to be low, i.e. less than 80% in most cases, the export price is generally determined on the basis of the average export price of the cooperating non-IT suppliers and best information available, e.g. statistics or the highest dumping margin or other available information. In China's view, it is artificial and not in accordance with the practice of the European Union to state that in case cooperation is low, the export price is based on the weighted average export prices of all NME producers.[39]

6.40 In connection with this paragraph, both parties repeat their views about paragraph 7.50 of the Interim Report, where the determination of export price for non-IT producers is described. As we did with respect to paragraph 7.50, see paragraph 6.30 above, we have modified paragraph 7.80, which concerns the same issue, accordingly.

6.41 **Paragraph 7.86**: The European Union requests that the Panel modify this paragraph in order to properly reflect the European Union's arguments.[40] China did not comment on this request.

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[33] China, request for interim review, para. 10.
[34] China, request for interim review, para. 10.
[35] European Union, Comments on China's request for interim review, p. 2.
[36] China, request for interim review, para. 11.
[37] European Union, Comments on China's request for interim review, p. 2.
[38] European Union, request for interim review, p. 4-5.
[39] China, Comments on the European Union's request for interim review, para. 12. In this regard, China refers to footnote 221 of China's second written submission.
[40] European Union, request for interim review, pp. 4-5.

6.42 Given that the requested modification reflects the European Union's arguments as presented to the Panel, we have granted the European Union's request and modified this paragraph accordingly.

6.43 **Paragraph 7.100**: The European Union requests that Panel to amend this paragraph in order to reflect the European Union's arguments as contained in its submissions, referring specifically to European Union, first written submission, paragraph 119 and European Union, second oral statement, paragraph 15.[41] China did not comment on this request.

6.44 Given that the requested modification reflects the European Union's arguments as presented to the Panel, we have granted the European Union's request and modified this paragraph accordingly.

6.45 **Footnote 83**: The European Union requests the Panel to delete the observation in this footnote that the European Union "has not substantiated its argument".[42] In this respect, the European Union refers specifically to paragraph 148 of its first written submission, where it argued that the use of the terms "suppliers" and "sources" in Article 9.2, while the *Anti-Dumping Agreement* specifically employs the terms "exporter" and "producer", must have a meaning, in particular that anti-dumping measures aim at identifying the supplier which is the actual source of the price discrimination. The European Union observes that it makes an argument by implication in this respect, which it contends is also substantiated in view of the precedent and subsequent paragraphs of that section. China maintains that there is nothing in the cited section of the European Union's first written submission which "substantiates" the European Union's argument. China therefore requests the Panel not to delete the phrase.[43]

6.46 We note that, to support its request for a modification of footnote 83 of the Interim Report, the European Union refers the Panel to paragraph 148 of its first written submission, which is already cited in that footnote. In our view, there is therefore no need to modify the footnote, and we therefore have denied the European Union's request. However, for clarity, we have added a cross reference in footnote 83 (now footnote 281) to paragraph 7.104 of the Report, where we rejected the proposition that "supplier" means something other than "exporter" or "producer".

6.47 **Paragraph 7.117**: China requests that this paragraph be modified by adding a sentence.[44] The European Union requests the Panel to reject the proposed changes, asserting that it is clear that the Panel correctly summarized the most relevant elements of China's argument, and that China has not provided any citations to its submission to show the contrary and the European Union could not find any reference in China's submissions with the suggested language.[45]

6.48 While China does not refer to its submissions in support of the requested modification, China's first and second written submissions contain language to this effect. We have therefore granted China's request and modified this paragraph accordingly.

6.49 **Paragraph 7.138**: The European Union notes that this paragraph refers to the Commission of the European Union ("the Commission") whereas the Panel has referred to the Commission in previous sections of its Report. The European Union requests the Panel to include the full name and the abbreviation the first time it refers to the Commission in its Report.[46] China did not comment on the European Union's request.

6.50 We have granted this request, and modified the Report accordingly.

[41] European Union, request for interim review, p. 5.
[42] European Union, request for interim review, p. 5.
[43] China, Comments on the European Union's request for interim review, paras. 13-14.
[44] China, request for interim review, para. 12.
[45] European Union, Comments on China's request for interim review, p. 2.
[46] European Union, request for interim review, p. 5.

6.51 **Paragraph 7.143**: China requests that the Panel modify this paragraph to accurately reflect the facts of this case.[47] China contends that it is not correct to state that most of the producers did not make themselves known and that only 46 producers came forward, asserting that, according to the Information Document, the Commission received information from more than 114 producers. China considers that it should be clarified that the 46 Community producers are those which came forward and provided the requested information and expressed a wish to be included in the sample within 15 days as of the date of initiation of the investigation and which supported the complaint. The European Union requests the Panel to refuse to make the proposed changes, asserting that the Panel correctly summarized the major elements of the investigating authorities' findings on injury referring each time in a footnote to the relevant recitals of the Definitive Regulation.[48]

6.52 This paragraph is part of a section where the Panel summarizes the facts of the investigation at issue, and therefore reflects our understanding of those facts. In our view, China's proposed alternative text does not add clarity to this paragraph, is argumentative and is not entirely correct as a matter of fact. We therefore have denied China's request, with the exception of a modification to reflect the fact that 46 cooperating producers expressed their willingness to be included in the sample.

6.53 **Paragraph 7.149**: The European Union invites the Panel to reconsider the conclusion that: "Finally, we do not consider it necessary to make findings under Article 9.4 of the AD Agreement in respect of China's "as applied" claim, for the same reasons that led us to find it unnecessary to make findings with respect to China's "as such" claim under that provision".[49] The European Union asserts that China did not include a claim under Article 9.4 of the *Anti-Dumping Agreement* in its Panel request and thus this claim, which the European Union argues was included for the first time in China's first written submission, was outside the Panel's terms of reference.[50] The European Union notes that China argued that this claim fell within the Panel's terms of reference because it was included in the context of its "as such" claim. The European Union considers that, by exercising judicial economy, the Panel seems to have found that China's claim under Article 9.4 against Council Regulation No 91/2009 fell within its terms of reference. If that is the case, the European Union requests the Panel to provide its views as to why this result should be granted in view of the fact that this was an issue disputed by the parties. Otherwise, the European Union invites the Panel to change its conclusion and find that China's claim under Article 9.4 did not fall within its terms of reference since it was not included in its Panel Request.

6.54 China notes that in reply to the European Union's objection in its first written submission that China's claim under Article 9.4 [in relation to the second measure at issue] was outside the Panel's terms of reference, China explained that Article 9(5) of the Basic AD Regulation which is being challenged "as such" is also being challenged "as applied" in the framework of the anti-dumping investigation on imports of certain iron or steel fasteners originating in China.[51] China also notes that it pointed out that its claim concerning the application of Article 9(5) in the fasteners investigation is the logical continuation of China's challenge to Article 9(5) "as such" and that given that Article 9.4 of the AD Agreement is included in the panel request in connection with the claims against Article 9(5) "as such", China's claim that Article 9(5) "as applied" in the fasteners investigation violated Article 9.4 is within the Panel's terms of reference. China considers that the Panel expressly acknowledged this "logical continuation" by describing the claim in its Interim Report as being "whether Article 9(5) of the Basic AD Regulation, as applied in the fasteners investigation, is inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement". China understands that the Panel

[47] China, request for interim review, para. 13.
[48] European Union, Comments on China's request for interim review, p. 2.
[49] European Union, request for interim review, pp. 5-6.
[50] The European Union refers in this regard to paragraph 212 of its first written submission.
[51] China refers to paragraphs 371 – 383 of its second written submission in this regard.

implicitly concluded that China's claim under Article 9.4 is within its terms of reference. In China's view, the Panel may, for the purposes of clarity, state this explicitly in its Report.[52]

6.55 We agree that the text as originally drafted was unclear, and we therefore have granted the European Union's request, redrafting this paragraph to clarify the parties' arguments and our conclusion.

6.56 **Paragraph 7.150**: China considers that this paragraph does not accurately reproduce China's arguments as set out *inter alia* in its first and second written submissions, and therefore requests that the Panel modify it.[53] The European Union requests the Panel to reject the proposed changes, asserting that it is clear that the Panel correctly summarized the most relevant elements of China's argument, and that China has not provided any precise citations to its submission to show the contrary.[54]

6.57 While China does not refer to its submissions in support of the requested modification, since the request does reflect China's arguments as they were presented to the Panel, we have granted China's request, modified this paragraph accordingly and indicated where in China's submissions those arguments are found.

6.58 **Paragraph 7.168**: China considers that this paragraph does not accurately reproduce China's argument as set out in its answer to Panel question 19, and therefore requests that the Panel modify it.[55] The European Union requests the Panel to reject China's proposed amendments, asserting that the relevant paragraph of the Panel's Report accurately reflects China's argument as made in China's answer to Panel question 19.[56]

6.59 The modification proposed by China does not in any way alter the content of this paragraph, and we have therefore granted China's request and have modified this paragraph accordingly.

6.60 **Paragraph 7.172**: China considers that this paragraph does not accurately reproduce China's argument as set out in its answer to Panel question 19, and therefore requests that the Panel modify it.[57] For the same reasons as above concerning China's comments with respect to paragraph 7.168 of the Interim Report, the European Union requests the Panel to reject the change proposed by China.[58]

6.61 The modification proposed by China does not in any way alter the content of this paragraph and we have therefore granted China's request and have modified this paragraph accordingly.

6.62 **Paragraphs 7.172 – 7.175**: The European Union recalls its submissions in the course of these proceedings, where it explained in detail the steps taken by the investigating authority in the fasteners investigation.[59] The European Union asserts that China did not dispute the steps the European Union asserted it had taken in ascertaining production figures prior to initiation. The European Union requests the Panel to take this into account in its analysis with respect to the quality of the Commission's determination on standing, proposing that the Panel amend footnote 138 to

[52] China, Comments on the European Union's request for interim review, paras. 15-18.
[53] China, request for interim review, para. 14.
[54] European Union, Comments on China's request for interim review, p. 2.
[55] China, request for interim review, para. 15.
[56] European Union, Comments on China's request for interim review, p. 2.
[57] China, request for interim review, para. 16.
[58] European Union, Comments on China's request for interim review, p. 3.
[59] European Union, request for interim review, pp. 6-7. The European Union refers in particular to European Union, first written submission, para. 263; European Union Opening Oral Statement, Second Hearing with the Panel, para. 22 in this regard.

reflect this. In addition, the European Union requests the Panel to amend paragraph 7.152 by adding a footnote describing the steps taken.

6.63 China opposes the European Union's request, asserting that it is incorrect that "China did not dispute these steps". China notes that it stated that the European Union explains "the methodology used by the investigating authority to examine standing" in abstract terms[60], but did not give any details about how this examination was carried out in the context of the fasteners investigation. China asserts that evidence it put forward in its first written submission clearly shows that the European Union examined the degree of support for, or opposition to, the application only after the initiation of the investigation. Furthermore, the fact that China disagreed with the description provided by the European Union is clear from paragraph 22 of the European Union's opening statement at the second substantive meeting, where the European Union stated that "Contrary to what China asserts, the figure of EU total production contained in the Complaint and which was finally included in the Note to the File was also examined by checking the figures in EUROSTAT". China asserts that the European Union intentionally omitted the phrase "contrary to what China asserts" in its comments on the Interim Report. China maintains that this phrase clearly shows that China disagrees with the description provided by the European Union. Therefore, China requests the Panel not to make the modification requested by the European Union.[61]

6.64 Given that this paragraph contains the European Union's own arguments, we have granted the European Union's request and modified this paragraph accordingly. However, the steps taken by the Commission are not uncontested as a matter of fact, and we therefore have denied the European Union's request to modify footnote 138.

6.65 **Paragraph 7.178**: China requests that the Panel delete the sentence "China has not disputed this assertion" from paragraph 7.178.[62] China asserts that it is not correct that it did not dispute the assertion that "the European Union contends that the company-specific figures in this table do include a 15 percent margin of error to protect the confidentiality of the production data of individual producers, but that the totals indicated for complainants and supporters are the actual, correct figures, and do not reflect that 15 percent margin".[63] According to China, the European Union submitted no evidence in support of its statement that the 15% margin only relates to individual company figures and that, moreover, this justification does not stand in view of the fact that the production figures for each producer in the document are anonymous.

6.66 The European Union requests the Panel to reject the proposed changes, asserting that it is clear that China did not contest this issue. The European Union asserts that, in response to question 86 from the Panel after the second hearing, it indicated that the company-specific figures in question included a 15% margin of error to protect the confidentiality of the production data of individual producers, but that the totals indicated for the complainants and the supporters were the actual, correct figures. The European Union asserts that China did not comment on the European Union's response, noting that while China refers to its second written submission, paragraph 490 to argue that it did so, China's second written submission triggered the question from the Panel.[64]

6.67 Question 86 was put to the parties after the second substantive meeting with the parties, that is after the receipt of China's second written submission. Therefore, that submission does not establish that China disputed the European Union's answer to question 86. Moreover, paragraph 490 of China's

[60] China refers to paragraph 478 of China, second written submission in this regard.
[61] China, Comments on the European Union's request for interim review, paras. 19-21.
[62] China, request for interim review, para. 17.
[63] China refers in this respect to paragraph 490 of China, second written submission.
[64] European Union, Comments on China's request for interim review, p. 3.

second written submission does not in any case rebut the European Union's contention. In that paragraph, China asserts that the European Union did not submit evidence in support of its position, and that since the production figures were listed for each producer anonymously, there is no basis for the assertion that the 15 percent margin of error was for confidentiality reasons. This does not, however, address the European Union's contention that the overall figure did not include the 15 percent margin of error. We have therefore denied China's request.

6.68 **Paragraph 7.205**: China requests that the Panel modify this paragraph to more accurately reflect China's arguments, as set out in paragraphs 505 to 528 of its second written submission.[65] The European Union did not comment on China's request.

6.69 This paragraph is an introduction to our analysis of the European Union's preliminary objection to China's first allegation of error with regard to the domestic industry, which we ultimately rejected. In this context, we see no need to expand on the brief description of China's arguments in response to the European Union's objection. We have therefore denied China's request.

6.70 **Paragraph 7.213**: China requests that the Panel modify this paragraph to more fully and accurately reflect China's arguments, referring in this regard to China, Comments on European Union answer to Panel question 89, paragraph 16 and paragraphs 533-534 of China, second written submission.[66]

6.71 The European Union requests that the Panel reject China's request, asserting that the Panel correctly summarized China's position as set forth, *inter alia*, in paragraphs 533 – 534 of China, second written submission. The European Union considers that the changes China requests are not reflected in the paragraphs of that submission cited by China, and that China misunderstands the European Union's replies to Panel questions 88 and 89 in asserting that the European Union acknowledged that "the 318 producers and the additional 54 producers not only received the sampling form but that they were also asked to state their position vis-à-vis the investigation (in relation to the standing issue examination)". The European Union maintains that this is not correct, and that the Panel was right not to include this comment in its Report. According to the European Union, it is not the case that the authorities had information about support for the complaint or lack thereof by the producers that were contacted, as it did not ask these producers about their position with respect to the complaint following initiation, stating that after initiation, this was not a relevant question anymore.[67]

6.72 China's proposed inclusions do not describe facts found or relied upon by the Panel, but rather describe China's arguments and interpretation of facts, particularly with respect to the European Union's answers to Panel questions 88 and 89. The Panel is not required to exhaustively summarize all of a party's arguments in the course of its analysis, which this paragraph is part of. We have therefore denied China's request.

6.73 **Paragraph 7.214, and Footnotes 247 and 249**: China requests that the Panel modify this paragraph and the footnotes.[68] China asserts the this paragraph misrepresents its view, and that it has never stated that it "accepted" that "at least one producer which was not a complainant, and had remained silent prior to initiation, was not only included in the domestic industry, but was selected for the sample". China notes that this information was and is impossible for it to verify since the identity of the complainants has been kept confidential. Moreover, China asserts that the European Union did not provide any evidence supporting this factual assertion, which the Panel could not therefore check. China asserts that the Panel erred, in footnote 247, in stating that "it is clear that support or lack

[65] China, request for interim review, para. 18.
[66] China, request for interim review, para. 19.
[67] European Union, Comments on China's request for interim review, p. 3.
[68] China, request for interim review, paras. 20-22.

thereof **as a matter of fact** was not enquired into by the Commission" (emphasis added). China asserts that the Commission sent sampling forms to 318 producers and an additional 54 producers, and also contacted these producers in the framework of its continuing investigation of the "standing" issue and requested each producer to state its position *vis-à-vis* the investigation.[69] Thus, China argues, the Commission enquired about and knew the positions of the producers concerned *vis-à-vis* the investigation. Finally, China notes that the Panel does not refer to paragraph 76 of China's second oral statement regarding the European Union practice, which China contends is evidence showing that support to the complaint is a necessary condition for a domestic producer to be part of the domestic industry. China requests that the Panel add a reference to this statement in footnote 249.

6.74 The European Union requests the Panel to reject China's requested change, asserting that the Panel correctly reflected the fact that in its comments on the European Union's answer to Panel question 89, China "appeared to accept" the fact that the company referred to by the European Union in its replies had not supported the complaint but had remained silent. The European Union considers that China's proposed change is based on the erroneous assertion that the Commission enquired about producers' position in respect of the complaint. According to the European Union, that was simply not the case, which it asserts is clear from the sampling forms submitted to the Panel. The European Union contends that China's assertions in this regard are incorrect, noting that China did not submit any evidence to support them. The European Union also requests that the Panel reject China's proposal to reflect the argument that to include only supporters of the complaint is standard EU practice. First, China's argument about the EU's standard practice is not relevant in the context of this "as applied" claim. Second, the European Union contends that it is not the case that this is standard EU practice, and the evidence China submitted of certain specific cases is not convincing. Third, the European Union notes that the Panel is not obliged to address each and every argument of a party, and considers that the Panel was correct not to address this assertion.[70]

6.75 For the most part, China's proposed text reflects its own views of the facts, as argued to the Panel, rather than the Panel's views. While China continues to assert that the Commission inquired as to the position of EU producers with respect to the complaint, the only evidence before the Panel, the sampling forms, does not support that assertion. Given that this paragraph is part of our analysis, and that we did not accept China's view of the facts in this context, we see no reason to reflect China's arguments in further detail. Moreover, while it is true that China referred to other EU anti-dumping cases in arguing its claim, it made no claim with respect to EU practice concerning definition of the domestic industry. Its claim concerned only the decision in this particular investigation. We therefore see no need to include an aspect of China's argument which was not relevant to the Panel's consideration of the claim actually before it. We have therefore denied China's request. However, to more fully reflect China's position, we have added a footnote in paragraph 7.214 referring to China's argument that it was not possible for it to verify whether one producer, which was not complainant and did not indicate a position in support of or opposition to the complaint prior to initiation, was included in the domestic industry and selected for the sample.

6.76 **Paragraph 7.215**: China submits that this paragraph also misrepresents the facts of this case when it refers to "the fact that at least one producer who did not affirmatively state support for the complaint was included in the domestic industry" and requests that the Panel modify it.[71] China makes largely the same arguments as with respect to paragraphs 7.213 and 7.214, noting that even if the producer identified by the European Union as having come forward after the initiation did not mention its position in its sampling form, it did it in its reply to the "standing" inquiry, and requests that the Report reflect this view. For the same reasons as given in respect of China's comments

[69] China refers in this regard to its comments on the European Union's reply to Panel question 89.
[70] European Union, Comments on China's request for interim review, pp. 3-4.
[71] China, request for interim review, para. 23.

concerning paragraph 7.213 of the Interim Report, the European Union requests the Panel to reject the change proposed by China.[72]

6.77 The European Union itself requests the Panel to consider deleting the last two sentences of this paragraph, as it considers that their relevance to the Panel's finding is not clear.[73] China considers that the sentences that the European Union asks the Panel to delete are relevant and therefore asks the Panel to reject the European Union's request.[74] China recalls that its claim that the European Union acted inconsistently with Articles 4.1 and 3.1 of the AD Agreement because the European Union had excluded from the definition of the domestic industry certain categories of producers extended not only to the exclusion of producers that did not support the complaint, but also to those producers that came forward more than 15 days after the publication of the Notice of Initiation. China notes that the findings of the Panel in the sentences that the European Union requests to have deleted address the second aspect of China's claim, namely the exclusion of the producers that came forward more than 15 days after the publication of the notice of initiation.

6.78 For the same reasons as set forth with respect to paragraphs 7.213 and 7.214, we have denied China's request.

6.79 We have also denied the European Union's request. The European Union has not identified any error or suggested any revisions, but merely contends that the relevance of the last two sentences of this paragraph to the Panel's finding is "not clear". The point being made is that while producers that did not come forward during the 15-day period were not included, this is not the same as excluding them, and the fact that the Commission did consider expanding the industry, even if it did not do so, supports this view. Thus, these two sentences support the Panel's conclusion that the Commission did not exclude domestic producers that did not support the complaint. We have, however, modified the last two sentences in order to clarify our views.

6.80 **Paragraph 7.219 and footnotes 254, 255 and 256**: China considers that this paragraph is incorrect in several respects, and requests that the Panel modify it.[75] First, according to China, the fact that one of the producers included in the domestic industry allegedly was not one of the complainants and did not express any view before the initiation of the investigation does not establish that this producer "did not support the complaint" once it came forward after the investigation was initiated. Therefore, China suggests that the Panel clarify that the producer concerned did not expressly state support for the complaint *in its sampling form*. According to China, the fact that the sampling form did not request the producer to expressly state its support or opposition of the complaint cannot be considered as sufficient evidence of the fact that this producer did not support the complaint.

6.81 Second, China requests that the Panel modify footnotes 254 and 256 to clarify that it argued that any deadline for domestic producers to make themselves known must be "reasonable".[76] Third, China maintains that it substantiated its claim that the 15-days allowed by the Commission was insufficient and unreasonable[77], and requests that the evidence and arguments it submitted in relation to this issue be fully reported. Fourth, China asserts China it provided evidence of the fact that the

[72] European Union, Comments on China's request for interim review, p. 4.
[73] European Union, request for interim review, p. 7.
[74] China, Comments on the European Union's request for interim review, para. 22.
[75] China, request for interim review, paras. 24-28.
[76] China refers in this regard to China, answer to Panel question 23.
[77] China refers in this regard to China, second written submission, paras. 577 – 581.

Commission inquired and thus necessarily knew about the position of that producer *vis-à-vis* the investigation[78], and requests that the evidence and arguments it has put forward be fully reported.

6.82 For the same reasons as given above in respect of China's comments concerning paragraph 7.213 of the Interim Report, the European Union requests the Panel to reject the change proposed by China. According to the European Union, that China disagrees and made unsubstantiated assertions about the sufficiency of a 15-day period does not require that the Panel accept this view. The European Union contends that China made bare assertions about the alleged bias of the 15 day period, and that "mere speculations" are not sufficient to substantiate an argument. The European Union also considers that the Panel was correct to state that "China proffers no evidence" of its assertion that the Commission enquired about the position of the producers with respect to the complaint, contending that the fact that China made an assertion to the contrary does not mean that it proffered any "evidence". For the same reasons as explained regarding China's comments concerning paragraph 7.213 of the Interim Report, the European Union contends that it is simply not the case "that the Commission inquired and thus necessarily knew about the position of that producer *vis-à-vis* the investigation".[79]

6.83 With respect to China's first comment, we have denied China's request, for the reasons expressed above with respect to paragraph 7.214. With respect to China's second comment, we have granted China's request by modifying footnote 254 (now footnote 481) to indicate that China did not object to the application of reasonable deadlines. Footnote 256 is a citation, and we see no reason to modify it. With respect to China's third comment, we have denied China's request. Paragraphs 577 to 581 of China's second written submission set forth China's arguments as to the insufficiency of the 15-day period, which position is reflected in paragraph 7.219 of the Interim Report. China asserted that the time limit was short, making it more likely that complainants and supporting companies would come forward during that period, rather than opponents, that the Commission's methodology of linking willingness to be included in the sample to inclusion in the industry was fundamentally biased because opposing producers would be less likely to be willing to be part of the sample, and that the 15-day period was not the period allowed to "make oneself known", which is 40 days.[80] In our view, these arguments do not "substantiate" China's position, in the sense that they do not demonstrate that the posited consequences actually occurred in this case. In the absence of such a demonstration, including evidence, we are of the view that China's arguments are speculation, and do not substantiate its position. With respect to China's fourth comment, we have denied China's request. Despite China's assertion, paragraph 16 of China's comments on the European Union's answer to Panel question 89 does not contain evidence that the Commission enquired about and knew the position of the producer in question regarding the complaint, but merely reiterates the arguments China had made previously, and which we did not accept. China's "understanding" of events is not a fact, but an argument. As footnote 255 (now footnote 482) reflects our analysis and conclusion concerning the evidence before us, and accurately reflects the evidence, we see no reason to expand the description of China's arguments in this regard.

6.84 **Paragraph 7.233**: The European Union requests the Panel to consider modifying or deleting the fourth sentence of this paragraph, asserting that it is neither necessary nor appropriate to suggest that a possible violation of Article 4.1 would necessarily violate Article 3.1.[81] The European Union considers that Article 3.1 relates to the manner in which an authority examines the state of the domestic industry ("objective examination") and the quality of the evidence used in this respect ("positive evidence"). The European Union agrees that if the definition of the domestic industry is

[78] China refers in this regard to China, Comments on the European Union's answer to Panel question 89, para. 16.

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

[80] China, second written submission, paras. 578-580.

[81] European Union, request for interim review, pp. 7-8.

inconsistent with Article 4.1, it does not matter whether an objective examination was conducted or not. But that does not mean that necessarily Article 3.1 has been violated. It simply becomes irrelevant whether Article 3.1 was complied with or not; but that is not the same as finding that this provision has been violated. China considers that if a domestic industry has been wrongly defined, it logically follows that the injury assessment made with respect to such a wrongly defined domestic industry is not consistent with Article 3.1. This sentence is in line with the Panel's finding in *EC – Salmon (Norway)*, paragraph 7.124. China therefore submits that the Panel should reject the European Union's request.[82]

6.85 This sentence reflects our agreement with the views of the panel in *EC – Salmon (Norway)*, cited in footnote 276, that "[f]urthermore, the EC's analyses of injury and causation were based on information relating to a wrongly-defined industry, and are therefore necessarily not consistent with the requirements of Articles 3.1, 3.4, and 3.5". To modify it as proposed by the European Union would be inappropriate, as it would no longer be an accurate statement of the *Salmon* panel's views. We have therefore denied the European Union's request.

6.86 **Paragraph 7.236**: China requests that the paragraph be modified to accurately reflect its arguments.[83] The European Union requests the Panel to reject the proposed changes as it is clear that the Panel correctly summarized the most relevant elements of China's argument. The European Union submits that China has not provided any precise citations to its submission to show the contrary.[84]

6.87 China has not substantiated that the text it proposes to delete is inaccurate, and we have therefore denied its request. We have, however, added a footnote referencing China's second written submission at paragraphs 681-684, where this argument is expressed.

6.88 **Paragraph 7.238**: China requests that the Panel modify this paragraph to accurately reflect its argument.[85] According to China, its argument is not that the volume of production is irrelevant, but rather that "the determination of a sample ***merely*** on the basis of the "largest volume that can reasonably be investigated" is not appropriate to satisfy the representativity requirement", referring to paragraph 676 of its second written submission. The European Union did not comment on China's request.

6.89 The sentence to which China objects reflects our understanding of China's argument, which goes on to contend that the Commission erred in relying only on volume of production, and should have used a statistically valid sample.[86] Our understanding of China's argument as implying that volume of production is irrelevant to the selection of a sample for purposes of injury analysis has not changed, and we therefore have denied China's request.

6.90 **Paragraph 7.283**: China requests that the Panel modify this paragraph to accurately and completely reflect China's arguments.[87] The European Union did not comment on China's request.

6.91 This paragraph sets forth the Panel's conclusion, and in that context, we see no reason to expand the reference to China's arguments, which are in any case reported elsewhere. Moreover, China's proposed additional text introduces concepts that China did not argue during the proceeding, and for which it provides no reference, and China's argument with respect to a "theoretical basis" of

[82] China, Comments on the European Union's request for interim review, para. 23.
[83] China, request for interim review, para. 29.
[84] European Union, Comments on China's request for interim review, p. 4.
[85] China, request for interim review, para. 30.
[86] China, second written submission, paras. 678-689.
[87] China, request for interim review, para. 31.

the definition of like product, and the "fact that de facto the product concerned and the "like product" do not consist of the same products" is unclear. We have therefore denied China's request.

6.92 **Paragraph 7.285**: China requests that the Panel modify this paragraph to accurately reflect China's arguments.[88] The European Union did not comment on China's request.

6.93 Since the requested modification reflects China's arguments as presented to the Panel, we have granted China's request and modified the paragraph accordingly.

6.94 **Paragraph 7.294**: China requests the Panel to modify this paragraph to accurately reflect its arguments, referring in particular to paragraphs 769 - 788 of its second written submission.[89] The European Union requests that the Panel reject the changes proposed by China, as the summary provided in this paragraph correctly reflects the essential elements of China's claim as presented in paragraph 766 of China's second written submission.[90]

6.95 The additional text proposed by China concerns two elements of its claim regarding the Commission's dumping determination. Given that the first part of China's request concerns China's own arguments, we have granted this part of China's request and modified this paragraph accordingly. The second aspect of China's request concerns the procedural aspects of the Commission's determination, which are the subject of a separate procedural claim addressed elsewhere in the Report, at paragraphs 7.477-7.483. Therefore, we have denied this aspect of China's request.

6.96 **Paragraphs 7.302 and 7.306**: With respect to paragraph 7.302, China asserts that it provided ample evidence of the fact that the differences reflected in the PCN affected price comparability.[91] China requests that the Panel modify this paragraph to reflect this evidence and arguments.[92] As regards paragraph 7.306, China maintains, as it did with respect to paragraph 7.302, that it provided evidence that the PCN characteristics reflect differences that affect price comparability and requests that this evidence and its arguments be reported in the Panel's Report but makes no specific textual suggestions.[93] China also maintains that it expressly noted that "interested parties have stressed throughout the investigation that it was of fundamental importance that the comparison be made on the PCN basis".[94] China recalls that it explained that, if interested parties did not focus their comments during the investigation on the characteristics reflected in the PCN, it was because they assumed that the comparison was being made on such basis. China further recalls that it argued that the absence of specific requests for adjustments concerning physical differences reflected in the PCNs was due to the lack of information by the Commission which never informed all interested parties that the comparison was not being made on a PCN basis but exclusively on the basis of two product characteristics.[95] Finally, China notes that the Panel has not addressed its argument that the failure of the Commission to inform the interested parties of the comparison method used and of the fact that the comparison was no longer made on the basis of the PCN but on the basis of other characteristics itself constitutes a violation of Article 2.4, and in particular of its last sentence.[96]

[88] China, request for interim review, para. 32. We note that the suggested change reflects the text of China, second written submission, para. 759.

[89] China, request for interim review, para. 33.

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

[91] China refers in this regard to China, second written submission, paras. 797 – 806.

[92] China, request for interim review, para. 34.

[93] China, request for interim review, paras. 35-39.

[94] China refers in this regard to China, second oral statement, para. 96 and China, second written submission, para. 806.

[95] China refers in this regard to China, second written submission, paras. 775 – 786.

[96] China refers in this regard to China, second written submission, para. 796.

6.97 The European Union requests that the Panel reject China's request to reflect "evidence" which it contends the Panel rightly pointed out China did not present. The European Union argues that China confuses bare assertions with evidence. The European Union refers to, for example, paragraphs 475 – 477 of its first written submission as well as paragraphs 50 – 54 of its oral statement at the second meeting in which aspects of China's arguments in paragraphs 34 – 39 of its interim review comments are addressed. According to the European Union, it is not appropriate to attempt to re-litigate this argument at the interim review stage.

6.98 With respect to paragraph 7.302, we note that China's comments merely refer to the relevant parts of its second written submission where this issue is discussed, but do not demonstrate any error in the Panel's view that China "pointed to no evidence that was before the investigating authority" in support of its position. We therefore have denied China's request. With respect to paragraph 7.306, we consider that, in its response to Panel question 38(b), China recognized that the Chinese producers did not make requests for adjustments for differences affecting price comparability, with the exception of one Chinese producer who made a request with respect to alleged differences in quality, as indicated in footnote 388 of the Interim Report. With respect to China's concern that the Panel failed to address its argument that, by failing to inform the Chinese producers of its decision not to base the dumping determinations on full PCNs, the European Union violated Article 2.4 of the AD Agreement, we recall that this is the main argument China raises in connection with its claim under Articles 6.2, 6.4, 6.5 and 6.9 of the AD Agreement, which is addressed in the Report at paragraphs 7.477-7.483. For the foregoing reasons, we have denied China's request concerning paragraph 7.306.

6.99 **Paragraph 7.313**: China suggests several modifications in this paragraph to clarify its arguments.[97] First, China proposes to clarify that its argument is not limited to the use of simplified PCNs but also encompasses the absence of any adjustments to take into account the elements identified in the PCNs which were not taken into account in the comparison, referring in this regard to China, second written submission, paragraph 849. Second, China requests a clarification that the fact that the information was requested on a PCN basis created a presumption which implied that the Commission should have examined the PCN factors which were finally not taken into account for making the price undercutting analysis and concluded that they could not affect the price undercutting analysis. Third, China requests clarification that it claimed and provided evidence that the product characteristics which were not taken into account had an impact on consumer perception and market value. The European Union argues that the Panel correctly summarized the most relevant elements of China's argument in this regard and invites the Panel to reject China's request.[98]

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

6.101 **Paragraph 7.314**: China suggests that the Panel modify the fourth and fifth sentences of this paragraph for the sake of clarity.[99] China also requests that the Panel modify the last three sentences of the paragraph to reflect China's argument more accurately. The European Union requests the Panel to reject the proposed changes, arguing that the Panel correctly decided not to reflect China's confusing assertions with respect to "standard" fasteners. With respect to China's request with respect to its argument on the adjustment for quality differences, the European Union also argues that this request should be rejected since this paragraph correctly reflects China's arguments in this regard.[100]

[97] China, request for interim review, para. 40.
[98] European Union, Comments on China's request for interim review, p. 5.
[99] China, request for interim review, paras. 41-42.
[100] European Union, Comments on China's request for interim review, p. 5.

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

6.103 **Paragraph 7.327**: China requests that the Panel modify this paragraph to accurately reproduce China's arguments.[101] China also asserts that the Panel did not address its arguments and evidence that the characteristics identified in the PCNs which were not taken into account affected price comparability *and consumer perception* and had therefore to be fully taken into account. The European Union contends that this paragraph correctly reflects China's arguments and asks the Panel to reject China's request. In any case, the European Union objects to China's assertion that it presented "evidence" that "the characteristics identified in the PCNs which were not taken into account affected price comparability *and consumer perception*". This, in the view of the European Union, is simply not correct.[102]

6.104 Paragraph 7.327 reflects the Panel's understanding of the parties' arguments with respect to the claim on price undercutting. China's proposed modification would not clarify our views in this regard. With regard to China's argument that the Interim Report does not reflect China's arguments and evidence to the effect that the characteristics identified in the PCNs which were not taken into consideration by the Commission affected price comparability and consumer perception, China has not specified where in its submissions such arguments were made. We have therefore denied China's request.

6.105 **Paragraph 7.333**: China requests that the Panel revise the fourth sentence of this paragraph to reflect China's arguments more accurately.[103] The European Union did not comment on this request.

6.106 China's requested change would not affect the substance of this paragraph, and we have therefore granted China's request and modified this paragraph accordingly.

6.107 **Paragraph 7.337**: China suggests replacing the phrase "several panel reports" with the phrase "several panel and Appellate Body reports" in the third sentence.[104] The European Union did not comment on China's request.

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

6.109 **Paragraph 7.338**: China requests that the Panel modify this paragraph to reflect the second aspect of China's claim more accurately.[105] The European Union did not comment on China's request.

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

6.111 **Paragraph 7.348**: China suggests adding a footnote referring to the Definitive Regulation, recital 78, at the end of this paragraph.[106] The European Union did not comment on China's request.

6.112 We have granted China's request.

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[101] China, request for interim review, paras. 43-44. China refers in this regard to China, second written submission, para. 834 and China, answer to Panel question 41.

[102] European Union, Comments on China's request for interim review, p. 5.

[103] China, request for interim review, para. 45.

[104] China, request for interim review, para. 46.

[105] China, request for interim review, para. 47.

[106] China, request for interim review, para. 48.

6.113 **Paragraph 7.351**. China requests that the Panel modify this paragraph to reflect its claim more accurately.[107] The European Union did not comment on China's request.

6.114 We have granted China's request and modified this paragraph accordingly.

6.115 **Footnote 484**: The European Union requests that the figure "99.9 percent" be bracketed.[108] Alternately, the European Union suggests modifying the text of the footnote to avoid the question of bracketing. China disagrees with the European Union's request to add the word "negligible" to describe the volume of exports of the two Chinese exporting producers which were found not to be dumping. China considers the word "negligible" as having a subjective connotation. China agrees with the European Union's suggestion to replace the confidential figure of [99.9%] by the words "almost 100%".[109]

6.116 The figure "99.9 percent" was not bracketed in paragraph 531 of the European Union's first written submission, to which it is cited. The European Union's first written submission was posted on the European Union's web-site as of 16 September 2010, http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_145984.pdf. Thus, despite this information having been bracketed at other places in the European Union's submissions, and notwithstanding China's agreement, the cited figure is unquestionably in the public domain, and there is no basis to bracket it as confidential information. We therefore have denied the European Union's request to bracket the figure, and there is no reason to amend the text to avoid the bracketing issue.

6.117 **Paragraph 7.372**: China requests that the Panel modify the last three sentences of this paragraph to reflect its arguments more accurately.[110] The European Union requests the Panel to reject China's proposed amendments as the paragraph at issue accurately reflects China's argument as made in paragraphs 439 – 444 of its first written submission.[111]

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

6.119 **Paragraph 7.373**: China requests that the Panel revise this paragraph to reproduce China's argument in relation to the Commission's conclusions regarding profitability more accurately.[112] The European Union requests the Panel to reject China's proposed amendments as the paragraph at issue accurately reflects China's argument as made in paragraphs 446 – 447 of its first written submission to which the Panel refers.[113]

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

6.121 **Paragraph 7.374**: China requests that the Panel revise this paragraph to describe China's arguments more accurately and more completely.[114] The European Union did not comment on China's request.

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

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[107] China, request for interim review, para. 49.
[108] European Union, request for interim review, p. 8.
[109] China, Comments on the European Union's request for interim review, paras. 24-25.
[110] China, request for interim review, para. 50.
[111] European Union, Comments on China's request for interim review, p. 5.
[112] China, request for interim review, para. 51.
[113] European Union, Comments on China's request for interim review, p. 5.
[114] China, request for interim review, para. 52.

6.123 **Paragraph 7.376**: The European Union requests that the Panel consider amending the final sentence of this paragraph to clarify its meaning.[115] China did not comment on the European Union's request.

6.124 While the European Union does not refer to its submissions in support of the requested modification, since the request does reflect the European Union's arguments as they were presented to the Panel, we have granted the European Union's request, modified this paragraph accordingly and indicated where in the European Union's submissions those arguments are found.

6.125 **Paragraph 7.394**: China requests that the Panel modify this paragraph and add a footnote.[116] China asserts that the statement "while the specific numbers and degree are different, both the Information Document and the Definitive regulation come to the same essential conclusion, reporting a significant loss of market share by the European Union industry" in this paragraph does not apply to sales, requests that the Report reflect this, and suggests a footnote to clarify the differences between the Information Document and the Definitive Regulation in relation to sales, similar to footnote 562 of the Interim Report with respect to market share. The European Union requests the Panel to reject China's proposed change as it simply represents a continuation of the arguments China made in the course of the panel proceedings which confused the Panel as to the findings of the investigating authorities. The European Union submits that the opportunity to comment on the Interim Report in this interim review should not be used for further litigation of the matter. The European Union notes that China's argument about the alleged discrepancy between the Information Document and the Definitive Regulation is addressed in its submissions.[117]

6.126 China is correct that the Panel's statement concerns only the discussion of market share in the Information Document and the Definitive Regulation, as is clearly stated in the text. We therefore deny China's request in this regard as redundant. The reference to the similar conclusions is reported as a matter of fact, not as an essential aspect of our analysis, and thus the fact that the Information Document and the Definitive Regulation reported different trends in sales is not relevant to our conclusion, which as stated, is based on the fact that the parties were aware that the analysis in the Information Document was preliminary and that the final analysis might be based on different information. We have therefore denied China's request.

6.127 **Paragraphs 7.396-7.397**: China requests that the Panel modify these paragraphs to reflect that it has never claimed that the Commission did not examine the level of profitability at all, but that it maintains that the examination carried out by the Commission was not objective.[118] The European Union maintains that the Panel accurately dealt with both aspects of China's claim and that there is therefore no basis for making the suggested changes.[119]

6.128 The phrase China proposes be deleted reflects our understanding of China's argument as asserting that the Commission failed to take the increase in profitability into consideration in its analysis, as well as that the Commission failed to objectively examine the profitability of the industry. The contested phrase indicates that, to the extent that China is making the former argument, it is incorrect as a matter of fact. Our understanding of China's arguments in this regard has not changed, and therefore we have denied China's request.

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[115] European Union, request for interim review, p. 8.

[116] China, request for interim review, para. 53.

[117] European Union, Comments on China's request for interim review, p. 5. The European Union refers in this regard to paragraphs 587 – 588 of, we believe, its first written submission, and European Union, second written submission, paras. 194-195.

[118] China, request for interim review, para. 54.

[119] European Union, Comments on China's request for interim review, p. 5.

6.129 **Paragraph 7.404**: China requests that the Panel modify the first three sentences of this paragraph, and the footnotes pertaining to those sentences.[120] China considers that, as drafted, they do not correctly reflect the findings on injury reached by the Commission in the Definitive Regulation. In general, China notes that it would have preferred the Panel to quote the exact statements included in the Definitive Regulation. In particular, China points out that the Commission did not "conclude" in the Definitive Regulation that "cash flow declined by almost 20 percent from 2005 to the investigation period", although it recognizes that this can be deduced from the table provided in section 5.4 of the Definitive Regulation. Moreover, China contends that the Commission did not state in its injury analysis that the margins of dumping were "significant" but rather that they were "above *de minimis*". China further notes that, contrary to what the third sentence seems to suggest, the Commission did not even state, let alone "explain", in the Definitive Regulation that the positive developments in relation to stocks and prices did not reflect the significant increase in demand which might have been expected to result in more rapid positive movement. With respect to the return on investments, China observes that the Definitive Regulation did include a comment on the relationship between the development thereof and the increase in demand, but not exactly in the way described in this paragraph. Furthermore, China points out some references in the footnotes that it contends are not correct or are incomplete. The European Union argues that the Panel correctly summarized the major elements of the investigating authorities' findings on injury referring each time in a footnote to the relevant recitals of the Definitive Regulation and therefore asks the Panel to reject China's request.[121]

6.130 We have granted China's request in part, by modifying the paragraph to reflect that the Commission concluded that the dumping margins were above *de minimis*, and that given the volume and the price of the dumped imports, the impact of the margin of dumping could not be considered negligible. However, with respect to the remainder of China's request, this paragraph reflects our understanding of the Definitive Regulation conclusions as a whole, and thus synthesises some elements of those conclusions, rather than re-stating them in the terms used by the Commission. Merely that an aspect of the Definitive Regulation is not stated as a specific conclusion does not mean that our understanding in referring to that aspect as a conclusion is incorrect. Similarly, while China may not view a particular aspect of the Definitive Regulation to "explain" certain aspects, we considered that, as a whole, such an explanation can be understood from the Definitive Regulation. We have therefore denied the remainder of China's request.

6.131 **Paragraph 7.407**: China requests that the Panel modify this paragraph to clarify and reflect its arguments more accurately.[122] China refers specifically to China, second written submission, paragraphs 944-947, 948 and 949 and China, answer to Panel question 52, paragraph 172, in this regard. The European Union sees no reason for the Panel to make the proposed changes as the Panel accurately summarized the essential elements of China's arguments in respect of the injury analysis.[123]

6.132 This paragraph is part of the Panel's analysis, and thus it is not necessary to summarize all aspects of China's arguments in detail. Nonetheless, we have modified paragraph 7.407 to reflect China's argument more fully, and included additional references to China's submissions.

6.133 **Paragraph 7.413**: China requests that this paragraph be modified to clarify the distinction between the two main elements of its first assertion of error and reflect its arguments more accurately and completely.[124] The European Union asks the Panel to reject China's request since the Panel

[120] China, request for interim review, para. 55.
[121] European Union, Comments on China's request for interim review, p. 6.
[122] China, request for interim review, para. 56.
[123] European Union, Comments on China's request for interim review, p. 6.
[124] China, request for interim review, para. 57.

accurately summarized the essential elements of China's arguments in respect of the causation analysis, which, according to the European Union, was not properly before the Panel anyway.[125]

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

6.135 **Paragraph 7.414**: China requests that this paragraph be modified to reproduce its argument more accurately.[126] The European Union did not comment on China's request.

6.136 While China does not refer to its submissions in support of the requested modification, since the request does reflect China's arguments as they were presented to the Panel, we have granted China's request, modified this paragraph accordingly and indicated where in China's submissions those arguments are found.

6.137 **Paragraphs 7.415 et seq**: The European Union requests that the Panel reflect its objection to the way China developed its argument on causation and non-attribution in its second written submission, which the European Union asserts effectively introduced a new claim that was not part of the request for establishment.[127] The European Union explained that China's request for establishment contains a claim in respect of the non-attribution analysis but not on the question of causation *per se*.[128] The European Union considers that this new claim of China in respect of the establishment of a causal link between the dumped imports and the injury found to exist is simply outside the Panel's terms of reference since it was not part of the request for establishment.

6.138 China notes that in its first written submission, it had identified two sets of errors in the causation analysis[129], namely that: "(i) the EC failed to demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry and (ii) the EC failed to ensure that injury caused by factors other than dumped imports was not improperly attributed to dumped imports, in particular the increase in raw material prices and the export performance of the Community industry". According to China, these arguments are properly reflected in paragraphs 7.412 – 7.414 of the Interim Report. China notes that the European Union did not raise any objection in its first written submission, at the first substantive meeting or in its second written submission regarding these two aspects of its claim on causation. In China's view, the claim discussed by China in its second written submission was not "new" as alleged by the European Union. China asserts that it reflected the first aspect of China's claim on causation, i.e. that the European Union failed to demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry, which China had identified and substantiated in its first written submission. China argues that the European Union is not entitled to raise such a procedural objection at such a late stage of the proceedings. In this regard, China recalls the Appellate Body's statement that "when a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do promptly. A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its rights to have a panel consider such objections". China contends that if the European Union wished to complain about China's claim, it was required to raise it in its first written submission, at the latest. Moreover, China contends that by raising this objection only during the second substantive meeting, the European Union deprived China of the right to defend itself and to present arguments as to why this aspect of its claim is within the Panel's terms of reference, thus raising a due process issue. In any case, China submits that the first aspect of its claim is within the Panel's terms of reference as its panel request unambiguously refers to

[125] European Union, Comments on China's request for interim review, p. 6.
[126] China, request for interim review, para. 58.
[127] European Union, request for interim review, p. 9.
[128] The European Union refers in this regard to European Union, second oral statement, para. 70.
[129] China, First Written Submission, paras. 462, 474 – 493.

Articles 3.1 and 3.5 of the AD Agreement and raises a claim of violation of these provisions through the causation analysis. In China's view, that the European Union violated Articles 3.1 and 3.5 because (i) the European Union failed to demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry and (ii) the European Union failed to ensure that injury caused by factors other than dumped imports was not properly attributed to dumped imports, are just arguments which substantiate the claim put forward by China.[130]

6.139 It is clear that China argued both aspects of its claim in its first written submission. We consider that the European Union should have raised its objection earlier, particularly in a case where it made numerous similar preliminary objections. In order to clarify our views, we have modified footnote 596 (now footnote 841) to reflect the European Union's objection, as set out in its second oral statement, and that we consider the European Union's objection to be untimely and therefore decline to address it.

6.140 **Paragraph 7.416**: The European Union requests the Panel to consider this paragraph to make it clearer and easier to read.[131] China did not comment on the European Union's request.

6.141 We have granted the European Union's request and redrafted this paragraph to clarify without altering its meaning.

6.142 **Paragraph 7.431**: China requests that the Panel add to this paragraph references to the relevant parts of its submissions to the Panel, where it addressed the reasoning developed by the Commission in relation to increased raw material prices.[132] The European Union contends that the Panel should not make the proposed changes as the Panel accurately summarized the essential elements of China's arguments in respect of the non-attribution analysis.[133]

6.143 The additional text China proposes to add to paragraph 7.431 does not clarify the issue being addressed in that paragraph, but merely reiterates China's argument. As this paragraph is part of the Panel's analysis, we see no reason to expand the summary of China's argument. Moreover, the additional references China proposes to add to footnote 651 of the Interim Report do not relate to the question being addressed in this paragraph, concerning the effect of increased raw material costs, and China's alternative explanation in that regard. Question 59 of the Panel concerns the export figures used by the Commission, and Exhibit CHN-76 does not refer to raw material costs at all. We have therefore denied China's request.

6.144 **Paragraph 7.434**: China requests that the Panel revise this to clarify the object of the statement that "China does not dispute this", and add additional references to China's arguments.[134] China notes that it understands the Panel to consider that China does not dispute that the Commission addressed the question of the export performance of the domestic industry, as noted by the Panel in the first sentence of the preceding paragraph. However, since the preceding paragraph also reproduces the considerations of the Commission in the Definitive Regulation, China suggests that the statement "China does not dispute this" could be misinterpreted to mean that China does not dispute the findings reached in the Definitive Regulation in relation to the export performance of the domestic industry, which China did dispute. China asserts that it argued that the conclusion reached by the Commission, that the export performance was not a source of material injury, is not a conclusion which could have been reached by an unbiased and objective investigating authority on the basis of

[130] China, Comments on the European Union's request for interim review, paras. 26-32.
[131] European Union. request for interim review, p. 9.
[132] China, request for interim review, para. 59. China refers in this regard to China, answer to Panel question 59 and Exhibit CHN-76, China, first written submission, paras. 483-486, China, second written submission, paras. 983-990, and China, answer to Panel question 58.
[133] European Union, Comments on China's request for interim review, p. 6.
[134] China, request for interim review, para. 60.

the facts on the record.[135] China also requests that the Panel add a reference to paragraph 490 of its first written submission with respect to its argument concerning the relevance of the increase in exports. The European Union did not comment on China's request.

6.145 We have granted China's request and modified paragraph 7.434 to clarify that China did not dispute that the Commission addressed the question of the export performance of the domestic industry, and added the requested reference.

6.146 **Footnote 658**: The European Union considers that this footnote should be revised to indicate that the export information of sampled producers was considered.[136] The European Union notes that it submitted an internal document that reflected the export performance of sampled producers, which it argues shows that such information was part of the authority's considerations. China disagrees with the European Union's request. China interprets the phrase "the European Union does not assert otherwise" to mean that the European Union does not assert that "there is an indication in the ***Definitive Regulation*** that the information was actually considered by the Commission in its analysis". According to China, the European Union has not provided any reference in the ***Definitive Regulation*** showing that the information was actually considered by the Commission in its analysis. Therefore, China submits that footnote 658 should not be modified.[137]

6.147 It is true that the European Union submitted, in its answer to Panel question 100, an "extract from an internal document" which reflects the export performance of sampled producers, and there is no reason not to accept that this information was, as asserted by the European Union "prepared in the course of the investigation [and summarized] the verified data ... for the sampled producers".[138] We note, however, that the European Union did not submit the actual document to the Panel, and did not specifically identify it, but only reproduced the information concerning exports in answering the Panel's question. In any event, the mere fact that the document existed does not demonstrate that the Commission considered the information concerning sampled producers' export performance reported in that document in making its decision. Indeed, the fact that the Definitive Regulation refers exclusively to other information on exports, and gives no hint that any other information was available to the Commission, suggests to the contrary that the information in was **not** actually considered by the Commission. Finally, while the European Union now argues that the document shows that the information was part of the authority's consideration, it made no such argument previously. In submitting the information, the European Union asserted that it "confirms both the lack of importance of export sales representing only 7.3 percent of total sales and the healthy state of export performance evidencing that this factor could not have been a cause of injury"[139], but did not argue that the Commission in fact took this information into consideration, rather than or in addition to the information actually cited and relied upon in the Definitive Regulation. We have therefore denied the European Union's request.

6.148 **Paragraph 7.440**: China requests that the Panel modify this paragraph for clarity.[140] The European Union did not comment on this request.

6.149 Since the proposed modification reflects China's arguments as presented to the Panel and provides more clarity, we have granted China's request and modified this paragraph accordingly.

[135] China refers in this regard to China, second written submission, paras. 994 and 1000.
[136] European Union, request for interim review, p. 9-10.
[137] China, Comments on the European Union's request for interim review, paras. 33-34.
[138] European Union, answer to Panel question 100, para. 38.
[139] European Union, answer to Panel question 100, para. 38.
[140] China, request for interim review, para. 61.

6.150 **Paragraph 7.447**: China requests that the Panel revise the twelfth sentence of this paragraph in order to avoid possible misunderstanding.[141] China notes that this paragraph states, *inter alia*, that "despite China's characterization" of its "two allegations of violation of Article 6.2, one as a dependent claim on a violation of Article 6.4 and one independently", "finding a violation of Article 6.2 in the context of China's so-called "independent" claim under Article 6.2 would also require a prior finding, in connection with the claim under Article 6.5, that the identity of the complainants and the supporters was wrongly treated as confidential information". China stresses in this respect that its characterization of one of its claim of violation of Article 6.2 as independent and the other one as dependent refers to the relationship between a violation of Article 6.2 with a violation of Article 6.4 and not Article 6.5, and considers that Panel acknowledges, but that the paragraph is not sufficiently clear in this respect. The European Union did not comment on this request.

6.151 The modification proposed by China does not change the content of this paragraph and we have therefore granted China's request and modified this paragraph accordingly.

6.152 **Paragraph 7.448**: China requests that the Panel revise this paragraph to correctly describe the complaint with respect to potential retaliation from customers.[142] The European Union did not comment on this request.

6.153 We have granted China's request and modified this paragraph accordingly.

6.154 **Paragraph 7.449**: China requests that the Panel modify this paragraph to clarify that Exhibit CHN-44 shows that the Commission informed those Chinese producers which had expressly requested that the identity of the complainants be disclosed of its decision to accept the request for confidentiality of the identity of the complainants and the supporters.[143] The European Union sees no reason for the Panel to make the proposed changes as the Panel accurately summarized the facts and the essence of the disagreement between the European Union and China.[144]

6.155 We have granted China's request and modified this paragraph accordingly.

6.156 **Paragraph 7.452**: China requests that the Panel modify this paragraph.[145] China considers that it incorrectly states that "[t]he complaining European Union producers asserted that they feared commercial retaliation if such customers found out that these producers had requested the initiation of an anti-dumping investigation on fasteners from China, which might have the effect of raising prices on such fasteners, and thus raising the costs of these customers". According to China, this explanation was not provided by the complainants in their Complaint. The European Union did not comment on this request.

6.157 We have granted China's request and modified this paragraph accordingly.

6.158 **Paragraph 7.454, footnote 685**: China requests that the Panel modify the statement in footnote 685.[146] China notes that the European Union asserted that at least one company included in the sample was not, in fact, either a complainant or supporter of the complaint, but maintains that no evidence in this regard was provided by the European Union. The European Union requests the Panel to reject the proposed changes, arguing that the Panel correctly summarized the most relevant

[141] China, request for interim review, para. 62.
[142] China, request for interim review, para. 63.
[143] China, request for interim review, para. 64.
[144] European Union, Comments on China's request for interim review, p. 6.
[145] China, request for interim review, para. 65.
[146] China, request for interim review, para. 66.

elements of China's argument. The European Union also submits that China has not provided any citations to its submission to show the contrary.[147]

6.159 Footnote 685 refers to paragraph 7.214 of the Report, where the Panel found, as a matter of fact, that at least one EU producer which was not a complainant or supporter of the complaint was subsequently included in the sample for the EU industry. We have denied China's request to modify footnote 685 of the Interim Report, but modified paragraph 7.454 to better reflect China's argument, which is cited in footnote 684 (now footnote 939).

6.160 **Paragraphs 7.477, 7.485 and 7.486**: With respect to paragraph 7.477, China requests that the Panel modify this paragraph for clarity.[148] China considers it important to clarify that the information provided by the Commission one working day before the deadline for commenting on the General Disclosure Document concerning the characteristics on the basis of which the comparison was being made was provided only to two Chinese exporting producers who had requested clarification in this regard repeatedly.[149] China notes that this comment applies throughout the section addressing China's claim that the European Union violated Articles 6.2, 6.4, 6.5 and 6.9 by failing to disclose aspects of the normal value calculation. With respect to paragraphs 7.485 and 7.486, China requests that the Panel revise paragraph 7.486, for consistency and to avoid confusion.[150] China notes that paragraph 7.485 states that "the General Disclosure Document makes it clear that the Commission based its normal value determination on "product types", as opposed to PCNs". China acknowledges that the General Disclosure Document indeed makes it clear that the Commission based its normal value determination on "product types", but maintains that the fact that these "product types" differ from the PCNs is only clear after the letter of the Commission dated 21 November 2008, as stated in paragraph 7.489. China notes that this is also clear from paragraphs 7.490 and 7.494.

6.161 The European Union requests the Panel to reject China's request. The European Union submits that the proposed changes attempt to improve China's arguments *ex post* Panel proceedings. Furthermore, argues the European Union, in paragraph 72 of China's comments, China itself proposes a reference to requests by Chinese exporting producers generally.[151]

6.162 We have granted China's request to clarify that the Commission provided information on product types only to the two Chinese producers that requested such information by referring, in paragraphs 7.485 and 7.486, to "two Chinese producers". With respect to China's request regarding paragraph 7.485, in our view, this paragraph states the Panel's understanding of the General Disclosure Document, namely that the Commission based its normal value determination on product types, not PCNs, but did not explain how those product types were established.[152] We have therefore denied China's request.

6.163 **Paragraph 7.496**: China requests that the Panel modify this paragraph to correctly reflect its claim.[153] China considers that the text as drafted is incorrect because first, paragraph 7.496 states that "China contends that the European Union violated its obligations under Articles 6.4, 6.2 and 6.5 of the AD Agreement by failing to disclose, in the individual and General Disclosure Documents, information pertaining to the determination of the normal value". However, China maintains that its claim does not relate to the failure to disclose this information in the disclosure documents, but to the failure to provide the opportunity to see such information, including in the disclosure documents.

[147] European Union, Comments on China's request for interim review, p. 6.
[148] China, request for interim review, paras. 67-68.
[149] China refers in this regard to China, answer to Panel question 38(b).
[150] China, request for interim review, paras. 69-70.
[151] European Union, Comments on China's request for interim review, p. 6.
[152] We note that China's request for interim review refers to paragraph 7.486 of the Interim Report, at paragraph 70, but the modification requested pertains to text in paragraph 7.485.
[153] China, request for interim review, paras. 71-73.

China refers in this regard to paragraph 1085 of China's second written submission. Second, China contends that the paragraph does not reflect that requests to get information on the normal value were made during the investigations, referring in this regard to paragraph 279 of China's answer to Panel question 64 and paragraphs 41-42 of China's replies to Panel question 101and Exhibit CHN-74. The European Union argues that the proposed changes attempt to improve China's arguments *ex post* Panel proceedings and asks the Panel to reject them.[154]

6.164 With respect to the first element of China's request, we note that this paragraph reflects our understanding of China's arguments with respect to the claim on the procedural aspects of the Commission's normal value determinations, and we therefore deny China's request in this regard. As regards the second element of China's request, given the Panel's legal analysis with respect to this aspect of China's claim, there is in our view no need to mention China's argument that the Chinese producers sought to obtain information on normal value determinations during the investigation at issue in this paragraph. We have, however, amended paragraph 7.461, where China's arguments on this aspect of the claim are summarized, to mention this aspect of China's argument.

6.165 **Paragraph 7.502**: China requests that the Panel modify this paragraph.[155] China considers that it is incorrect to state that the European Union submits that "China's claim under Article 6.9 of the AD Agreement falls outside the Panel's terms of reference, because this claim […] *was not identified in China's panel request*" (emphasis added). In China's view, the European Union's argument in relation to China's panel request only relates to the fact that China's panel request would not expressly refer to "product types", referring in this regard to the European Union's first written submission, paragraph 745. The European Union requests the Panel to reject the proposed changes because the Panel correctly summarized the most relevant elements of the European Union's arguments.[156]

6.166 We have granted China's request, and modified this paragraph to describe the European Union's argument more specifically.

6.167 **Paragraph 7.506**: China notes that this paragraph does not refer to the Panel Report in *China – Publications and Audiovisual Products* which China considered as relevant for the purposes of this matter, but makes no specific request in this regard. The European Union did not comment on this request.

6.168 China in its second written submission did refer to the Panel Report in *China – Publications and Audiovisual Products*.[157] However, as China itself put it, this report "elaborated on the ... statement of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*".[158] In our view, having addressed China's arguments in reliance on the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice*, there is no need to also discuss the findings of the panel in *China – Publications and Audiovisual Products* on the same issue, and we have therefore denied China's request.

6.169 **Paragraph 7.512**: The European Union requests that the Panel amend this paragraph to accurately reflect the European Union's arguments, referring in this regard to its answer to Panel question 72, paragraphs 174 – 181 and its Comments on China's answer to Panel question 101 [sic], paragraph 27.[159] China contends that in the quoted paragraphs, it is nowhere mentioned that "[t]he European Union notes that thereafter, this issue has not been brought to the Commission's attention by

[154] European Union, Comments on China's request for interim review, p. 6.
[155] China, request for interim review, para. 74.
[156] European Union, Comments on China's request for interim review, p. 6.
[157] China, second written submission, para. 1101.
[158] China, second written submission, para. 1101.
[159] European Union, request for interim review, p. 10. It appears that the European Union may have intended to refer to question 107.

the Chinese producers". In China's view, this statement is directly contradicted by the facts which have been explained by China on the basis of supporting evidence. In China's first written submission, China provided evidence through Exhibit CHN-24 showing that Chinese exporting producers continued to draw the Commission's attention to the serious deficiencies of the Community producers' questionnaire responses even after the letter was sent by the Commission to the Community producers in May 2008. China therefore requests that the European Union's request be rejected.[160]

6.170 Since the requested modification reflects the European Union's arguments as presented to the Panel, we have granted the European Union's request and modified this paragraph accordingly.

6.171 **Paragraph 7.536**: With a view to reflecting its argument more accurately, China suggests the Panel revise this paragraph.[161] The European Union requests the Panel to reject the proposed changes as the Panel correctly summarized the most relevant elements of China's argument. Further, the European Union contends that China has not provided any citations to its submissions to show the contrary.[162]

6.172 While China does not refer to its submissions in support of the requested modification, since the request does reflect China's arguments as they were presented to the Panel, we have granted China's request, modified this paragraph accordingly and indicated where in China's submissions those arguments are found.

6.173 **Paragraph 7.539**: China requests that the Panel modify the first sentence of this paragraph to more accurately reflect its arguments.[163] The European Union requests the Panel to reject the proposed changes as the Panel correctly summarized the most relevant elements of China's argument. Further, the European Union argues that China has not provided any citations to its submissions to show the contrary.[164]

6.174 Given that this paragraph concerns China's own arguments, and having made a similar modification to paragraph 7.536, we have granted China's request and modified this paragraph accordingly.

6.175 **Paragraph 7.542**: The European Union requests that the Panel amend this paragraph to accurately reflect its arguments, referring in particular to its first written submission, paragraph 774.[165] China did not comment on this request.

6.176 Since the requested modification reflects the European Union's arguments as presented to the Panel, we have granted the European Union's request and modified this paragraph accordingly.

6.177 **Paragraph 7.558, footnote 818**: China requests that the Panel amend this footnote to clarify that China disputes the European Union's assertion that "none of the companies involved complained about disclosure of confidential information".[166] China refers in this regard to its first written submission, paragraph 622, and Exhibit CHN-61. The European Union maintains that the alleged

[160] China, Comments on the European Union's request for interim review, paras. 35-36.
[161] China, request for interim review, para. 76.
[162] European Union, Comments on China's request for interim review, p. 6.
[163] China, request for interim review, para.77.
[164] European Union, Comments on China's request for interim review, p. 6.
[165] European Union, request for interim review, pp. 10-11.
[166] China, request for interim review, para. 78.

evidence China refers to does not concern any of the companies mentioned in the MET Disclosure Document and asks the Panel to reject the proposed changes.[167]

6.178 Contrary to the European Union's assertion, the MET Disclosure Document specifically refers to the Chinese company on whose behalf the letter in Exhibit CHN-61 raises concerns about the disclosure of confidential information.[168] It is not clear that any confidential information of that company was actually disclosed in the document, but nonetheless, it would be more correct to indicate that one Chinese producer raised concerns about the disclosure of confidential information in the MET Disclosure Document, as shown in the attached proposed revisions. We have therefore granted China's request and modified the text of footnote 818 (now footnote 1092).

6.179 **Paragraph 7.575**: China requests that the Panel modify this paragraph to reflect its arguments more accurately.[169] The European Union did not comment on China's request.

6.180 We have granted China's request and modified footnote 853 (now footnote 1127) to reflect that China argued that the fact of verification supported its contention that the MET/IT claim form should be considered a "questionnaire" within the meaning of Article 6.1.1 of the AD Agreement.

6.181 **Section VIII.A Conclusions**: The European Union requests that the Panel insert a section regarding those claims where the Panel considers that China has failed to make a *prima facie* case (e.g., paragraphs 7.497, 7.501 and 7.539). In addition, the European Union considers that paragraph 8.2(e) in the conclusions should read "Article 6.4 ... with respect to **a specific aspect** of the normal value determinations" and not "aspects".[170] China submits that there is no need to include an additional section regarding the claims for which the Panel considers that China has failed to make a *prima facie* case. China argues that the conclusions part of the Panel's Report reflects all findings that the Panel has made with respect to all the claims that China has pursued in this dispute.[171] China did not comment on the second aspect of the European Union's request.

6.182 With respect to the European Union's request regarding paragraph 8.2(e), we found violations with respect to more than one procedural aspect of the normal value determination, and therefore we deny the European Union's request. With respect to the European Union's request regarding our findings concerning failure to make a *prima facie* case in certain instances, our conclusions in this regard are part of our substantive analysis, and are discussed in the body of the Report, but do not constitute conclusions separate from our overall conclusions on the respective claims. We have therefore denied the European Union's request in this regard. However, we have reviewed our conclusions to ensure that all our findings are appropriately reflected, and to that end, have modified paragraph 8.3 to state that "China has not established that the European Union acted inconsistently with ...". This formulation more clearly addresses both claims with respect to which we found that China did not make a *prima facie* case, as well as claims with respect to which we rejected China's arguments on the basis of a more elaborated substantive analysis.

[167] European Union, Comments on China's request for interim review, p. 7.
[168] Exhibit CHN-19.
[169] China, request for interim review, para. 79.
[170] European Union, request for interim review, p. 11.
[171] China, Comments on the European Union's request for interim review, paras. 37-38.

VII. FINDINGS

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

7.1 Before beginning our evaluation of the issues in this dispute, we consider it useful to outline the legal 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

7.2 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.[172]

7.3 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 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 will apply with respect to both the factual and the legal aspects of the present dispute.

7.4 Thus, we will find the challenged anti-dumping determination to be consistent with the AD Agreement if we find that the EU investigating authorities 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.[173] In our assessment of the matter, we must limit our review to the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", in accordance with Article 17.5(ii) of the AD Agreement. We will not undertake a *de novo* review of the evidence before the investigating authority during the proceeding, and will not substitute our judgement for that of the EU investigating authorities even though we might have made a different determination were we examining the evidence that was before the investigating authorities ourselves.

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[172] Article 11 of the DSU provides in 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."

[173] See below, paragraphs 7.6 - 7.8.

7.5 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.'"[174] (Footnote omitted.)

2. Rules of Treaty Interpretation

7.6 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."

7.7 A number of WTO reports address the application of these 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[175], 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".[176] 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".[177]

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[174] 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, para. 93.

[175] 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.

[176] 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.

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

7.8 In the context of disputes under the AD Agreement and its separate standard of review, the Appellate Body has stated that:

> "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."[178] (emphasis in original)

7.9 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 the AD Agreement. The difference is that Article 17.6(ii) provides explicitly that if a panel finds more than one permissible interpretation of a provision of the AD Agreement, it shall 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.[179] 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.[180] In this respect, therefore, it is for the European Union to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. As noted below, the European Union has asserted with respect to a number of claims that China has failed to make a *prima facie* case. Should we agree, we need not analyse such claims further, but will dismiss them.

B. TERMS OF REFERENCE OF THE PANEL

7.11 The European Union argues that a number of the claims addressed in China's first written submission are not within the Panel's terms of reference either because (1) they were not identified in China's panel request consistently with the requirements of Article 6.2 of the DSU, or (2) they were not subject to consultations. China responds that all the claims that the European Union argues are outside the Panel's terms of reference are in fact within the terms of reference.

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[178] 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, paras. 57 and 59.

[179] 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 and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, para. 337.

[180] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.

7.12 Given the significant number of terms of reference objections raised by the European Union, and in order to avoid repetition, we consider it appropriate to outline at the outset the legal standard under which we will assess such objections. We will then apply that standard to the specific objections raised by the European Union below, when we address the claims to which each specific objection pertains.

7.13 The first set of terms of reference objections raised by the European Union pertains to China's panel request. We note that under Article 7.1 of the DSU, it is the complaining party's request for establishment of a panel – that is, the 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."

Therefore, a panel request must identify *the specific measures at issue* and must provide a *brief summary of the legal basis of the complaint sufficient to present the problem clearly*. Together, these two elements constitute the "matter referred to the DSB", which forms the basis of 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 matter(s) raised in the panel request fall within the panel's terms of reference; and second, it serves the due process objective of notifying the parties and potential third parties of the nature of a complainant's case.[181] To ensure the fulfilment of these objectives, a panel has to examine the panel request carefully "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[182]

7.14 The Appellate Body's analysis 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.[183] 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.[184] 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.[185]

7.15 Thus, with respect to the European Union's argument that certain claims addressed in China's first written submission were not identified in its panel request consistently with the requirements of Article 6.2 of the DSU, we shall base our assessment on the principles outlined above. This will require us, 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

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[181] 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.

[182] 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.

[183] 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.

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

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

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.[186]

7.16 The second set of terms of reference objections raised by the European Union relates to consultations. The European Union asserts that some of the claims which it acknowledges are sufficiently set out in China's panel request, are nonetheless outside the Panel's terms of reference because they were not subject to consultations. In support of its assertions, the European Union refers to alleged inadequacies in China's request for consultations and/or asserts that no consultations took place with respect to certain claims.

7.17 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 note 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.
>
> 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)

7.18 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. 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

[186] 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.

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.

7.19 In our view, none of these legal provisions supports the proposition that a complaining Member is precluded from identifying in its panel request claims not specifically identified in its request for consultations. Article 6.2 of the DSU requires that a panel request must indicate whether consultations were held, but neither it nor any other provision of the DSU indicates that the scope of the request for consultations determines the precise scope of the subsequent panel request.

7.20 We note that the effect of a complaining Member's request for consultations on a panel's terms of reference has been discussed extensively in prior panel and Appellate Body 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".[187] 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.

7.21 A similar issue arose in *Brazil – Aircraft*. The respondent in that case argued that certain subsidy programmes not identified in the complaining Member'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 respect to which consultations were held could undermine the effectiveness of the panel process".[188] 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 <u>precise identity</u> between the matter with respect to which

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

[188] 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.

> consultations were held and that with respect to which establishment of a panel was requested."[189] (emphasis added)

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."[190] (footnote omitted, italic emphasis in original, underline emphasis added)

7.22 More recently, the Appellate Body, in *US – Upland Cotton*, underlined the importance of not allowing the request for consultations to inappropriately limit the scope of the dispute, 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."[191] (footnotes omitted, emphasis added)

7.23 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, stating:

> "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,

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[189] Panel Report, *Brazil – Aircraft*, para. 7.10.

[190] 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.

[191] 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.

> 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."[192]

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."[193] (emphasis added)

7.24 Based on the foregoing, we consider 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 not specifically identified in China's request for consultations, but properly identified in the panel request, will fall within our terms of reference.

7.25 Finally, with regard to consultations, we recall that China, in Exhibit CHN-65, submitted a list of questions that were allegedly sent to the European Union prior to consultations and were discussed during consultations. China submitted this document in response to the factual assertion made by the European Union that some claims identified in China's panel request were not discussed during consultations.[194] This raises the question of what determines the scope of consultations between the parties to a dispute: the request for consultations or what is actually discussed in such consultations? We note that this particular issue also arose in *US – Upland Cotton*. The factual circumstances presented in *US – Upland Cotton* were very similar to those presented in these proceedings. The complaining party in that dispute presented to the panel a list of questions that had been submitted in writing to the respondent during consultations. In determining whether the complainant had broadened the scope of the dispute in its panel request, the panel took this list into consideration in considering what had actually been discussed during the consultations between the parties.[195] The Appellate Body, however, disapproved the panel's actions in this regard, concluding that

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[192] 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.

[193] 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, para. 138.

[194] The European Union objected to the submission of this document by China and requested a decision from the Panel on this matter. The Panel's decision allowing the submission, but noting that the decision was "without prejudice to our consideration of [the exhibit's] relevance to, or the weight we may accord to it in our consideration of the preliminary jurisdictional objections raised by the European Union" was sent to the Parties on 7 May 2010. See Annex H.

[195] Panel Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299, para. 7.61.

panels should limit their analysis regarding the scope of consultations to the written request for consultations. The Appellate Body considered that to examine what happened in consultations would be contrary to Articles 4.6 and 4.4 of the DSU, which provide, respectively, that consultations shall be confidential and that the request for consultations be made in writing and notified to the DSB. The Appellate Body also noted that often it would be difficult for a panel to find out what was discussed in consultations because there is no public record of those discussions and parties often disagree about what was discussed.[196]

7.26 Taking the Appellate Body's reasoning into consideration, we find that it would not be appropriate to look into what was actually discussed between China and the European Union in the consultations between the parties, and we will therefore limit our analysis regarding the scope of consultations to the text of China's request for consultations.

7.27 In addition to its terms of reference objections based on the alleged shortcomings in China's panel request and the alleged lack of consultations, the European Union also contends that the Panel cannot rule on claims raised in connection with Council Regulation No. 1225/2009 because this Regulation was not identified as a measure in China's panel request. We address this objection below in connection with the China's "as such" claims against the mentioned Regulation.[197] Similarly, we address the European Union's "preliminary" objections based on China's alleged failure to set out a *prima facie* case with respect to several claims in the course of addressing the specific claims to which those objections pertain.

C. CLAIMS REGARDING COUNCIL REGULATION NO. 1225/2009 (THE BASIC AD REGULATION) AS SUCH

1. Preliminary Objections

7.28 The European Union raises two sets of preliminary objections with regard to China's claims regarding the Basic AD Regulation. First, the European Union submits that Council Regulation No. 1225/2009 was not identified as a specific measure in dispute in China's panel request, and therefore it is not within the Panel's terms of reference. The European Union asserts that the measure which was identified in China's panel request, Council Regulation No. 384/96, as amended, has been repealed, and therefore requests us not to make findings on China's claims in connection with that Regulation. If we decide to make findings, the European Union considers that we should refrain from making any recommendations on claims in connection with that Regulation.

7.29 Second, 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 China's 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. China disagrees with the European Union and submits that both Council Regulation No. 1225/2009 and all the claims raised in China's first written submission are within the Panel's terms of reference.

(a) Whether Council Regulation No. 1225/2009 Is Properly Before the Panel

7.30 The European Union maintains that Council Regulation No. 1225/2009 is not properly before the Panel because it was not identified as a specific measure at issue in China's panel request. It follows that the Panel cannot make findings with respect to the claims that China raises in connection with this Regulation. According to the European Union, the Panel could make findings regarding the

[196] Appellate Body Report, *US – Upland Cotton*, para. 287.
[197] See paragraphs 7.30-7.39.

repealed Council Regulation No. 384/96, but should refrain from making recommendations in this regard, since Council Regulation No. 384/96 has been repealed.

7.31 China notes that Article 9(5) of Council Regulation No. 1225/2009 is identical to Article 9(5) of Council Regulation No. 384/96. In China's view, "the [European Union] adopts a purely formalistic approach which ignores the fact that the measure being challenged, namely Article 9(5), is identically worded in both Council Regulation (EC) No 384/96 as amended and Council Regulation (EC) No 1225/2009".[198] Therefore, China asserts that Article 9(5) of Council Regulation No. 1225/2009 is properly before the Panel and the Panel should address the claims raised by China in connection with this Regulation. China submits that the need for the prompt settlement of disputes and to provide security and predictability would be undermined if the Panel were to agree with the European Union's views.

7.32 We begin by observing that it is undisputed that both China's request for consultations[199] and its panel request[200], dated 4 August and 13 October 2009, respectively, identify Council Regulation No. 384/96 of 22 December 1995, as amended, as the measure at issue in connection with the "as such" claims in this dispute. We recall that this Panel was established by the DSB on 23 October 2009. Council Regulation No. 384/96 was repealed by Council Regulation No. 1225/2009 of 30 November 2009, which entered into force on 11 January 2010 – that is, both the repeal of Council Regulation No. 384/96 and the entry into force of Council Regulation No. 1225/2009 occurred **after** the establishment of this Panel. It is also undisputed that Article 9(5) of the Council Regulation No. 384/96 is almost identical to Council Regulation No. 1225/2009.[201] The changes made by Council Regulation No. 1225/2009 to Article 9(5) of Council Regulation No 384/96, as amended, are indicated by ***bold italics*** below:

> "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 ~~*as to*~~ ***for*** imports from those sources from which undertakings under the terms of this Regulation 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.
>
> Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:
>
> (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*~~***; state*** officials appearing on the board of ~~***D***~~***d***irectors 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

[198] China, second written submission, para. 84.
[199] WT/DS397/1, Annex G-1.
[200] WT/DS397/3, Annex G-2.
[201] See European Union, answer to Panel question 12, where the European Union identified the textual changes indicated above in ***bold italics***.

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty."[202]

7.33 In our view, these minor textual differences clearly do not affect the scope and operation of this provision.[203] The issue therefore is whether Council Regulation No. 1225/2009 falls outside our terms of reference purely because it is not specifically identified in China's panel request. In this regard, we emphasize that, while the enactment of Council Regulation No. 1225/2009, repealing and replacing the earlier Council Regulation, No. 384/96 of 22 December 1995, as amended, was proposed before, Council Regulation No. 1225/2009 was not in fact enacted, and did not come into effect, until **after** China submitted its panel request and this Panel was established.

7.34 We note that one of the objectives of Article 6.2 of the DSU is to ensure the due process rights of the respondent in dispute settlement proceedings. It is clear that those rights would be undermined where the text of the panel request does not sufficiently inform a responding Member of the measure at issue and the nature of the claims raised by the complaining Member. This, however, clearly is not the case in the present proceedings. China raised certain claims in connection with a specific provision of Council Regulation No. 384/96 in both its request for consultations and its panel request. While it is true that this Regulation was subsequently repealed, it was immediately replaced by Council Regulation No. 1225/2009 which contains, in almost identical terms, and in identical substance, the same provision as was specifically identified in China's panel request. This repeal and replacement took place after China submitted its panel request, and after this Panel was established. To require China in such circumstances to restart the dispute settlement process, potentially requiring a new request for consultations[204], would defeat the purpose of the DSU to provide for the "prompt settlement of situations in which a Member considers that benefits accruing to it" under a covered Agreement are being impaired by another Member's measure, as provided for in Article 3.3 of the DSU. Thus, we consider the European Union's objection to be formalistic, rather than substantive. In the circumstances of this dispute, the due process rights of the European Union cannot be considered to have been undermined by allowing the dispute to go forward challenging the replacement measure rather than the measure named in the panel request. Indeed, to sustain the European Union's objection would not be consistent with the effective functioning of the WTO dispute settlement system, as it might lead to inappropriate legal manoeuvres to avoid dispute settlement, inconsistent with the obligation of Members to engage in dispute settlement "in good faith in an effort to resolve the dispute".[205] We therefore consider that Council Regulation No. 1225/2009 is properly before us and will base our findings and recommendations on China's "as such" claims on the relevant parts of that Regulation.

7.35 The European Union posits that China described the specific measure at issue in a very specific and narrow manner in its panel request. Specifically, the European Union notes that China did not refer to "replacements, related measures or implementing measures". Likewise, notes the European Union, "China did not identify the matter by using broader terms such as "individual treatment" or "individual treatment regime or practice" of the European Union in its panel request".[206] It follows, in the European Union's view, that the specific measure at issue in connection with China's "as such" claims is limited to Article 9(5) of Council Regulation No. 384/96, as amended.[207] For the

[202] European Union, answer to Panel question 12.

[203] Indeed, the European Union does not contend otherwise.

[204] It is foreseeable that a request for establishment naming a different measure than the request for consultations might be challenged as raising a matter as to which consultations were not held.

[205] DSU, Article 3.10. To be clear, we are ***not*** suggesting that the European Union engaged in any such manoeuvring in this dispute. There is no reason for us to think that the European Union's decision to repeal and replace Council Regulation No. 384/96 bore any relationship whatsoever to this dispute, and China has not suggested otherwise. Our concern is for the potential consequences of our decision.

[206] European Union, first written submission, para. 40.

[207] European Union, first written submission, para. 40.

European Union, since Council Regulation No. 1225/2009 did not amend Article 9(5) of Council Regulation No. 384/96, it falls outside the Panel's terms of reference. Again, we consider the proposition advocated by the European Union to be formalistic, and we do not believe that this consideration is decisive. The European Union's approach suggests that had China included, for instance, the words "and any replacements thereof", Council Regulation No. 1225/2009 would have fallen within the Panel's terms of reference. We decline to take such a mechanistic approach to determining our jurisdiction on the basis of the panel request. Instead, we consider it appropriate to look at the difference between the old and the new Article 9(5) to determine whether, in light of any textual differences between the two, the due process rights of the European Union would be undermined were we to proceed to resolve this dispute with respect to Council Regulation No. 1225/2009, rather than Council Regulation No. 384/96. Since the two texts are virtually identical, and with respect to substance, the two iterations of the provision in question may be deemed identical, we are of the view that the European Union's due process rights are well preserved.[208]

7.36 The European Union cites several panel and Appellate Body reports in support of its arguments in this context. For instance, it notes that, in *EC – Chicken Cuts (Brazil)*[209], the complainants in their submissions to the panel presented claims with respect to measures that had not been identified in their panel requests.[210] The panel found that since the complainants' panel requests were not worded sufficiently broadly, they could not be interpreted as containing these new measures.[211] However, we note that the circumstances of the present proceedings are significantly different from those in *EC – Chicken Cuts (Brazil)*. Unlike in that dispute, here the text of the "new" measure is virtually identical to the old one, and substantively it is identical. Thus, there is no question, in our view, whether the panel request can be interpreted as containing a "new" measure.

7.37 The European Union also cites the panel report in *China – Publications and Audiovisual Products*.[212] However, the issue in that dispute also differs significantly from the issue before us. In the paragraph specifically cited by the European Union, that panel noted that the Appellate Body had found that "references in a panel request to amendments, related measures, or implementing measures" could bring certain measures within a panel's terms of reference even if such measures had not been identified in the panel request.[213] In the present proceedings, however, the question is not whether the identification of Council Regulation No. 384/96 "as amended" brings Council Regulation No. 1225/2009 within our terms of reference despite it not having been specifically identified in the panel request. Rather, the question is whether the identification of Council Regulation No. 384/96 in the panel request limits our terms of reference so as to preclude our consideration of its substantively identical replacement, Council Regulation No. 1225/2009. We therefore consider that the discussion in that panel report is not pertinent to the issue presented in these proceedings.

7.38 We note that the spirit of previous WTO reports concerning whether amendments to specific measures identified in a panel request or new measures introduced subsequent to a panel request would fall within a panel's terms of reference actually supports our approach in this regard. While in

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[208] Equally, the inclusion of language such as "and any replacements thereof" would not, in our view, be sufficient to bring within a panel's terms of reference a replacement measure which was fundamentally different in substance from the identified measure.

[209] European Union, first written submission, footnote 32.

[210] Panel Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil* ("*EC – Chicken Cuts* (*Brazil*)"), WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295, para. 7.16.

[211] Panel Report, *EC – Chicken Cuts* (*Brazil*), paras. 7.28-7.29.

[212] European Union, first written submission, footnote 33.

[213] Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* ("*China – Publications and Audiovisual Products*"), WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, para. 7.18.

those cases, the principal issue was whether the text of the request can be understood to refer to other measures than those named, here, the issue is whether the failure to refer to a subsequent replacement of the named measure, identical in substance, precludes us from considering it. It is now well established that a measure which is not identified in the complainant's panel request may nonetheless fall within a panel's terms of reference if it is sufficiently closely related to the measure identified in the panel request, such that the respondent can be found to have had adequate notice of the nature of the claims that the complainant might raise during the panel proceedings.[214] We consider that to conclude, in this dispute, that a subsequent measure which is substantively identical to the measure identified in the panel request falls within our terms of reference is consistent with this reasoning. It is true that China's panel request does not contain language such as "and amendments or subsequent measures", but given that the new and the old measures are substantively identical, we do not consider this to be significant.

7.39 Finally, we are of the view that our resolution of this issue is consistent with the requirement of Article 11 of the DSU that a panel "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". It also serves the principle laid down in Article 3.3 of the DSU, to ensure prompt settlement of disputes between WTO Members, which is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". We therefore conclude that Council Regulation No. 1225/2009 is properly before us in this dispute, and will make our findings and recommendations with respect to that measure.

(b) Whether All Claims Raised by China in Connection With the Basic AD Regulation are Within the Panel's Terms of Reference

(i) Arguments of the Parties

European Union

7.40 The European Union maintains that under the DSU, it is not enough to summarily identify the legal basis of the complaint, the identification must present the problem clearly.[215] The European Union asserts that claims raised by China under Articles 6.10, 9.3 and 9.4 of the AD Agreement and under Article X:3(a) of the GATT 1994 are not properly before the Panel because the relevant parts of China's panel request do not present the problem clearly as required under Article 6.2 of the DSU. More specifically, the European Union submits that, with respect to these four claims, China failed to plainly connect the specific measure at issue to the legal provisions claimed to have been infringed.[216] It follows, in the European Union's view, that these claims are not within the Panel's terms of reference.

[214] See, for instance, Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.8; Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473), para. 135; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* ("*US – Zeroing* (*Japan*) (*Article 21.5 – Japan*)"), WT/DS322/AB/RW, adopted 31 August 2009, para. 113 ("We share the Panel's view that the use of the term "closely connected" earlier in paragraph 12 of the panel request provides additional support for finding that "subsequent closely connected measures" refers to periodic reviews of the anti-dumping duty order on ball bearings, which were conducted after the reviews listed in the panel request.")

[215] European Union, first written submission, para. 48.

[216] European Union, first written submission, para. 51.

China

7.41 China contends that its panel request satisfies the requirements of Article 6.2 with regard to the claims subject to the European Union's objection. According to China, the European Union confuses the procedural obligations contained in the DSU with the substantive analysis of the measure at issue, as well as claims with arguments. According to China, "Article 6.2 merely requires the complaining party to identify in its Panel Request the specific measure at issue and the claims so as to enable the defending party to know the problem at issue".[217] Specifically, China argues that Article 6.2 does not require that the scope of the specific measure at issue correspond to the scope of the legal provision claimed to have been violated.[218] China argues that from China's panel request, the European Union knew very well the specific measure at issue and the legal provisions identified as having been violated, and asserts that the contents of the European Union's first written submission demonstrate this. China maintains that the European Union's arguments concern the substantive issue of whether Article 9(5) of the Basic AD Regulation addresses the calculation of dumping margins, which this Panel is called upon to decide, rather than the procedural requirements of the DSU.[219] China also claims that the European Union has failed to demonstrate that China's alleged failure to present the problem clearly prejudiced its ability to defend its interests.[220] China therefore requests the Panel to find that the four claims that the European Union takes issue with are properly before the Panel.

(ii) Arguments of Third Parties

Brazil

7.42 Brazil notes that a panel request performs two functions: a) it informs the respondent of the nature of the claims raised by the complainant, and b) it determines the jurisdiction of the panel. According to Brazil, "the essence of the dispute is to be presented in the panel request in such a way that the responding Member can be reasonably expected to understand the case being brought against it".[221] With respect to the European Union's argument that China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement are outside the Panel's terms of reference, Brazil submits that the European Union conflates the threshold examination of the panel request with the substantive analysis of China's claims. In Brazil's view, China's panel request provides the gist of what is at issue and this is also confirmed by the contents of China's first written submission. Further, Brazil contends that the European Union has not shown that its due process rights have been prejudiced by the alleged inadequacies in China's panel request.

(iii) Evaluation by the Panel

7.43 We note that the premise for the European Union's preliminary objection with respect to China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement is the allegation that the specific measure at issue, *i.e.*, 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 determination of dumping margins or the establishment of the level of anti-dumping duties.[222] Since, according to the European Union, the specific measure at issue does not address the calculation of dumping margins, the European Union argues that claims under the provisions of the AD Agreement which deal with the calculation of margins fall outside our terms of reference.

[217] China, second written submission, para. 27.
[218] China, second written submission, para. 28.
[219] China, second written submission, para. 31.
[220] China, second written submission, paras. 41-46.
[221] Brazil, written submission, para. 4.
[222] See, European Union, first written submission, paras. 53, 54, 58 and 62.

7.44 In this regard, we agree with China that the European Union confuses the identification of the claims in the panel request with the arguments that are to be developed in the subsequent panel proceedings. We find it relevant and important in this regard that the European Union dedicates a significant portion of its substantive arguments regarding these three claims to its effort to demonstrate 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. Indeed, it is clear to us 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] We note that this argument is the only basis for the European Union's terms of reference objection in this context. We therefore find that China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement are within our terms of reference.

7.45 With regard to China's claim under Article X:3(a) of the GATT 1994, the European Union makes similar arguments. It contends 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. According to the European Union, "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".[224] Here too, we are of the view that the European Union confuses the identification of a claim with the arguments that may be 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. We recall that what matters for purposes of Article 6.2 of the DSU 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 prepare its arguments accordingly. Whether the description of the claim makes legal sense is something to be scrutinized by the Panel in the course of the panel 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, clearly identifies a claim under Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation. We therefore consider this claim to be within our terms of reference as well.

2. Relevant Provisions of Council Regulation No. 1225/2009

7.46 Council Regulation No. 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 rule set out in Article 2(1)-(6) for the determination of normal value essentially replicates the provisions of Article 2.2 of the AD Agreement, and applies to market economy countries, whether or not Members of the WTO.

7.47 Paragraph 7 of Article 2 contains specific rules on the determination of normal value in investigations conducted against non-market economies ("NMEs"). It groups those countries into two categories: those NMEs that are WTO Members and those NMEs that are not, and establishes different rules for determining normal value for these two categories:

[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.

[224] European Union, first written submission, para. 67.

(a) Paragraph 7(a), which applies to NMEs that are **not** Members of the WTO, including Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan, provides that for these countries, 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".

(b) Paragraph 7(b), which applies to Kazakhstan and NMEs that are Members of the WTO as of the date of initiation of a given investigation, including China, provides that if one or more producers[225] subject to the investigation demonstrate that "market economy conditions prevail" for them, normal value is determined for those producers in accordance with the basic rules set out in paragraphs 1-6 of Article 2, that is, the rules applicable to market economy countries. Otherwise, normal value will be determined on the basis of paragraph 7(a), *i.e.*, the rules that apply to NMEs that are not Members of the WTO, including for any producers who are unable to demonstrate that "market economy conditions prevail" for them.

Paragraph 7(c) sets out the criteria on the basis of which a foreign producer would be expected to demonstrate that it operates according to market economy principles, and thus that "market economy conditions prevail" for it, in which situation, the first option under paragraph 7(b) will be applied, and a determination of normal value in accordance with the rules applicable to market economy countries will be made for that producer. These criteria are generally referred to as the "market economy test" ("MET").[226] There are no claims in this dispute with respect to the market economy test, either as such, or as applied in the investigation.

7.48 Central to China's "as such" claims in this dispute is paragraph 5 of Article 9 of the Basic AD Regulation, which explains the modalities for the imposition of anti-dumping duties. It provides, 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. <u>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</u>." (emphasis added)

Thus, Article 9(5) requires that in principle a duty be specified for each such "supplier". It then introduces two exceptions to this principle: (1) where it is impracticable to specify the duty for each

[225] In this report, we use the words "producer" and "exporter" interchangeably, with both referring to companies that are subject to an anti-dumping investigation in the European Union.

[226] Under Article 2(7)(c), a request for market economy treatment must be made in writing and must contain sufficient evidence that the producer operates under market economy conditions, that is if: 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.

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 analogue country prices or one of the other methods in that provision. In these cases, the Regulation imposing the duty shall specify a duty rate for the supplying country concerned, that is, a single "country-wide" duty rate will be specified, which will apply to all imports from that country.

7.49 Article 9(5) provides for an exception to the specification of a country-wide duty rate. It provides:

> "Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:
>
> "(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 generally referred to as the "individual treatment ("IT")" test. If a producer demonstrates that it meets these conditions and is thus entitled to IT, the EU authorities will specify an individual duty rate for that producer. Exporters who do not satisfy the IT test will be subject to the country-wide duty rate.

7.50 In sum, when an exporter from a WTO Member that the European Union treats as a NME is subject to an anti-dumping investigation conducted by the European Union, the following possibilities with respect to the determination of normal value and the imposition of duty apply:

(a) If the exporter satisfies the MET, then its normal value will be determined on the same basis as for producers in market economies. A dumping margin for that producer will be calculated by comparing that normal value to the export prices of that producer, and an individual duty rate will be applied to that producer.

(b) If the exporter fails the MET ("NME exporter"), then its normal value will be determined on the basis of an alternative method (typically based on prices in an analogue third country). Whether the export price used in calculating the dumping margin will be based on the exporter's own export sales will depend on whether the exporter requests and is granted IT.

    (i) If the NME exporter makes such a request and demonstrates that it meets the criteria in Article 9(5) of the Basic AD Regulation, the NME exporter will have an individual duty rate applied to it, calculated on the basis of a comparison of the alternative-method normal value with its own export prices.

(ii) Otherwise, the non-IT NME exporter will be subject to a country-wide duty rate. The determination of the export price used to calculate that country-wide 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 percent 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 percent 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.[227]

3. Whether Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement

(a) Arguments of the Parties

(i) China

7.51 China argues that the first sentence of Article 6.10 of the AD Agreement requires investigating authorities, as a rule, to calculate an individual margin of dumping for each exporter/foreign producer of the allegedly dumped imports.[228] Exceptionally, under the second sentence, it allows the use of a sample where the number of exporters, producers, importers or types of products involved is high.[229] In China's view, sampling is the only exception to the rule set forth in the first sentence of Article 6.10.[230] Therefore, according to China, by providing that exporting producers from NMEs are subject to a country-wide dumping margin unless they are able to demonstrate that they meet the five criteria of Article 9(5) violates Article 6.10. According to China, even though the text of Article 9(5) of the Basic AD Regulation refers to "an individual duty" rather than "an individual margin of dumping", the application of an individual duty necessitates the calculation of an individual margin of dumping.[231] China asserts that, as a result, Article 9(5) of the Basic AD Regulation violates Article 6.10 of the AD Agreement.[232]

7.52 China argues that just as Article 6.10 requires the calculation of individual dumping margins, Article 9.2 of the AD Agreement requires the authorities to name individual suppliers in the imposition of anti-dumping duties.[233] Exceptionally, this provision permits the authorities to name the supplying country where naming individual suppliers would be impracticable. China notes Article 9.4 of the AD Agreement, which provides for the imposition of anti-dumping duties in cases where sampling is used, and argues that when Article 9.2 is read in conjunction with Article 9.4, it becomes clear that the only instance in which the authorities would be permitted to assign country-wide duties is when sampling is used in the investigation.[234] According to China, therefore, by subjecting the assignment of individual duty rates to the fulfilment of certain conditions, Article 9(5) of the Basic AD Regulation violates Article 9.2 of the AD Agreement.

[227] European Union, answer to Panel question 4.
[228] China, first written submission, para. 55.
[229] China, second written submission, para. 224.
[230] China, second written submission, para. 221.
[231] China, first written submission, para. 59.
[232] China, first written submission, para. 62.
[233] China, first written submission, para. 71.
[234] China, first written submission, para. 74.

7.53 China notes that the margins of dumping for Chinese producers that do not qualify for IT under Article 9(5) of the Basic AD Regulation are calculated on the basis of a comparison of the normal value calculated for the analogue country with the average export prices of all cooperating non-IT exporting producers which, in most cases, will be further averaged with best information available such as, e.g., import statistics.[235] China contends that this calculation is inconsistent with the requirements of Article 2 of the AD Agreement because it is not based on the individual export prices of the relevant producers. As a result, those exporting producers which have company-specific export prices which are higher than the average export price used for non-IT exporting producers will be subject to a duty which exceeds their dumping margin established under Article 2 of the AD Agreement. China claims that, as a result, the duties imposed on the basis of such margins violate the principle set forth in Article 9.3 of the AD Agreement, that the anti-dumping duty imposed shall not exceed the margin as established under Article 2.[236]

7.54 China asserts that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.4 of the AD Agreement for two reasons. First, the dumping margins calculated for non-sampled producers will reflect the weighted average of the margins calculated for the sampled producers which, to the extent sampled producers are not granted IT, will be inconsistent with Article 2 of the AD Agreement because they will be based on the export prices of all cooperating foreign producers, as opposed to those of the individual producers.[237] Second, Article 9(5) of the Basic AD Regulation runs counter to the obligation contained in the last sentence of Article 9.4 of the AD Agreement in that Article 9(5) subjects the right to request individual margins to conditions that are not found in Article 9.4 of the AD Agreement.[238]

(ii) European Union

7.55 The European Union contends that the obligation set forth in the first sentence of Article 6.10 is purely procedural. It requires the authorities to calculate an individual margin for each known exporter or producer but does not address how such calculation should be made. The calculation of margins is addressed elsewhere in the Agreement.[239] The nature of the obligation contained in Article 6.10 is different from the nature of the issue raised by China, namely the assignment of individual, as opposed to country-wide, duty rates. The imposition of duties is addressed under Article 9 of the Agreement.[240] Accordingly, the European Union maintains that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set out in Article 6.10 of the AD Agreement.[241]

7.56 On substance, the European Union posits that sampling, allowed under the second sentence of Article 6.10, is not the only exception to the general rule set out in the first sentence of this provision.[242] For instance, the European Union argues that Article 6.10 permits investigating authorities to treat separate companies as a single entity which is the actual source of dumping.[243] The European Union asserts that other exceptions to the general rule are also possible, including, the European Union contends, that provided for in Article 9(5) of the Basic AD Regulation. Therefore, Article 9(5) of the Basic AD Regulation is not inconsistent with Article 6.10 of the AD Agreement.[244]

[235] China, second written submission, para. 302.
[236] China, first written submission, paras. 85-86.
[237] China, first written submission, paras. 89-90; China, second written submission, paras. 302-303.
[238] China, first written submission, paras. 91-92.
[239] European Union, first written submission, paras. 133-135.
[240] European Union, first written submission, para. 136.
[241] European Union, first written submission, para. 138.
[242] European Union, first written submission, paras. 140-142.
[243] European Union, first written submission, para. 147.
[244] European Union, first written submission, paras. 153-154.

7.57 The European Union contends that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set forth under Article 9.2 of the AD Agreement because the latter does not require an anti-dumping duty to be company-specific, but merely that the suppliers be "named".[245] In the alternative, the European Union maintains that, contrary to China's argument, Article 9.4 of the AD Agreement cannot be interpreted to identify the only instance where the investigating authorities can impose anti-dumping duties for the supplying country.[246] The European Union notes that the third sentence of Article 9.2 allows authorities to name the supplying country when several suppliers are involved and it is impracticable to name all of them.[247] According to the European Union, "impracticable" refers to situations where the duty would not address the source of dumping and therefore would be ineffective.[248] The European Union therefore contends that Article 9(5) of the Basic AD Regulation is not inconsistent with Article 9.2 of the Agreement since it serves to identify when it would be impracticable to assign individual duties and therefore country-wide duties should be assigned.[249]

7.58 The European Union also asserts that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set forth under Article 9.3 of the AD Agreement, because Article 9(5) of the Basic AD Regulation does not address the calculation of dumping margins or the relationship between anti-dumping duties and dumping margins.[250] Assuming that Article 9(5) of the Basic AD Regulation is related to the obligation set forth in Article 9.3 of the AD Agreement, the European Union maintains that China's claim under Article 9.3 is dependent on its claims under Articles 6.10 and 9.2. Since, in the European Union's view, Article 9(5) of the Basic AD Regulation does not violate those two provisions, there can be no violation of Article 9.3 either.[251] The European Union disagrees with China's argument that the single anti-dumping duty imposed on a country-wide basis will necessarily lead to the collection of duties in excess of the relevant margin of dumping.[252] The European Union asserts, in this regard, that "in case of imports from China, the proper duty rate for the actual supplier is subject to the maximum ceiling of the dumping margin found for that supplier based on the weighted average of the intermediate results found for cooperating non-IT suppliers and the results obtained for the non-cooperating suppliers".[253]

7.59 The European Union submits that Article 9(5) of the Basic AD Regulation does not necessarily require the use of sampling and therefore does not fall within the scope of the obligation set forth under Article 9.4 of the AD Agreement.[254] Assuming that the Panel disagrees with this view, the European Union submits that China's claim under Article 9.4 of the AD Agreement is entirely dependant on its claims under Articles 6.10 and 9.2 of the AD Agreement. Since, in the European Union's view, 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.[255] Further, the European Union disagrees with China's argument that Article 9(5) of the Basic AD Regulation results in the assignment of duties to cooperating non-sampled suppliers in excess of the weighted average of the margins of dumping of the sampled suppliers.[256]

[245] European Union, first written submission, paras. 99- 101.
[246] European Union, first written submission, paras. 103-105.
[247] European Union, first written submission, para. 107.
[248] European Union, first written submission, paras. 108-116.
[249] European Union, first written submission, para. 122.
[250] European Union, first written submission, paras. 158-159.
[251] European Union, first written submission, para. 160.
[252] European Union, first written submission, para. 162.
[253] European Union, first written submission, para. 163.
[254] European Union, first written submission, paras. 166-168.
[255] European Union, first written submission, para. 169.
[256] European Union, first written submission, para. 171.

(b) Arguments of Third Parties

(i) Brazil

7.60 Brazil submits that Article 9(5) of the Basic AD Regulation is not inconsistent with the relevant WTO disciplines. According to Brazil, the provisions of Article 2 and those of Article 6.10 of the AD Agreement only apply in investigations dealing with producers that operate in accordance with market economy principles. Where the authorities determine that market economy principles do not prevail in the country of export, they may use a methodology that does not take into consideration the domestic prices in that country. Brazil finds support for this view in paragraph 15(a)(i) of China's Protocol of Accession. Brazil submits that where the producer shows that it operates independently from the State, it should be entitled to an individual margin of dumping as required under Article 6.10. Brazil considers that the panel report in *Korea – Certain Paper* lends support to this view. Further, Brazil maintains that where the test developed by that panel is applied *vis-à-vis* exporters from a non-market economy country, the burden shifts to such exporters to demonstrate that they operate independently from the State. Thus Brazil considers that Article 9(5) of the Basic AD Regulation is not inconsistent with Article 6.10 of the AD Agreement. Turning to Article 9 of the AD Agreement, Brazil submits that there is no provision in this Article which requires the determination of individual anti-dumping duties. The only obligation that Brazil infers from Article 9 is that the duty should not exceed the margin established in accordance with Article 2 of the AD Agreement. But this is independent from the methodology applied in the determination of that margin. Brazil therefore concludes that Article 9(5) of the Basic AD Regulation is not inconsistent with the obligations contained in Article 9 of the AD Agreement either.

(ii) Colombia

7.61 Colombia submits that the European Union has shown that Article 9(5) of the Basic AD Regulation does not fall within the scope of application of Article 6.10 of the AD Agreement because it deals with the imposition of anti-dumping duties, and not the calculation of dumping margins. Further, Colombia contends that the investigating authorities are entitled to treat as one entity producers that are found to be related to the State and to calculate a single margin of dumping for them. It follows that Article 9(5) of the Basic AD Regulation is not inconsistent with Article 6.10. According to Colombia, under Article 9.2 of the AD Agreement, authorities are allowed to impose anti-dumping duties either on an individual or nation-wide basis. Article 9(5) of the Basic AD Regulation explains the conditions under which the Commission of the European Union ("Commission") will apply individual, as opposed to country-wide, duties. Therefore, it is not inconsistent with the obligation set forth under Article 9.2 of the AD Agreement.

(iii) India

7.62 India's understanding of the obligation embodied in Article 6.10 of the AD Agreement is that this provision requires investigating authorities to calculate individual margins of dumping for each known exporter or producer. India presents the view that sampling is but one exception to this principle and seeks clarity from the Panel in this regard. India notes the second paragraph of the Note Ad Article VI of the GATT 1994 and paragraph 15(a)(i) of China's Protocol of Accession, and argues that should the Panel interpret the word "sale" used in the Protocol of Accession as referring both to domestic and export sales, this may confirm the view that sampling is not the only exception to the general rule provided for in the first sentence of Article 6.10.

(iv) Japan

7.63 Japan draws a link between paragraph 15(a)(ii) of China's Protocol of Accession and the conditions contained in Article 9(5) of the Basic AD Regulation to qualify for IT. According to

Japan, if the conditions set forth under Article 9(5) of the Basic AD Regulation correspond to the conditions contained under paragraph 15(a)(ii) of China's Protocol of Accession to show that market economy conditions prevail in a given industry and if the calculation of a country-wide duty under Article 9(5) of the Basic AD Regulation is equivalent to using a methodology that is not based on a strict comparison with domestic prices within the meaning of paragraph 15(a)(ii) of China's Protocol of Accession, the Panel should find that the European Union did not violate Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement. Japan invites the Panel to clarify the relationship between Article 9(5) of the Basic AD Regulation and paragraph 15(a)(ii) of China's Protocol of Accession. Further, with respect to Article 6.10, Japan agrees with the European Union that, as clarified by the panel in *Korea – Certain Paper*, this provision allows authorities to treat related companies as a single producer or exporter. However, in Japan's view, this reasoning relates to the definition of a "producer" or "exporter" under Article 6.10 and has no bearing on the relationship between the first and second sentences of this provision. Japan is of the view that sampling is the only exception to the general rule set forth in the first sentence of Article 6.10.

(v) Turkey

7.64 Turkey notes that the first sentence of Article 6.10 of the AD Agreement provides for a general rule and that the second sentence introduces an exception to this rule, namely the use of sampling. Turkey, however, does not consider sampling to be the sole exception to this rule. According to Turkey, the AD Agreement contains rules that apply to anti-dumping investigations conducted against companies from market economy countries. It is therefore normal that Article 6.10 does not contain an exception for NMEs. Turkey argues that in countries where there is State intervention in the economy, such intervention affects not only costs and domestic prices but also export prices. As a result, in investigations carried out against producers from such countries, the investigating authorities are permitted to disregard the actual export prices in the calculation of dumping margins.

(vi) United States

7.65 The United States notes that, in principle, Article 6.10 requires investigating authorities to calculate individual dumping margins for each known exporter or producer. This requires the investigating authorities to identify the producers and exporters in the first place. The United States submits that in making this determination, the authorities should be allowed to take into consideration economic realities and to treat multiple entities as one if the facts demonstrate that the companies are sufficiently related. According to the United States, these realities also include the kind of economy in which the companies operate. The United States maintains that there is ample evidence showing significant State intervention in the Chinese economy. Thus, it becomes more important to analyze well the structures and operations of Chinese companies in order to determine whether they are independent from the State. The United States considers that to the extent that Article 9(5) of the Basic AD Regulation is designed to examine the relationship between the producers and the State in the exporting country, it would not be inconsistent with Article 6.10 of the AD Agreement. The United States finds support for its views in the panel decision in *Korea – Certain Paper*.

7.66 The United States contends that Article 9 of the AD Agreement does not preclude investigating authorities from imposing and applying a singly duty to a group of companies. Article 9 refers to the imposition of duties on products, not individual producers or exporters. Further, the United States contends that in order to decide which duty will be applied to which company, the investigating authorities have to know whether a group of companies function as a single entity. If it is determined that this is the case, there is nothing in Article 9 that would preclude the authorities from treating such companies as a single entity in respect of the imposition and collection of anti-dumping duties.

7.67 The United States maintains that Article 9(5) of the Basic AD Regulation does not fall within the scope of Article X:3(a) of the GATT 1994 because it does not address the administration of any legal instrument.

(c) Evaluation by the Panel

(i) The Scope/Operation of Article 9(5) of the Basic AD Regulation

7.68 We note that the parties disagree as to the scope/operation of Article 9(5) of the Basic AD Regulation. The gist of the disagreement is whether this provision determines whether NME exporters will have individual dumping margins calculated as well as which exporters will have individual duty rates applied, or whether it is limited to determining which exporters will have an individual duty rate and which ones will be subjected to a country-wide duty rate. China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement are premised on the view that Article 9(5) of the Basic AD Regulation determines whether the Commission will calculate individual or country-wide dumping margins, in addition to determining whether individual or country-wide duty rates will be applied. In this regard, we recall that the meaning of the national law of a WTO Member is a matter of fact for panels to establish.[257] We note that the European Union has not provided any evidence of the meaning of Article 9(5) of the Basic AD Regulation, such as, for instance, an interpretation from the EU courts having relevant jurisdiction. Thus, we consider that it falls upon us to clarify the scope/operation of Article 9(5) of the Basic AD Regulation as a factual matter before engaging in a substantive analysis of China's claims.

7.69 The European Union submits that Article 9(5) of the Basic AD Regulation deals exclusively with the imposition of anti-dumping duties, and does not concern the calculation of dumping margins at all. At the beginning of an investigation, NME producers are invited to fill out and submit to the Commission "the MET/IT claim form" in order to demonstrate, *inter alia*, that they meet the conditions set out under Article 9(5) of the Basic AD Regulation for IT. If these conditions are met, the Commission will assign an individual duty rate to that producer. If the conditions are not met, the producer will be subject to a country-wide duty. According to the European Union, this is all that Article 9(5) of the Basic AD Regulation does. Other issues, such as the calculation of dumping margins and determination of the levels of the duties to be imposed, are, according to the European Union, governed by other provisions of the Basic AD Regulation, not Article 9(5). It follows from the European Union's argument that China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement have to be dismissed because the specific measure at issue is not related to the obligations set out in these three provisions.

7.70 China disagrees. According to China, the scope of Article 9(5) of the Basic AD Regulation is not limited to determining whether the NME producers will receive individual or country-wide anti-dumping duties. Whether the Commission will determine an individual or country-wide dumping margin for exporters is also governed by this provision.

7.71 We recall that Article 9(5) of the Basic AD Regulation provides that NME producers that fail the IT test will be subject to the imposition of a country-wide anti-dumping duty. NME producers that pass the IT test, on the other hand, will have their own individual duty rates imposed. We recognize that, on its face, the text of Article 9(5) does not mention dumping margins. But, looking at the operation of this provision as a whole, in the context of an anti-dumping investigation conducted by the European Union, we agree that, as China argues, Article 9(5) not only determines whether a

[257] See, for instance, 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. 7.90; Appellate Body Report, *India – Patents* (*US*), paras. 65-67.

particular NME producer will be subjected to an individual or country-wide duty, but necessarily also determines whether the Commission will calculate an individual dumping margin for that producer.

7.72 As a general matter, it is clear to us that there is a close and necessary link between the calculation of a margin of dumping and the imposition of an anti-dumping duty. Article 2 of the AD Agreement sets out the rules that apply to the calculation of dumping margins. These rules generally address the substantive aspects of margin calculations. Article 2.1 contains the definition of dumping. Article 2.2 lays down detailed principles for the determination of normal value, including for such complex matters as sales below cost and low volume of sales that arise in determining normal value. Article 2.3 provides guidance for those situations where the export price may be deemed to be unreliable, as a result of which the authorities can resort to constructed export price. Article 2.4 stipulates that a fair comparison has to be carried out between normal value and export price and sets out rules for how that comparison is to be undertaken.

7.73 Article 9 of the AD Agreement, entitled "Imposition and Collection of Anti-Dumping Duties," sets out the disciplines governing the imposition of anti-dumping duties. Of the specific provisions set forth under Article 9, paragraph 3 seems most closely linked to the calculation of dumping margins, setting out the principle that an anti-dumping duty cannot exceed the margin of dumping established under Article 2 of the AD Agreement. Article 9.2 stipulates that the authorities should normally name the individual suppliers of the product concerned in connection with the imposition of a duty, but allows the naming of the country if naming individual suppliers would be "impracticable". Article 9.4 explains how, in investigations where the authorities use sampling as provided for under Article 6.10 of the AD Agreement, maximum duty rates should be calculated for producers and exporters not examined as part of the sample.[258]

7.74 It seems to us that, normally, an investigating authority would calculate the margin of dumping and impose the consequent anti-dumping duty on the same basis. In other words, it seems logical to us that an investigating authority would impose an anti-dumping duty on a producer-specific basis only if the underlying margins were also calculated on a producer-specific basis. Conversely, if the margins have been calculated on a country-wide basis, one would expect the authorities to also impose the duty on a country-wide basis. The European Union's argument, that the basis on which duties are ultimately to be imposed is not determinative of, and indeed is somehow entirely separate from, the basis on which margins are calculated, seems counterintuitive. In our view, it would not make sense for an investigating authority to calculate individual dumping margins for producers with respect to which the national legislation requires the imposition of country-wide anti-dumping duties.[259] Indeed, in response to questioning in this regard the European Union explained:

> "The EU authorities <u>do not calculate individual dumping margins</u> for non-IT suppliers."[260] (emphasis added)

[258] Thus, the rules in Article 9.4 are, in the context of foreign producers and exporters who are not individually examined as a part of the sample in an investigation, the functional equivalent of the rules in Article 2 for calculating dumping margins, as they establish the maximum rate of duty that may be applied for these companies.

[259] Conversely, if the underlying margins have not been calculated on a producer-specific basis, then any anti-dumping duties could only be applied on an "individual basis" in the most nominal sense, as the duty applied "individually" to each producer would presumably be the same for all of them.

[260] European Union, answer to Panel question 6(a). The European Union went on to observe "[h]owever, the export prices of non-IT suppliers are generally used to determine the dumping margin for the actual supplier, *i.e.*, the State". European Union, answer to Panel question 6(a). Thus, it seems clear that the EU authorities collect the individual export prices of non-IT suppliers, but simply use them on an average basis to determine a country-wide dumping margin.

7.75 The European Union went on to state that:

> "Non-IT suppliers are considered to be related through the State, the actual supplier and source of the alleged price discrimination. Thus, the country-wide dumping margin calculation aims at calculating the dumping margin for the actual supplier."[261] (emphasis added)

Thus, the European Union acknowledges that the application of Article 9(5) of the Basic AD Regulation entails the calculation by the EU authorities of a country-wide margin and the consequent imposition of a country-wide duty *vis-à-vis* non-IT producers. Nonetheless, the European Union asserts that "the calculation of an individual dumping margin for the State and its related export branches (*i.e.*, non-IT suppliers) or for MET/IT suppliers is not established by reason of the operation of Article 9(5) ... the calculation of the individual dumping margin for the State and the MET/IT suppliers is carried out by reason of the operation of Articles 2(7) and 18 of Council Regulation No 384/96[.]"[262] We note, however, that the issue before us is not the mechanics of the calculation of dumping margins but rather whether the Commission calculates an individual margin and assigns an individual duty to individual Chinese producers. Nothing in either of the Articles cited by the European Union pertains to whether or not an individual margin will be calculated for any foreign producer or exporter, and the European Union does not assert otherwise. These provisions only relate to the mechanics of the calculation of dumping margins, and this argument therefore is not pertinent to our inquiry.

7.76 Thus, our understanding of the EU legislation is that whether or not the Commission will calculate individual dumping margins and assign individual anti-dumping duties with respect to exporters from NMEs is addressed exclusively in Article 9(5) of the Basic AD Regulation. No other provision in the Basic AD Regulation or any other element of the EU legislation has been brought to our attention which would produce this particular result.[263]

7.77 Based on the foregoing considerations we conclude that 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. More specifically, where this provision requires that a country-wide duty be imposed on NME producers that fail the IT test, it is undisputed that the Commission calculates only a country-wide dumping margin for such producers, and not individual dumping margins. With respect to producers that pass the IT test, an individual margin is calculated and an individual duty is imposed. We therefore consider that, 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. Having clarified this factual issue, we now proceed to the substantive assessment of China's claims against Article 9(5) of the Basic AD Regulation.

(ii) Substantive Analysis

7.78 China maintains that Article 9(5) of the Basic AD Regulation violates Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement since it requires that NME producers from China be subject to a country-wide margin of dumping and a country-wide anti-dumping duty unless they can demonstrate that they meet all of the conditions for IT set out in that provision.

[261] European Union, answer to Panel question 6(b).
[262] European Union, answer to Panel question 82.
[263] It seems to us, for instance, that should the Commission be challenged in the relevant EU court for failing to grant individual treatment to such exporters in a particular case, it would have to rely on Article 9(5) of the Basic AD Regulation in defending its action.

7.79 We recall that, under the Basic AD Regulation, in an anti-dumping investigation involving a non-market economy, the NME producers are first subject to the market economy test, to determine whether the Commission will base the determination of normal value for them on a consideration of the domestic prices of these producers. If a producer passes this test, its normal value will be based on that producer's domestic prices and the export prices that will be compared to that normal value will be based on that exporter's own export prices – it is treated exactly as if it were a producer from a market economy country. If a producer fails the MET, the domestic prices of that producer are not taken into consideration in the determination of its normal value, which is determined on an alternate basis.

7.80 That producer is next subject to the IT test, which determines whether an individual margin will be calculated and an individual duty will be imposed with respect to that producer or whether a country-wide margin will be calculated, and the producer will be subject to a country-wide duty. The IT test only applies to producers who fail the MET. As we have concluded above, pursuant to Article 9(5) of the Basic AD Regulation, that a country-wide duty will be imposed with respect to producers that fail the IT test entails that the Commission will calculate a country-wide margin for such producers. As described in para. 7.50(b)(ii) above, the determination of the export price used to calculate that country-wide margin 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 percent 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 percent 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.

7.81 Thus, as a technical matter, the Commission calculates one single dumping margin for NME producers that fail the IT test. The Commission then imposes a single "country-wide" duty rate for those producers, which may be less than that margin if the EU authorities determine that a lesser duty would suffice. For NME producers that pass the IT test, the Commission will compare the same normal value, but with these producers' own export prices. Thus, as a technical matter, the Commission calculates individual margins for NME producers that pass the IT test and individual duties are imposed, which may be less than the individual margins calculated if the EU authorities determine that a lesser duty would suffice.

7.82 China's claims under Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement, therefore, only concern the export price aspect of dumping determinations for NME producers. China contends that disregarding the export price of non-IT producers and instead taking into consideration the weighted average export price of a group of Chinese producers as the single export price, and calculating a country-wide dumping margin and a country-wide duty level on that basis, is inconsistent with the cited provisions of the AD Agreement.

7.83 China's arguments under all four provisions of the AD Agreement at issue are premised on the view that the AD Agreement requires individual treatment for producers subject to an investigation with respect to the dumping determination. China contends that this individual treatment obligation requires the investigating authorities, as a rule, to take into consideration a producer's own export prices in the calculation of that producer's individual dumping margin, and to base the duty rate for that producer on that individual margin.[264] China acknowledges that Articles 6.10 and 9.2 provide for exceptions to the individual treatment principle, but maintains that where these exceptions do not apply, the investigating authorities have to provide individual treatment to foreign producers.

[264] Or, of course, a lesser duty may be imposed. Since this may occur regardless of the basis on which the dumping margin is calculated, and is not at issue in this case, we do not address this circumstance.

7.84 Given that the gist of China's claim pertains to the fact that Chinese producers that fail the IT test are not accorded individual margins and individual duties by the European Union, we consider it appropriate to start our assessment with the provision of the AD Agreement that is the most directly related to the issue of individual treatment and move on, to the extent necessary, to the other provisions raised by China. In our view, the provision that is most directly relevant to China's claim is Article 6.10 of the AD Agreement. Article 6.10 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."

7.85 Article 6.10 clearly concerns individual treatment of producers and exporters subject to anti-dumping investigations, setting out the principle that the investigating authorities shall, "as a rule", "determine", *i.e.*, calculate, an individual dumping margin for "each known producer or exporter ... of the product under investigation". It also provides that where the number of producers, exporters, importers or product types is "so large" as to make it impracticable to calculate individual margins, the investigating authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid, or to the largest percentage of the volume of exports from the exporting country in question. The "limited examination" provided for in this Article is generally referred to as "sampling", even where a statistically valid sample is not used, but the second alternative for limiting examination is used.[265]

7.86 With respect to China's claim under Article 6.10 of the AD Agreement, the disagreement between the parties centres on whether sampling is the only exception to the general obligation to calculate individual margins for each known producer or exporter set out in the first sentence. China argues that Article 6.10 requires investigating authorities to calculate an individual dumping margin for each known exporter or producer except where, as stated in the second sentence of this provision, the authorities resort to sampling because of the large number of exporters, producers, importers or product types. Although the European Union argues that Article 6.10 does not apply here, we have rejected that view, concluding above that Article 9(5) of the Basic AD Regulation does in fact address the calculation of margins.[266] The European Union also objects to China's substantive arguments.

[265] Article 6.10 also contains provisions regarding the selection of the foreign producers/exporters to be included in a sample, and the right of producers not included in the sample selected to have an individual margin calculated for them nonetheless, unless to do so would be unduly burdensome for the investigating authorities. These provisions are not at issue in this dispute.

[266] See paragraphs 7.68-7.77.

The European Union does not disagree that the principle laid down under Article 6.10 is that an individual margin be calculated for each known producer. It considers that Article 6.10, first sentence, contains the expression of a preference, as a general rule, not a strict obligation which must be complied with in each and every case. However, it argues that sampling is not the only exception to this preference.[267] Specifically, the European Union maintains that in non-market economies, the State may be found to be the source of dumping. In such cases, the investigating authorities can, in effect, treat the State as a "producer", calculate a single margin of dumping and duty rate for the State, and assign that country-wide duty to producers that cannot demonstrate that they are independent from the State.

7.87 China's argument raises two issues: (1) whether sampling as described in the second sentence of Article 6.10 constitutes the only exception to the principle laid down in the first sentence, and (2) whether a State may be seen as a producer and a single margin may be established and a duty imposed on exports from that State unless individual exporters can demonstrate their independence from the State according to a set of criteria established by the importing Member conducting an anti-dumping investigation.

7.88 We note that the first sentence of Article 6.10 provides that the investigating authorities must, "as a rule", calculate an individual dumping margin for each known exporter or producer of the product under investigation. The second sentence states that where the number of exporters, producers, importers or types of product involved is so large as to make an individual determination impracticable, the authorities may base their determinations on an examination of a statistically valid sample or the largest percentage of the volume of the exports from the country at issue which can reasonably be investigated. In light of the text and its structure, it is clear to us that the second sentence of Article 6.10 introduces an exception to the principle laid out in the first sentence. The question that the European Union raises, however, is whether sampling is the sole exception to the principle of individual dumping determinations, or whether there may be other exceptions.

7.89 With respect to the relationship between the first and the second sentences of Article 6.10, the European Union argues:

> "The second sentence of 6.10 on sampling is not an exception to this general rule. Rather, the second sentence is simply an affirmative statement relating to (i) the conditions for sampling and (ii) the composition of the sample. There is no direct link between the general principle of the first sentence and the possibility of sampling in the second sentence. These two sentences are simply two affirmative statements of what an investigating authority ought to do in general (individual margin determination), and what it is allowed to do (sampling)."[268]

According to the European Union, there may be additional situations, other than sampling, which may justify not calculating an individual margin for a producer. In this regard, the European Union refers to the fact that a new exporter which is related to an exporter of a product subject to an anti-dumping duty is not entitled to request the calculation of an individual margin; that individual producers that are related to one another are not entitled to individual margins under Article 6.10; that the investigating authorities may calculate different margins for a producer and an exporter that sells the products of that producer; that the authorities may base their margin determinations for a non-cooperating producer on facts available; that no margin would be calculated for an exporter which is a "mere trader" in the subject product; that the authorities may be unable to gather information with

[267] European Union, second written submission, para. 38.
[268] European Union, answer to Panel question 7.

respect to some producers; and that a margin may sometimes be determined on the basis of a constructed normal value and/or constructed export price.[269]

7.90 We are not convinced by the European Union's arguments. The wording of Article 6.10, particularly the fact that the exception is stated immediately after the rule, seems to suggest that sampling is the sole exception to the rule of individual margins. Moreover, the examples that the European Union gives as potential other exceptions to the rule in the first sentence of Article 6.10 are directly based on other provisions of the AD Agreement, and as such, we are of the view that they cannot be considered even potentially as "exceptions" to the obligation to calculate individual dumping margins. Rather, they are specific rights and obligations otherwise provided for in the AD Agreement. For instance, Article 9.5 provides that new exporters of a product subject to an anti-dumping duty are entitled to an expedited review to determine an individual dumping margin for them, except for new exporters that are related to an exporter that was subject to the underlying investigation and for which a duty has thus already been imposed. Since this situation is specifically provided for, we see no reason why the non-calculation of an individual margin in this context should be considered as a possible exception to the first sentence of Article 6.10. Similarly, the fact that the investigating authorities may calculate different margins for a producer and an exporter that sells the products of that producer cannot be interpreted as being an additional exception to the first sentence of Article 6.10. Rather, that situation seems to fit the general rule, that an individual margin of dumping is calculated for each foreign producer and exporter of the product. Similarly, the fact that dumping determinations may be based on facts available under Article 6.8 would seem irrelevant to the question before us – in such cases, it is the failure of an individual foreign producer or exporter to provide information that justifies the use of facts available, and the margin applied to that non-cooperating party is "individual" in that sense, regardless of how it may be calculated. It goes without saying that if the investigating authorities are not aware of a particular producer, an individual margin cannot be calculated for it.[270] Indeed, the first sentence of Article 6.10 only requires the determination, as a rule, of an individual margin of dumping for "known" producers or exporters, so questions about the scope of any "exceptions" to that rule for unknown exporters simply do not arise. Finally, the use of constructed normal value and/or export price are situations governed by the relevant provisions of Article 2 and there is thus no reason to rely on an exception to the obligation set forth in the first sentence of Article 6.10 to justify their use.

7.91 The remaining argument put forward by the European Union in this regard, *i.e.*, that where several producers are related, the investigating authorities do not have to calculate individual margins for such producers, requires further consideration. The European Union submits that Article 9(5) of the Basic AD Regulation, through the IT test, allows the Commission to ascertain whether several producers are related to the State and therefore whether that group of suppliers, namely the State, should be subjected to a single margin calculation and a single duty rate. The way the European Union sees it, the relationship between non-IT suppliers and the State is similar to the relationship that the panel in *Korea – Certain Paper* found between several legally distinct entities producing the product, but for which the Korean investigating authorities had calculated a single margin, treating them as a single producer. In this regard, the European Union posits:

> "Thus, like in *Korea – Certain Paper*, the reasoning behind these criteria is to identify the actual source of price discrimination, the single supplier of the product concerned. Only by doing so, the anti-dumping duty imposed will address the actual source of price discrimination effectively."[271] (underline emphasis added)

[269] European Union, answer to Panel question 7.
[270] Imports from producers not known to the investigating authority will generally be subject to an "all-others" duty rate, subject to possible review under Article 9.5.
[271] European Union, answer to Panel question 10.

7.92 We recall that in the anti-dumping investigation at issue in *Korea – Certain Paper*, the Korean investigating authorities had treated three separate legal entities exporting the product under consideration as a single exporter, and calculated a single margin of dumping and imposed a single anti-dumping duty rate on them. The issue in that case was whether Article 6.10 allowed investigating authorities to treat separate legal entities as a single exporter, calculate a single margin of dumping, and impose a single anti-dumping duty rate on them. The panel recalled that the AD Agreement did not address anywhere whether each separate legal entity had to be treated as an individual producer or exporter in the context of an anti-dumping investigation. Based on an analysis of the text of Article 6.10 in light of its context, particularly Articles 9.5, 2.3 and 2.1 of the AD Agreement, the panel concluded that Article 6.10 did not preclude investigating authorities from treating multiple legal entities as a single producer or exporter for purposes of an anti-dumping investigation. The panel, however, underlined that in order to do so, "[the investigating authorities have] to determine that these companies are in a relationship close enough to support that treatment".[272] The panel then concluded that "Article 6.10, read in its context, and in particular with Article 9.5, could permissibly be interpreted to allow such treatment in other circumstances where the structural and commercial relationship between the companies in question is sufficiently close to be considered as a single exporter or producer".[273]

7.93 We note that the reasoning of the panel in *Korea – Certain Paper* was based on the structural and commercial relationship between separate legal entities producing the exported product, and was focussed on determining whether, despite the form of distinct entities, they were in fact appropriately treated as a single producer or exporter for purposes of the first sentence of Article 6.10. In our view, the operation of Article 9(5) of the Basic AD Regulation is fundamentally different. The criteria laid down in Article 9(5) of the Basic AD Regulation do not go to the structural and commercial relationships between distinct legal entities. We recall that the relevant criteria in Article 9(5) of the Basic AD Regulation are, *inter alia*: whether producers are allowed to repatriate capital and profits; whether export prices and quantities are freely determined; the involvement of the State in ownership of companies; and whether exchange rate conversions are carried out at market rates. These conditions relate to the role of the State in the way business is conducted in a given country, as opposed to the criteria considered by the panel in *Korea – Certain Paper*, which relate to the commercial relationship between nominally distinct companies. The European Union's approach essentially presumes that the State should be considered as a "parent company" for potentially thousands of distinct legal entities producing and exporting a product under investigation, and only if these entities can demonstrate their independence will they receive an individual dumping margin calculation. We do not consider this to be a plausible application of the reasoning of the panel in *Korea – Certain Paper*.

7.94 Having said that, we do not by any means exclude the possibility that in a given investigation the investigating authorities might determine that one or more nominally distinct producer(s) or exporter(s) is/are, in fact, sufficiently related to the State to justify concluding that they are a single producer or exporter. In such a situation, the authorities could well treat the producer(s)/exporter(s) and the State as a single exporter, calculate a single dumping margin for, and assign a single duty to, that single exporter. As we have noted above, however, the criteria in Article 9(5) of the Basic AD Regulation do not in our view serve the purpose of finding this type of relationship between the State and individual exporters. Rather, Article 9(5) of the Basic AD Regulation presumes that this type of relationship exists, and requires the fulfilment of all the specified criteria by each individual exporter seeking individual treatment in order to avoid the consequences of this presumption.

[272] 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, para. 7.161.
[273] Panel Report, *Korea – Certain Paper*, para. 7.162.

7.95 Thus, there is an important difference between the test applied by the panel in *Korea – Certain Paper* and the one applied under Article 9(5) of the Basic AD Regulation with respect to the burden of proof. Under the test applied by the panel in *Korea – Certain Paper*, the investigating authorities have to show that there is a sufficiently close structural and commercial relationship between individual producers to justify treating them as a single entity. If this cannot be demonstrated, the authorities, pursuant to the first sentence of Article 6.10, must treat each legal entity as a separate producer/exporter, and calculate individual dumping margins for each of them. An investigating authority applying this test starts from the premise that each exporter or foreign producer will be considered separately. Should it appear that this is not the case in a particular investigation, the investigating authority must obtain evidence on the basis of which it can affirmatively conclude that two or more of these nominally distinct entities are appropriately treated as a single exporter or producer. Under Article 9(5) of the Basic AD Regulation, however, the starting point is the presumption that NME producers are related to the State, as a result of which nominally distinct producers will not be considered separately in any investigation. In every case involving NME producers, the burden is on each such producer seeking individual treatment to provide evidence with respect to the Article 9(5) criteria sufficient to overcome the presumption to the satisfaction of the Commission. The difference in the starting points of the two tests, and the different evidentiary burdens involved, in our view, show how different these two tests are.

7.96 In this regard, the European Union maintains that:

> "In the context of market economy countries, the close relationship between the separate legal entities has to be examined on a case by case basis. In contrast, in non-market economy countries, since the role of the State is different than in market economy countries, the presumption of State control is the general rule."[274] (footnote omitted)

We are not convinced by this argument and the European Union has not pointed to any legal basis that would support it.[275] In our view, applying such a presumption to NME producers would seriously undermine the logic of Article 6.10 which requires that individual margins be calculated for each known producer unless the conditions set forth in its second sentence apply and sampling can be used.

7.97 In addition, we note that China has submitted undisputed evidence that the Commission does, in fact, apply a test such as was applied by the investigating authority in *Korea – Certain Paper* in the context of investigations involving both market and non-market economy countries, in order to determine whether nominally distinct companies should be treated as a single exporter or producer. The examples submitted by China show that the Commission applies the IT test in addition to this test – that is, the Commission first determines which, if any, groups of companies should be considered as a single producer or exporter, and then applies the IT test to each "single" producer or exporter it finds on the basis of that test.[276] This clearly shows that the Commission itself distinguishes the test aimed at determining whether separate legal entities should be treated as a single producer/exporter for purposes of dumping determinations, from the IT test under Article 9(5) of the Basic AD Regulation which determines whether individual margins should be calculated and individual duties assigned to NME producers.

[274] European Union, answer to Panel question 84.

[275] We note that, while the European Union and certain other WTO Members treat China as a non-market economy in the context of anti-dumping investigations, there are a number of other WTO Members that do not.

[276] China, answer to Panel question 3.

7.98 Based on the foregoing, we find that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement in that it conditions the calculation of individual margins for producers from NMEs on the fulfilment of the IT test.

7.99 Having resolved China's claim under Article 6.10, we note that Article 9.2 of the AD Agreement also concerns individual treatment, albeit with respect to duty imposition, and therefore turn next to China's claim under this provision. China asserts that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the AD Agreement because it subjects non-IT producers to a country-wide duty rate. According to China, Article 9.2 lays down the general principle that anti-dumping duties have to be imposed on an individual basis, as this is the only way to ensure that the amount of the duty imposed is "appropriate" as required under Article 9.2. The use of "amounts" in the plural also supports the view that duties have to be imposed individually, that is, for each producer. In this regard, China considers there to be a parallel between Articles 6.10 and 9.2: since margins have to be calculated on an individual basis, duties should also be imposed on that basis.

7.100 The European Union submits that the Panel should reject China's claim under Article 9.2, asserting that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set forth in that provision, because China's claim under Article 9.2 is premised on the incorrect assumption that the AD Agreement takes a company-specific approach with respect to the imposition of anti-dumping duties. This premise being false, the European Union contends that the Panel need not assess the substantive arguments raised by China in this regard. Should the Panel reject the European Union's objection in this regard, the European Union maintains that Article 9.2 of the AD Agreement does not require a company-specific approach to the imposition of anti-dumping duties. Assuming that there is such a general requirement, the European Union maintains that Article 9.2 does nonetheless allow the imposition of country-wide duties. In this regard, the European Union's arguments focus on the word "impracticable" in Article 9.2. The European Union maintains that "impracticable" in the context of Article 9.2 entails 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 exporter would render those duties ineffective, not feasible or not suited for being used for a particular purpose, i.e., offsetting or preventing dumping from the actual supplier, the State.[277]

7.101 China disagrees with this interpretation and submits that "impracticable" in the context of Article 9.2 refers to situations where it is not possible, as a practical matter, to impose individual duties with respect to every producer. Although impracticability would normally occur as a result of there being many individual producers subject to the duty, China does not exclude the possibility that impracticability may also stem from factors other than the number of producers.

7.102 With respect to the preliminary objection raised by the European Union to the effect that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation contained in Article 9.2 of the AD Agreement, we note that China argues that Article 9.2 requires, in principle, that anti-dumping duties be imposed on an individual basis. In other words, what the European Union suggests is a preliminary issue is in fact the main substantive argument that China raises in connection with its claim under Article 9.2 of the AD Agreement. We therefore reject this preliminary objection and proceed to address the substance of China's claim.

[277] European Union, first written submission, para. 119; European Union, opening oral statement at the second meeting, para. 15.

7.103 Article 9.2 reads:

> "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." (emphasis added)

Thus, Article 9.2 starts out by outlining the basic parameters with respect to the imposition of anti-dumping duties. The first sentence states that duties should be collected in appropriate amounts and on a non-discriminatory basis from all sources found to be dumping and causing injury except with respect to imports from sources for which a price undertaking has been accepted. We consider that the word "sources" contained in the first sentence of Article 9.2 refers to producers and exporters of the product subject to the anti-dumping investigation.[278] We note that the term "sources" is used twice in this sentence, first referring to sources found to be dumping and then referring to sources from which price undertakings have been accepted. Under Article 8 of the AD Agreement, undertakings to revise prices or cease exports at dumped prices can be accepted only from individual exporters, following at least a preliminary determination of dumping.[279] It is therefore clear to us that the use of the phrase "sources from which price undertakings have been accepted" is a reference to exporters or foreign producers who export the product subject to the anti-dumping investigation.[280] This, in our view, also informs the interpretation of the first reference to "sources" and we consider that both references to "sources" under the first sentence of Article 9.2 are references to exporters or foreign producers who export the product subject to the anti-dumping investigation. Moreover, we have concluded above that dumping, in the sense of the calculation of a margin of dumping, is as a rule determined for individual foreign producers or exporters of the product subject to the anti-dumping investigation.

7.104 We note that the second and third sentences of Article 9.2 are more directly relevant to China's claim. The second sentence lays down the principle that the authorities should name the individual suppliers with respect to the imposition of the duties. Similar to our understanding of the word "sources" in the first sentence of this provision, we consider that the "suppliers" referred to in the second and third sentences are the individual foreign producers or exporters of the product subject to the anti-dumping investigation.[281] The third sentence introduces an exception to this rule,

[278] In this regard, we note the European Union's argument that "sources" can be interpreted as referring to the State where it is the State that is the source of the actual price discrimination. European Union, second written submission, para. 54. We would agree that the term "sources" may refer to the State in a case where it is demonstrated, in the particular investigation, that the State is the actual producer or exporter of the product in question. However, as discussed elsewhere in our findings, we disagree that the State can be presumed to be the source of price discrimination in a non-market economy.

[279] This is in contrast to the parallel provision of the SCM Agreement, Article 18, which specifically provides for the acceptance of undertakings from the government of the exporting Member to eliminate or limit the subsidy, or take other measures concerning its effects. In our view, this difference reflects the fact that subsidization is a matter of government action, while dumping is, in general, a consequence of pricing decisions by commercial enterprises.

[280] We recognize that Article 8 refers only to "exporters". However, in our view, this reference clearly includes those foreign producers who export the product subject to the anti-dumping investigation, as there would be no reason to consider undertakings from producers who do not export.

[281] In this regard, we note the European Union's argument that the use of the terms "suppliers" and "sources" in Article 9.2 "indicates that anti-dumping measures aim at identifying the supplier which is the actual

providing that where naming individual suppliers would be impracticable, the authorities may name the supplying country. In our view, this sentence suggests that in investigations involving multiple producers, the authorities may find it impracticable to name all the producers individually with respect to the imposition of the duties and, instead, may consider it appropriate to name the supplying country. The grounds on which the authorities would made such a finding, however, are not readily apparent from the text. In other words, what is meant by "impracticable" is not explicit, and each party assigns a different meaning to this word in the context of Article 9.2.

7.105 China argues that there is a parallel in this regard between Articles 6.10 and 9.2 which would mean that "impracticable" under Article 9.2 refers to investigations where, because of the large number of producers, it would be difficult to manage the implementation of the measure if each supplier is named individually. According to the European Union, however, under Article 9.2, it would be impracticable to assign individual rates to individual producers if that would undermine the effectiveness of the measure. This would be the case, it argues, where the source of the price discrimination is the State, not the individual producers. In such situations, the duty would only be effective if it targets the real source of the problem, *i.e.*, the State, which, according to the European Union, is what Article 9(5) of the Basic AD Regulation is intended to do. The European Union argues that, through the IT test, Article 9(5) aims at identifying circumstances in which the State is the source of the price discrimination and provides that in such situations the duty should be imposed with respect to the State, not the individual producers that are related to the State.

7.106 We are not convinced by the European Union's argument that Article 9(5) of the Basic AD Regulation aims at finding the source of price discrimination. By "price discrimination", we understand the European Union to refer to differentiation between the normal value and the export price of a product. Since normal value for a NME producer is not based on the producer/exporter's own prices, and thus is not within its control, this leaves us to understand that the European Union's argument is that Article 9(5) of the Basic AD Regulation identifies situations where the export prices of a product are set by the State, rather than by the producer itself. However, while one of the relevant criteria, whether export prices are freely determined, seems relevant in this regard, it is only one of the criteria in Article 9(5) of the Basic AD Regulation, and we recall that for a NME producer to be accorded an individual margin, it must satisfy all of the criteria. Thus, even if a given NME producer is able to freely determine its export prices, which would suggest that the State is not the source of the price discrimination, it will fail the IT test if it fails to satisfy some of the other criteria, such as the repatriation of capital and profits, the determination of export prices and quantities, and conditions and terms of sale. In such a circumstance, it is difficult to see how it can be concluded that the "source" of the price discrimination is the State.

7.107 Turning to Article 9.2, we note that the third sentence of this provision consists of two parts. The first part contains two conditions: that there be several suppliers from the same country and that it be impracticable to name all these suppliers in connection with the imposition of the duty. The second part establishes the outcome where these two conditions are met – that the authorities can name the supplying country concerned when imposing an anti-dumping duty. Thus, this sentence may be interpreted as meaning that where two conditions are met, the investigating authorities may deviate from the rule embodied in the preceding sentence of Article 9.2 and may name the supplying country with respect to the duty being imposed. The first condition refers to the existence of several suppliers. Several means, *inter alia*, "more than two but not many".[282] Thus, we consider that this

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source of the price discrimination, regardless of the fact that, *strictu sensu*, there may be several separate legal entities or "exporters" shipping the product concerned to other countries". European Union, first written submission, para. 148. The European Union, however, has not substantiated this argument. We understand this statement to mean that "suppliers" refers to something other than exporters and, as mentioned above, disagree with it. See paragraph.7.104.

[282] The New Shorter Oxford English Dictionary, Clarendon Press, 1993.

refers to investigations where more than two producers are to be subject to anti-dumping duty. "Impracticable" means, *inter alia*, "not practicable; unable to be carried out or done; impossible in practice".[283] Seen in light of the first condition in the first part of this sentence, in our view, "impracticable" refers to it being difficult or impossible to name all producers individually with respect to the imposition of an anti-dumping duty. Moreover, we recall that this sentence states that if "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". (emphasis added) It seems clear to us that "these suppliers" refers back to the immediately preceding identification of "several suppliers from the same country". Thus, unless the authorities consider that because of the large number of producers involved it would be impracticable to name them individually, we conclude that the rule set forth in the second sentence of Article 9.2 would apply and the authorities would be required to name each producer individually, which in our view entails the imposition of an individual anti-dumping duty. When the third sentence of Article 9.2 is read in its totality, the European Union's argument that "impracticable" refers to situations where individual treatment would undermine the effectiveness of the measure becomes untenable.[284]

7.108 Our interpretation finds support when Article 9.2 is read in light of Article 6.10 as context. We note that there is an important similarity between Articles 9.2 and 6.10. Article 6.10 requires that an individual margin be calculated with respect to each known producer or exporter and Article 9.2 requires that each supplier be named individually with respect to the imposition of an anti-dumping duty. Although one concerns margin calculations and the other duty imposition, we consider that these two provisions relate to the same general obligation, namely the obligation to provide individual treatment to producers in the context of anti-dumping proceedings. Thus, Article 6.10 represents relevant context for the interpretation of Article 9.2.

7.109 We note that, compared with Article 9.2, Article 6.10 contains more detailed provisions with respect to individual treatment. As we have explained above, Article 6.10 provides that, in principle, the authorities should calculate an individual margin for each known exporter or producer. The second sentence of Article 6.10 provides for an exception where the number of, *inter alia*, exporters or producers is so large as to make such individual calculations impracticable, allowing authorities to limit their examination either by using a statistically valid sample or by examining the largest percentage of the volume of dumped imports that can reasonably be investigated. This sentence links the word "impracticable" to the large number of producers or exporters. That is, under Article 6.10 what makes individual dumping calculations impracticable is set out in the provision itself – a large number of producers or exporters. Unlike Article 6.10, Article 9.2 does not contain such clear guidance as to what is meant by "impracticable" with respect to the naming of supplier(s). However, given the, to us, clear similarity between the functions of Articles 6.10 and 9.3, we think "impracticable" under Article 9.2 should be interpreted consistently with the meaning of this word as used in Article 6.10. This supports our view that impracticability under Article 9.2 refers to situations where, because of the large number of suppliers, that is, producers or exporters, it would be difficult to assign a duty to each of them individually, in which case the authorities are permitted to name the supplying country, that is, assign a country-wide duty.

7.110 We recognize that there is a difference between the texts of Articles 6.10 and 9.2: Article 6.10 refers to "exporters or producers" whereas Article 9.2 refers to "suppliers". In this regard, we recall that Article 9.2 has remained unchanged since it was agreed as Article 8(b) of the Kennedy Round Anti-Dumping Code in 1967, while Article 6.10 was negotiated in the Uruguay Round. Thus, we see Article 6.10 as a further elaboration of the notion of individual treatment originally contained

[283] The New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[284] We note in this regard that we consider the European Union's reliance on a draft revision of the New Shorter Oxford Dictionary, dated December 2009, in arguing that impracticable should be understood to mean ineffective, to be entirely unpersuasive.

in what is now Article 9.2 of the AD Agreement. For this reason, in addition to those set out above[285], we consider that the term "supplier" under Article 9.2 is equivalent to "exporter" or "producer" under Article 6.10.

7.111 Finally, we note that, the application of customary rules of interpretation to the text of Article 9.2 does not result in any ambiguity, and thus does not require resort to supplementary means of interpretation.[286] We will nonetheless briefly address the European Union's arguments in that regard. The European Union notes that the Kennedy Round Anti-Dumping Code[287] incorporated the interpretative note to Article VI of the GATT 1947 by specifying (as does Article 2.7 of the AD Agreement) that the provisions on the determination of dumping were "without prejudice to" the interpretive note.[288] The European Union asserts that other provisions were also introduced to address the lack of independency of operators from the State in international trade, referring in this regard to, *inter alia*, Article 8 of the Kennedy Round Anti-Dumping Code, which introduced the possibility to name the supplying country concerned when it was impracticable to name all the suppliers[289] and which is currently reflected in almost identical terms in Article 9.2 of the AD Agreement. According to the European Union, this:

> "codified the understanding of the GATT Contracting Parties that, in some cases, and in particular with respect to non-market economy countries, the actual producer was the exporting country as such and, thus, it was necessary to specify anti-dumping duties on a country-wide basis to address the actual source of price discrimination. Indeed, in a non-market economy country, the 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 producer, the State."[290]

In the view of the European Union, this meant that with respect to anti-dumping duties against producers from NMEs, "it would not be relevant to name exporting companies separately since they collectively constituted one single supplier or exporting entity, *i.e.*, the State".[291] We find this proposition to be unconvincing. Assuming it were appropriate and necessary to consider the negotiating history, we do not agree that the "incorporation" of the Ad Note to Article VI of the GATT 1947 in the Kennedy Round Anti-Dumping Code demonstrates that Article 9.2 allows investigating authorities to name the State in connection with the imposition of anti-dumping duties in investigations involving producers from NMEs. As noted by China, other elements of the negotiating history suggest that Article 8 of the Kennedy Round Anti-Dumping Code was intended to ensure that anti-dumping duties were imposed only on those firms found to be dumping.[292] We simply cannot see

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[285] See paragraph 7.104.

[286] We note that the European Union takes the same view, albeit with respect to its own interpretation of the text. European Union, second written submission, para. 59.

[287] Kennedy Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, TN.64/98, 20 June 1967.

[288] European Union, first written submission, para. 11. The interpretive note provides, in relevant part:

> "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."

[289] European Union, first written submission, para. 12.

[290] European Union, first written submission, para. 12 (footnote omitted).

[291] European Union, first written submission, para. 12.

[292] China, second written submission, paras. 193-197.

that merely because the Ad Note and Article 8 of the Kennedy Round Anti-Dumping Code were being addressed at the same time demonstrates that they necessarily address the same issues.

7.112 Based on the foregoing considerations, we conclude that Article 9.2 of the AD Agreement requires the investigating authorities to name the individual suppliers, that is, the producers or exporters, on whom anti-dumping duties are imposed, except that where the number of producers or exporters is so large that it would be impracticable to do so, the authorities may name the supplying country. We read these provisions in parallel with the requirements of Article 6.10 of the AD Agreement relating to the determination of dumping margins, and conclude that Article 9.2 does not, contrary to the European Union's view, allow the imposition of a single country-wide anti-dumping duty in an investigation involving a non-market economy. We recall that Article 9(5) of the Basic AD Regulation requires that a country-wide duty be imposed with respect to producers or exporters from NMEs unless such producers or exporters show, on the basis of the criteria set out in that provision, that they are independent from their State. We therefore find that Article 9(5) of the Basic AD Regulation violates the obligation laid down in Article 9.2 of the AD Agreement.

7.113 Having found that Article 9(5) of the Basic AD Regulation is inconsistent with the obligations set forth under Articles 6.10 and 9.2 of the AD Agreement, we now turn to China's claims under Articles 9.4 and 9.3.

7.114 Article 9.4 governs the imposition of anti-dumping duties in investigations where, in accordance with Article 6.10, sampling has been used in the calculation of dumping margins. In other words, Article 9.4 sheds light on the consequences with respect to duty imposition of using a sample at the margin calculation stage. Article 9.4 essentially limits the duty rate for producers not sampled to a maximum of the weighted average margin calculated for the sampled producers.[293] As to Article 9.3, we note that the chapeau of this provision, which is at issue here, establishes the principle that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

7.115 China contends that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.4 of the AD Agreement for two reasons: 1) because it allows the Commission to calculate the margin of dumping for non-sampled producers based on the margins of sampled producers which, to the extent some of those sampled producers have failed the IT test, are not based on their individual export prices; and 2) because it subjects the calculation of an individual duty, which non-sampled producers are entitled to request under the last sentence of Article 9.4, to the fulfilment of the IT test. The European Union submits that China's claim under Article 9.4 is dependent on its claims under Articles 6.10 and 9.2 of the AD Agreement, and asserts that since Article 9(5) of the Basic AD Regulation is not inconsistent with any of these two provisions, it cannot be inconsistent with the obligations set forth in Article 9.4 either.[294]

7.116 We note that both arguments put forward by China replicate its arguments in connection with its claims under Articles 6.10 and 9.2 of the AD Agreement. The first argument takes issue with the fact that the application of Article 9(5) of the Basic AD Regulation to the sampled producers could, in some circumstances, also render the duty assigned to the non-sampled producers WTO-inconsistent.

[293] Article 9.4 excludes from that weighted average zero and *de minimis* margins and margins determined on the basis of facts available.

[294] The European Union also argues that China's description of how the Commission calculates the margin for non-sampled cooperating producers is wrong. According to the European Union, what the Commission does in such investigations is compare the export prices of non-IT producers with the normal value for the analogue country (which the European Union calls "intermediate results"), then calculate individual margins for producers that pass the MET and IT tests; and then calculate the weighted average of the "intermediate results" and the individual dumping margins in order to obtain the margin that will be applied to non-sampled cooperating producers. European Union, first written submission, para. 171.

The second argument states that there would be a violation of Article 9.4 where a non-sampled producer requesting the calculation of an individual duty is subjected to the IT test under Article 9(5) of the Basic AD Regulation. Given that China has presented no new or independent arguments in support of its claim of violation of Article 9.4, we are of the view that a finding of violation of Article 9.4 would add nothing to the resolution of this dispute, nor would it help in any potential implementation. We therefore consider it appropriate to exercise judicial economy and decline to address this claim.

7.117 Turning finally to China's claim under Article 9.3, we note China's argument that the calculation of a country-wide dumping margin for producers that fail the IT test is inconsistent with Article 2.3 of the AD Agreement, which, China contends, requires that margin calculations be based on the individual export prices of such producers. According to China, the imposition of a duty on the basis of a margin that is inconsistent with the requirements of Article 2, in turn, violates Article 9.3, which requires that the duty imposed should not exceed the margin as established under Article 2. China claims that those exporting producers which have company-specific export prices which are higher than the average export price used for non-IT exporting producers will be subject to a duty which exceeds their dumping margin established under Article 2 of the AD Agreement.[295] The European Union once more submits that China's claim under Article 9.3 is dependent on a finding of violation of Articles 6.10 and 9.2, and asserts that since Article 9(5) of the Basic AD Regulation is not inconsistent with these two provisions, there is no violation of Article 9.3 either. In addition, the European Union argues as a substantive matter that since the duty imposed under Article 9(5) of the Basic AD Regulation is not higher than the margin found for the State, there can be no violation of Article 9.3. Further, it contends that since China's assumption that Article 6.10 requires individual dumping margins is erroneous, Article 9(5) of the Basic AD Regulation cannot be found to be inconsistent with Article 9.3 of the AD Agreement.

7.118 We have found Article 9(5) of the Basic AD Regulation to be inconsistent with Articles 6.10 and 9.2 of the AD Agreement, which in our view contain provisions that are more directly relevant to the dispute than Article 9.3. Finding a violation of Article 9.3 would not contribute to the resolution of this dispute or aid in implementation. We therefore consider it appropriate to exercise judicial economy and refrain from making findings with respect to China's claim under Article 9.3 of the AD Agreement.

4. Whether Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994

(a) Arguments of Parties

(i) China

7.119 China notes that Article 9(5) of the Basic AD Regulation only applies to some WTO Members, including China, and not to all. According to China, as a legal instrument that governs the conduct of anti-dumping investigations, this Regulation constitutes a law or formality within the meaning of Article I:1 of the GATT 1994.[296] China asserts that this provision requires that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in any other country shall be accorded immediately and unconditionally to the like product originating in the territories of all other contracting parties. China therefore argues that by not automatically giving the Chinese producers the right to have individual dumping margins calculated and individual

[295] China, first written submission, para. 86; China, second written submission, para. 306.
[296] China, first written submission, para. 96.

duty rates imposed on them, Article 9(5) of the Basic AD Regulation violates the Most Favoured Nation ("MFN") principle embodied in Article I:1 of the GATT 1994.[297]

(ii) European Union

7.120 The European Union submits that if the Panel finds that 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, there can be no violation of Article I:1 of the GATT 1994.[298] Independently, the European Union also argues that treating two different situations in two different ways would not necessarily violate the MFN principle in Article I:1 of the GATT 1994. According to the European Union, "imports from market and non-market economy countries may be subject to different treatment in the context of the anti-dumping rules precisely because they are different in nature. Therefore, by definition, no discrimination can arise".[299]

(b) Arguments of Third Parties

(i) Colombia

7.121 Colombia contends that Article 9(5) of the Basic AD Regulation is not inconsistent with the obligation set forth under Article I.1 of the GATT 1994 because it is in conformity with the second paragraph of Ad Article VI of the GATT 1994.

(c) Evaluation by the Panel

7.122 We recall that Article 9(5) of the Basic AD Regulation, which subjects the imposition of an individual duty rate for NME exporters to the fulfilment of certain conditions, only applies to producers from certain NMEs, including China. Producers from other WTO Members, *i.e.*, so-called "market economy countries", are entitled to individual treatment without having to fulfil the conditions set forth under Article 9(5) of the Basic AD Regulation.[300]

7.123 Article I:1 of the GATT 1994 reads:

> "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, <u>any advantage, favour, privilege or immunity</u> granted by any contracting party to any product originating in or destined for any other country shall be <u>accorded immediately and unconditionally</u> to the like product originating in or destined for the territories of all other contracting parties." (emphasis added)

Thus, Article I:1 of the GATT 1994 requires that any privilege granted to imports of any country be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other WTO Members. This "most-favoured-nation" ("MFN") principle is considered

[297] China, first written submission, paras. 97-98.
[298] European Union, first written submission, para. 173.
[299] European Union, first written submission, para. 175; European Union, second written submission, para. 78.
[300] We recall that producers from NMEs not Members of the WTO are subject to a different set of rules, but of course, Article I:1 of GATT 1994 does not apply to them.

to be "a cornerstone of the GATT and is one of the pillars of the WTO trading system".[301] The MFN principle requires WTO Members to treat like products equally irrespective of their origin.[302] Based on the text of Article I:1, it is clear to us that for there to be a violation of the MFN obligation, the complaining party must show that "there [is] an advantage, of the type covered by Article I and which is not accorded unconditionally to all "like products" of all WTO Members".[303]

7.124 Turning to the facts of the present dispute, first we note that Article 9(5) of the Basic AD Regulation constitutes a rule or formality, maintained by the European Union in connection with importation. It is clear to us that this rule affects imports from certain countries, since it sets out criteria for determining whether the export prices of producers subject to anti-dumping investigations will be taken into consideration, individual margins of dumping calculated, and individual anti-dumping duties imposed upon importation of the relevant product to the European Union. Second, we consider that determining and imposing individual duties for producers subject to an anti-dumping investigation, that is basing the duties for such producers on individual margins established on the basis of their own export prices rather than the average export price of a group of producers from the same country, is an advantage within the meaning of Article I.1 of the GATT 1994. This is because such individual treatment ensures that an exporter is not subjected to a duty higher than its own dumping margin, as would be the case for some exporters with a country-wide duty imposed on the basis of a margin calculated on average export prices. Third, as noted above[304], Article 9(5) of the Basic AD Regulation lists the WTO Members, including China, whose producers subject to anti-dumping proceedings in the European Union are not automatically accorded the right to have individual dumping margins and anti-dumping duties, but rather must fulfil the conditions set out in Article 9(5) of the Basic AD Regulation in order to have individual dumping margins calculated for and anti-dumping duties imposed on them. Thus, it is clear that the application of Article 9(5) will, in certain situations, result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union. Thus, we consider that Article 9(5) violates the MFN obligation of Article I:1 of the GATT 1994.

7.125 The European Union submits that "imports from market and non-market economy countries may be subject to different treatment in the context of the anti-dumping rules precisely because they are different in nature. Therefore, by definition, no discrimination can arise".[305] We disagree. In our view, in anti-dumping investigations, imports from NMEs may be treated differently from imports from market economy countries only to the extent the WTO Agreement or some other relevant provision allows such different treatment.[306] The European Union, however, has not demonstrated that any provision of the AD Agreement, or any other provision of the WTO Agreement, allows for the different treatment of imports from NMEs provided for in Article 9(5) of the Basic AD Regulation. Nor has the European Union demonstrated that there is a relevant difference in the nature of imports from NMEs that justifies different treatment – it asserts this to be the case, but in our view,

[301] 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.

[302] 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. 89.

[303] 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.

[304] See paragraph 7.46.

[305] European Union, first written submission, para. 175.

[306] We recall, for instance, that the Ad Note to Article VI of the GATT 1994 allows for different treatment with respect to the determination of normal value in anti-dumping investigations against Members that have a complete or substantially complete monopoly of their trade. Similarly, paragraph 15 of China's Protocol of Accession to the WTO permits different treatment with respect to the determination of normal value in investigations conducted against Chinese producers provided certain conditions are met.

this is merely an assumption, without a sufficient factual basis.[307] In the absence of an explicit authorization to do so, or a sufficient factual basis showing that a difference in the nature of the imports concerned, any differential treatment on the basis of the origin of goods, including on the basis of the nature of the economy in the exporting country, would violate the MFN principle.

7.126 Referring to the GATT panel report in *US – MFN Footwear*, the European Union argues that treating one category of products differently from another category of products does not violate the MFN obligation of Article I:1 of the GATT 1994.[308] However, as that panel also noted[309], treating differently like products originating in different countries violates Article I:1. In this case, it is clear that the Basic AD Regulation treats different countries differently, and thus potentially treats like products from different countries differently. In this regard, we find it significant that the Basic AD Regulation explicitly lists the countries the producers of which will be subject to the IT test, referring to NMEs that are WTO Members which also includes China. This suggests that the Regulation itself demonstrates that this rule only applies to a pre-determined group of WTO Members, without consideration of the specific circumstances in individual cases.

7.127 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.

5. Whether Article 9(5) of the Basic AD Regulation is inconsistent with Article X:3(a) of the GATT 1994

(a) Arguments of the Parties

(i) China

7.128 China submits that its claim under Article X:3(a) of the GATT 1994 is directed against the manner in which the Commission administers Article 9(5) of the Basic AD Regulation.[310] China contends that Article 9(5) of the Basic AD Regulation falls within the scope of Article X:3(a) of the GATT 1994 which refers to "laws, regulations, decisions and administrative rulings of general application".[311] China observes that the methodology for the calculation of the country-wide margin of dumping varies depending on the degree of cooperation on the part of the foreign producers subject to an investigation. Where the level of cooperation is considered to be high, the Commission bases the country-wide margin at the level of the highest margin calculated for a cooperating producer. When, however, the level of cooperation is low, other methodologies are used. Therefore, China submits, Article 9(5) of the Basic AD Regulation is not administered in a uniform manner in all anti-dumping investigations.[312] China also maintains that Article 9(5) of the Basic AD Regulation is not administered in a reasonable manner in anti-dumping investigations against Chinese exporters since the dumping determinations against such exporters are usually made by the Commission on the basis of facts available even where the conditions set out under Article 6.8 of the AD Agreement are not

[307] In this regard, we note that the fact that producers in a non-market economy may be able to demonstrate that they operate on market economy principles, and may, under Article 9(5) of the Basic AD Regulation, be able to demonstrate that they are independent of the State, suggests to us that it is not as clear as the European Union would have it that the mere fact that the economy of a WTO Member is classified by another Member (but not, by any means, all Members) as a NME can be, without a specific factual showing, a sufficient justification for different treatment under Article I:1 of the GATT 1994.

[308] European Union, first written submission, para. 177.

[309] GATT Panel Report, *Footwear from Brazil* ("*US – MFN Footwear*"), DS18/R, adopted 19 June 1992, BISD 39S/128, para. 6.11.

[310] China, first written submission, para. 102.

[311] China, first written submission, para. 101.

[312] China, first written submission, paras. 107-112.

met.[313] In China's view, such non-uniform and unreasonable 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.

(ii) European Union

7.129 The European Union asserts that Article 9(5) of the Basic AD Regulation provides for a methodology for determining anti-dumping duties in investigations against NMEs. It does not contain any rules on how such methodology should be administered. Since the specific measure at issue does not fall within the scope of the obligation contained in Article X:3(a) of the GATT 1994, the European Union contends that the Panel should reject China's claim.[314] In this regard, the European Union also finds it puzzling that China has raised this as an "as such" claim. The European Union submits that normally an "as such" claim is one directed at measures that mandate a particular result which is WTO-inconsistent, which, according to the European Union, is not the case with respect to Article 9(5) of the Basic AD Regulation.[315] Assuming that Article 9(5) of the Basic AD Regulation does address the administration of the methodology, the European Union submits that a methodology that varies depending on the level of cooperation on the part of foreign exporters cannot *per se* be considered as non-uniform. According to the European Union, the application of Article 9(5) of the Basic AD Regulation leads to the same result where the circumstances are the same, and therefore is applied in a consistent manner in all investigations.[316] The European Union also counters China's assertion that Article 9(5) of the Basic AD Regulation is administered in an unreasonable manner. The European Union contends that this aspect of China's claim is devoid of any legal basis.[317]

(b) Arguments of Third Parties

(i) United States

7.130 The United States submits that to the extent that China challenges Article 9(5) of the Basic AD Regulation as such under Article X:3(a) of the GATT 1994, the specific measure at issue does not fall within the scope of the obligation contained in the legal provision invoked by China. The obligation set forth under Article X:3(a) of the GATT 1994 pertains to the administration of the instruments identified in Article X:1. According to the United States, laws and regulations may only be challenged under Article X:3(a) where they address the administration of another legal instrument. Since Article 9(5) of the Basic AD Regulation does not address the administration of another legal instrument, it is not, in the view of the United States, challengeable under Article X:3(a).

(c) Evaluation by the Panel

7.131 China's claim under Article X:3(a) of the GATT 1994 is two-fold. First, China contends that the manner in which the European Union administers Article 9(5) of the Basic AD Regulation is non-uniform because the method used for the calculation of the country-wide dumping margin for NME producers that fail the IT test depends on the level of cooperation of those producers. Second, China asserts that the administration of this provision is unreasonable because the Commission resorts to facts available in the calculation of the country-wide margin of dumping for the non-IT producers. The European Union submits that Article 9(5) of the Basic AD Regulation does not address the administration of the provisions contained therein. It is, therefore, not clear which provision in that Article China challenges in connection with this claim. The European Union also takes issue with the

[313] China, first written submission, paras. 113-114.
[314] European Union, first written submission, paras. 182-186.
[315] European Union, first written submission, para. 68.
[316] European Union, first written submission, para. 192.
[317] European Union, first written submission, para. 193.

fact that China's claim is directed at Article 9(5) of the Basic AD Regulation "as such", arguing that a claim under Article X:3(a) of the GATT 1994 normally should take issue with the administration of a measure, not with the measure itself.

7.132 Article X:3(a) of the GATT 1994 provides:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

Thus, Article X:3(a) lays down the principle that WTO Members should administer their laws, regulations, decisions and rulings that affect trade in a uniform, impartial and reasonable manner. In our view, this obligation aims at ensuring that laws, regulations, decisions and rulings that are substantively consistent with a Member's WTO obligations are also implemented in an appropriate manner so that exporters from other Members can predict the treatment their exports will be accorded under the regime to which their trade will be subjected in the territory of that Member.

7.133 We recall our finding that Article 9(5) of the Basic Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the AD Agreement.[318] 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 Article 9(5) of the Basic Regulation to be "as such" inconsistent with the European Union's obligations under Articles 6.10 and 9.2 of the AD Agreement, we see no reason to consider whether this WTO-inconsistent measure is administered in a uniform and reasonable manner by the European Union. We therefore apply judicial economy with respect to China's claim under Article X:3(a) of the GATT 1994.

6. Whether Article 9(5) of the Basic AD Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement

(a) Arguments of the Parties

(i) China

7.134 China asserts that since Article 9(5) of the Basic AD Regulation is inconsistent with the provisions of the AD Agreement and the GATT 1994 discussed above, it follows that it is also inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement, which require WTO Members to ensure the conformity of their laws, regulations and administrative procedures with their WTO obligations.[319]

(ii) European Union

7.135 The European argues that since Article 9(5) of the Basic AD Regulation is not inconsistent with any of the obligations cited by China, it can not be inconsistent with the obligations set forth under Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement and that therefore this claim should be rejected.[320]

(b) Evaluation by the Panel

7.136 Article XVI:4 of the WTO Agreement reads:

[318] See paragraphs 7.98 and 7.112 above.
[319] China, first written submission, para. 121.
[320] European Union, first written submission, paras. 195-196.

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

Article 18.4 of the AD Agreement similarly provides:

> "Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

7.137 Thus, Article XVI:4 of the WTO Agreement requires WTO Members to ensure that their laws, regulations and administrative provisions are consistent with the provisions of the agreements annexed to the WTO Agreement, and Article 18.4 of the AD Agreement imposes the same obligation with respect to laws, regulations and administrative procedures pertaining to the conduct of anti-dumping investigations. We have concluded above[321], 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 find that the European Union has acted inconsistently with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement by failing to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the relevant Agreements.

D. CLAIMS REGARDING COUNCIL REGULATION 91/2009 ("THE DEFINITIVE REGULATION")

1. Background of the Investigation at Issue

7.138 Council Regulation (EC) No. 91/2009 of 26 January 2009, the Definitive Regulation, imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.[322] 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 considerations, evidence, and reasoning underlying the determinations of the EU investigating authority, the Commission, on dumping, injury, and causal link, as well as on matters 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. Before addressing those claims, we set out below our understanding of the proceedings in the investigation.

7.139 On 26 September 2007, the Commission received a complaint from the European Industrial Fasteners Institute, the complainant, for the initiation of an anti-dumping investigation on imports of steel fasteners originating in China.[323] Evidence submitted in connection with the application was deemed sufficient and an investigation was initiated on 9 November 2007. On 4 August 2008, the Commission provided the interested parties with an Information Document[324] detailing preliminary findings as of that point in the investigation and inviting them to make comments. No provisional measures were imposed, as the Commission considered that certain aspects of the investigation needed further examination. On 18 September 2008, a public meeting was organized in which all interested parties participated.

7.140 The Commission used sampling in making its dumping determination. A total of 110 Chinese producers made themselves known by the relevant deadline, 15 days from initiation, and were considered as cooperating parties. The sample selected for purposes of the dumping determination

[321] See paragraphs 7.98 and 7.112.
[322] Exhibit CHN-4.
[323] The Commission defined the "product concerned", that is, the product imported from China that was the subject of the investigation, in recital 40 of the Definitive Regulation, Exhibit CHN-4.
[324] Exhibit CHN-17.

initially included nine Chinese producers. All nine producers applied for market economy treatment ("MET"). The Commission determined that four of the nine producers provided false information and denied their MET requests. The remaining five Chinese producers were denied MET on the grounds that they did not meet the criteria set out in Article 2(7)(c) of the Basic AD Regulation. These five producers also requested, and were granted, individual treatment ("IT") under Article 9(5) of the Basic AD Regulation. Five additional Chinese producers not selected for the sample submitted replies to the questionnaire, requesting that the Commission calculate individual margins for them pursuant to Articles 9(6) and 17(3) of the Basic AD Regulation. One of these companies did not produce the product under investigation, and its request was not accepted. The Commission concluded that one of the remaining four companies provided misleading information and was considered as non-cooperating, and therefore denied its request.[325] The remaining three producers requested MET, but their requests were denied. These three producers also requested IT, which requests were granted.[326] Thus, the Commission undertook to individually examine eight Chinese producers in total in making its dumping determination.

7.141 Since none of the individually-examined Chinese producer was granted MET, the Commission determined the normal value on the basis of information concerning an analogue third country, India. The data pertaining to one cooperating Indian producer of the subject product was used in the determination of normal value. There is no dispute concerning the determination of normal value in this case.

7.142 For all examined Chinese producers having been granted IT, export prices were, in principle, 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 (China) to the European Union. The Commission found that the export prices reported by two Chinese exporting producers were not reliable and resorted to constructed export price for them. Dumping margins for the five sampled producers granted IT were based on a comparison of the normal value calculated for the analogue country with each company's weighted average export price. A weighted average of those margins was calculated and applied to the non-sampled Chinese producers, except for the three non-sampled producers that were granted IT. Individual dumping margins were calculated for these, based on a comparison of the normal value for the analogue country with each company's weighted average export price. For two of these companies, the calculated margin was zero, while a margin above *de minimis* was calculated for the third.

7.143 With respect to the determination of injury, the Commission found there were some 300 producers of fasteners in the European Union, most of whom did not make themselves known to the Commission in response to the notice of initiation. However, 46 cooperating producers did come forward expressing their willingness to be included in the sample. Of these, one did not provide sufficient information during verification to be considered cooperating. The remaining 45 producers were found to constitute the domestic industry. The producers that supported the complaint and cooperated with the Commission represented 27 per cent of total production of the like product in the EU.[327] Given the number of producers in the domestic industry, the Commission used sampling in investigating and assessing injury. Based on its analysis of the information before it, the Commission determined that dumped imports from China caused material injury to the domestic industry.

[325] Definitive Regulation, Exhibit CHN-4, recital 78.

[326] Late in the proceedings, some exporters argued that these companies should be treated as part of the sample, or that the sample should have been enlarged, rather than receiving individual examination under Article 17(3) of the Basic AD Regulation. The Commission rejected this argument, concluding that the sample was sufficient. Definitive Regulation, Exhibit CHN-4, recital 21.

[327] Total production of the like product was estimated to be 1,421,602 tonnes in 2006. Definitive Regulation, Exhibit CHN-4, recital 113.

2. Whether Article 9(5) of the Basic AD Regulation, as applied in the fasteners investigation, is inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement

(a) Arguments of the Parties

(i) China

7.144 China acknowledges that in the fasteners investigation the Commission granted the IT requests of the eight Chinese producers examined. However, China contends that subjecting such treatment to the conditions set forth under Article 9(5) of the Basic AD Regulation was inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement.[328] The bases of China's claims under these three provisions of the AD Agreement are identical to those China raised in connection with its claims of inconsistency of Article 9(5) of the Basic AD Regulation "as such". That is, China submits that for the same reasons that Article 9(5) of the Basic AD Regulation is "as such" inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement, its application in the fasteners investigation was inconsistent with these provisions.[329]

(ii) European Union

7.145 The European Union argues that China's claim under Article 9.4 of the AD Agreement is outside the Panel's terms of reference because it was not included in China's panel request.[330] The European Union notes that China's "as applied" claims repeat its "as such" claims regarding Article 9(5) of the Basic AD Regulation, and asserts that since the "as such" claims are unfounded, the Panel should also reject China's "as applied" claims regarding the Definitive Regulation.[331] The European Union submits that, even if the Panel finds that Article 9(5) of the Basic AD Regulation is inconsistent with the AD Agreement or the GATT 1994 cited by China "as such", since all the Chinese producers that requested IT in the investigation at issue were granted such treatment, China is challenging a non-existent measure. The European Union therefore requests the Panel to reject China's "as applied" claims regarding Article 9(5) of the Basic AD Regulation.[332]

(b) Evaluation by the Panel

7.146 As set out in our findings above[333], 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. The issue raised by this claim is whether the application of Article 9(5) of the Basic AD Regulation in the fasteners investigation was also inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

7.147 We recall, and both parties agree, that in the fasteners investigation all Chinese producers that requested IT were granted such treatment. This raises the question of whether the application of Article 9(5) of the Basic AD Regulation was nevertheless inconsistent with the cited provisions in this investigation. As noted, the European Union maintains that China is challenging a non-existent measure since all the IT requests were granted. China, on the other hand, submits that it challenges the non-automatic character of the decision by the Commission to grant IT to the Chinese exporters subject to this investigation, and thus the issue it raises is properly before the Panel.

7.148 In our view, the fact that all the IT requests were granted in the underlying investigation does not preclude us from considering whether the application of Article 9(5) of the Basic AD Regulation

[328] China, first written submission, paras. 177, 184 and 187.
[329] China, first written submission, para. 167.
[330] European Union, first written submission, para. 212.
[331] European Union, first written submission, para. 210.
[332] European Union, first written submission, paras. 213-217.
[333] See paragraphs 7.98 and 7.112 above.

in the investigation was inconsistent with the AD Agreement. Having found that this provision of EU regulation is inconsistent with Articles 6.10 and 9.2 of the AD Agreement as such, it is difficult to see how its application in this investigation could be considered consistent with the obligations of the European Union under the AD Agreement. We therefore conclude that, having found Article 9(5) of the Basic AD Regulation to be inconsistent with Articles 6.10 and 9.2 of the AD Agreement, and for the same reasons, its application in the fasteners investigation was also inconsistent with these two provisions.[334]

7.149 We recall that we applied judicial economy with respect to China's claim under Article 9.4 of the AD Agreement in connection with Article 9(5) of the Basic AD Regulation "as such".[335] For the same reasons, we consider it appropriate to exercise judicial economy and decline to make a finding on China's claim under Article 9.4 in the context of the fasteners investigation. Since we do not address this claim substantively, we do not consider it necessary to address the European Union's terms of objection in this regard.

3. Whether the European Union violated Article 5.4 of the AD Agreement in its standing determination

(a) Arguments of the Parties

(i) China

7.150 China claims that the Commission's determination on standing was inconsistent with the requirements of Article 5.4 of the AD Agreement, and puts forward three main arguments in support of its claim. First, China submits that the Commission failed to examine whether the figure for total EC production was reliable and correct.[336] By not checking the adequacy and accuracy of this figure the Commission failed to conduct an "examination" on the issue of standing as required under Article 5.4. Second, China argues that the Commission failed to examine, prior to initiation, whether the application had been made by or on behalf of the domestic industry. In China's view, the Commission made its standing determination after the initiation of the investigation. Third, China maintains that the Commission's decision on standing was wrong since the EU producers supporting the application accounted for less than 25 per cent of total production. In this regard, China asserts that the 27 per cent share cited in the Definitive Regulation includes the production accounted for by producers that made themselves known within the 15 day period following initiation provided for domestic producers to come forward and indicate their willingness to cooperate in the investigation. China also contends that a 15 per cent margin of error in the calculation of the production accounted for by the producers supporting the application also undermined the accuracy of this calculation. Further, China maintains that the Eurostat data used to calculate the total EU production underestimated total production.

[334] In addition, there is, in our view, a possibility that the very existence of Article 9(5) of the Basic AD Regulation as part of the legal framework that applies to anti-dumping investigations conducted by the European Union might have affected participation by Chinese exporters in the fasteners investigation, and/or the quality and quantity of information Chinese exporters provided to the Commission. Specifically, we consider that the very existence of the test embodied in Article 9(5) of the Basic AD Regulation, as well as the nature of that test, including the criteria established and its application in other investigations, may well have discouraged other Chinese producers from coming forward and cooperating and from requesting IT in the investigation at issue. This further supports our view that the application of Article 9(5) of the Basic AD Regulation in this investigation was inconsistent with Articles 6.10 and 9.2 of the AD Agreement.

[335] See paragraph.7.116.

[336] China, second written submission, para. 392.

(ii) European Union

7.151 The European Union submits that China's claim under Article 5.4 is not within the Panel's terms of reference because: a) it was not subject to consultations[337]; b) China's panel request does not identify it consistently with the requirements of Article 6.2 of the DSU[338]; and c) the Notice of Initiation of the investigation at issue, which sets out the Commission's determination on the issue of standing, is not a measure identified in China's panel request.[339]

7.152 Responding to the substance of China's arguments, the European Union argues that the Commission did examine standing prior to the initiation of the investigation, and that the complainants represented 37 per cent of the total EU production of the like product. Specifically, the European Union contends that prior to the initiation the Commission contacted all EU producers identified in the complaint and asked them to submit their production figures and indicate their position as to the initiation of an investigation. These producers were also asked to flag any missing names in the list of producers. The producers thus brought to the attention of the Commission were also contacted and asked to submit the same information. All the information obtained from the producers was analysed prior to initiation.[340] The results of this process were summarized in the Note to the File dated 8 November 2007. The European Union argues that China's claim that the figures used for the calculation of the total EU production were not reliable should be rejected because China has failed to make a *prima facie* case in this regard.[341] The European Union contends that, contrary what China asserts, the total EU production figure submitted in the complaint was examined by checking the figures in Eurostat.[342] Moreover, the European Union maintains that the Commission's reliance on Eurostat data to estimate total EU production of the like product was reasonable and objective, given that these statistics were not prepared solely for the purpose of this investigation, but rather are systematically and objectively collated over time and are used by different entities.[343]

(b) Evaluation by the Panel

(i) Terms of Reference

7.153 As mentioned above, the European Union raises three sets of terms of reference objections with respect to China's claim on the issue of standing. China disagrees with the European Union and argues that China's claim with respect to standing is within the Panel's terms of reference.

7.154 First, the European Union argues that this claim is outside the Panel's terms of reference because it was not subject to consultations. The European Union submits that in its request for consultations, China affirmed the fact that the Commission had found that the domestic industry accounted for 27 per cent of the total EU production and did not raise a claim in connection with the obligation set forth in the third sentence of Article 5.4 of the AD Agreement. In its panel request, however, China both challenged the finding made by the Commission that the domestic industry represented 27 per cent of the total EU production and made a claim with respect to the obligation set forth in the third sentence of Article 5.4. According to the European Union, "[t]his double alteration of determination and obligation necessarily [changed] the *essence* of the complaint".[344]

7.155 China's request for consultations reads, in relevant part:

[337] European Union, first written submission, paras. 242-246.
[338] European Union, first written submission, paras. 249-252.
[339] European Union, first written submission, paras. 253-254.
[340] European Union, first written submission, para. 263.
[341] European Union, first written submission, para. 269.
[342] European Union, opening oral statement at the second meeting, para. 22.
[343] European Union, first written submission, para. 267.
[344] European Union, first written submission, para. 246 (emphasis in original).

> "The EC initiated the AD investigation with the support of producers accounting for only 27 per cent of the total domestic production, rendering the said investigation inconsistent with Article 5.4 of the AD Agreement".[345] (emphasis added)

China's panel request reads in pertinent part:

> "Article 5.4 of the AD Agreement because the EC initiated the anti-dumping proceeding on the basis of a complaint by the Community producers allegedly representing 27% of the total domestic production in the EC while (i) the EC failed to examine properly before the initiation whether the application has been made by or on behalf of the domestic industry and (ii) the EC improperly concluded that the application had been made by or on behalf of the domestic industry"[346] (emphasis added)

7.156 Article 5.4 of the AD Agreement provides:

> "5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.
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>
> [13] 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.
>
> [14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1."

We note that, generally speaking, the obligation set forth in Article 5.4 pertains to determining whether the complaint (the "application" in Article 5.4) has been lodged "by or on behalf of" a domestic industry, and establishes numerical criteria for that determination, based on the proportion of domestic production of the like product attributable to the producers supporting and opposing the complaint. The first sentence of this provision sets out the general rule that no investigation can be initiated unless the authorities determine that the application has been made by or on behalf of the domestic industry producing the like product in the importing country. The following two sentences introduce the specific numerical criteria for this determination, both of which must be satisfied.

7.157 We note that China's request for consultations states that by initiating the investigation with the support of producers accounting for "only" 27 per cent of total production, the European Union acted inconsistently with Article 5.4 of the AD Agreement. The language in the panel request is more

[345] WT/DS397/1, Annex G-1, p.2.
[346] WT/DS397/3, Annex G-2, p.3.

detailed. It expresses disagreement with the determination that the domestic industry supporting the complaint accounted for 27 per cent of total production, and explains in clearer terms the specific allegations put forward by China. We recall that following the legal framework we set out above[347] the issue is whether or not the claim presented in China's panel request may reasonably be said to have evolved from the legal basis identified in the request for consultations.

7.158 The request for consultations suggests that China considers that a finding that producers accounting for 27 per cent of domestic production support the complaint is not enough to support the conclusion that the complaint has been made by or on behalf of the domestic industry. The panel request, however, clearly takes issue with the conclusion that producers accounting for 27 per cent of domestic production actually supported the complaint, although it is not clear whether this is because these producers did not actually support the complaint, or because they did not actually account for 27 per cent of total domestic production of the like product. In that sense, there is a difference between the two requests. In our view, however, despite this difference, the claim in the panel request can reasonably be found to have evolved from the legal basis identified in the request for consultations.

7.159 The request for consultations identifies a legal basis for China's complaint – a violation of Article 5.4 of the AD Agreement with respect to the determination of standing. The panel request more specifically sets out a claim of violation of Article 5.4 of the AD Agreement with respect to the determination of standing. In our view, the question to be resolved in determining whether the claim was the subject of the consultations is whether the legal basis of the claim in the panel request may reasonably be said to have evolved from the legal basis identified in the request for consultations. Although in this case, the legal basis set out in the request for consultations and the claim set out in the panel request may have been premised on different aspects of the obligation set forth in Article 5.4, in our view, they pertain to the same issue, namely the consistency with Article 5.4 of the Commission's standing determination. We do not consider that the difference between the request for consultations and the panel request changed the essence of China's claim. We therefore reject the European Union's argument that this claim is outside the Panel's terms of reference because it was not subject to consultations.

7.160 Second, the European Union maintains that China's panel request does not identify this claim consistently with the requirements of Article 6.2 of the DSU. The EU's objection in this regard pertains to the summary of the legal basis of the complaint, not the identification of the specific measure at issue. The European Union submits that "it is impossible to ascertain with any certainty which of the several obligations or rights referenced in Article 5.4 and footnotes 13 and 14, or for that matter Article 4.1, of the *Anti-Dumping Agreement* forms the basis of China's claim, in a manner that permits one to ascertain the problem clearly".[348]

7.161 As explained above, although Article 5.4 contains a general obligation to ensure that the complaint is made by or on behalf of the domestic industry producing the like product in the importing country, in our view that obligation has several aspects, each of which may be the focus of a claim of violation of this provision. Looking at China's panel request, we note that the request takes issue with three aspects of the Commission's determination on standing. It suggests that the calculation of the 27 per cent figure may not have been correct; that the Commission failed to examine whether the application had been made by or on behalf the EU industry; and that the Commission improperly concluded that the application was made by or on behalf of the EU industry. We also note that, in the subsequent panel proceedings, China developed its claim on standing along the lines of the legal basis for that claim outlined in its panel request. We therefore consider that the "brief summary" of the legal basis for China's claim of violation of Article 5.4 of the AD Agreement

[347] See paragraphs 7.11 to 7.27 above.
[348] European Union, first written submission, para. 249.

in its panel request was sufficient to comply with the requirements of Article 6.2 of the DSU and reject the European Union's argument in this regard.

7.162 Third, the European Union asserts that the Commission's determination on standing was contained in the Notice of Initiation, and given that China's panel request does not identify the Notice of Initiation as a specific measure at issue, China's claim on standing falls outside the Panel's terms of reference.

7.163 There is no dispute that the Definitive Regulation reiterates the basis for the initiation of the investigation, including that the complaint was lodged "on behalf of producers representing a major proportion, in this case more than 25 per cent, of the total Community production of certain iron or steel fasteners".[349] The European Union's argument implies that this statement is not a "determination" of standing, and thus the fact that this is mentioned in the Definitive Regulation is insufficient to bring it within our terms of reference. We disagree. However, even if we did not consider the statement in the Definitive Regulation to be sufficient to bring China's standing claim before us, we would nonetheless find it to be within our terms of reference, for the following reasons.

7.164 Article 17.4 of the AD Agreement provides that a Member may refer a matter on which consultations have been held to dispute settlement "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 [or] a provisional measure has a significant impact and the Member that requested consultations considers that the [provisional] measure was taken contrary to the provisions of [Article 7.1] ...". In *Guatemala – Cement I*, the Appellate Body pointed out that "[a]ccording to Article 17.4, a "matter" may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place".[350] While the panel in that case had concluded that Article 17.4 was a timing provision, governing when a matter could be referred to the DSB[351], the Appellate Body concluded that the provision required that the matter referred to the DSB concern claims regarding one of these three types of measures, that is, a definitive anti-dumping measure, a price undertaking, or a provisional anti-dumping measure (with conditions).[352] In this context, the Appellate Body clarified that a "matter" consists of the measure(s) at issue and the claims identified by the complaining Member in connection with such measures.

7.165 Thus, it seems clear to us that Article 17.4 would not allow a Member to bring a case citing a notice of initiation as the measure at issue, or at least not without also citing one of the three measures specified in Article 17.4. However, this does not limit a complaining Member's right to bring claims about any aspect of the anti-dumping investigation in question. We note in this regard the Appellate Body's statement that:

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[349] Definitive Regulation, Exhibit CHN-4, recital 1.

[350] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 79 (emphasis in original).

[351] Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/R, adopted 25 November 1998, as modified by Appellate Body Report WT/DS60/AB/R, DSR 1998:IX, 3797, para. 7.18.

[352] Appellate Body Report, *Guatemala – Cement I*, paras. 77-80. Subsequent decisions have made clear that a Member may bring claims concerning the legislation of the importing Member (Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* ("*US – Section 129(c)(1) URAA*"), WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581, para. 6.22), as well as other acts or omissions that can be deemed a "measure" of the importing Member. 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, para. 81.

> "This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*."[353]

Thus, we consider that in a dispute concerning a final anti-dumping measure, as this one undisputedly does, a complaining Member may raise any alleged violations of the WTO Agreement arising out of the initiation or conduct of, as well as the determinations made and actions taken in the course of, the underlying anti-dumping investigation.

7.166 This is exactly what happened in this dispute. In its panel request, China identified the final anti-dumping measure imposed by the European Union as a specific measure at issue and raised numerous claims alleging violations of various provisions of the AD Agreement involving various actions and decisions of the Commission at various stages of the investigation, including the determination of standing supporting the initiation of the investigation at issue. In our view, all of these claims, regardless of whether they were initially set out in the Notice of Initiation or some other document, arise out of the anti-dumping investigation in which the Definitive Regulation is before us in this dispute. We therefore reject the European Union's objection in this regard.

7.167 Based on the foregoing, we conclude that China's claim with respect to the Commission's standing determination is within our terms of reference and proceed to consider that claim.

(ii) Substantive Analysis

7.168 We note that China's first and second arguments are interconnected. One takes issue with the timing of the Commission's determination and the other with the quality of it. As regards timing, China acknowledges[354] that the Notice of Initiation shows that the Commission considered and took a decision on standing prior to initiation. China nonetheless asserts that the Commission only examined whether the application had been made by or on behalf of the domestic industry once the investigation had been initiated.

7.169 We note that with respect to standing, the Notice of Initiation provides, in pertinent part:

> "1. Complaint
>
> The complaint was lodged on 26 September 2007 by the European Industrial Fasteners Institute (EIFI) ('the complainant') on behalf of producers representing a major proportion, in this case more than 25 %, of the total Community production of certain fasteners of iron or steel."[355]

Thus we consider that the Notice of Initiation clearly shows that the Commission did make a determination in this regard prior to initiation.

7.170 China asserts, however, that this determination was somehow made subsequent to the initiation of the investigation. To support this view, China refers to the part of the Definitive Regulation which describes how the Commission looked into the issue of standing after the initiation of the investigation. Recital 26 of the Definitive Regulation reads:

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[353] Appellate Body Report, *Guatemala – Cement I*, para. 79.
[354] China, answer to Panel question 19.
[355] Exhibit CHN-14, p. 267/31.

> "The issue of the standing of the Community industry was questioned by some importers in the Community and also by some exporting producers. Indeed, certain interested parties provided, after the publication of the Notice of Initiation, lists of Community producers that allegedly had not been consulted as to their support or otherwise for the proceeding. A questionnaire was subsequently sent to all such producers. Moreover, several companies came forward on their own initiative without having received a questionnaire. However, none of the responses received from these producers has reduced the level of standing mentioned in the preceding recital. In fact, many of these companies supported the complaint."[356] (emphasis added)

In our view, this statement shows that, although the Commission made a determination on standing prior to the initiation of the investigation, the issue was revisited in response to the allegations made by some importers and exporters that the investigation had been initiated without ensuring that there was standing. However, it is undisputed that, whatever the extent of this post-initiation inquiry may have been, the European Union did not, in fact, substantively change its conclusion that there was standing.[357]

7.171 The fact remains that a determination was made on this issue prior to initiation. The mere fact of revisiting after initiation a determination which had to be and was made prior to initiation does not, in our view, undermine the validity of the pre-initiation determination of standing. We therefore reject China's argument in this regard.[358]

7.172 With respect to the quality of the Commission's determination, China argues that the Notice of Initiation only demonstrates that the Commission considered and made a decision on standing, but does not necessarily show that the Commission "examined" this matter and made a "determination" on the basis of such examination as required under Article 5.4.[359] China posits that unless the European Union produces the documents that were before the Commission when the standing determination was made, it should be assumed that no adequate examination was conducted on this issue.[360] We recall, however, that it is for China to make a *prima facie* case of violation of a covered agreement before the burden shifts to the European Union to rebut China's case. In our view, China has failed to make a *prima facie* case that the European Union failed to examine the question of standing.

7.173 China does not argue that an investigating authority is barred from using the information submitted in the complaint for purposes of determining standing.[361] As China sees it, however, "examination" under Article 5.4 requires at least that the investigating authorities check the adequacy and accuracy of the information that forms the basis for the standing determination. According to China, the European Union failed to conduct this type of examination.

7.174 We note that the test that China refers to is found in Article 5.3 of the AD Agreement which requires the authorities to examine the "adequacy and accuracy" of the evidence submitted in the complaint in order to determine whether it would be justified to initiate an investigation. We also note that China has not raised a claim under Article 5.3. However, even assuming that there were

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[356] Definitive Regulation, Exhibit CHN-4, recital 26.

[357] The European Union, while acknowledging that the Commission engaged in this inquiry, characterizes it as being a "mistake" as it caused "confusion". European Union, answer to Panel question 31. China does not argue that the European Union was required to revisit the determination of standing, or that it erred in maintaining its original decision. We therefore do not address either of these issues.

[358] As noted, China makes no claim that the European Union was required to reconsider the issue of standing after initiation, or allege any violations in the context of the reconsideration that took place in this case.

[359] China, second written submission, para. 462.

[360] China, second written submission, para. 463.

[361] China, answer to Panel question 20.

such a claim, we are of the view that China has not submitted any evidence demonstrating that the Commission failed to check the accuracy and adequacy of the information in the application which was used for standing purposes.[362]

7.175 It is undisputed that the Commission relied on Eurostat data provided in the complaint in determining total EU production of the like product. China does not argue that Eurostat statistics *per se* constituted a non-objective source of data in terms of determining total EU production.[363] China's arguments in this regard are limited to the assertion that the Commission failed to take active steps in order to make sure that the production data obtained from Eurostat were reliable and correct. We note, however, that China does not even assert that there was reason to doubt the reliability of that information in this investigation which the Commission disregarded.[364] As a consequence, China's argument that the Commission did not examine whether the producers supporting the application accounted for at least 25 per cent of the total EU production cannot stand.

7.176 China's third argument is that the Commission's decision on standing was wrong since the EU producers supporting the application as a matter of fact accounted for less than 25 per cent of total EU production of the like product. In this regard, China first asserts that, in its determination on standing, the Commission took into account production accounted for by producers that made themselves known following the initiation of the investigation. To support this view, China refers to recital 114 in the Definitive Regulation, which reads:

> "**2. Definition of the Community industry**
>
> (114) The production of the Community producers that supported the complaint and fully cooperated in the investigation represents 27,0 % of the production of the product concerned in the Community. It is therefore considered that these companies constitute the Community industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation."[365]

According to China:

> "[T]he Community producers referred to in this statement include not only those companies listed in the Complaint as "complainants" or "supporters" but also those who made themselves known within 15 days after the initiation of the investigation. In view of this, it is more than likely that the standing threshold of 25% would not have been met if the production volume of companies which only made themselves known after the initiation of the investigation had been disregarded."[366]

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[362] In this regard, we would like to note the well-established principle of WTO jurisprudence that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation". 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. 7.57; 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, para. 7.70; Panel Report, *Guatemala – Cement I*, para. 7.57.

[363] See paragraph 7.179 below.

[364] China does not dispute that the Eurostat data are regularly collected and maintained for reasons other than the conduct of this, or any other, anti-dumping investigation, and are routinely relied upon by the EU investigating authorities.

[365] Definitive Regulation, Exhibit CHN-4, recital 114.

[366] China, first written submission, para. 216.

7.177 China's allegation has no basis in fact. First, we note that recital 114 of the Definitive Regulation pertains to the definition of domestic industry, not standing. Second, we note the European Union's argument, which China has not countered, that, as shown in a Note for the File prepared at the time the standing determination was made[367], the share of EU production accounted for by producers expressly supporting the complaint, which the Commission calculated prior to initiation, was 37 per cent, not 27.[368] Third, we recall our finding that the Commission made its determination on standing prior to initiation, as reflected in the Notice of Initiation.[369] Thus, China's assertion that the Commission, in its standing determination took into consideration the production of EU producers that made themselves known after the initiation, is unfounded as a matter of fact.

7.178 Next, China contends that there was a 15 per cent margin of error in the calculation of the production accounted for by the producers supporting the application, which also undermined the accuracy of this calculation. In this regard, China refers to a communication from the Commission in which it is stated that the figure representing total production accounted for by the Complainants is subject to a 15 per cent margin of error for confidentiality reasons.[370] China argues that this is "sufficient to cast doubt on the complainants [sic] standing".[371] In response to questioning on this issue by the Panel, the European Union states that the 15 per cent margin of error was intended to protect company-specific confidential information of the EU industry. In this regard, the European Union refers to the table found in Exhibit CHN-42 which contains a list of complainants and supporters of the complaint, together with their production figures, as well as the total figures for complainants and supporters.[372] The European Union contends that the company-specific figures in this table do include a 15 per cent margin of error to protect the confidentiality of the production data of individual producers, but that the totals indicated for complainants and supporters are the actual, correct figures, and do not reflect that 15 per cent margin. China has not disputed this assertion. We therefore reject China's allegation that the 15 per cent margin of error undermined the reliability of the Commission's calculation.

7.179 Finally, China argues that the Eurostat data used to estimate total EU production of the like product underestimated that production. As previously noted, China does not question the objectivity of the process whereby the data are collected by national authorities. It contends, however, that Eurostat statistics do not provide a proper basis for measuring total domestic production of fasteners because they only reflect production sold, as opposed to total production, and do not include production of small and medium enterprises.[373]

7.180 We note that the AD Agreement does not contain rules governing the sources or collection of data to be used in an investigation. Article 3.1 requires that an injury determination be based on positive evidence and include an objective examination of the relevant injury factors. However, China does not argue, much less demonstrate, that the Eurostat statistics are not positive evidence, or

[367] The Note for the File reads, in relevant part, that "the request is supported by Community producers representing in total more than 37% of Community production in 2006 and more than 41% in the first half of 2007". Exhibit EU-6, p. 1.

[368] European Union, first written submission, para. 266; European Union, second oral statement, para. 23. We recognize that there is a discrepancy between the 27 per cent and 37 per cent support figures cited in the Definitive Regulation, and the Note to the File. However, China has not made any arguments in this regard. Moreover, we note that the Note to the File is not the determination at issue, and the 37 per cent referred to in that document is not the subject of China's claim. While we do not know the reasons for this discrepancy, we consider it of no importance in these circumstances.

[369] See paragraph 7.169 above.

[370] Exhibit CHN-39, p.1.

[371] China, first written submission, para. 223.

[372] European Union, answer to Panel question 86. The list does not disclose the names of EU producers.

[373] China, first written submission, paras. 217-219; China, answer to Panel question 87(a).

that they were not objectively examined. Rather, China's argument is that the investigating authority should have relied on some other data in determining standing. In our view, however, these arguments do not suffice to make out a violation of Article 5.4.

7.181 With respect to this aspect of China's claim, we questioned China regarding whether, in China's view, there was a better source of data for the estimation of domestic production of the like product, available to the Commission at the time, but which the Commission failed to take into consideration. China refers to three alternative sources. First, China mentions a study concerning the fastener market in Italy, produced by DATABANK which, China argues, was submitted to the Commission during the fasteners investigation and which the Commission could have checked prior to initiation. Second, China points to evidence concerning the EU automotive industry which was submitted to the Commission during the fasteners investigation and which the Commission could have taken into account prior to initiation. Third, China posits that the Commission could have requested information from various producers associations in the EU member States.[374]

7.182 We disagree that any of these was necessarily a better source of information on EU production of fasteners, much less that the Commission could have and should have relied on one of these sources rather than the Eurostat data. First, it does not appear that information from these sources would have been more accurate and more complete than Eurostat statistics. In this regard, we note that the first source China mentions pertains to domestic production of fasteners in only one EU member State, the second to only one sector of the domestic industry, and the third is entirely hypothetical. Second, China's argument that the Commission could have checked these sources is, in our view, pure speculation. China has not demonstrated that these sources were available to the Commission prior to initiation, which is when the standing determination was made.[375] Even assuming that the information in these sources better reflected total EU production of fasteners, a proposition we have rejected, we consider it would be inappropriate to base a finding of violation of Article 5.4, concerning a decision made prior to initiation, on the investigating authority not having considered information brought to its attention after the determination has been made and the investigation initiated. Thus, none of China's arguments shows that there were credible alternative sources of information regarding total EU production of fasteners, at the time the standing determination was made, of which the Commission was aware and which it declined to take into consideration. We therefore find that China's allegations in this regard have no basis.

7.183 Based on the foregoing, we reject China's claim that the Commission's standing determination was inconsistent with Article 5.4 of the AD Agreement.

4. Whether the European Union violated Articles 4.1 and 3.1 of the AD Agreement in defining the domestic industry

(a) Arguments of the Parties

(i) China

7.184 China raises five allegations of error with regard to the domestic industry definition in the investigation at issue.

[374] China, answer to Panel question 87(c).

[375] As noted above, paragraph 7.181, China itself acknowledges that the study concerning the fastener market in Italy, produced by DATABANK, was submitted to the Commission during the investigation, not prior to initiation. China, answer to Panel question 87(c). China has not otherwise alleged that the Commission was aware of this study prior to initiation.

7.185 First, China asserts that the Commission violated Articles 4.1 and 3.1 of the AD Agreement by excluding from the domestic industry definition producers that made themselves known after the 15-day deadline following the publication of the Notice of Initiation, and those that did not support the complaint.[376] According to China, the European Union thus considered that an investigating authority may exclude individual domestic producers of the like product, or groups of such producers, from the domestic industry, provided that the producers included in the industry account for a major proportion of domestic production of the like product.[377] China considers this position inconsistent with Article 4.1, which in China's view does not allow exclusion of producers from the domestic industry for reasons other than those set out in subparagraphs (i) and (ii) of Article 4.1, and inconsistent with Article 3.1, as it does not allow the investigating authority to carry out an objective examination of the effects of dumped imports.[378]

7.186 Second, China argues that the domestic industry as defined by the Commission did not include domestic producers of the like product accounting for a "major proportion" of total EU production as required under Article 4.1 of the AD Agreement.[379] China's claim in this regard is based on two grounds. First, China asserts that the data relied on by the European Union to estimate the volume of total domestic production did not reflect the actual total production in the European Union, and in fact largely underestimated that production.[380] In this respect, China relies on the same arguments it raised in connection with its arguments concerning the Commission's determination of standing – that the Eurostat data concerned the volume of production sold, rather than total volume of production, and do not include production of small and medium-sized enterprises.[381] Second, China asserts that a 27 per cent share of total domestic production does not constitute a "major proportion" within the meaning of Article 4.1. In this regard, China argues that the European Union's presumption, as set out in Article 5(4) of the Basic AD Regulation, that 25 per cent constitutes a "major proportion" within the meaning of Article 4.1, is not correct.[382] China argues that "major" means "important, serious or significant", and thus "major proportion" must refer to an "important, serious, or significant" part of total domestic production. In addition, China considers that the use of the word "proportion" entails that the domestic producers included in the major proportion must be "representative" of the whole.[383] In its first written submission, China argued that it was obvious that 27 per cent cannot be regarded as significant.[384] In any event, China argues that, even granting that 27 per cent of total domestic production may constitute a "major proportion" within the meaning of Article 4.1, this can only be the case if the overall circumstances of the case indicate that the proportion of domestic production at issue is sufficient to be deemed "major". China contends that the European Union failed to consider this question at all, simply relying on the presumption that 25 per cent is sufficient.[385]

7.187 Third, China contends that the Commission violated Article 3.1 of the AD Agreement by not defining the domestic industry in relation to the Investigation Period, 1 October 2006-30 September 2007.[386] China notes that the data relied on by the European Union in considering the question of major proportion related to calendar year 2006, rather than the Investigation Period.

[376] China, first written submission, paras. 239-240.
[377] China, first written submission, para. 241.
[378] China, first written submission, paras. 243-244.
[379] China, first written submission, para. 247.
[380] China, first written submission, para. 250.
[381] China, first written submission, para. 249. See China, First written submission, paras. 218-222.
[382] China, first written submission, paras. 262-265, China, second written submission, paras. 593, 616-622.
[383] China, second written submission, paras. 597-598, 632; answer to Panel question 22, para. 95; China, first oral statement, para. 98.
[384] China, first written submission, para. 266.
[385] China, second written submission, para. 629.
[386] China, first written submission, para. 269.

China contends that the domestic industry must be defined in relation to the same period that is used for assessing the injury factors.[387] China recognizes that there is no express requirement in the AD Agreement requiring the use of the investigation period for the definition of the domestic industry, but argues that since the injury determination is made with respect to the data for the domestic industry for the investigation period, it follows that the domestic industry must be defined in relation to the same period.[388]

7.188 Fourth, China argues that the European Union violated Articles 3.1 and 4.1 of the AD Agreement by basing its injury determination on a sample of domestic producers that was not representative. In this regard, China argues that a sample in the context of an injury determination must comply with the requirements of Article 4.1 of the AD Agreement, and that the sample in this cased was made up of six producers accounting for 17.5 per cent of total domestic production of the like product, and thus violated Article 4.1.[389] In addition, China argues that the sample, since it consisted of only six producers representing only 17.5 per cent of total domestic production, could hardly be considered as "representative" of total domestic production, and thus was inconsistent with Article 3.1 of the AD Agreement, which requires that the injury determination be based on positive evidence and an objective examination of the volume, price effects, and impact of dumped imports.[390] China specifically disagrees with the European Union's view that the sample selected must be representative of the domestic industry as defined by the investigating authority, but need not be representative of domestic producers as a whole.[391] China argues that, to the extent the sample selected was based on a definition of domestic industry itself inconsistent with Articles 3.1 and 4.1 of the AD Agreement, it is necessarily inconsistent with Article 3.1.[392] China further contends that the European Union acted inconsistently with Article 3.1 by selecting the sample based on volume of production as the sole criterion, arguing that this is not appropriate to satisfy the requirement of representativeness.[393] In any event, China asserts that the output of the domestic producers selected for the sample does not constitute the largest volume of production of the like product in the European Union which would reasonably be investigated.[394]

7.189 Fifth, China considers that the European Union acted inconsistently with Article 4.1 of the AD Agreement by not excluding from the domestic industry definition producers that were related to the exporters or importers or were themselves importers of the product under consideration.[395] In this regard, China notes the undisputed fact that certain of the producers in the domestic industry, and included in the sample, were related parties. China asserts that the European Union erroneously concluded that the Chinese subsidiaries of these producers were established predominantly to serve the Chinese market, and that the interests of these producers remained centred in the European Union.[396] According to China, the European Union failed to objectively examine the relationship between the EU producers and their Chinese subsidiaries, and thus abused its discretion under Article 4.1 by not excluding those related producers from the domestic industry.[397] While China acknowledges that Article 4.1 does not impose an obligation on investigating authorities to exclude related domestic producers, it considers that the investigating authorities do not have unlimited discretion in deciding whether or not exclusion is warranted in a particular case, and that the

[387] China, first written submission, para. 272.
[388] China, second written submission, paras. 654, 657.
[389] China, first written submission, para. 276.
[390] China, first written submission, paras. 279-282.
[391] China, second written submission, para. 666.
[392] China, second written submission, para. 669.
[393] China, second written submission, para. 676.
[394] China, second written submission, para. 683.
[395] China, first written submission, para. 296.
[396] China, first written submission, paras. 286-290.
[397] China, first written submission, paras. 291-295.

determination must be based on an objective examination of positive evidence, pursuant to Article 3.1.[398]

(ii) European Union

7.190 The European Union argues that China's first allegation of error is not within the Panel's terms of reference because it was not subject to consultations. According to the European Union, the request for consultations did not set forth a claim that failure to include domestic producers who came forward more than 15 days after initiation was inconsistent with Articles 4.1 and 3.1 of the AD Agreement.[399]

7.191 With respect to the substance, the European Union contends that, contrary to China's argument, Articles 4.1 and 3.1 of the AD Agreement do not require an investigating authority to define the domestic industry so as to include all producers, or even the largest possible group of producers.[400] The European Union notes that while China refers to several different documents in support of its arguments, the investigating authority's determination with respect to the domestic industry is set out in the Definitive Regulation, and asserts that the Panel should focus on the information therein in evaluating China's claim.[401] The European Union asserts that Articles 4.1 and 3.1 of the AD Agreement impose no obligation on an investigating authority to include all domestic producers, regardless of when they make themselves known. In the European Union's view, there is no hierarchy between the two ways of defining domestic industry under Article 4.1, either by including all producers, or by including those whose production constitutes a major proportion of total domestic production of the like product.[402] The European Union acknowledges that an investigating authority may not exclude categories of producers which actually produce a like product, but asserts that the Commission did not do so in this case.[403] Moreover, in the European Union's view, this does not mean that if the producers it includes constitute a major proportion of total domestic production of the like product, the investigating authority must look further to include additional producers of the like product.[404] The European Union asserts that the Commission contacted all known producers of the like product, and invited them to participate in the investigation, but set a deadline of 15 days for producers to come forward and indicate willingness to participate, and did not include producers who made themselves known after the 15-day deadline.[405] The European Union considers that once it was clear in this investigation that the producers who came forward within the 15-day period accounted for a major proportion of total domestic production there was no need to add more producers to the domestic industry. In the European Union's view, producers who come forward after the deadline do not constitute a "category" of producers who may not be excluded from the domestic industry.[406] The European Union considers that Article 3.1 of the AD Agreement does not impose any obligations with respect to the definition of the domestic industry, but merely requires an objective examination based on positive evidence of the impact of the dumped imports on the domestic industry, and thus the

[398] China, second written submission, paras. 689-690.
[399] European Union, first written submission, para. 285.
[400] European Union, first written submission, para. 279.
[401] European Union, first written submission, paras. 280-281.
[402] European Union, first written submission, para. 298.
[403] Specifically, in response to questions from the Panel, the European Union maintained that it did not exclude producers who did not express support for the investigation, as a group, from the domestic industry, asserting that as a matter of fact, at least one such producer was included not only in the domestic industry, but in the sample. European Union, answer to Panel question 89, para. 19.
[404] European Union, first written submission, para. 301.
[405] European Union, first written submission, para. 302. The European Union notes that during the Panel's first substantive meeting with the parties, China indicated that it accepts that investigating authorities may impose deadlines on interested parties to come forward and make their interest in participating in the investigation known. European Union, second written submission, para. 90.
[406] European Union, second written submission, para. 100.

European Union contends that the Article 3.1 aspect of China's claim is entirely dependant on its claim with respect to the definition of the domestic industry.[407] Finally, the European Union notes that because the Commission was going to use sampling in its injury determinations, there was no reason to add additional producers to the domestic industry definition.[408]

7.192 With regard to China's second allegation of error, the European Union asserts that the Eurostat data provided a reasonable estimate of total EU production of the like product, referring to its arguments in this regard with respect to the standing determination.[409] Moreover, the European Union submits that in the circumstances of this investigation, 27 per cent did represent a major proportion of total production within the meaning of Article 4.1 of the AD Agreement.[410] The European Union notes that the AD Agreement does not define the term "major proportion", and contends that China's argument that the domestic industry should preferably include all domestic producers of the like product is not correct.[411] In the European Union's view, there is noting in the term "proportion" that requires that producers accounting for a major proportion of total domestic production of the like product in some way "represent" all producers.[412] The European Union contends that China failed to make a *prima facie* case that 27 per cent is not a major proportion in this case, asserting that not only is the legal premise of China's argument wrong, it is not true that the European Union limited itself or failed to include as many producers as possible, and China has failed to provide any evidence why 27 per cent is necessarily insufficient.[413] The European Union contends that 27 per cent is "important, serious or significant" in view of the record of the investigation.[414] Moreover, European Union considers that the "circumstances of the case" that are relevant to determining whether a particular proportion is sufficient to be considered "major" in any case do not include the number of producers of the like product.[415]

7.193 With regard to China's third allegation of error, the European Union asserts that China errs in its description of the facts. The European Union notes that China refers, in connection with this claim to the period of investigation for the dumping determination, and that this is not the period used for assessment of the injury factors.[416] The European Union agrees that the period of investigation for the dumping determination was the period 1 October 2006 to 30 September 2007, but maintains that the period for the assessment of the injury factors was from January 2003 to October 2007. This period included calendar year 2006, the period with respect to which the determination of domestic industry was made, and which was the last full year prior to initiation for which data was available.[417] Moreover, the European Union submits that China's claim should be rejected because Article 3.1 of the AD Agreement does not require that the assessment of "major proportion" be based on the period of investigation for dumping determinations.[418]

7.194 In response to China's fourth allegation of error, the European Union argues that China fails to make a *prima facie* case of a violation, since Article 4.1 of the AD Agreement does not require that the sample used for injury determinations represent a major proportion of total production.[419] The

[407] European Union, first written submission, paras. 306-307.
[408] European Union, first written submission, para. 284.
[409] European Union, first written submission, paras. 313, 265-274.
[410] European Union, first written submission, para. 316.
[411] European Union, first written submission, para. 326, referring to China, first written submission, para. 256.
[412] European Union, second written submission, para. 101.
[413] European Union, first written submission, paras. 330-334.
[414] European Union, first written submission, para. 337.
[415] European Union, second written submission, para. 122.
[416] European Union, first written submission, para. 354.
[417] European Union, second written submission, para. 128.
[418] European Union, first written submission, paras. 359-363.
[419] European Union, first written submission, paras. 374-377.

European Union notes that Article 4.1 does not refer to sampling at all, and that to read Article 4.1 as requiring that a sample of the domestic industry must represent a major proportion of total domestic production makes no sense, as it ignores the essence of sampling as a concept.[420] Thus, the European Union argues, China's argument confuses the notion of the domestic **producers** as a whole, and the domestic **industry** as a whole. According to the European Union, a proper sample must be representative of the domestic industry as a whole. However, the European Union contends that, if the domestic industry is defined as producers of a major proportion of total domestic production of the like product, a proper sample must be representative of that industry, but need not be representative of the domestic producers as a whole.[421]

7.195 With regard to China's fifth allegation of error, the European Union contends that the Commission heard and considered the views of the EU importers and Chinese exporters that some related domestic producers should be excluded from the domestic industry in the investigation at issue, but made a reasoned determination to the contrary.[422] Further, the European Union argues that Article 4.1 of the AD Agreement does not require the exclusion of related producers from the definition of domestic industry, but simply allows such exclusion if circumstances justify this.[423] In addition, the European Union argues that Article 3.1 imposes no obligation with respect to an investigating authority's decision whether to exclude related domestic producers from the domestic industry, and asks the Panel to reject this aspect of China's claim as well.

(b) Arguments of Third Parties

(i) Colombia

7.196 Colombia takes the view 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. However, the discretion afforded an investigating authority does not mean it can use arbitrary or not verifiable methods.[424] Colombia considers that the objective examination principle demands a correct assessment of the effect of the dumped imports, and to make that evaluation, investigating authorities are required to conduct a correct determination of the domestic producers/domestic industry in every case, which analysis shall be conducted according to Article 4.1 of the AD Agreement.[425] Colombia agrees with the European Union that under Article 4.1, the domestic industry may be defined so that either all eligible producers (domestic producers as a whole), *or* those producers that represent "a major proportion" of the eligible domestic production, are included, and that either of these definitions is valid.[426] However, using one or the other alternative does not allow the investigation to be limited to a segment of the domestic industry.[427] The requirement to conduct an investigation over the totality of the domestic industry does not, however, prevent investigating authorities from either sampling or examining a domestic industry by part, sector or segment.[428] Colombia also agrees, referring to the report in *EC – Salmon (Norway)*, that an investigating authority may proceed on the basis of a sample, so long as the sample is representative, such that an objective examination under Article 3.1 can be undertaken.[429] Colombia considers that an investigating authority should rely on statistical methods

[420] European Union, first written submission, paras. 380-381.
[421] European Union, first written submission, para. 384-394.
[422] European Union, first written submission, para. 397.
[423] European Union, first written submission, paras. 404-405.
[424] Colombia, written submission, paras. 65-67.
[425] Colombia, written submission, para. 72.
[426] Colombia, written submission, para. 73.
[427] Colombia, written submission, para. 74, citing, Appellate Body Report, *US – Hot Rolled Steel*, para. 190.
[428] Colombia, written submission, para. 77
[429] Colombia, written submission, paras. 79-80.

when selecting the domestic producers to be part of a sample.[430] For Colombia the burden of proof to show that a sample is representative of the industry, in order to fulfil the objective examination requirement of Article 3.1 of the AD Agreement, lies on the national authorities and has to be interpreted in the context of the obligations under Article 5.4 of the AD Agreement.[431]

(ii) Japan

7.197 Japan indicates that the definition of the domestic industry has broad implications for antidumping investigations, including the determinations of injury and causation.[432] Japan considers that China's arguments relating to Article 4.1 of the AD Agreement raise three key issues.

7.198 With respect to the first issue, whether the European Union violated Article 4.1 of the AD Agreement by excluding from the outset from the domestic industry companies that did not support the investigation, Japan's primary concern is ensuring fairness in the investigation process.[433] Without commenting on the specific facts of this case, Japan believes that domestic producers that do not support an AD complaint but fully cooperate in an AD investigation may not from the outset be excluded from the domestic industry. Japan considers that the European Union's interpretation of "domestic industry" to mean that so long as the producers included in the domestic industry constitute "a major proportion" of the domestic production of the like product, investigating authorities are not required to include any other domestic producers of the like product in the "domestic industry" could allow investigating authorities to define the domestic industry in a results-oriented way, for example, by including only unprofitable producers *(e.g.*, complainants) and excluding profitable producers *(e.g.*, cooperating producers opposing the complaint). Assessing injury with respect to such a domestic industry would, in Japan's view, be inconsistent with the obligation of Article 3.1 of the AD Agreement to conduct an "objective examination" of injury.[434] Thus, Japan disagrees with the European Union's view that there is no obligation on investigating authorities in respect of the definition of the domestic industry.[435] Japan notes that "the concept of 'domestic industry' is *critical* to an injury determination, as it defines the framework for data collection and analysis"[436], and considers that there is a general obligation to conduct AD investigations in an unbiased and objective manner, regardless of which aspect of the investigation is at issue. Moreover, Japan considers the European Union's approach problematic to the extent that it allows domestic producers themselves to tailor the "domestic industry" by designating those companies for which injury is more likely to be found as supporting the complaint, whereas those companies for which injury is less likely to be found as not supporting the complaint, as inherently unfair and making it impossible for the investigating authority to conduct an objective examination as required by Article 3.1 of the AD Agreement.

7.199 As regards the second issue (the domestic industry's share in total domestic production), Japan notes that the term "major proportion" is not defined in Article 4.1 of the AD Agreement or in any other provision of the AD Agreement. Therefore, without commenting on the specific facts of this case, Japan agrees neither with China's argument that 27 per cent of domestic production *a priori* does not constitute a "major proportion" nor with the European Union's argument that 25 per cent is *a priori* sufficient to reach the "major proportion" threshold.[437] Japan recognizes the difficulty of

[430] Colombia, written submission, para. 82.
[431] Colombia, written submission, para. 82.
[432] Japan, written submission, para. 18.
[433] Japan, written submission, para. 20.
[434] Japan, written submission, paras. 22-23.
[435] Japan, written submission, para. 27.
[436] Japan, written submission, para. 28, citing Panel Report, *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. 7.321 (emphasis added by Japan).
[437] Japan, written submission, para. 31.

quantifying what constitutes an "important, serious or significant" proportion of domestic production. Thus, in Japan's view, it is sufficient that the investigating authority assess what constitutes a major proportion on a case-by-case basis in an unbiased and objective manner[438], and requests that the Panel carefully consider the facts of this case.[439]

7.200 As regards the third issue (sampling), Japan recognizes that there are no clear provisions in the AD Agreement applicable to the post-initiation phase of the investigation that permit investigating authorities to engage in sampling of the domestic industry.[440] However, Japan notes that the panel in *EC – Salmon (Norway* concluded that the AD Agreement allows authorities to conduct sampling of the domestic industry where there are so many domestic industry members that individual examination of all of them would be impracticable.[441] Japan disagrees with China's argument that sampled domestic producers must account for a major proportion of total domestic production.[442] In Japan's view, the Article 4.1 requirement concerning "major proportion" of total domestic production must be clearly distinguished from the requirements for the selection of a sample.[443] Japan observes that accepting China's argument that the collective output of the sample must constitute a major proportion of total domestic production would vitiate the purpose of sampling in cases where there are so many domestic industry members that an individual examination of each of them would be impracticable, which, by hypothesis, would be the only instance in which investigating authorities would resort to sampling.[444] Japan considers that the second sentence of Article 6.10, which relates to sampling of exporters, producers, importers or types of products, would be helpful also in the context of sampling for the injury determination. The requirement explicitly imposed by the second sentence of Article 6.10 for the selection of a sample is that the sample be either statistically valid or based on the largest volume of sales *i.e.*, exports, that can be reasonably investigated. However, in Japan's view, the primary requirement for the selection of a sample for the injury determination is that, as explained by the panel in *EC – Salmon (Norway)*, the sample must be sufficiently representative of the domestic industry.[445]

(iii) Norway

7.201 Norway focuses on one of the issues raised by China, the alleged exclusion of certain categories of domestic EU producers that produced the domestic "like product" during the relevant period.[446] Norway argues that the investigating authority in the determination of the domestic industry cannot exclude groups of producers.[447] In Norway's view, the European Union argues that an investigating authority has the discretion to exclude whichever producers it wishes, provided that the remaining producers represent a "major proportion" of the industry.[448] Norway disagrees that Article 4.1 permits such a determination, which would prevent an objective examination of the industry, as required by the AD Agreement. Norway observes that, under Article 4.1, the "domestic industry" comprises producers "as a whole" of the like products. In the alternative, the industry may be limited to a "major proportion" of the industry. However, the only category of producers that may

[438] Japan, written submission, para. 33.
[439] Japan, written submission, para. 34.
[440] Japan, written submission, para. 35. Japan notes that footnote 13 of the AD Agreement appears to provide for the possibility of sampling domestic producers before initiation of an anti-dumping investigation. *Id*. at footnote 22.
[441] Japan, written submission, para. 36.
[442] Japan, written submission, para. 37.
[443] Japan, written submission, para. 38.
[444] Japan, written submission, para. 39.
[445] Japan, written submission, paras. 40-41.
[446] Norway, written submission, para. 4.
[447] Norway, written submission, para. 5.
[448] Norway, written submission, para. 9, referring to European Union, first written submission, paras. 296-297.

be entirely excluded from the industry is "related" producers, thereby ensuring the inclusion of domestic producers from all segments and sectors of the industry on an equal footing, and that any determinations made with respect to the "domestic industry" will be representative of that industry as a whole. Norway asserts that Article 4.1 does not authorise an authority to limit an industry solely to the producers that supported the investigation, or exclude "silent" producers.[449] Norway considers that this reading of Article 4.1 is supported by strong contextual evidence in Articles 3 and 5 of the AD Agreement[450], as well as by footnote 13 of the AD Agreement, attached to Article 5.4.[451] Accordingly, it is Norway's view that an investigating authority cannot exclude categories of producers from the definition of the domestic industry, whether these categories are based on the production of a particular type or model of the like product or their opposition or silence in respect of the investigation.[452]

(iv) United States

7.202 The United States considers that China argues that the EU acted inconsistently with Article 3.1 of the AD Agreement by (1) excluding domestic producers that did not support the application from its examination of injury, and (2) evaluating injury factors on the basis of different groupings of domestic producers.[453] While it takes no position on the merits of China's factual allegations, the United States agrees with China that, under either of these conditions, an investigating authority fails to undertake an "objective examination" of the impact of dumped imports on the domestic industry as required by Article 3.1 of the AD Agreement.[454]

7.203 The United States notes that, as the Appellate Body has recognized, "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*".[455] The United States considers that, in light of this understanding of Article 3.1, an investigating authority's inclusion of only supportive domestic firms, to the exclusion of other domestic firms, in its examination of the domestic industry appears to show a selection bias *ab initio*.[456] When an investigating authority chooses to investigate data concerning only a portion of the domestic industry, with no objective explanation therefor, it falls short of the requirement in Article 3.1 to conduct an "objective examination" of the state of the domestic industry, particularly where the selected partial data is that chosen by the supporters of the application.[457]

7.204 Furthermore, the United States asserts that, where an investigating authority has failed to conduct an "objective examination" as required by Article 3.1, that error permeates the investigating authority's analyses of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5, respectively, as a consequence of the fact that, instead of conducting these analyses in relation to an objectively-determined "domestic industry", the investigating authority analyzed these

[449] Norway, written submission, para. 10.
[450] Norway, written submission, para. 11.
[451] Norway, written submission, para. 17.
[452] Norway, written submission, para. 20.
[453] United States, written submission, para. 29, referring to China, first written submission, paras. 241-242 and 435-445.
[454] United States, written submission, para. 29.
[455] United States, written submission, para. 30, citing, Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (emphasis added).
[456] United States, written submission, para. 31.
[457] United States, written submission, para. 31, referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 180-181; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.86.

elements solely by reference to those members of the domestic industry that supported the antidumping application.[458]

(c) Evaluation by the Panel

7.205 In addition to substantively responding to China's arguments, the European Union asserts, as a preliminary matter, that China's first allegation of error was not the subject of consultations, and is therefore not within the Panel's jurisdiction, and that China has failed to make a *prima facie* case with respect to its claims concerning "major proportion" and representativeness of the sample chosen. With respect to China's first allegation of error, that the failure to include in the domestic industry producers coming forward after the 15-day deadline established in the Notice of Initiation was inconsistent with Articles 3.1 and 4.1 of the AD Agreement, the European Union alleges that the brief summary of the legal basis in the request for consultations does not identify this allegation as the matter in dispute.[459] China responds by asserting that its request for consultations is broad enough to cover the more specific issue, which it identifies in its panel request.[460] China also asserts that the European Union errs as a matter of law in suggesting that the request for consultations must set forth the identical "matter" as is identified in the panel request.

7.206 We recall the principles we addressed earlier in this report in this respect[461], and that Article 4.4 of the DSU requires that a request for consultations contain "an indication of the legal basis for the complaint". We consider that this is a different, and in our view less stringent, requirement than those of Article 6.2 of the DSU with respect to a panel request. Moreover, it is clear to us that, to the extent it suggests that the request for consultations must set forth the identical matter that is subsequently identified in the panel request, the European Union is in error.[462] In this case, China's request for consultations contains multiple references to Articles 3.1 and 4.1:

> "2. China considers that the EC's imposition of anti-dumping duties on imports of certain iron or steel fasteners originating in the People's Republic of China is inconsistent with the EC's obligations under Articles VI and X:3(a) of the GATT 1994; Articles 1, 2.1, 2.2. 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the AD Agreement as well as Part I, paragraph 15 of China's Protocol of Accession. ...
>
> (vi) The EC based its injury determination on data from EC producers accounting for only 27 per cent of the estimated total EC production of the product concerned in 2006, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement;
>
> (vii) The EC failed to determine which proportion of the total domestic production was represented by the EC producers in relation to which the injury

[458] United States, written submission, para. 32. In this respect, the United States recalls that the analyses set out in Articles 3.2, 3.4 and 3.5 all form part of the determination as to whether there is material injury to the *domestic industry*. See Footnote 9 to the AD Agreement. The United States also notes that, in *Mexico – Olive Oil*, the panel discussed the overarching importance of the domestic industry definition to various aspects of the injury determination in Article 15 of the SCM Agreement, which provisions parallel those of Article 3 of the AD Agreement. 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, paras. 7.197-7.201.

[459] European Union, first written submission, paras. 285-290.

[460] China, second written submission, paras. 521, 527.

[461] See paragraphs 7.16 to 7.24 above.

[462] See, Panel Report, *Brazil – Aircraft*, para. 7.10; Appellate Body Report, *Brazil – Aircraft*, para. 132.

> determination was made throughout the investigation period, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement;
>
> (viii) The EC conducted the injury determination on the basis of a sample of EC producers accounting for only 17.5 per cent of the total EC production of the product at issue in 2006, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement; ...
>
> (ix) The EC failed to exclude from the scope of the domestic industry EC producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement."

7.207 Articles 3.1 and 4.1 are provisions setting forth multiple obligations for investigating authorities. While the Appellate Body has indicated that a mere listing of legal provisions alleged to be violated may not be sufficient to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in the context of a panel request[463], it is not clear to us that a similar approach should be taken with respect to a request for consultations. Unlike Article 6.2 of the DSU, which requires that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, Article 4.4 of the DSU requires only that a request for consultations contain "an indication of the legal basis for the complaint". In our view, this is a lesser requirement than that of Article 6.2, and may well be satisfied in a particular case by listing the Articles allegedly violated. China's request for consultations clearly indicates that it seeks consultations with the European Union concerning alleged violations of the provisions of the AD Agreement set out in the chapeau of paragraph 2, including Articles 3.1 and 4.1. In the following subparagraphs, China sets out additional information as to the circumstances of the alleged violations, including with respect to the definition of the domestic industry. While not specifically identifying the failure to include in the domestic industry producers coming forward after the 15-day deadline established in the Notice of Initiation, China's request for consultations makes it clear that China considered that there were several errors in the European Union's definition of the domestic industry. In this case, we consider that the reference to Articles 3.1 and 4.1 in the chapeau of paragraph 2 of the request for consultations itself gives an "indication" that the legal basis of the complaint is a violation of some aspect of those provisions, with some further explanation in the following subparagraphs for some of the Chinese concerns. Moreover, we note that there is no dispute that the panel request clearly sets out a claim of violation with respect to the failure to include in the domestic industry producers coming forward after the 15-day deadline established in the Notice of Initiation. Thus, it is clear to us that the panel request concerns the same dispute, and evolved from the matter set out in the request for consultations. In these circumstances, we conclude that China's request for consultations does contain a sufficient "indication of the legal basis" for the first allegation of error with respect to its claim of violation of Articles 3.1 and 4.1 of the AD Agreement, which is therefore within our terms of reference.

7.208 With respect to whether China made out a *prima facie* case regarding its claims concerning "major proportion" and representativeness of the sample chosen, 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".[464] The European Union's assertion of failure to present a *prima facie* case with respect to the "major proportion" issue appears to rest, in significant part, on a disputed interpretation of the AD Agreement. In this situation we consider it appropriate to resolve that question of interpretation

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

[464] 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.

first. We will then consider the parties' arguments with respect to China's claims, including the European Union's assertions regarding China's alleged failure to present a *prima facie* case.

7.209 Before turning to the parties' arguments, we set out below our conclusions with respect to the facts surrounding the definition of domestic industry in this case. Some of these facts were disputed by the parties, and we have resolved those disputes as necessary in order make our decision.

7.210 In this anti-dumping investigation, the Commission did not specifically set out a "definition" of the domestic industry *per se*. However, its views on the subject are clear from the Definitive Regulation. First, the Commission defined the "product concerned" in the investigation, as:

> "certain iron or steel fasteners, other than of stainless steel, *i.e.* wood screws (excluding coach screws), self-tapping screws, other screws and bolts with heads (whether or not with their nuts or washers, but excluding screws turned from bars, rods, profiles or wire, of solid section, of a shank thickness not exceeding 6 mm and excluding screws and bolts for fixing railway track construction material), and washers, originating in the People's Republic of China (all together hereinafter referred to as fasteners or product concerned).
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> The product concerned is normally declared within CN codes 7318 12 90, 7318 14 91, 7318 14 99, 7318 15 59, 7318 15 69, 7318 15 81, 7318 15 89, ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00.
>
> Fasteners are used to mechanically join two or more elements in construction, engineering, etc., and are used in a wide variety of industrial sectors, as well as by consumers. Based on their basic physical and technical characteristics and end uses, all fasteners are considered to constitute a single product for the purpose of the proceeding. Within the same national or international standards, fasteners should comply with the same basic physical and technical characteristics including notably strength, tolerance, finishing and coating."[465]

7.211 At paragraphs 48-56 of the Definitive Regulation, the Commission addressed various arguments of the parties to the investigation concerning the issue of like product, and concluded at paragraph 57 that:

> "the fasteners produced and sold by the Community industry in the Community, fasteners produced and sold on the domestic market in the PRC and those produced and sold on the domestic market in India, which served as an analogue country, and fasteners produced in the PRC and sold to the Community are alike within the meaning of Article 1(4) of the basic Regulation."

7.212 Referring to the indication at the outset of the investigation, in the Notice of Initiation, that sampling might be used, the Definitive Regulation states that:

> "in view of the large number of producers, sampling of the domestic industry was proposed... In order to enable the Commission to decide whether sampling would be necessary, and if so to select a sample, Community producers were requested to make themselves known within 15 days from the date of the initiation of the investigation and to provide basic information on their production and sales, and the names and activities of all their related companies involved in the production and/or selling of the product concerned....46 Community producers that produced the product

[465] Definitive Regulation, Exhibit CHN-4, recitals 40-42.

> concerned in the Community during the investigation period and expressed a wish to be included in the sample within the aforesaid period were considered as cooperating companies and were taken into account in the selection of the sample ....These Community producers represented over 30% of the estimated production in the Community in 2006. These producers are considered to constitute the Community industry as mentioned in recital 114."[466]

The Commission concluded, at recital 114 of the Definitive Regulation, that:

> "The production of the Community producers that supported the complaint and fully cooperated in the investigation represents 27,0% of the production of the product concerned in the Community. It is therefore considered that these companies constitute the Community industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation."

7.213 In response to questions from the Panel, the European Union clarified that, at the time of initiation, it sent sampling forms to 318 EU producers of fasteners, asking for certain basic information concerning their operations, which could be used to determine the composition of the intended sample, and setting a 15-day deadline.[467] Five national associations of producers were also sent letters, and the Notice of Initiation invited any other domestic producers who so wished to come forward and provide the requested information within the 15-day period.[468] Another 54 producers, whose names had been provided by exporters, were subsequently contacted by the Commission, which sent sampling forms to 45 and received 10 completed forms in return, but none of these producers were ultimately included in the domestic industry.[469] The sampling forms do not contain any questions concerning support for or opposition to the application.[470] China asserts that this does not mean the EU investigating authority was not aware of the positions of all companies with respect to the investigation.[471] In this respect, China notes that the Information Document, sent to the parties at the time it was decided not to impose provisional measures, indicates that of 114 companies who came forward with relevant information, those who produced the product under investigation and expressed a wish to be included in the sample were considered as "cooperating" and were taken into account in the selection of the sample. Of these cooperating companies, 86, representing 36 per cent of estimated EU production, supported the complaint, while 25, accounting for 9 per cent of EU production, opposed the complaint, and three did not express an opinion.

7.214 We note that the Definitive Regulation suggests, by using the term "producers that supported the complaint", that, as alleged by China, only producers expressing support for the complaint were included in the domestic industry. While the Information Document also seems to support this conclusion, we accept that, as asserted by the European Union, this is a working document reflecting progress in the investigation to that point, with no legal status in EU law, which was made available to the parties despite there being no obligation to do so, and is not the measure before us.[472] Thus, we do

[466] Definitive Regulation, Exhibit CHN-4, recitals 22-25.
[467] European Union, answer to Panel question 88, para. 17.
[468] European Union, answer to Panel question 88, para. 17.
[469] European Union, answer to Panel question 89, para. 20. One of these companies had in fact been contacted at initiation, and was thus already included in the domestic industry. *Id*.
[470] See Exhibits EU-30 and EU-31.
[471] China, Comments on European Union answer to Panel question 89, para. 16.
[472] European Union, answer to Panel question 30, para. 88. China disagrees with the European Union in this regard, referring to the title of the cover letter transmitting the Information Document, which refers to "**Preliminary findings** and continuation of the investigation without imposition of provisional measures". China, second oral statement, para. 63 (emphasis added by China). However, we do not consider that the title of the document binds the European Union, and accept the European Union's representation of the document's status under EU law.

not consider the representations in the Information Document as constituting part of the measure which we must evaluate. We note that the European Union indicates[473] that at least one producer which was not a complainant, and had remained silent prior to initiation, was not only included in the domestic industry, but was selected for the sample.[474] The European Union indicates that, based on arguments made by Chinese exporters, it continued to consider the question of standing after the initiation, that this continued examination confused the question of the definition of the domestic industry, and that the "unfortunate standard formulation" in the Definitive Regulation (referring to the use of the term "producers that supported the complaint" with respect to the domestic industry)[475], did not affect the definition of the domestic industry, with respect to which no distinction was made between producers who supported the complaint and those that did not.[476]

7.215 We are sympathetic to China's position with respect to the question of whether producers who do not support the complaint may be excluded from the domestic industry in the abstract. Issues might arise should an investigating authority systematically exclude from the domestic industry companies that produce the like product but do not support the complaint. On the other hand, we also have sympathy for the European Union's view that producers who do not support the complaint are not likely to cooperate, and thus cannot effectively be considered as part of the domestic industry unless they specifically come forward and agree to participate in the investigation. We consider that, on the facts before us, China has not demonstrated that the EU investigating authority in this case did, in fact, exclude producers that did not support the complaint from the domestic industry. In our view, this is demonstrated by the fact that at least one producer who did not affirmatively state support for the complaint was included in the domestic industry. In addition, while it seems clear that producers who did not make themselves known within the 15-day period established at initiation were not included in the domestic industry, we find that the investigating authority did not act to exclude such producers. There seems to have been a process of considering additional producers for inclusion in the domestic industry, based on arguments made by the exporters. While none of the producers so considered were in the end included in the domestic industry, in our view, the fact that the Commission considered including them the domestic industry supports our view that it did not simply exclude producers who did not come forward within the 15-day period.

7.216 Finally, we note that the Definitive Regulation indicates that the Commission chose the sample by selecting, from the 46 producers constituting the Community industry, those with the largest production volumes, "so as to achieve the largest representative volume of production of the like product produced in the Community which could reasonably be investigated within the time available".[477] From the completed sampling forms received from domestic producers, the investigating authority selected a sample comprising seven producers, accounting for approximately 70 per cent of the production of the Community industry, as defined by the Commission, that is, the 46 producers. Subsequently, one sampled producer was considered as not cooperating, and dropped from the sample, resulting in a sample comprising six producers accounting for approximately 65 per cent of the production of the Community industry as defined by the Commission. Questionnaires

[473] China asserted, in its request for interim review, that the European Union did not provide any evidence in this regard, and that China could not independently verify this fact, as the identities of the complainants was confidential. China, request for interim review, para. 20. However, we have no reason to doubt the European Union's assertion of fact in this regard.

[474] European Union, answer to Panel question 89, para. 19; China, Comments on European Union answer to Panel question 89, para. 15. China asserts that the fact that this company did not express a view prior to initiation does not mean that it did not support the complaint when it came forward after initiation and expressed a willingness to be included. *Id*. Whether this is true or not is not relevant to our evaluation, since it is clear that the support or lack thereof as a matter of fact was not enquired into by the Commission, and thus was not an aspect of the inclusion of this company in the domestic industry.

[475] European Union, answer to Panel question 89, para. 18.

[476] European Union, answer to panel question 34, para. 105.

[477] Definitive Regulation, Exhibit CHN-4, recital 27.

were sent to the sampled companies and replies from all of them were received within the deadlines established by the Commission.[478]

7.217 Turning to the first aspect of China's claim, we recall that Article 4.1 of the AD Agreement provides:

> "4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:
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> (i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
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> (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.
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> [11] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter."

7.218 Thus, the plain language of Article 4.1 makes it clear that domestic producers of the "like product" are the starting point for the definition of the domestic industry. It is also clear from the plain language of Article 4.1 that the domestic industry is to be defined as producers "as a whole" of the like product defined in the investigation, or, in the alternative, those producers whose output of that product constitutes a major proportion of total domestic production of this product.[479] In addition, it is clear that Article 4.1 sets out circumstances in which some producers of the like product **may** be left out of the domestic industry. Thus, Article 4.1(i) provides for exclusion of producers related to the exporters or importers, or producers who are themselves importers of the allegedly dumped product, while Article 4.1(ii) provides that, in the exceptional circumstances of two or more competitive markets within the territory of a Member, producers within each market may be regarded

[478] Definitive Regulation, Exhibit CHN-4, recitals 28-30.

[479] See, 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. 7.110.

as a separate industry if certain conditions are satisfied. However, we agree with the views of the panel in *EC – Salmon (Norway)*, that:

> "nothing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision.[283] Thus, we see no basis in the text of Article 4.1 which would allow for the exclusion from the domestic industry, as a category or group, of producers of any form of the like product...
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> [283] By this, we do not mean to suggest that a determination based on information from fewer than all domestic producers of the like product will necessarily be insufficient as an element of a decision to impose anti-dumping duties. However, we do see a clear distinction between the definition of the domestic industry as set out in Article 4.1, and whether the information obtained during the investigation concerning the domestic industry, as defined, is sufficient to form the basis of a determination of injury and causation."[480]

7.219 On its face, it is clear that Article 4.1 of the AD Agreement does not establish any particular procedure or methodology for investigating authorities in defining the domestic industry. There is nothing in Article 4.1 which would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry.[481] We have concluded, on the basis of the facts before us, that the Commission, the EU investigating authority, did not act to exclude the "category" of producers asserted by China, that is, "producers that did not support the complaint", from the definition of the domestic industry. As noted, at least one producer that did not support the complaint was, in fact, included in the domestic industry, and in the sample.[482] In addition, we consider, and China does not disagree[483], that it is reasonable for investigating authorities to impose deadlines for domestic producers to make themselves known and then define the domestic industry on the basis of those that come forward within that deadline. While China suggests that the 15-days allowed by the Commission was insufficient, it does not substantiate this position, and we see no basis for concluding that the 15-day period was necessarily insufficient.[484] Moreover, it seems clear that the Commission did consider the possible inclusion of additional producers in the domestic industry, although it ultimately did not include any. In our view, the mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers expressing different views with respect to the complaint, or producers who did not come forward within the 15-day period, does not demonstrate that the European Union acted inconsistently with Article 4.1 of the AD Agreement in defining the domestic industry. Thus, we find that China has failed to demonstrate that the European Union excluded producers that did not support the complaint, and has failed to demonstrate that the definition of the domestic industry was inconsistent with Article 4.1 of the AD Agreement in this regard.

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[480] Panel Report, *EC – Salmon* (*Norway*), para. 7.112.

[481] Indeed, China does not dispute that such deadlines may be applied, so long as they are reasonable. China, answer to Panel question 23, para. 101.

[482] China contends that the fact that this company did not indicate support for the complaint prior to the initiation does not mean that it did not support the complaint when it came forward after the initiation. China, comments on European Union, answer to Panel question 89, para. 15. However, China proffers no evidence which might suggest that the Commission inquired whether this company supported the complaint, that the company did, in fact support the complaint, or that the Commission took this question into consideration at all.

[483] China, answer to Panel question 23, para. 101.

[484] We recall that in connection with its claim under Article 6.1.1 of the AD Agreement with respect to the time given to fill out the MET/IT claim forms, China does not argue that the 15-day deadline given to fill out those forms is unreasonable. See, footnote 1130 below.

7.220 Finally, although China asserts that the two legal bases it posits for this aspect of its claim, Articles 3.1 and 4.1 of the AD Agreement, are independent of one another, China has not, in our view, made a *prima facie* case of violation of Article 3.1 of the AD Agreement. Article 3.1 of the AD Agreement 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."

7.221 China asserts that it is only possible to undertake an objective examination pursuant to Article 3.1 if the result of the examination is not predetermined by the way the domestic industry is defined.[485] We do not disagree. However, we have rejected China's position with respect to this aspect of its claim challenging the domestic industry definition in this case. China makes no other allegations in support of its claim of violation of Article 3.1, and we therefore dismiss that aspect of China's claim.

7.222 China's second allegation of error has two aspects: (a) whether, in the circumstances of this investigation, the Eurostat data considered by the Commission constituted a reliable basis for estimating total EU production of fasteners in assessing whether the producers included in the domestic industry accounted for a "major proportion" of total domestic production of the like product, and (b) whether the 27 per cent of total EU production accounted for by the producers found to constitute the domestic industry was sufficient to constitute a "major proportion" of total domestic production of the like product, under Article 4.1 of the AD Agreement.

7.223 We note that China's arguments concerning the first aspect essentially reprise its arguments in the context of its claim with respect to standing. As discussed in more detail above, and for the same reasons, we do not consider that the European Union erred in relying on the Eurostat data in estimating total EU production of fasteners.[486] China acknowledges that the specific data used, PRODCOM statistics, are gathered according to objective rules, but asserts that these rules themselves make the data unsuitable for calculating domestic production. However, similar to the standing determination, the definition of the domestic industry takes place at an early stage of the proceedings, when the information available to the investigating authority is necessarily limited. In our view, reliance on a set of data gathered and maintained on an objective basis for reasons not linked to the anti-dumping investigation is a reasonable basis for an investigating authority to make decisions concerning the definition of the domestic industry, including whether a group of producers accounts for a sufficient proportion of total domestic production to be considered a "major proportion" of that production. We do not preclude the possibility that such a decision might be revisited at a later stage of the proceedings, when more information has become available to the investigating authority. However, there is nothing in the facts before us that would support the view that the Commission should have approached the Eurostat data with suspicion.

7.224 China contends that the alleged underestimation of production volumes in the data was confirmed by evidence provided by interested parties during the investigation.[487] Even assuming that to be true, we fail to see how this could be taken into account at the beginning stages of the investigation when the Commission was assessing whether producers considered for inclusion in the domestic industry accounted for a major proportion of total EU production of fasteners. Although China asserts that other information was available to the investigating authority on EU production of

[485] China, answer to Panel question 23, para. 107.
[486] See, paragraphs 7.179 to 7.182 above.
[487] China, answer to Panel question 87, para. 3.

fasteners, we note that this information at best relates to only some production, in Italy and for the automotive industry[488], and we cannot see how such partial information would constitute a more appropriate basis for estimating total domestic production than the data actually relied upon. Thus, we conclude that the European Union did not violate Article 4.1 by relying on Eurostat data in estimating total EU production for purposes of defining the domestic industry.

7.225 The principal issue raised by China is whether the European Union violated Article 4.1 in defining producers accounting for 27 per cent of estimated total EU production of fasteners as the domestic industry on the basis that these producers accounted for a "major proportion" of total domestic production within the meaning of Article 4.1. China argued that the Commission wrongly relied on a presumption that producers accounting for 25 per cent of total domestic production constitute a major proportion of domestic production.[489] Whether or not the Commission relied on such a presumption, it is for China to make a *prima facie* case that the Commission's definition of domestic industry is inconsistent with Article 4.1 in the investigation in dispute.[490] Although China's first written submission asserted that a "major proportion" must be as close as possible to domestic production "as a whole"[491], at the first meeting of the Panel, China's representative acknowledged that there is no proportion, in the abstract, that must be satisfied to constitute a "major proportion", and that depending on the circumstances, even something less than 25 per cent might be sufficient. In our view, the assertion that the Commission relied on a presumption is not alone sufficient to demonstrate, *prima facie*, that the definition of domestic industry in this case is inconsistent with Article 4.1 of the AD Agreement. We therefore do not consider it necessary to address China's argument that the European Union erred by presuming that producers accounting for 25 per cent of total domestic production will constitute a major proportion, and thus satisfy the requirements of Article 4.1 in this regard. We now turn to the question whether, in this case, the European Union erred in concluding that producers of 27 per cent of estimated total EU production of fasteners accounted for a "major proportion" of total domestic production within the meaning of Article 4.1

7.226 We recall the provisions of Article 4.1, quoted above, which do not define the term "major proportion". As the parties have recognized, a "major" proportion is one that is "important, serious, or significant".[492] The parties also agree that the "major proportion" referred to in Article 4.1 of the AD Agreement may be something less than 50 per cent, and that the lower limit is not determinable in the abstract, but will depend on the facts of the case. This is consistent with the views of the panel in *Argentina – Poultry*, which concluded:

> "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible. Indeed, this approach is entirely consistent with the Spanish version of Article 4.1, which refers to producers representing "una proporción importante" of domestic production. Furthermore, Article 4.1 does not define the "domestic industry" in terms of producers of the major proportion of total domestic production. Instead, Article 4.1 refers to producers of a major proportion of total domestic production. If Article 4.1 had referred to the major proportion, the requirement would clearly have been to define the "domestic industry" as producers constituting 50+ per cent of total domestic production.[224] However, the reference to a major

[488] See, China, answer to Panel question 87, para. 8.
[489] China, first written submission, para. 265.
[490] We note in this regard that China did not bring a claim against Article 4(1) of the Basic AD Regulation, which links "major proportion" for purposes of the domestic industry definition, by reference, to Article 5(4) of the Basic AD Regulation, which in turn incorporates the numerical tests for standing set out in Article 5.4 of the AD Agreement.
[491] China, first written submission, para. 256.
[492] China, first written submission, para. 253; European Union, first written submission, para. 319.

> proportion suggests that there may be more than one "major proportion" for the purpose of defining "domestic industry". In the event of multiple "major proportions", it is inconceivable that each individual "major proportion" could – or must – exceed 50 per cent. This therefore supports our finding that it is permissible to define the "domestic industry" in terms of domestic producers of an important, serious or significant proportion of total domestic production. For these reasons, we find that Article 4.1 of the *AD Agreement* does not require Members to define the "domestic industry" in terms of domestic producers representing the majority, or 50+ per cent, of total domestic production.
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> [224] If Article 4.1 had referred to "the" major proportion, we may have been required to accept Brazil's interpretation of Article 4.1."[493]

The panel in that case went on to observe that there was "nothing on the record to suggest that, in the circumstances of this case, 46 per cent of total domestic production is not an important, serious or significant proportion of total domestic production", and accordingly rejected Brazil's claim that Argentina violated Article 4.1 of the AD Agreement by defining "domestic industry" as consisting of domestic producers accounting for 46 per cent of total domestic production.

7.227 We agree with these views, and consider it appropriate to apply them in our analysis in this dispute. Thus, the question for us is whether, in light of the facts on the record of the anti-dumping investigation before us, there is anything that supports China's contention that 27 per cent of estimated EU production of fasteners is not an important, serious, or significant proportion of total domestic production of that product.

7.228 In its first written submission, China did not make any arguments with respect to the facts of this case, but did raise such arguments at the first meeting of the Panel with the parties, and in subsequent submissions. We note that the European Union asserts that China fails to make a *prima facie* case with respect to this claim, as it failed to provide any relevant evidence of why 27 per cent of total domestic production does not constitute a "major proportion" of total domestic production. In its second written submission, China asserted the following specific circumstances in support of its contention that 27 per cent of domestic production did not satisfy the major proportion requirement: (a) that the domestic producers included in the domestic industry are not representative of the whole of domestic production, (b) that it was feasible, as a practical matter, to include more domestic producers, (c) that the producers included represent only a small portion of the total number of domestic producers, and (d) that the domestic industry definition excluded producers other than those referred to in Article 4.1(i) and (ii).[494] China also argues that investigating authorities are required to examine and determine, in light of the specific circumstances of each case whether the major proportion test has been satisfied, including not only quantitative elements, but also aspects such as those set out in (a) – (d) above.[495] According to China, the EU investigating authority simply failed to consider the circumstances of the case, and instead rested on the fact that 27 per cent is more than 25 per cent, and therefore was sufficient. China asserts that this failure cannot be cured by the fact

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[493] 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 Panel Report, para. 7.341 (footnote 223 deleted, emphasis in original).

[494] China, second written submission, paras. 632-639.

[495] China, second written submission, para. 628.

that the domestic industry as defined did, in fact, include large and smaller companies and producers of different types of the like product.[496]

7.229 We recall that Article 4.1 is a definitional provision. Thus, while it does impose an obligation on an investigating authority to ensure that it defines a "domestic industry" in a manner consistent with that provision, Article 4.1 does not set out any requirements with respect to how an investigating authority is to do this. We see no basis in the text of Article 4.1 for the proposition put forward by China that an investigating authority must, of its own accord, "examine and determine" whether the major proportion test has been satisfied by considering the specific circumstances of the case with reference to the criteria proposed by China. We do not mean to suggest that an investigating authority may ignore relevant evidence, and in particular arguments made by interested parties, suggesting that a particular definition of domestic industry is inconsistent with Article 4.1. But the only requirement clearly set out in that provision is that the domestic industry consist of "domestic producers of the like product", either as a whole, or those of them accounting for a major proportion of total domestic production. We see no basis in the text of the AD Agreement to impose on investigating authorities an affirmative obligation to examine non-quantitative factors in defining a domestic industry on the basis of producers accounting for a major proportion of domestic production of the like product.[497] Nor, in our view, does the report in *Argentina – Poultry* suggest otherwise. While the panel in that dispute did note that "[t]here is nothing on the record to suggest that, in the circumstances of this case, 46 per cent of total domestic production is not an important, serious or significant proportion of total domestic production"[498], we do not understand this to impose an affirmative obligation on the investigating authority to examine and determine unspecified "circumstances" in defining the domestic industry.

7.230 Even assuming non-quantitative factors are relevant to the definition of a domestic industry under Article 4.1, we do not consider that the factors China raises in this regard are relevant in this case, or in general. For instance, we see nothing in Article 4.1 that would require an investigating authority, in defining the domestic industry, to examine and determine whether producers accounting for a major proportion, are, in addition, somehow "representative" of the whole of domestic production.[499] Nor do we see anything in the text of Article 4.1 that would require an investigating authority to include as many producers as is "practically feasible", so long as the producers that are included account for a sufficient quantity of domestic production to be considered a "major proportion". Similarly, we consider irrelevant whether the number of producers included in the domestic industry is a small or a large portion of the total number of producers. Article 4.1 refers to the volume of production accounted for by producers, a consideration which is, in our view, not addressed by taking account of the number of producers. Moreover, as the European Union observes,

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[496] China, second written submission, para. 629.

[497] We note that this does not mean that we agree that any domestic industry which includes producers accounting for more than 25 per cent of total domestic production will necessarily be consistent with Article 4.1 of the AD Agreement, nor that an examination of injury to such an industry will necessarily be consistent with the provisions of Article 3 of the AD Agreement.

[498] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.342.

[499] We note in this regard China's contention that:

> "[b]y failing to include in the domestic industry domestic producers that opposed the complaint or remained silent, the EU investigating authorities defined a domestic industry that is not "representative" of the whole industry and thus does not constitute a "proportion" of the total domestic production and *a fortiori* not a "major proportion" of that production."
>
> China, second written submission, para. 633.

We consider this contention fundamentally flawed. As China recognizes, there are two alternative bases for the definition of the domestic industry. Nothing in Article 4.1 suggests that an industry defined on the basis of domestic producers of a major proportion must somehow "represent" the putative industry that would be defined on the basis of domestic producers as a whole. Indeed, such a requirement would be illogical and circular.

it is precisely in the situation of a "fragmented" industry with many producers that a definition of the domestic industry based on the "major proportion" is most likely[500], and to require that an industry in that situation must include a major proportion of the number of the producers would vitiate the effectiveness of the major proportion option. Finally, as noted above, we have rejected as a matter of fact China's contention that the Commission wrongly excluded certain categories of producers. We therefore conclude that the European Union did not act inconsistently with Article 4.1 of the AD Agreement in defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners.

7.231 Turning to China's third allegation of error, we recall our conclusion above that there is nothing in Article 4.1 that establishes any methodological requirements with respect to the definition of the domestic industry. In particular, there is nothing in that Article that establishes any period of time for which total domestic production must be calculated in the context of determining whether the major proportion requirement is satisfied. Similarly, we can see nothing in Article 3.1, even assuming it is relevant to the definition of the domestic industry *per se*, which would establish that the definition of the domestic industry must relate to any specific period, and in particular, the period for which data is collected for purposes of the dumping margin calculations.

7.232 In this regard, we note that the period China considers relevant is what the European Union refers to in its practice as the "Investigation Period", which we understand to be the period for which data is collected for purposes of calculating dumping margins. However, we note that there was another relevant period defined in this investigation, from January 2003 to October 2007, referred to in EU practice as "the period considered", which was the period for which information was collected for purposes of examining the question of injury to the domestic industry.[501] The information on which the calculation of major proportion was made covered calendar year 2006, and thus was within the period considered. China argues that "the existence of material injury within the meaning of Article 3.4 of the AD Agreement was assessed on the basis of the status of the domestic industry during [the Investigation period 1 October 2006-30 September2007]. The previous periods were used only in order to detect trends".[502] On this basis, China considers that the EU authorities were required to define the domestic industry in relation to the Investigation Period. We do not agree.

7.233 In our view, even assuming China is correct that the existence of injury was determined with respect to the Investigation Period, a question which is not before us and which we do not address, we do not see that this would necessarily establish that the definition of the domestic industry must be based on data for the same period. China suggests that to do otherwise will necessarily result in a failure to undertake an "objective examination", as required by Article 3.1, in the context of the injury determination. We fail to see why a definition of domestic industry based on data for production of the like product for the last full calendar year for which data is available should necessarily result in an injury determination based on a non-objective examination. We agree that a determination based on a wrongly defined domestic industry will be inconsistent with Article 3.1, as regardless of how "objective" in the abstract the examination of positive evidence concerning that wrongly defined industry may be, the conclusion would simply pertain to the wrong industry.[503] However, there is no period defined in the AD Agreement with respect to which the injury determination must be made, and indeed, China does not allege otherwise. Thus, a definition of industry based on a major proportion calculated for the last full calendar year prior to initiation is not necessarily "wrongly defined". We therefore do not agree that a definition of domestic industry based on a major

[500] European Union, second written submission, para. 122.
[501] Definitive Regulation, Exhibit CHN-4, recital 39.
[502] China, second written submission, para. 649.
[503] See, Panel Report, *EC – Salmon* (*Norway*), para. 7.124.

proportion calculated for data relating to a period other than the period for which data is collected for the dumping determination necessarily is inconsistent with Article 3.1 of the AD Agreement.[504]

7.234 Turning to China's fourth allegation of error, we note that China does not dispute that an investigating authority may use sampling in making its injury determination, but asserts that it must be "consistent with the general obligations for investigating authorities, in accordance with Article 3.1, to conduct an objective examination based on positive evidence".[505] In this context, China focuses on the assertion that the sample selected was not representative because the share of domestic production accounted for by sampled producers was too small, and because it represented, at best, a domestic industry defined inconsistently with Articles 3.1 and 4.1 of the AD Agreement.

7.235 We agree with China that, as stated by the panel in *EU – Salmon (Norway)*,

> "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 favouring the interests of any interested party, or group of interested parties, in the investigation." 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."[506]

We have above rejected China's allegations that domestic industry was defined inconsistently with Articles 3.1 and 4.1 of the AD Agreement, and we therefore dismiss that aspect of China's allegation that the sample selected by the EU investigating authority was not representative of the domestic industry.[507]

7.236 China also argues that by using volume of production as the sole criterion for selection of the sample, and in doing so, failing to include in the sample producers whose output represented the largest volume of production of the like product which could reasonably be investigated within the

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[504] We note, in addition, that China has made no other arguments suggesting that the period actually considered by the Commission, calendar year 2006, was inappropriate or unreasonable. In this regard, we consider pertinent the European Union's argument that this represented the last full calendar year prior to initiation for which data were available, which would at a minimum support a conclusion that the period was reasonable, were we to address the question.

[505] China, second written submission, para. 667, referring to Panel Report, *EC – Salmon* (*Norway*), para. 7.130.

[506] Panel Report, *EC – Norway* (*Salmon*), para. 7.130 (footnotes omitted).

[507] In this respect, we note that we agree with the European Union that a sample for purposes of assessing injury in an anti-dumping investigation must be sufficiently representative of the domestic industry as defined by the investigating authority in the particular case, always assuming, however, that the domestic industry was defined consistently with the requirements of Article 4.1. Thus, we reject China's argument that, since the sample consisted of only six producers representing only 17.5 per cent of total domestic production, it could not be considered as "representative" of total domestic production. China, first written submission, paras. 279-282. The percentage of **total domestic production** represented by the sample is in our view irrelevant to the question of the representativeness of a sample of domestic industry defined as producers accounting for a **major proportion** of total domestic production of the like product.

time available, the EU investigating authority selected a sample that was not representative.[508] We note that no provision of the AD Agreement addresses the question of sampling in the context of injury determinations, including the selection of a sample. This is in contrast to the context of dumping determinations, where Article 6.10 explicitly authorizes sampling, and sets out guidance for the selection of an appropriate sample. One of the methods set out in Article 6.10 for selection of a sample for the dumping determination is to " limit [the] examination ... to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated".

7.237 As noted above, the Commission selected the sample based on the volume of production of the producers who expressed willingness to be included in the sample. China argues that selection on the basis of volume of production is not appropriate to satisfy the requirement that the sample be representative of the domestic industry.[509] In this respect, China argues that, unlike in the context of a dumping determination based on sampling, where there is a possibility for subsequent refunds in the future for exporters who do not actually dump, or dump at lower margins, there is no similar system which would take account of the absence of uninjured domestic producers, and thus it is particularly important that the sample be sufficiently representative of the domestic industry.[510] China asserts that the EU investigating authorities should have used a statistically valid sample, which is the only guarantee of having a sufficiently representative sample of the domestic industry.[511]

7.238 We note the statement of the panel in *EC – Salmon (Norway)*, which China relies upon in making its argument:

> "In addition, 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 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."[512]

In our view, this statement does not suggest, as China implies, that the volume of production is irrelevant to the selection of a sample in the context of injury determinations, but merely suggests that other considerations may be relevant. Other than to assert that the EU investigating authority did not include in the sample it selected producers accounting for the largest percentage of volume that could reasonably be selected, however, China makes no argument as to other potentially relevant factors

[508] China, second written submission, paras. 681-684.

[509] At the second meeting of the Panel with the parties, the European Union asserted that this constituted a new claim that was not part of the request for consultations or the Panel request, and is outside the Panel's terms of reference. European Union, second oral statement, para. 40. However, we do not consider this argument to constitute an entirely new claim, as alleged by the European Union, but rather a newly developed argument in support of China's claim that the European Union failed to make a determination of injury with respect to the relevant domestic industry, in part because the sample included producers accounting for only 17.5 per cent of domestic production.

[510] China, second written submission, paras. 674-675.

[511] China, second written submission, para. 679.

[512] Panel Report, *EC –Salmon* (*Norway*), footnote 309.

that might have been relevant to the selection of the sample in this case. Nor does China even suggest that any such factors were raised during the course of the investigation but not considered by the investigating authority. The European Union asserts that the sample selected in fact included producers of all types of fasteners and small as well as large producers.[513] In our view, in the absence of any arguments concerning relevant factors either ignored or dismissed by the investigating authority, and given that the sample selected does appear to include producers whose production is representative of that of the industry defined in the investigation, we conclude that China has not demonstrated that the sample selected is not representative of the domestic industry solely because it was selected on the basis of volume of production.

7.239 China also asserts that the EU investigating authority failed to select as the sample producers whose output constitute the largest volume of production that could reasonably be investigated, and that it should have used a statistically valid method for selecting the sample, as provided for in Article 6.10 of the AD Agreement. In this respect, we note that Article 6.10 is not, by its own terms, applicable to the selection of a sample for purposes of the injury determination.[514] We recall that there is no guidance in the AD Agreement on the sources, collection or verification of information concerning injury, and that the question of sampling in this context is not addressed in the AD Agreement. Thus, there is absolutely no basis in the text from which we can derive any specific methodological guidance in this respect. We certainly would not disagree that a statistically valid sample would most likely be sufficiently representative to serve as the basis of an injury determination, but we can see significant difficulties in attempting to construct such a sample in any particular anti-dumping investigation, given that in our understanding, a first requirement for a statistically valid sample is a significant amount of information concerning the "universe" or "population" that is to be sampled. In an anti-dumping investigation, on the other hand, and certainly at the beginning stages when a sample for purposes of the injury investigation is likely to be selected, there may be only very limited information concerning domestic producers available to the investigating authority. Given the time constraints for the conduct of an investigation[515], it seems clear to us that to require a statistically valid sample would, in many cases, make it impossible for a sample to be selected. Since we consider that sampling is permitted in the context of injury determinations, a view China does not contest, we cannot accept the contention that only a statistically valid sample will be sufficiently representative for purposes of an injury determination.

7.240 Similarly, in the absence of any methodological guidance for the selection of a sample in the context of an injury determination, we cannot conclude that a selection based on volume of production is necessarily unsatisfactory. With respect to China's assertion that the EU investigating authority did not, in fact, select as the sample producers whose output constitute the largest volume of production that could reasonably be investigated, we note that the only support China asserts for this contention is the fact that, for some of the injury factors, the European Union considered data for the

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[513] European Union, first written submission, para. 392.

[514] Article 6.10 of the AD Agreement, which is not in dispute in this context, provides:

> "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."

Thus, it is clear to us that Article 6.10 sets out requirements with respect to the selection of samples in the context of making dumping determinations, but does not refer to the selection of samples in the context of an injury determination.

[515] Article 5.10 of the AD Agreement provides that an anti-dumping investigation shall be completed within 12 months, or, in exceptional circumstances, no more than 18 months, after initiation.

sampled producers, while for other factors, it considered data for the entire domestic industry. We do not see how this demonstrates that the EU investigating authority could have carried out the entire injury examination for the domestic industry it had defined, or at least included more producers in the sample, as China asserts.[516] China quotes the views of the panel in *EC – Salmon (Norway)*, which stated that:

> "the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources."[517]

7.241 However, China neglects to mention that this comment was not made in connection with the issue of sampling in the injury context, but rather in the context of the dumping determination, as Norway had challenged the selection of the sample of exporters for the dumping determination in that dispute. Moreover, even assuming the matters referred to by the panel in that case, the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources, would be relevant factors in assessing whether the sample in an injury context represents a sufficiently large volume of domestic production, a question we do not consider it necessary to resolve, China has made no representations concerning these factors in this case. We therefore reject China's arguments that the European Union acted inconsistently with Article 3.1 of the AD Agreement in the selection of a sample of the domestic industry.

7.242 Finally, we turn to China's allegation that the European Union acted inconsistently with Articles 4.1 and 3.1 of the AD Agreement by including in the domestic industry and in the sample producers that were related to the exporters or importers or were themselves importers of the allegedly dumped product. We recall the language of Article 4.1(i), which provides that:

> "when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" **may** be interpreted as referring to the rest of the producers" (footnote deleted, emphasis added).

China recognizes that Article 4.1 does not require the exclusion of related producers or importing producers.[518] Nonetheless, China submits that investigating authorities do not have unlimited discretion in determining whether or not to exclude such producers, that the "objective examination" and "positive evidence" requirements of Article 3.1 apply to the decision of investigating authority in such cases, and asserts that the basis of the EU investigating authority's decision not to exclude related producers or importing producers is not supported by the evidence in the record of the investigation.

7.243 It is clear to us, as China acknowledges, that the use of the term "may" in Article 4.1 makes it clear that investigating authorities are not required to exclude related producers or importing producers. There is nothing in the text of Article 4.1(i) that would establish any criteria that might be relevant to an investigating authority's decision in this regard.[519] In this case, the European Union explained its reasons for not excluding certain related producers in the definitive Regulation, at

[516] China, second written submission, para. 683.
[517] Panel Report, *EC – Salmon* (*Norway*), para. 7.188.
[518] China, second written submission, para. 689.
[519] We note that proposals were made in the Rules Negotiations under the Doha Development Agenda that would establish criteria for determining whether or not to exclude related producers or importing producers from the domestic industry, and the Chairman's first draft text in fact proposed amending the AD Agreement in this respect. Document TN/RL/W/213, dated 30 November 2007, p. 10, Article 4.1(i), proposed footnotes 17, 18. That negotiators proposed amending the AD Agreement in this regard supports the view that the text as currently in force does not establish any criteria.

recitals 115-118. China does not suggest that the bases cited by the European Union are irrelevant, but rather asserts that the evidence contradicts the conclusion reached.

7.244 We are not persuaded by China's view that Article 3.1 of the AD Agreement applies to the decision whether to exclude related or importing domestic producers in the manner proposed by China. The European Union suggests that the reason Article 4.1 allows the exclusion of related producers is because such producers may be less representative of the interests of the domestic industry, and may be benefiting from the dumped imports themselves. Thus, the European Union argues that, if anything, the exclusion of such related producers is in the exporting country's interest, which undermines the assertion that the failure to exclude them in this case is an abuse of the discretion provided for in Article 4.1.[520] In our view, there is nothing in Article 3.1, or in Article 4.1, that limits the discretion of investigating authorities to exclude, or not, related or importing domestic producers. Moreover, even assuming we considered it necessary to review the European Union's decision not to exclude related producers in this case, we fail to see the relevance of the factual basis for China's argument. The fact that two of the exporters to which EU producers were related stated that they produce principally for export, rather than for sale in the domestic Chinese market is in our view irrelevant to a decision whether to exclude the related EU producers from the domestic industry. In the absence of any criteria in the AD Agreement against which the decision not to exclude related producers might be assessed, we reject China's assertion that the European Union acted inconsistently with Articles 3.1 and 4.1 of the AD Agreement by failing to exclude related producers from the domestic industry.

5. Whether the European Union violated Articles 2.1 and 2.6 of the AD Agreement in defining the product under consideration and/or the like product

(a) Arguments of the Parties

(i) China

7.245 China asserts that, in the investigation which led to the definitive anti-dumping measure at issue, there was great uncertainty concerning the precise scope of the "product under consideration" and whether fasteners produced by the Community industry were comparable to fasteners produced by the producer in the analogue country, India, and to those produced in China and exported to the EC.[521] China asserts that the Definitive Regulation defined the "product concerned", and it is this definition which is being challenged in this dispute.[522] Thus, in China's view, its claim is properly before the Panel.

7.246 China claims that the European Union acted inconsistently with Articles 2.1 and 2.6 of the AD Agreement by including in the scope of the product under consideration both standard and special fasteners as "like" products, despite readily apparent differences in characteristics and uses. In particular, China contends that, by concluding that fasteners produced and sold by the Community industry, fasteners produced and sold on the domestic market in India and fasteners produced in the PRC and sold to the Community were alike, the European Union violated Articles 2.1 and 2.6 of the AD Agreement.[523] In China's view, Articles 2.1 of the AD Agreement, in combination with Article 2.6, sets forth an obligation concerning the definition of the product concerned, such that the product concerned can only include products that are "like, in order to ensure that the dumping

[520] European Union, first written submission, para. 410. China did not respond to the European Union's argument in this respect.
[521] China, first written submission, para. 298.
[522] China, second written submission, para. 696.
[523] China, first written submission, para. 331.

determination is based on a comparison between products which are "like"".[524] In support of its position, China refers to the text of the provisions, as well as to Articles 6.10, 2.4, and 2.4.2 of the AD Agreement as relevant context, and to the object and purpose of the AD Agreement.[525] China notes that the product under consideration in the investigation included both standard and special fasteners, and that the "like product" for purposes of both the dumping and injury assessments also included both standard and special fasteners.[526]

7.247 China argues that fasteners produced in China for export to the European Union and those produced by the Community industry are not "like" due to differences in physical and technical characteristics, lack of interchangeability and different end-uses and prices.[527] China states that the Commission recognized that the Chinese producers exported to the European Union almost exclusively standard fasteners whereas the EU producers mainly produced special fasteners, and therefore only compared standard fasteners for purposes of its dumping and injury determinations.[528] China argues that the differences in terms of physical and technical characteristics, end-uses and prices between fasteners produced by the Chinese exporting producers for export to the European Union, fasteners produced by the Indian producer, and fasteners produced by EU producers, establish that they are not like.[529] Given this situation, the Commission, in China's view, acted inconsistently with Articles 2.1 and 2.6 of the AD Agreement by including special fasteners in the like product.

(ii) European Union

7.248 The European Union contends that the product under consideration for purposes of the investigation at issue was defined in the Notice of Initiation, which, since it was not identified in China's request for establishment, is not a measure within the Panel's terms of reference, and therefore requests that China's claim be rejected.[530] With respect to the substance of China's claim, the European Union distinguishes the determination of the "product concerned" and the determination of the "like product". With regard to the former, the European Union argues that Articles 2.1 and 2.6 of the AD Agreement are definitional provisions which cannot be the basis of a claim of inconsistency with the AD Agreement.[531] Moreover, the European Union argues that Article 2.1 does not contain any obligation regarding the selection of the product concerned, and that Article 2.6 of the AD Agreement is not relevant to China's claim regarding the product concerned.[532] In the European Union' view, the product concerned can contain multiple models.[533]

7.249 With regard to the determination of the like product, the European Union asserts that this claim is not within the Panel's terms of reference because China's panel request only refers to the selection of the product concerned, on the assumption that the like product standard applies.[534] In any event, the European Union argues that, if the Panel concludes that this claim is within its terms of reference, the like product definition in the investigation at issue was that "fasteners (standard and special) [were] like fasteners (standard and special)"[535], which definition the European Union asserts

[524] China, second written submission, para. 707.
[525] China, second written submission, paras. 711-725.
[526] China, first written submission, paras. 303, 326.
[527] China, first written submission, para. 340.
[528] China, first written submission, para. 327. China sets out what it considers the relevant facts in this regard in paragraphs 341-354 of its first written submission.
[529] China, second written submission, para. 739.
[530] European Union, first written submission, paras. 424-425.
[531] European Union, first written submission, para. 423.
[532] European Union, first written submission, paras. 427, 432-439.
[533] European Union, first written submission, para. 431.
[534] European Union, first written submission, para. 440.
[535] European Union, first written submission, para. 441.

is consistent with Article 2.6 of the AD Agreement. The European Union adds that the Commission never made a determination to the effect that standard and special fasteners were alike.[536]

(b) Arguments of Third Parties

(i) Chile

7.250 Chile notes that, with respect to the comparison of the normal price with the export price, Article 2.1 and 2.6 of the AD Agreement preclude comparison of the prices of products that are not identical without first separating them into categories. In Chile's view, the AD Agreement requires the investigating authority to conduct a thorough analysis of the characteristics of the product in question before making the comparison between normal value and export price.[537]

(ii) Colombia

7.251 Colombia agrees with the European Union that Article 2.6 of the AD Agreement is a definitional provision, and in this sense, the determination of the product concerned is not the subject of any specific obligation under Articles 2.1 and 2.6 of the AD Agreement.[538] However, when considering likeness between the product concerned, which may be freely determined by the investigating authorities, and the like domestic product, the investigating authorities are bound by the provisions of those Articles.[539] Colombia considers that the specific assessment of likeness should be made on a case-by-case basis, in light of the facts of the investigation.[540] With respect to the present dispute, Colombia considers that the challenged measure is in conformity with the provisions of Articles 2.1 and 2.6 of the AD Agreement.[541]

(iii) Japan

7.252 Japan asks the Panel to "carefully examine" whether the European Union correctly defined the product under consideration[542], but notes that there is no requirement that the product under consideration include only "like" products, or that each individual item within the "like product" be like each individual item within the product under consideration.[543] Japan considers that the AD Agreement does not provide any guidance on how the product under consideration should be determined, and that Article 2.6 requires the identification of those products that are "like" the product under consideration.[544]

(iv) Norway

7.253 Norway considers that, contrary to the arguments of the European Union, Articles 2.1 and 2.6 of the AD Agreement contain obligations with respect to the determination of the product under consideration that must be fulfilled.[545] In Norway's view, all models of the product included in the scope of the "product under consideration" must be "like" each other, within the meaning of Article 2.6 of the AD Agreement.[546] Norway contends that, to the extent that the Panel finds that

[536] European Union, first written submission, para. 441.
[537] Chile, oral statement, para. 8.
[538] Colombia, written submission, para. 89.
[539] Colombia, written submission, para. 90.
[540] Colombia, written submission, para. 97.
[541] Colombia, written submission, para. 102.
[542] Japan, written submission, para. 44.
[543] Japan, oral statement, para. 14.
[544] Japan, oral statement, paras. 15-17.
[545] Norway, written submission, paras. 22-25.
[546] Norway, written submission, para. 32.

standard and special fasteners are not, in fact, "like" each other, this would entail a finding of violation of Articles 2.1 and 2.6 of the AD Agreement.[547]

(v) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

7.254 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), while not taking a position on the factual arguments of the parties, disagrees with the European Union's view that Articles 2.1 and 2.6 are not relevant to the selection of the product concerned.[548] In Chinese Taipei's view, whether the European Union correctly determined the products under consideration and the like products is an important issue in this dispute, as these determinations set the parameters of the investigation.[549] Chinese Taipei considers that the intertwined relationship between the determination of the scope of the product concerned and the like product definition, as provided for in Articles 2.1 and 2.6 of the AD Agreement, need further clarification by the Panel, as do the questions of how an investigating authority determines the scope of the product under consideration, and how much latitude the AD Agreement allows in this regard.[550]

(vi) United States

7.255 The United States disagrees with China's understanding of the definition of "like product" in anti-dumping investigations, but takes no position with respect to the merits of China's factual assertions.[551] In the United States' view, as a purely definitional provision, Article 2.6 itself imposes no obligation on WTO Members.[552] Moreover, the United States contends that the scope of any "product" may contain any number of items that vary in limited degree from one another, and that there is no requirement under the AD Agreement that each individual item within the like product be "like" individual items within the product under consideration.[553] What is required, in the United States' view, is a comparison of the overall scope of the product under consideration with the overall scope of the like product.[554] The United States asserts that this view is confirmed by the context of Article 2.6, including Articles 6.10 and 2.4 of the AD Agreement.[555]

(c) Evaluation by the Panel

7.256 In addressing China's claims with respect to product under consideration[556] and like product, we consider first the European Union's preliminary objections, before turning, if necessary, to the substance of those claims.

(i) Product under consideration

7.257 The European Union asserts that the definition of the product under consideration in the underlying investigation was set out in the Notice of Initiation, which is not a measure in dispute, and

[547] Norway, written submission, para. 39.
[548] Chinese Taipei, oral statement, para. 5.
[549] Chinese Taipei, oral statement, para. 8.
[550] Chinese Taipei, oral statement, paras. 11-12.
[551] United States, written submission, para. 23.
[552] United States, written submission, para. 25.
[553] United States, written submission, para. 26.
[554] United States, written submission, para. 26.
[555] United States, written submission, paras. 27-28.
[556] With respect to terminology, we note that the European Union uses the phrase "product concerned", and China, and some third parties, do so as well in some instances, where the AD Agreement refers to the "product under consideration". There is no dispute that these two phrases refer to the same concept in the context of anti-dumping investigations. Except when referring to the parties' and third parties' arguments, we prefer to use the terminology of the AD Agreement itself.

therefore that this claim is not within the Panel's jurisdiction.[557] We note that the European Union raised a similar argument with respect to the determination of standing, which we have rejected.[558] Moreover, we note that the definition of the product under consideration is clearly set forth in recital 40 of the Definitive Regulation, a measure which the European Union does not dispute is before the Panel.[559] As discussed in more detail above[560], we consider that in a dispute concerning a final anti-dumping measure, a complaining Member may raise any alleged violations of the WTO Agreements arising out of the initiation or conduct of, as well as the determinations made and actions taken in the course of, the underlying anti-dumping investigation. We therefore conclude that China's claim with respect to the product under consideration, which is undisputedly set out in the panel request, is properly before us.

7.258 Turning to the substance of China's claim with respect to product under consideration, we note that China does not argue that any provision of the AD Agreement sets out a definition of the product under consideration for purposes of an anti-dumping investigation. Rather, China has constructed an argument by combining Article 2.1 of the AD Agreement, which defines dumping for purposes of the AD Agreement, and Article 2.6, which defines the term "like product" for purposes of the AD Agreement. We are not persuaded by China's arguments that these two provisions, taken together, establish the obligations on an investigating authority with respect to the definition of the product under consideration asserted by China. We note that China makes no argument under Article 2.1 independent of its assertion that Article 2.1, in combination with Article 2.6, imposes obligations with respect to the definition of the product under consideration.[561]

7.259 To recall briefly the relevant facts, in this case, the Commission defined the "product concerned" in the investigation, as:

> "certain iron or steel fasteners, other than of stainless steel, *i.e.* wood screws (excluding coach screws), self-tapping screws, other screws and bolts with heads (whether or not with their nuts or washers, but excluding screws turned from bars, rods, profiles or wire, of solid section, of a shank thickness not exceeding 6 mm and excluding screws and bolts for fixing railway track construction material), and washers, originating in the People's Republic of China (all together hereinafter referred to as fasteners or product concerned).
>
> The product concerned is normally declared within CN codes 7318 12 90, 7318 14 91, 7318 14 99, 7318 15 59, 7318 15 69, 7318 15 81, 7318 15 89, ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00.
>
> Fasteners are used to mechanically join two or more elements in construction, engineering, etc., and are used in a wide variety of industrial sectors, as well as by consumers. Based on their basic physical and technical characteristics and end uses, all fasteners are considered to constitute a single product for the purpose of the proceeding. Within the same national or international standards, fasteners should comply with the same basic physical and technical characteristics including notably strength, tolerance, finishing and coating."[562]

[557] The European Union makes no objection based on the request for consultations or the panel request with respect to China's claim regarding product under consideration.
[558] See paragraphs 7.162 to 7.166 above.
[559] Definitive Regulation, Exhibit CHN-4, para. 40.
[560] See paragraphs 7.162 to 7.166 above.
[561] China, answer to Panel question 37.
[562] Definitive Regulation, Exhibit CHN-4, recitals 40-42.

The Commission went on to consider, and reject, arguments by the parties, concerning the scope of the product under consideration.[563]

7.260 In considering China's claims concerning product under consideration, we note first that there is no specific provision in the AD Agreement concerning the selection, description, or determination, of a product under consideration, and China does not argue otherwise. China asserts that the product under consideration can only include products that are "like" within the meaning of Article 2.6 of the AD Agreement, in order to ensure that the determination of dumping is based on a comparison of products which are "like" within the meaning of that provision. China argues that the facts in the investigation demonstrate that the product under consideration included both standard and special fasteners, which China contends are not "like" within the meaning of Article 2.6.

7.261 Thus, the question for us is whether China's premise, that Articles 2.1 and 2.6 in combination require that all individual items within the product under consideration be "like" each other, is correct. If not, then China's legal argument is incorrect, and we need not consider its contentions regarding the facts of this case.

7.262 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."

7.263 Beyond noting that Article 2.1 requires that the comparison that must be made to determine whether there is dumping must be carried out between the export price of a product and the price for the "like product ... in the exporting country"[564], China does not address this provision in its arguments. We agree that Article 2.1 refers to "a product" as being dumped, but cannot see that it establishes any specific obligation concerning the scope of that product. Nothing in the text of Article 2.1 provides any guidance as to what the parameters of "a product" with respect to which a determination of dumping is made should be. The mere fact that a dumping determination is ultimately made with respect to "a product" says nothing about the scope of that product. There is certainly nothing in the text of Article 2.1 that can be understood to require any consideration of "likeness" in the scope of the exported product investigated, contrary to China's argument.[565]

7.264 At the same time, other provisions of the AD Agreement, relevant as context to our understanding of Article 2.1, suggest that whatever the parameters of "a product" in Article 2.1 may be, the concept is not so limited as China argues. For instance, Article 6.10 provides for "limited examination" (that is, sampling) in cases where the number of "types of products involved" in an investigation is so large as to make it impracticable to determine an individual margin of dumping. If the meaning of "a product" in Article 2.1 were limited as China argues, there would be no possibility that more than one "type of product" would be at issue in any investigation, and thus no need for this aspect of Article 6.10.

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[563] Definitive Regulation, Exhibit CHN-4, recitals 43-47.

[564] In this case, the price for the like product in the exporting country was determined on the basis of the prices in the analogue country, India.

[565] We do not exclude the possibility that there may be a group of goods whose range is so broad as to preclude their being considered "a product", for instance, a product denominated "transportation equipment" that includes bicycles and jet aircraft. But we do reject the view that the concept of likeness as set out in the Article 2.6 definition of "like product" is the appropriate basis for evaluating whether any particular group of goods comprises such a broad range of goods as to preclude being treated as a product under consideration.

7.265 China agrees that the product under investigation can include different types or models of the product concerned, but argues that this does not mean that the investigating authorities may include in the scope of the product under consideration products that are so substantially different that the differences can not be compensated by making adjustments. We note that, as China correctly observes, Article 2.4 requires that an investigating authority make due allowance for differences which affect price comparability, including differences in physical characteristics. In our view, this clearly demonstrates that there may be differences within the product under consideration and like product. However, the fact that Article 2.4.2 of the AD Agreement requires a comparison of a weighted average normal value with a weighted average of prices of all comparable transactions does not, in our view, support the view that a product must necessarily include only "like" goods, such that all of them are comparable to each other.[566] Rather, and as recognized by the Appellate Body, under Article 2.4.2, an investigating authority may divide a product being investigated into groups or categories of comparable goods for purposes of comparison of normal value and export price – the practice of "multiple averaging".[567] This would be unnecessary if China's position with respect to the definition of product under consideration were correct. These considerations lead us to conclude that, while Article 2.1 establishes that a dumping determination is to be made for a single "product under consideration", there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article.

7.266 In essence, China's claim is grounded in Article 2.6, which provides:

> "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 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."

7.267 It is clear to us that the subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the term "like product" for purposes of the AD Agreement. The plain language of Article 2.6 calls for an assessment of "likeness" between some group of goods[568] and "the product under consideration" in order to identify a "like product". Thus, logically, the scope of the "product under consideration" referred to in Article 2.6 must already be known before the provisions of Article 2.6 regarding "likeness" come into play. That is, it must be known what the comparator is, before any comparison can be made to assess whether another product is "identical" to or, in the absence of an identical product, "has characteristics closely resembling those of", the imported "product under consideration". China's position would, in our view, require that any difference between categories of goods, and potentially even between individual goods, within a product under consideration would require that each such category or individual good be treated individually, as a separate product under consideration.[569] This would be problematic, as, given that a "domestic industry" for purposes of the AD Agreement is defined as producers of a like product, such a

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[566] See, China, second written submission, para. 716.

[567] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875, para. 81.

[568] In an anti-dumping investigation, the question of "like product" arises in two contexts – identifying domestically produced goods that are "like" the product under consideration, and identifying goods sold in the market of the investigated foreign producers/exporters that are "like" the product under consideration. The identification of "like product" in these two contexts is for different purposes in the investigation.

[569] Indeed, it appears that China considers that the European Union would have acted consistently with the AD Agreement had it conducted separate investigations of standard fasteners and special fasteners. However, even assuming such separate investigations would themselves be appropriate, this does not mean that such separate investigations are required by the AD Agreement.

fragmented product under consideration, and correspondingly fragmented like products, would result in the definition of, and determination of injury to, multiple, narrowly defined "industries" which may bear little if any resemblance to the economic realities of the production of those goods in the importing country.

7.268 We note that, on its face, Article 2.6 does not apply to the question of "determining" anything at all – it defines the term "like product" for purposes of the AD Agreement, by reference to the "product under consideration" in the anti-dumping investigation, whose scope, as we have noted, must logically have been defined previously.[570] While it seems self-evident to us that an investigating authority must, at the time it initiates an anti-dumping investigation, make a decision as to the scope of that investigation, and give notice of the "product involved"[571], we are not persuaded that either Article 2.1 or Article 2.6 of the AD Agreement establishes a requirement for making an elaborated determination in that regard.

7.269 Essentially, China's argument raises an issue of policy, suggesting that the absence of limits on the scope of the product under consideration might result in erroneous dumping determinations by investigating authorities. China argues that, if products that are not "like" are treated as the product under consideration in a single investigation, a dumping determination would not reflect a comparison between a product's export price and the domestic price of its like product. China gives, as an example, an investigation in which apples and tomatoes are treated as one product under investigation.[572] China argues that the investigating authority could compare the prices of the apples and find they are dumped, and could compare the prices of the tomatoes and find they are not dumped, but an anti-dumping duty would nonetheless be imposed on both apples and tomatoes, which would be an unfair result.

7.270 We are not persuaded by this example. In the first place, it is not clear that, in this hypothetical situation, a calculation of the dumping margin for the product under consideration consistent with Article 2 of the AD Agreement would support the imposition of an anti-dumping duty at all. Moreover, the scope of the product under consideration will have consequences throughout the investigation, and the broader that scope, the more serious those consequences might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the AD Agreement. This would clearly be of concern with respect to the determination of injury to the domestic industry producing the like product. Thus, it seems to us that the possibility of an erroneous determination of dumping, and the erroneous imposition of an anti-dumping duty, based on an overly broad product under consideration, is remote. That remote possibility is certainly not enough to persuade us to read obligations into the AD Agreement for which we can find no basis in the text of the Agreement.

7.271 Moreover, we consider it noteworthy that, while the AD Agreement specifically defines "like product" by requiring a comparison between domestically-produced or foreign goods and the imported goods that are the product under consideration, there is no specific definition of "product under consideration". In our view, the very fact that there is a definition of like product in the AD Agreement indicates that Members were well able to define terms carefully and precisely when they considered it necessary. Their failure to provide any definition of product under consideration, much less to require that the scope of that product be determined on the basis of the concept of

[570] In view of our conclusions, we do not consider it necessary to address the question, raised by the European Union in connection with China's like product claim, whether a definitional provision may give rise to a finding of violation.

[571] AD Agreement, Article 12.1.1(i).

[572] China, second written submission, para. 720.

likeness set out in Article 2.6, indicates that they did not intend to do so.[573] This implies to us that the Members intended to allow investigating authorities wide discretion to determine a product under consideration.[574] In our view, this supports the conclusion that it would be absurd to impose the definition of like product from Article 2.6 onto the undefined term product under consideration. We simply see no basis in the text of Articles 2.1 and 2.6 of the AD Agreement for the obligation China seeks to impose on investigating authorities with respect to product under consideration.

7.272 Thus, we conclude that, contrary to China's claim, Articles 2.1 and 2.6 of the AD Agreement do not establish an obligation on investigating authorities to ensure that the product under consideration include only "like" products. We therefore do not consider it necessary to address China's arguments concerning the facts. Whether standard and special fasteners are or are not "like" each other within the meaning of Article 2.6 is not a relevant question with respect to the product under consideration, in light of our decision on the interpretation of Articles 2.1 and 2.6.

7.273 Finally, we note that this very issue, and the arguments raised by China (as well as other arguments not raised by China here), have been previously addressed, and rejected, by other panels. China has for the most part neither addressed nor attempted to distinguish the views of those panels from the circumstances of this case. While we are not bound by the decisions of other panels, we nonetheless consider their decisions relevant and potentially helpful in our assessment of the arguments in this case.

7.274 The most elaborated discussion of the issue of product under consideration to date was in the report of the panel in *EC – Salmon (Norway)*. Virtually every argument made by China in this case was made by Norway in that case.[575] The panel in *EC – Salmon (Norway)* rejected each of Norway's arguments. It found it "clear that the subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all".[576] The panel stated that:

> "[t]he plain language of Article 2.6 calls for an assessment of "likeness" between some group of goods[228] and "the product under consideration" in order to identify a "like product". Thus, logically, the scope of the "product under consideration" referred to in Article 2.6 must already be known before the provisions of Article 2.6 come into play. That is, it must be known what the comparator is, before any assessment can be made as to whether another product is "identical" to or, in the absence of an identical product, "has characteristics closely resembling those of" the imported "product under consideration".
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> [228] In an anti-dumping investigation, the question of "like product" arises in two contexts – identifying domestically produced goods that are "like" the product under consideration, and identifying goods sold in the market of the investigated foreign producers/exporter that are "like" the product under consideration. The identification of "like product" in these two contexts is for different purposes in the investigation."[577]

The panel concluded:

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[573] We note that proposals to establish a definition of "product under investigation" have been made in the context of the negotiations on anti-dumping under the Doha Development Agenda. See, e.g., document TN/RL/W/143 at page 11, paragraph 17.

[574] As noted above, China has made no argument concerning Article 2.1 apart from its arguments with respect to Article 2.6.

[575] Indeed, in its third party submission in this dispute, Norway repeats many of those same arguments.

[576] Panel Report, *EC – Salmon* (*Norway*), para. 7.51.

[577] Panel Report, *EC – Salmon* (*Norway*), para. 7.51.

> "contrary to Norway's claim, Articles 2.1 and 2.6 of the AD Agreement do not establish an obligation on investigating authorities to ensure that where the product under consideration is made up of categories of products, all such categories of products must individually be "like" each other, thereby constituting a single "product"."[578]

7.275 In *US – Softwood Lumber V*, which involved facts and arguments very similar to those of *EC – Salmon (Norway)*, the panel also rejected arguments much like those of China in this case. The panel in *US – Softwood Lumber V* found that Article 2.6 addresses the definition of the product that is to be considered "like" the product under consideration. According to the panel, the starting point for the application of Article 2.6 was the product under consideration. However, the panel could find no guidance in the AD Agreement on the way in which the "product under consideration" itself should be determined. The panel stated that:

> "[w]hile there might be room for discussion as to whether [the approach advocated by Canada] might be an appropriate one from a policy perspective, whether to require such an approach is a matter for the Members to address through negotiations. It is not our role as a panel to create obligations which cannot clearly be found in the AD Agreement itself."[579]

This aspect of the panel's report was not appealed, and was thus adopted by the DSB without modification.

7.276 In another case, *Korea – Certain Paper*, the panel referred to the product under consideration in the context of its consideration of a claim concerning the determination of like product under Article 2.6. In that case, the Korean Trade Commission (KTC) had initiated an investigation concerning dumped imports of "plain paper copier" ("PPC") and "wood-free printing paper" ("WF") from Indonesia. Indonesia made no claims concerning the product under consideration, which included both categories of paper, but did dispute the KTC's decision that there was one domestic industry producing the two categories of paper, and the determination of injury to that industry, despite having made separate dumping determinations for the two categories of paper. Indonesia argued that PPC and WF are not like products, and that under Article 2.6, the KTC should have analyzed the effects of imports of PPC on producers of PPC, and the effects of imports of WF on producers of WF. Korea argued that under Article 2.6, like product is defined by reference to the imported product, and that Indonesia's reference to the differences among the products produced by the domestic industry had no legal basis under the Agreement.

7.277 In its analysis, the panel noted that the investigation initiated by the KTC concerned dumped imports of PPC and WF, that the KTC determined that Korean PPC and WF were identical to imported PPC and WF, and made a single injury determination. The panel considered that the issue before it was whether Article 2.6 of the AD Agreement required the KTC to determine that PPC and WF were like products before proceeding to carry out a single injury determination. The panel concluded that it did not, stating:

> "once the product under consideration is defined, the investigating authority has to make sure that the product it is using in its injury determination is like the product under consideration. As long as that determination is made consistently with the

[578] Panel Report, *EC – Salmon* (*Norway*), para. 7.68.
[579] Panel Report, *US – Softwood Lumber V*, para. 7.157.

> parameters set out in Article 2.6, the investigating authority' s like product definition will be WTO-consistent."[580]

The panel went on to state that it saw

> "no basis in Article 2.6 for the proposition that the like product definition also applies to the definition of "the product under consideration". We are aware of no provision in Article 2.6, or any other Article in the Agreement, that contains a definition of "the product under consideration" itself,"

citing in this regard *US - Softwood Lumber V*. We agree with the views expressed by these Panels, and consider that they support our conclusions on China's claim under Articles 2.1 and 2.6.

7.278 Based on the foregoing, and in the light of standard set out in Article 17.6(i) of the AD Agreement, we do not accept China's view that Articles 2.1 and 2.6 must be interpreted to require the European Union to have defined the product under consideration to include only products that are "like". As a consequence, we dismiss China's claim that the product under consideration identified by the European Union was inconsistent with the requirements of Articles 2.1 and 2.6 of the AD Agreement.

(ii) Like product

7.279 Turning first to the European Union's preliminary objection, we note that in its request for establishment in this dispute, China sets out the following claim:

> "China submits that [the Definitive Regulation] is inconsistent, at least, with the following provisions of the AD Agreement and of the GATT 1994
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> - Articles 2.1 and 2.6 of the AD Agreement by including in the scope of the product under consideration both standard and special fasteners as "like" products despite their readily apparent differences and uses."[581]

7.280 The European Union contends that this passage "unequivocally related to the selection of the product concerned (albeit on the erroneous assumption that the like product standard applies)" and goes on to assert that the request for establishment "contains no claim regarding the determination of the like product".[582] According to China, on the other hand, the quoted passage suffices to set forth a claim with respect to the definition of the like product in the underlying dispute. China considers that the fact, which China acknowledges, that "the panel Request does not refer specifically to the determination made by the EU concerning the "likeness" of fasteners produced by the Chinese exporting producers, fasteners produced by the Indian producer and fasteners produced by the Community producers" does not cause the claim to fall outside the panels' terms of reference. In the regard, China asserts that the EU knows the essence of the issue from the request for establishment, and has not demonstrated that the alleged procedural deficiency has prejudiced the European Union's ability to defend itself.[583]

7.281 Keeping in mind the principles concerning sufficiency of a panel request outlined above, we agree with the European Union. In our view, the passage on which China relies as providing "a brief

[580] Panel Report, *Korea – Certain Paper*, para. 7.219.
[581] Annex G-1, p. 3.
[582] European Union, first written submission, para. 440.
[583] China, second written submission, para. 732.

summary of the legal basis of the complaint sufficient to present the problem clearly"[584] makes clear that China is making a claim with respect to the selection of the product under consideration. While we agree that China raised the concept of "likeness" as an element of its claim with respect to the product under consideration, we consider that this alone is not sufficient to set out a claim with respect to the definition of the like product *per se*. It is only under the most generous reading imaginable that one can, focussing on the phrase ""like" products" as used in China's panel request even have an inkling that China might intend to raise a claim with respect to the definition of the like product in this dispute. We recall that Article 2.6 of the AD Agreement, which defines the term "like product", establishes how an investigating authority is to define like product when it refers to a product which is "identical" to the product under consideration, or, if there is no such product, another product which "has characteristics closely resembling those of the product under consideration". There is nothing in the passage cited above which suggest that China intended to present arguments with respect to alleged errors in the course of this comparison of products. In our view, if a claim cannot reasonably be discerned as allegedly set out in the request for establishment, it is not necessary to consider whether the defending party has been prejudiced in its ability to defend itself. Thus, we consider that the panel request in this case does not set forth a claim with respect to the definition of the like product in the underlying investigation.

7.282 In any event, even had we concluded that China did set out a claim with respect to the definition of the like product in its panel request, we would have found that claim without merit in this case. Our review of the Definitive Regulation leaves us in no doubt that the like product defined in the underlying investigation is co-extensive with the product under consideration. We agree with the views of the panel in *Korea – Certain Paper*, which concluded that

> "once the product under consideration is defined, the investigating authority has to make sure that the product it is using in its injury determination is like the product under consideration. As long as that determination is made consistently with the parameters set out in Article 2.6, the investigating authority' s like product definition will be WTO-consistent."[585]

7.283 China contends that, in this investigation the product under consideration and the like product do not include the same products.[586] We disagree. It is clear to us from the Definitive Regulation that the product under consideration and the like product both include standard and special fasteners, albeit not in the same proportion. Even China only argues that imports from China consist "**almost**" exclusively of standard fasteners, thus acknowledging that there are imports of special fasteners from China.[587] Given that fact, it is clear to us that the like product defined by the European Union is coextensive with the product under consideration. Thus, even if we considered that the question were within our terms of reference, we would conclude that China has failed to establish a violation of Article 2.6 of the AD Agreement with respect to the definition of like product in this case.

[584] As required by Article 6.2 of the DSU.
[585] Panel Report, *Korea – Certain Paper*, para. 7.219.
[586] Answer to Panel question 36, para. 125. China seeks on this basis to distinguish this case from the facts in *US – Softwood Lumber V*, where the panel reached the same conclusion.
[587] Answer to Panel question 36, para. 125.

6. Whether the European Union violated Article 2.4 of the AD Agreement in its Dumping Determination

(a) Arguments of the Parties

(i) China

7.284 China argues that the Commission violated Article 2.4 of the AD Agreement in its dumping determination for two reasons: first, because it did not make the comparison between the normal value and the export price on the basis of product categories based on "Product Control Numbers" ("PCNs") which the Commission itself had defined in requesting information; and second, because it failed to make adjustments for quality differences and for certain differences in physical characteristics which were included in the PCNs, but not reflected in the factors on which product categories for the comparison were ultimately based and which affected price comparability.[588]

7.285 China notes that in the exporters' questionnaire, the Commission requested information to be provided on the basis of product categories identified by unique PCNs. Chinese producers submitted information on this basis. The questionnaire sent to the Indian exporter also requested information on the basis of the same PCNs. In the General Disclosure Document, however, the Commission stated that normal value had been determined on the basis of product types, not PCNs. In comparing normal value and export price, the Commission took into consideration two factors, strength class and the distinction between special and standard fasteners, and compared the prices of the product types so defined. China argues that all the product characteristics reflected in the PCNs represent physical differences that affect price comparability within the meaning of Article 2.4, and which, therefore, had to be taken into account when making the comparison between normal value and export price in order to carry out a "fair comparison".[589] By basing its product categorization on other factors, however, the Commission disregarded these important physical differences and acted inconsistently with Article 2.4.[590]

7.286 China also contends that the Commission violated Article 2.4 by failing to make certain adjustments. In this regard, China maintains that the Commission should have considered whether the PCN characteristics that were not reflected in the product types actually compared nonetheless required adjustments.[591] Second, China asserts that the Commission should have made an adjustment for differences in the quality of Chinese fasteners and fasteners produced by the Indian producer. China asserts that the Commission made only one adjustment, for differences in quality control costs of the Chinese producers and the Indian producer. However, China maintains that there was a significant quality difference between the fasteners produced by the Chinese producers and those of the Indian producer and that the adjustment made for quality control did not fully address the quality difference.[592] According to China, by not making these adjustments, the Commission violated Article 2.4 of the AD Agreement.

(ii) European Union

7.287 The European Union contends that the Definitive Regulation explains the Commission's dumping determinations, and that China simply ignores these explanations in making its arguments. According to the European Union, by not linking its arguments to the relevant parts of the Definitive

[588] China, first written submission, para. 377; China, second written submission, para. 790.
[589] China, second written submission, para. 759.
[590] China, first written submission, para. 383.
[591] China, second written submission, para. 793.
[592] China, first written submission, para. 387.

Regulation, China fails to make a *prima facie* case of violation.[593] In the European Union's view, the fact that information was requested on the basis of particular PCNs does not mean that each element reflected in those PCNs affects price comparability.[594] The European Union disagrees with China's assertion that the fair comparison obligation in Article 2.4 required in this investigation that adjustments be made for each PCN element. According to the European Union, no such obligation can be found in the AD Agreement. The European Union contends that PCNs provide a tool for the collection of data for the investigating authorities' dumping determinations. Certain elements of PCNs are standard in each investigation while other elements are added depending on the particularities of a given investigation. This is what the Commission did in this investigation. It designed the PCNs to describe the product manufactured in China, in the European Union and in India, and asked that information be provided for the PCN categories, which would allow a mechanical comparison to take place.[595] However, the Indian producer did not provide its information on the basis of PCNs, and therefore the Commission decided to base its dumping determinations on comparisons of product classified according to two factors, namely the strength class and the distinction between special and standard fasteners. The European Union contends that some interested parties also argued that the product classification should be made on the basis of these two factors.[596] The European Union also maintains that no interested party made a substantiated request during the fasteners investigation for adjustments to be made with respect to other product characteristics reflected in the PCNs.

7.288 With respect to the alleged quality differences between Chinese fasteners and fasteners produced by the Indian producer, the European Union acknowledges that some interested parties presented this argument during the investigation.[597] However, the European Union contends that, as explained in recital 56 of the Definitive Regulation, the Commission found that the Chinese and Indian fasteners had the same basic physical and technical characteristics. The Commission made adjustments for differences in quality control costs between Indian and Chinese fasteners, as well as for other factors such as transport, insurance, packing handling costs etc.[598] The European Union argues that in the absence of substantiation that differences demonstrated to affect price comparability were ignored, this aspect of China's claim, therefore, should also be rejected.

(b) Arguments of Third Parties

(i) Chile

7.289 Chile considers that investigating authorities have to take into account all the characteristics of the product under consideration before engaging in the comparison between normal value and the export price. According to Chile, the AD Agreement does not allow the comparison of the prices of products that are not identical without breaking them into models.

(ii) Colombia

7.290 Colombia submits that Article 2.4 of the AD Agreement contains obligations for both the investigating authorities and foreign producers subject to anti-dumping investigations. According to Colombia, if the European Union demonstrates that the Commission duly evaluated all the differences

[593] European Union, first written submission, paras. 455-456.
[594] For example, the European Union argues that one element of the PCNs in this dispute, customs classification (CN Codes), is not a difference affecting price comparability, but simply a way of identifying a product. European Union, answer to Panel question 43(b).
[595] European Union, answer to Panel question 43.
[596] European Union, answer to Panel question 43(b).
[597] European Union, first written submission, para. 452.
[598] European Union, first written submission, paras. 452-453.

that the Chinese producers argued affected price comparability, the Panel should find that the European Union acted consistently with its obligations under Article 2.4.

(c) Evaluation by the Panel

7.291 China puts forward two main arguments in support of its claim regarding the Commission's dumping determinations. It argues that the Commission violated the fair comparison obligation set forth in Article 2.4 of the AD Agreement by: a) not basing the comparison between the normal value and the export price on full PCNs, and b) failing to make adjustments for quality differences and for differences in physical characteristics that affected price comparability. Below, we address these two arguments in turn.

Failure to Use Full PCNs

7.292 Turning first to the relevant facts, we note that the Commission, in the questionnaires sent to the producer in India and to the Chinese producers, requested that information on the investigated products be reported on the basis of categories defined by PCNs. The relevant part of the questionnaire sent to the Chinese producers reads:

> "B-3 Comparison of export and domestic products
>
> **1- Product control number**
>
> In order to ensure a fair comparison between prices of the imports from China and prices charged and costs incurred by the Community producers, the Commission intends to classify the product concerned into different categories. The product has been categorised according to a "Product Control Number" (PCN) (see table below).
>
> The PCN consists of 10 characters/digits.
>
> ....
>
> The product control number will be used to compare prices of imports from the country concerned and prices charged by Community producers and to compare sales data to the cost of production. In this respect, it is of great importance that you apply the product control numbers throughout your questionnaire response (including the computer files) in an absolutely correct and consistent manner."[599] (emphasis in original)

7.293 The following elements make up the PCNs identified by the Commission: type of fasteners (by CN code)[600]; strength/hardness; coating; presence of chrome on coating, diameter; and length/thickness. The questionnaire sent to the producer in India also requested that information be provided on the basis of the same PCNs. However, the Indian producer did not provide information categorized on the basis of the PCNs as requested. Thus, the Commission could not base its comparison between the normal value and the export price on full PCNs.[601] Therefore, it resorted to "product types" defined by two factors, strength class and the distinction between standard and special

[599] Exhibit CHN-51, pp. 11-13.

[600] This element identified fasteners by CN code but did not distinguish between standard and special fasteners. The latter distinction was made later in the proceeding, after the adversarial meeting, but was not a part of the PCNs. Definitive Regulation, Exhibit CHN-4, recital 51.

[601] European Union, answer to Panel question 43(b).

fasteners, in the price comparisons for the dumping determination.[602] In other words, in its price comparison, it did not categorize the price information on the basis of all the factors reflected in the PCNs.

7.294 China argues that the Commission violated its obligation under Article 2.4 of the AD Agreement by not taking into consideration all the characteristics reflected in the PCNs in the comparison between normal value and export price. China does not claim that the Commission violated Article 2.4 merely by not making the price comparison on the basis of full PCNs. Rather, it asserts that in the investigation at issue all the physical characteristics identified in the PCNs, namely the type of fasteners (by CN code), strength/hardness, coating, presence of chrome on coating, diameter and length and thickness, were differences that affected price comparability within the meaning of Article 2.4, and therefore they should all have been taken into consideration by the Commission.[603] According to China, the fact that the information was requested on the basis of PCNs means that the product characteristics reflected in the PCNs "were all relevant and all affected price comparability".[604] The European Union states that the Commission regularly requests interested parties to provide information on the basis of PCNs. According to the European Union, PCNs provide a tool for information gathering in an investigation, but the inclusion of a factor in a PCN does not establish that it affects price comparability, and therefore its relevance for the price comparison to be carried out by the investigating authorities.[605] In addition, the European Union argues that since not all factors in a PCN affect price comparability, there is no obligation to explain why certain PCN features did not lead to an adjustment at a later stage.[606] In the view of the European Union, therefore, the Commission was not required to base its price comparison on full PCNs.

7.295 Article 2.4 of the AD Agreement provides, in pertinent part:

> "2.4 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.[7] 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.
>
> ———————
>
> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision. "

[602] Definitive Regulation, Exhibit CHN-4, recital 102; Letter from the Commission, Exhibit CHN-31, p. 2.
[603] China, second written submission, para. 759.
[604] China, second written submission, para. 766.
[605] European Union, first written submission, paras. 465-466; European Union, answer to Panel question 43(b).
[606] European Union, answer to Panel question 43(b).

7.296 We note that Article 2.4 of the AD Agreement requires that a fair comparison be carried out between the normal value and the export price, and that 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. The requirement for a "fair comparison" is aimed at making sure that the authorities compare the prices of products that are in fact comparable. Normal value and export price may reflect differences, and thus may not be comparable. Article 2.4 stipulates that the investigating authorities shall make "due allowance" for such differences that affect price comparability. Differences that affect price comparability may exist for various reasons, some of which are specifically cited in Article 2.4, *i.e.*, conditions and terms of sale, taxation, levels of trade quantities and physical characteristics. However, the list in Article 2.4 is not exhaustive, and the authorities must make due allowance for "any other differences which are also demonstrated to affect price comparability".[607]

7.297 There is no methodological guidance in Article 2.4 as to how due allowance for differences affecting price comparability is to be made. We understand that, in order to comply with the requirement of Article 2.4 to make due allowance for differences affecting price comparability between sales of the imported product and sales of the like product in the country of exports, most investigating authorities either make comparisons of transaction prices for groups of goods within the like product that share common characteristics[608], or by making an adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared. It is clear to us that investigating authorities may find the first method more practical in certain cases, since it may minimize, or even eliminate, the need to make adjustments for each difference that affect price comparability, which may be a difficult task.[609] However, the authorities are free to follow the second approach and make adjustments for each difference in physical characteristics that affects price comparability.

7.298 It seems clear to us that, under Article 2.4, it is the investigating authorities, not the foreign exporters, that must ensure a fair comparison between the normal value and the export price.[610] This does not, however, mean that the exporters have no obligation in this process. Although the obligation to make a fair comparison lies with the investigating authorities, it is for the exporters, who would be expected to have the necessary knowledge of the product in question, to make substantiated requests for adjustments in order to ensure such comparison.[611] If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment.[612] Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities "must take steps to achieve clarity as to the

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[607] Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

[608] In this regard, we note the reasoning of the panel in *US – Stainless Steel* (*Korea*) that the investigating authorities are not precluded by Article 2.4.2 of the AD Agreement from using the practice of "multiple averaging" when comparing normal value and export price on the basis of weighted averages. In "multiple averaging", the investigating authority groups comparable goods within the like product into categories or comparison groups, and calculates a weighted average normal value and export price for each category, which are then compared, and the results aggregated to determine the dumping margin for the product. According to the panel, "a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value". Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ("*US – Stainless Steel* (*Korea*)"), WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295, para. 6.111.

[609] For instance, we can well imagine the complexities that may arise in quantifying such differences as size, weight, raw materials, etc., once it is determined that a particular difference affects price comparability.

[610] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.

[611] 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. 7.158.

[612] Panel Report, *Korea – Certain Paper*, para. 7.147.

adjustment claimed and then determine **whether and to what extent that adjustment is merited**".[613] If no adjustment is requested, or if an adjustment is requested with respect to a difference that is not demonstrated to affect price comparability, or if the authority determines that an adjustment is not merited, no adjustment need be made. It follows that, in order to make a *prima facie* case of violation of Article 2.4 in this dispute, China has to demonstrate to the Panel that an adjustment should have been made with respect to (1) a difference (2) that was demonstrated to affect price comparability between the normal value and the export price, and that the Commission failed to make the adjustment.[614] With this background in mind, we now turn to China's argument.

7.299 We recall that China's claim concerns alleged differences in physical characteristics of Chinese fasteners and fasteners produced by the Indian producer. China argues that the Commission should have based its dumping determinations on full PCNs because, in China's view, all PCN factors represented a difference in the physical characteristics of the Chinese and Indian fasteners that required due allowance within the meaning of Article 2.4. The European Union disagrees, asserting that the fact that information was requested on the basis of PCNs does not necessarily mean that each element of those PCNs was relevant to the Commission's dumping determination.

7.300 China submits that all the factors reflected in the PCNs affected price comparability and should have been taken into consideration by the Commission:

> "[T]he main purpose of the PCNs is to identify comparable products and thereby to minimize the need for adjustments when making the comparison between export price and normal value as well as between the export prices and the prices of the like products in the importing country. To meet this objective, the PCNs must necessarily include those product characteristics which would justify an adjustment for differences in physical characteristics. It can, therefore, be expected that if the EU requires that domestic producers, importers and exporting producers submit all information requested in the questionnaire organized by PCN, they do so because they consider the distinction relevant for the comparisons which must be made. The differences identified through the PCNs can therefore be presumed to be relevant for comparison purposes."[615]

China contends that if the Commission asked the interested parties to submit information on the basis of PCNs it must be because the Commission considered each and every element of PCNs to represent a difference in physical characteristics which would necessarily affect price comparability.

7.301 We disagree. In our view, the fact that the Commission sought information on the basis of PCNs certainly suggests that the EU authorities considered, at least in the early stages of the investigative process, that these elements might affect price comparability, and that they therefore envisioned comparisons based on the PCNs in order to avoid possible problems of non-comparability. That is, it suggests that the Commission intended, at the outset, to follow the first method that we described above[616], whereby due allowance for differences affecting price comparability would be taken into consideration through comparisons based on PCNs, and therefore there would be no need to make individual adjustments for such differences. Since, however, the Indian producer did not submit its information on the basis of PCNs, the Commission was unable to make the comparison between the normal value and the export price on the basis of PCNs, and decided on an alternative basis for grouping the product into comparable categories.

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[613] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158 (emphasis added).
[614] Panel Report, *Korea – Certain Paper*, para. 7.138.
[615] China, answer to Panel question 41.
[616] See paragraph 7.297 below.

7.302 China asserts that each PCN characteristic constituted a difference in physical characteristics that affected price comparability, and that therefore, if the products were not grouped by PCNs, an adjustment had to be made for each characteristic reflected in the PCNs. In this regard, while it may be plausible that the PCN characteristics described in this case[617] indicate differences affecting price comparability, China has pointed to no evidence that was before the investigating authority that would support this conclusion. Moreover, it is clear that the Commission did not, in this case, reach such a conclusion, and thus, even if there were evidence to support it, it would be inappropriate for us, under the standard of review, to consider it for ourselves. We therefore consider that, as argued by the European Union, PCNs are a tool for gathering information, but there is no inherent reason to conclude, and no evidence in this dispute that would demonstrate, that every element of the PCN, either in general, or in this case, necessarily reflects a difference which affects price comparability for the product in question.

7.303 Moreover, when, as in this case, necessary information is not received in the format requested, that is, categorized according to PCNs, the investigating authority must nonetheless make a fair comparison of normal value and export price, including due allowance for differences demonstrated to affect price comparability. While information organized on the basis of PCNs may well facilitate the comparison process, by enabling what the European Union calls a "mechanical comparison"[618], the obligation to make a fair comparison under Article 2.4 does not vary depending on the form in which information is requested or received. Ultimately, the price comparison must be judged against the requirements of Article 2.4, and not on the basis of the information-gathering procedures of the investigating authority. We therefore reject China's argument that the Commission acted inconsistently with the obligation set forth under Article 2.4 of the Agreement by not taking into consideration all the PCN characteristics in making price comparisons in its dumping determination.

7.304 We note, however, that the fact that PCNs were not used in the price comparisons in this investigation does not absolve the Commission from its obligation under Article 2.4 to carry out a fair comparison between the normal value and the export price. In the absence of a comparison based on full PCNs, the Commission was required to make adjustments for differences demonstrated by the Chinese producers to affect price comparability. This takes us to the second argument raised by China, namely that the Commission failed to make adjustments for factors that affected price comparability.

Alleged Failure to Make Necessary Adjustments

7.305 China's second argument is that the Commission violated the obligation set forth in Article 2.4 of the AD Agreement by failing to make the necessary adjustments for differences that affected price comparability. In this regard, China raises two issues. First, China submits that the Commission erred by not considering whether adjustments needed to be made for elements of the PCNs which were not reflected in the "product types" on which it based its price comparisons. Second, China maintains that the Commission violated Article 2.4 by not making an adjustment for quality differences between Chinese fasteners and those of the Indian producer.

7.306 With respect to the first aspect of its argument, China contends:

> "The EU investigating authorities never examined, once they decided to exclude from the PCNs a number of physical characteristics initially used to categorize products, whether the excluded characteristics were to be considered as differences in physical characteristics affecting price comparability and *a fortiori* never determined whether

[617] These were, we recall, type of fasteners (by CN code); strength/hardness; coating; presence of chrome on coating, diameter; and length/thickness.

[618] European Union, answer to Panel question 43.

> or not an adjustment was required. Thus, by failing to evaluate the differences in physical characteristics which the investigating authorities had themselves identified as being relevant for the purposes of making a fair comparison, these authorities failed to act in compliance with Article 2.4, third sentence of the AD Agreement."[619]

China thus maintains that once it decided to exclude from its dumping margin calculation certain elements of the PCNs and to make its price comparison on the product categories defined by strength class and the distinction between special and standard, the Commission was required under Article 2.4 to consider whether adjustments for those elements of the PCNs were nonetheless required. We note that this aspect of China's argument effectively repeats its first argument, namely that the Commission acted inconsistently with Article 2.4 by not basing its comparison on full PCNs, which we have rejected above.[620] Having concluded that the European Union was not required to carry out its comparison on the basis of the PCNs, partly because the PCN elements do not necessarily reflect differences affecting price comparability and there is no evidence to demonstrate that they do in this case, we consider that the argument that the Commission should have considered whether the elements excluded from the comparison nonetheless required adjustments does not amount to a *prima facie* case of violation of Article 2.4. In this regard, we note, as China acknowledges[621] that, in the course of the investigation at issue, none of the Chinese producers argued that there were factors which affected price comparability within the meaning of Article 2.4 other than those used by the Commission to categorize the product for comparison purposes, that is, strength class (which was an element of the PCNs) and the distinction between standard and special fasteners (which was not an element of the PCNs). Given the absence of such a request from the Chinese exporters, and any showing that there was a factor which affected price comparability which should have been apparent to the Commission such that ignoring it would lead to a biased determination, China's argument is unfounded, and we therefore reject it.

7.307 The second aspect of China's argument relates to adjustments for quality differences. China submits that the Commission violated Article 2.4 by not making an adjustment for quality differences between the Chinese fasteners and those of the Indian producer. In this regard, China asserts that, at recital 52 of the Definitive Regulation, the Commission acknowledged that there were quality differences between these two groups of products. Recital 52 states:

> "The submission from the PRC authorities mentioned in recital 48 enclosed an analysis report detailing alleged quality differences between fasteners of a given standard (DIN 933 is used as an example) manufactured in the Community and the PRC. This analysis took into account variations in geometry, hardness and chemical composition. It was claimed that, although both products tested conformed to the DIN standard, the Community-produced fasteners had a greater consistency, *i.e.* less variation with respect to all parameters analysed, than the PRC-produced fasteners. On this basis, the PRC authorities concluded that the Community-produced product, given its superior quality, could not be compared to the PRC product. In that respect, it should be noted that the purpose of DIN and other widely accepted standards is to ensure that products satisfy certain essential user requirements. Any residual variation must be within limits which do not substantially affect the fastener's quality and function. Therefore, a fastener which is marketed as a DIN 933 bolt must be essentially comparable to another fastener marketed under the same standard. Any

[619] China, second written submission, para. 793.
[620] See paragraphs 7.294 to 7.302 above.
[621] China generally recognizes that the Chinese producers did not request an adjustment for factors other than those included in the PCNs. China, answer to Panel question 38(b), para. 138. China, however, argues that one Chinese producer requested an adjustment for differences in quality and we consider this argument below in paragraph 7.310.

> perceived differences in quality, which may subsist from a user's point of view, can be dealt with through an adjustment for physical differences (see recital 103) but do not mean that the two products are not comparable." (emphasis added)

7.308 We note that recital 52 relates to the issue of like product, not dumping determinations. Moreover, it refers to an analysis of differences between fasteners produced in China, and fasteners produced in the European Union, provided in support of China's argument that Chinese and EU fasteners are not comparable, and therefore should not be considered "like". In response to the argument of the Chinese authorities that alleged quality differences between Chinese fasteners and fasteners produced by the EU producers made the products not "like", the Commission stated that fasteners that met, for instance, a particular DIN standard were comparable, and that any perceived quality differences can be dealt with through adjustments. In this regard, recital 52 refers to recital 103, which contains the Commission's explanations regarding the adjustment made with respect to the differences between the quality control costs of the Chinese producers and those of the Indian producer. It is clear, however, that this recital does not even address the question of, much less demonstrate that the Commission did in fact determine that there were differences in quality between Indian and Chinese fasteners.

7.309 China's argument seems to rest on the premise that the Commission stated in recital 52 that any perceived quality differences would be dealt with through adjustments, and that therefore such adjustments should have been made.[622] We note, however, that recital 52 says that any perceived differences in quality can be dealt with through adjustments. Moreover, as noted, it is clear that this recital does not even address any differences between Indian and Chinese fasteners. Thus, despite the reference to recital 103, where the Commission explains the adjustment made for differences in the cost of quality control between Indian and Chinese producers, we do not see what relevance recital 52 has to the issue raised by China, that the Commission should have made an adjustment for quality differences between Chinese and Indian fasteners. Indeed, the analysis referred to in recital 52, which is the evidence China relies on to support the assertion of quality differences, concerns fasteners produced in China and the European Union, and does not even mention fasteners produced in India. Nor does China argue that the Commission anywhere else concluded that there were differences in quality between Indian and Chinese fasteners which affected price comparability and therefore required adjustment.[623] Thus, we do not consider the statement in recital 52 to demonstrate that the Commission recognized any quality differences between Indian and Chinese fasteners, much less any such differences that affected price comparability and therefore required an adjustment.

7.310 China argues that one Chinese producer referred to the issue of quality differences between the Chinese fasteners and fasteners produced by the Indian producer and requested an adjustment, citing in this respect a letter dated 24 November 2008, on behalf of Ningbo Yonghong Fasteners Co. Ltd., setting out this company's comments on the Commission's final disclosure dated 3 November 2008. The letter reads, in relevant part:

> "As explained above and as earlier explained in the comments of 4 September 2008, Chinese producers, [LIMITED]*, mainly focus on low-end, low-quality fasteners whereas producers in India, and particularly the cooperating producer in India, mostly focus on high-end, high-quality fasteners for automotive and aero-space applications.
>
> When making the comparison between the Chinese export prices and the normal value as established on the basis of data from the cooperating Indian producer, the

[622] China, answer to Panel question 94.

[623] We recall that the Commission made an adjustment for differences in the costs of quality control between the Chinese fasteners and fasteners produced by the Indian producer. Definitive Regulation, Exhibit CHN-4, recital 103.

> Commission Services apparently (due to the lack of disclosure with respect to the normal value determination, it could not be checked whether such an adjustment has indeed been made) made an adjustment for the cost of quality control incurred by the cooperating Indian producer.
>
> However, even though the Commission Services hereby acknowledge that there are quality differences between the products sold by Chinese producers and the products produced by the cooperating Indian producer, no adjustment seems to have been made for differences in quality.
>
> Clearly, such differences in quality affect price and price comparability and an adjustment should therefore be made according to Article 2(10)(a) basic Regulation. In fact, it has been the Commission Services' practice to make such adjustments if there is a difference in the quality of the final products or in the quality of the raw materials...
>
> Since the Commission Services acknowledged in recital (94) that there are quality differences between the products exported by Chinese manufacturers and the products produced by the cooperating Indian producer, Yonghong hereby requests an adjustment for the differences in quality of the products concerned and a difference in quality of the raw materials, *i.e.* wire rod, pursuant to Article 2(10)(a) or 2(10)(k) of the basic Regulation."[624] (emphasis added)

7.311 We note that this letter shows that Yonghong requested that an adjustment be made with respect to quality differences between the Chinese fasteners and fasteners produced by the Indian producer. However, nothing in this letter indicates that any evidence was proffered to the Commission to demonstrate that this alleged difference in quality affected price comparability, a demonstration required under Article 2.4 of the AD Agreement.[625] Moreover, it is not clear to us that the Commission did, as recited in the letter, "acknowledge that there are quality differences between the products sold by Chinese producers and the products produced by the cooperating Indian producer" within the categories that were actually compared. Recital 94 of the Disclosure document, referred to in this regard, is the same as recital 103 of the Definitive Regulation, and as discussed above, concerns difference in the costs of quality control procedures of the Indian producer and Chinese cooperating exporting producers, for which an adjustment was made. Thus, this recital does not support the assertion that the Commission recognized the existence of quality differences between Chinese and Indian fasteners. China has made no other argument in this regard. Based on the foregoing, we reject China's claim that the Commission violated Article 2.4 of the AD Agreement by not making the necessary adjustments in its dumping determinations in the investigation at issue.

[624] Exhibit CHN-74, pp. 10-11 .

[625] We note, in this regard, that the record does not show that Yonghong submitted information to support its argument that there was a difference between the Chinese fasteners and fasteners produced by the Indian producer. This might have been because of the fact that the Chinese producers were not informed in a timely fashion of the basis on which the Commission made its price comparison. We recall that this is the main basis of China's claim regarding the procedural aspects of the Commission's dumping determination, which we address below, at paragraphs 7.470 to 7.508.

7. Whether the European Union violated Articles 3.1 and 3.2 of the AD Agreement in its price undercutting determination

(a) Arguments of the Parties

(i) China

7.312 China submits that the Commission violated the obligations set forth in Articles 3.1 and 3.2 of the AD Agreement in its price undercutting determination. China acknowledges that Article 3.2 does not prescribe a particular methodology with respect to price undercutting determinations. However, argues China, the general obligation set forth under Article 3.1 to base an injury determination on positive evidence and an objective examination applies to price undercutting determinations. According to China, "[t]he requirement of "objectivity" implies that the comparison must be made in an even-handed manner and that comparable products must be compared".[626] China maintains that the Commission failed to observe these principles for two reasons, and therefore requests the Panel to find that the Commission's price undercutting determination was inconsistent with Articles 3.1 and 3.2 of the Agreement.

7.313 First, China notes that the Commission requested information on a PCN basis both from the Chinese and the EU producers. However, the Commission did not base its price undercutting determination on a comparison of product categories defined by full PCNs. Instead, the Commission used simplified PCNs, eliminating the factor of diameter, and using only length in centimetres.[627] According to China, the use of such simplified PCNs resulted in a situation in which product types with 30 per cent price difference or more were grouped together.[628] This rendered the results of the Commission's price undercutting determinations unreliable.[629] Therefore, China submits that "by failing to take into account the full PCNs or to make adjustments, the European Union ignored certain important differences in physical characteristics which affect price comparability and consumer perception and made a finding of injury more likely, thereby violating Articles 3.1 and 3.2 of the AD Agreement".[630] According to China, the fact that the Commission requested information on the basis of PCNs "create[d] a presumption that *all* the PCN characteristics were relevant in order to ensure a comparison which is even-handed and objective".[631] In China's view, as a result of this presumption, the Commission should have at least examined these factors which were finally not taken into account for making the price undercutting analysis and concluded why they could not affect the price undercutting analysis.[632]

7.314 Second, China asserts that the error caused by use of simplified PCNs was "compounded by the methodology applied by the EC to differentiate between special and standard fasteners".[633] China notes that the Commission in its price undercutting determination made a distinction between standard and special fasteners. That is, the prices of standard Chinese fasteners were compared with the prices of standard fasteners produced by the EU industry, and the prices of special Chinese fasteners were compared with the prices of special fasteners produced by the EU industry. However, China submits

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[626] China, first written submission, para. 393.

[627] China, first written submission, para. 391. We note that in paragraph 841 of its second written submission, China argues that the Commission omitted not only length but also diameter. As we have noted in paragraph 7.326 below, the facts on the record show that with respect to its price undercutting determinations the Commission combined "length" and "diameter" into "size".

[628] China argues that this price gap could go up to 80 per cent. China, first written submission, para. 394.

[629] China, first written submission, para. 394.

[630] China, answer to Panel question 42, para. 147; China, second written submission, para. 849.

[631] China, second written submission, para. 845.

[632] China, second written submission, para. 834.

[633] China, first written submission, para. 395.

that "the EU investigating authorities classified all fasteners as "standard" fasteners provided they met the industry standards". Therefore, such "standard" fasteners also included fasteners which, in addition to complying with industry standards, met the specific additional requirements of their customers.[634] Asserting that, unlike standard fasteners exported by the Chinese producers, the majority of standard fasteners produced by the EU producers also met specific customer requirements, China submits that these fasteners were naturally more expensive than Chinese standard fasteners and that comparing these two resulted in artificially high price undercutting margins.[635] Further, China argues that the Commission failed to make an adjustment for quality differences between Chinese standard fasteners and standard fasteners produced by the EU industry. In this regard, China notes that recital 52 of the Definitive Regulation, which addresses the issue of "like product", states that any perceived difference between the quality of Chinese and EU fasteners would be dealt with through adjustments.[636] China also notes that recital 125, which explains the Commission's price undercutting determinations, states that a similar method was used as the one described in recitals 102 and 103 which explain the Commission's dumping determinations. Given that recital 103 states that an adjustment for differences in quality control costs was made in the context of dumping determinations, China argues that it does not appear from the file that such an adjustment was actually made.[637] Even if an adjustment for differences in the costs of quality control was made, China contends that this is different from that for quality differences mentioned in recital 52 of the Definitive regulation, and that such an adjustment would, therefore, not be sufficient to address the quality differences between Chinese and EU-made fasteners.[638] China concludes that not taking into consideration the quality differences between Chinese and EU-made fasteners, which China contends are obviously important from a consumer's point of view and which affect prices[639], rendered the Commission's price undercutting determinations non-objective.[640]

(ii) European Union

7.315 The European Union asserts that this claim is outside the Panel's terms of reference because it was not subject to consultations.[641] The European Union recognizes that China's Panel request identifies a claim with respect to the Commission's price undercutting determination, but argues that no such claim was raised in the request for consultations, and this matter was not discussed in the consultations between the parties. The European Union also submits that China's claim on price undercutting has different legal and factual bases compared with the other injury-related claims raised in China's request for consultations. Therefore, argues the European Union, this claim is outside the Panel's terms of reference.[642]

7.316 If the Panel finds this claim to be within its terms of reference, the European Union requests the Panel to reject the substantive arguments presented by China. The European Union argues that Article 3.2 of the AD Agreement does not impose a particular methodology with respect to price undercutting determinations. In this regard, the European Union finds support in previous panel reports, including, among others, *EC – Tube or Pipe Fittings*, where the panel reasoned that Article 3.2 does not require that a price undercutting analysis in the injury context include adjustments in the same way that Article 2.4 does for price comparisons in dumping margin calculations.[643] Therefore, submits the European Union, the Commission cannot be said to have violated Articles 3.2

[634] China, second written submission, para. 850.
[635] China, second written submission, para. 850.
[636] China, second written submission, para. 854.
[637] China, second written submission, para. 854.
[638] China, second written submission, para. 855.
[639] China, second written submission, para. 856.
[640] China, second written submission, para. 856.
[641] European Union, first written submission, para. 485.
[642] European Union, paras. 488-491.
[643] European Union, first written submission, para. 496.

and 3.1 of the AD Agreement by not basing its price undercutting determination on full PCNs.[644] The European Union notes that China's reasoning is based on the text of Article 2.4 and contends that, as the panel in *EC –- Tube or Pipe Fittings* found, the requirements of Article 2.4 cannot be transposed into Article 3.2.[645]

7.317 The European Union also maintains that in the fasteners investigation, the Commission compared like and essentially comparable products. According to the European Union,

> "the comparison was actually made on the basis of 5 out of the 6 PCN features. In addition, and at the express insistence of Chinese interested parties, a distinction was made between special and standard fasteners. In so doing the EU authorities ensured a comparison which was undoubtedly fair and unbiased since the authorities went well beyond what they were obliged to do under the [AD Agreement]."[646]

The European Union contends that merely because different product types included in the same product group had different prices does not make the Commission's price undercutting analysis non-objective.[647] Further, the European Union maintains that in response to interested parties' argument regarding the alleged quality differences between Chinese fasteners and the fasteners produced by the EU producers, a distinction was made between standard and special fasteners which eliminated the possibility of comparing inexpensive standard Chinese fasteners with generally more expensive special fasteners produced by the EU producers.[648] Thus China's arguments about quality differences not having been taken into consideration are unfounded.

(b) Evaluation by the Panel

(i) Terms of Reference of the Panel

7.318 The European Union contends that China's claim is outside the Panel's terms of reference because it was not subject to consultations. According to the European Union, this claim is not identified at all in China's request for consultations and was not discussed during consultations either. China maintains that this claim was identified in China's request for consultations and discussed during consultations. China argues that the list of the questions[649] that China sent to the European Union prior to consultations confirms this.

7.319 China's request for consultations contains two references to Article 3.2 of the AD Agreement. One is found in the chapeau of paragraph 2. This paragraph reads:

> "2. China considers that the EC's imposition of anti-dumping duties on imports of certain iron or steel fasteners originating in the People's Republic of China is inconsistent with the EC's obligations under Articles VI and X:3(a) of the GATT 1994; Articles 1, 2.1, 2.2. 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the AD Agreement as well as Part I, paragraph 15 of China's Protocol of Accession." (emphasis added)

China argues that this part of its request for consultations is where its price undercutting claim is identified. The remainder of paragraph 2 lists 14 aspects of China's complaint with respect to the Definitive Regulation. The second reference to Article 3.2 is in item (x) of that list, which states:

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[644] European Union, first written submission, para. 498.
[645] European Union, second written submission, para. 166.
[646] European Union, second written submission, para. 167.
[647] European Union, first written submission, para. 504.
[648] European Union, first written submission, paras. 501-502.
[649] Exhibit CHN-65.

> "The EC failed to exclude from the volume of imports, for injury determination purposes, non-dumped imports, thereby acting inconsistently with Article 3.1 and 3.2 of the AD Agreement and Article VI:1 of the GATT 1994."

7.320 We note that, in the chapeau of paragraph 2, the request for consultations refers to the imposition of the anti-dumping duties in the steel fasteners investigation, therefore the specific measure at issue is properly identified. As to "the legal basis for the complaint", the second element that Article 4.4 of the DSU requires to be included in a request for consultations, the chapeau lists the various Articles of the AD Agreement with which China asserts the specific measure is inconsistent. The following fourteen sub-paragraphs list aspects of China's complaint with respect to the Definitive Regulation, but do not refer in so many words to the question of price undercutting. Thus, the threshold question for us is whether the reference to Article 3.2 of the AD Agreement in the chapeau of paragraph 2 of the request for consultations satisfies the requirement of Article 4.4 of the DSU with respect to China's complaint concerning the price undercutting analysis in the fasteners investigation. In our view, the resolution of this question depends in part on the nature of the obligation(s) set forth in the particular provision(s) cited as having been violated by the measure at issue, and in part on the specific terms of the request for consultations.

7.321 Article 3.2 of the AD Agreement provides:

> "3.2 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."

Thus, Article 3.2 addresses the details of two of the three main elements of an injury determination, namely the consideration of the volume of dumped imports and of the impact of the prices of such imports on the prices of the domestic industry producing the like product in the country of imports. With respect to volume, it provides that the authorities have to consider whether there has been an increase in the volume of dumped imports, either in absolute terms of relative to production or consumption in the importing country. With respect to the price analysis, Article 3.2 states that the investigating authorities have to consider whether there has been significant price undercutting by dumped imports, or whether the prices of the domestic industry have been significantly depressed or suppressed by the prices of dumped imports.[650]

7.322 Article 3.2 is a provision that contains multiple obligations for investigating authorities. While the Appellate Body has indicated that a mere listing of legal provisions alleged to be violated may not be sufficient to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in the context of a panel request[651], it is not clear to us that a similar approach should be taken with respect to a request for consultations. Unlike Article 6.2 of the DSU, which contains the requirement that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, Article 4.4 of the DSU requires only that a request

[650] Price depression is the situation where prices in the importing country decline, while price suppression is the situation where prices in the importing country either do not increase, or increase less than would otherwise be the case. Neither of these situations was at issue in the underlying investigation.

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

for consultations contain "an indication of the legal basis for the complaint". In our view, this is a lesser requirement than that of Article 6.2, and may well be satisfied in a particular case by listing the Articles allegedly violated. China's request for consultations clearly indicates that it seeks consultations with the European Union concerning alleged violations of the provisions of the AD Agreement set out in the chapeau of paragraph 2. While it is true that the following subparagraphs set out additional information as to the circumstances of the alleged violations, but not with respect to price undercutting, it is not clear to us that this is strictly necessary for purposes of Article 4.4.[652] In this case, we consider that the reference to Article 3.2 in the chapeau of paragraph 2 of the request for consultations is sufficient to give an "indication" that the legal basis of the complaint is a violation of some aspects of that provision. Moreover, we note that there is no dispute that the panel request clearly sets out a claim of violation with respect to the price undercutting analysis, and thus may be considered to concern the same dispute, and to have evolved from the matter set out in the request for consultations. On this basis, we conclude that China's request for consultations does contain a sufficient "indication of the legal basis", Article 3.2 of the AD Agreement, with respect to its complaint concerning the Commission's price undercutting analysis and that this claim is therefore within our terms of reference.

7.323 Turning to China's claim under Article 3.1 of the Agreement, we note that China's panel request, on page 4, cites Article 3.1, in addition to Article 3.2, with respect to the claim on price undercutting. In its submissions to the Panel, China invokes both Articles 3.1 and 3.2 in connection with this claim. Turning to whether the request for consultations indicates the legal basis for a complaint under Article 3.1 in relation to price undercutting, we note that the chapeau of paragraph 2 of the request for consultations cites Article 3.1. We recall that Article 3.1 sets forth the general obligations imposed on the investigating authorities with respect to injury determinations and sets out the three main components of an injury determination. Had China's request for consultations referred to Article 3.1 alone, it might have been difficult to conclude that the request contained a sufficient indication of the legal basis for a claim on price undercutting, which is specifically addressed in Article 3.2. However, the same chapeau sentence in the request for consultations refers to Article 3.2 of the AD Agreement. We consider that the alleged violation of Article 3.1 is dependent on a finding of violation of the obligations in one or more of other Articles of the AD Agreement referred to in the first sentence of paragraph 2, which contain more specific elaboration of the general requirement set out in Article 3.1. Since we have concluded that the request for consultations covers China's price undercutting claim, we also find that the alleged dependent violation of Article 3.1 is also within the scope of the request.[653]

(ii) Substantive Analysis

7.324 China's claim is based on two main arguments: a) that the Commission acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement by not basing its price undercutting determination on full PCNs; and b) that the method used to distinguish between standard and special fasteners did not result in an objective determination on price undercutting. Below, we address both arguments in turn.

7.325 With respect to China's first argument, we note that Article 3.2 of the AD Agreement stipulates, *inter alia*, that, in an injury determination, the investigating authorities have to consider whether there has been significant price undercutting by the dumped imports as compared with the prices of the like product in the importing country. Article 3.2 does not, however, prescribe a particular methodology for the consideration of price undercutting, nor does it require that a

[652] We do consider that a greater degree of particularity in a request for consultations might be desirable and would likely provide better focus for the consultations.

[653] Consequently, we need not go on to consider whether, had we not found the Article 3.2 complaint with respect to price undercutting within the scope of the request for consultations, we would nonetheless have found the Article 3.1 complaint, independently, within the scope of that request.

determination of price undercutting be made.[654] Thus the investigating authorities have a certain degree of discretion with respect to the methodology that they will follow in considering price undercutting and making any determination. This discretion is not, however, unlimited. Rather, the general obligation set forth in Article 3.1 of the AD Agreement to carry out an objective examination on the basis of positive evidence, sets the limits of the authorities' discretion in the context of considering price undercutting.[655] Therefore, in order to establish a *prima facie* case of violation, China has to establish that the Commission's price undercutting analysis did not constitute an objective examination based on positive evidence as required under Article 3.1 of the AD Agreement. In this regard, we note the Appellate Body's statement, 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 favouring the interests of any interested party, or group of interested parties, in the investigation".[656] We shall therefore consider whether China has adduced evidence showing that the Commission acted in a biased manner or favoured the interests of certain interested parties in its price undercutting determination in the investigation at issue.

7.326 The facts before us indicate that in the fasteners investigation the price information was submitted on a PCN basis by the Chinese and the EU producers. Originally, the PCNs defined by the Commission included six elements. In its price undercutting analysis, however, the Commission "simplified" the PCNs by replacing two separate elements, "diameter" and "length", with a single more general "size feature".[657] This resulted in a "modified" or "simplified" PCN with five characteristics, instead of six, and the pricing information was categorized according to the modified PCNs for purposes of the price undercutting comparisons.

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[654] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.278, where the panel noted that while the calculation of a dumping margin was determinative in a dumping determination, price undercutting was not determinative of injury, but was part of the overall assessment of injury to the domestic industry. The panel went on to observe that

> "[w]hile this certainly gives no basis or justification for an arbitrary or non-even-handed examination, particularly in light of the fact that the Agreement contains no specific conditions or criteria or methodology, it permits an investigating authority a degree of discretion in carrying out the price undercutting assessment."

Id. See also, 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. 7.73.

[655] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.292, where the panel observed, referring to the requirement in Article 3.1 to conduct an "objective examination" on the basis of "positive evidence", that the investigating authorities' examination must:

> "conform to the dictates of the basic principles of good faith and fundamental fairness. The investigating authority must therefore ensure an even-handed treatment of the information and data on the record of the investigation. However, in view of the stark contrast in the text, context, legal nature and rationale of the provisions in Article 2 of the *Anti-Dumping Agreement* relating to the calculation of the dumping margin and Article 3 relating to the injury analysis, we decline to transpose wholesale the more detailed methodological obligations of Article 2 concerning dumping into the provisions of Article 3 concerning injury analysis."

The panel also observed that relevant differences in prices might not be the same in the context of a price undercutting analysis and a dumping margin analysis. *Id*., para. 7.293.

[656] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[657] These simplified PCNs are shown in Exhibit CHN-55. The table in this exhibit contains the simplified PCNs in the first column and the corresponding original full PCNs in the second column. The European Union explained, in its answer to Panel question 43(b), that the last three digits in the original PCNs refer to "length", the second last three to "diameter" and that these two were replaced by "size" as reflected in the last two digits of the simplified PCNs. China has not contested the European Union's explanations in this regard.

7.327 In response to a question from the Panel, China stated that it "does not claim in the abstract that the Commission is required to necessarily and always examine these issues on the basis of the PCNs".[658] It contends, however, that the purpose of requesting information on a PCN basis was to make sure that the same product types would be compared and therefore the need to make adjustments would be minimized. Therefore, submits China, "the PCNs must necessarily include those product characteristics which would justify an adjustment for differences in physical characteristics".[659] We note that this argument is essentially the same argument made by China regarding the non-use of full PCNs in the context of the Commission's dumping determinations. Here, China contends that since the Commission asked the interested parties to submit information on a PCN basis, the price undercutting determination should have been based on full PCNs. That is, in China's view, the Commission in its price undercutting determination either should have taken into account the full PCNs or made adjustments for differences that affected price comparability.[660] The European Union, however, argues that the fact that information was requested on a PCN basis does not mean that all the product characteristics reflected in the PCNs were relevant to the price undercutting analysis. It also maintains that there is nothing inherently biased for or against foreign producers in the use of PCNs in making the price comparisons. According to the European Union, unlike Article 2.4, Article 3.2 does not even require that adjustments be made in the context of price undercutting analysis.[661]

7.328 It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to "consider" whether there has been significant price undercutting. In our view, price undercutting may be demonstrated by comparing the prices of the like product of the domestic industry with the prices of the dumped imports, as the European Union did in this case. However, there is no equivalent requirement under Article 3.2 to that of Article 2.4 of the AD Agreement with respect to "due allowance" for differences affecting price comparability. In our view, while it is clear that the general requirements of objective examination and positive evidence of Article 3.1 limit an investigating authority's discretion in the conduct of a price undercutting analysis, this does not mean that the requirements of Article 2.4 with respect to due allowance for differences affecting price comparability are applicable.[662] Thus, for instance, adjustments in the context of price undercutting analysis may be a useful means of ensuring that the requirements of objective examination of positive evidence in Article 3.1 are satisfied, as might the use of carefully defined product categories for the collection of price information. In this case, the Commission had requested price information on the basis of PCNs consisting of six elements, and then when it undertook the price undercutting comparisons, it "simplified" the PCN by referring to "size" rather than "length" and "diameter". In the first place, it is not at all clear to us, and China has not made any argument in this respect, that the feature of size is not an appropriate proxy for the two separate features of length and diameter. Thus, we do not consider that, by simplifying the PCNs on the basis of which the price undercutting analysis was conducted, the European Union acted inconsistently with the obligation to undertake an objective examination on the basis of positive evidence, as required by Article 3.1 of the AD Agreement. More importantly, however, given that there is no obligation to make due allowance for the purposes of price undercutting analysis even with respect to differences for which due allowance must be made under Article 2.4 when making dumping comparisons, the mere fact that the Commission did not do so does not, in our view, establish a violation of Articles 3.1 and 3.2 of the AD Agreement.

7.329 In any event, we recall that we rejected China's claim that the failure to use full PCNs, or make adjustments for those elements of the PCNs which were not reflected in the product types

[658] China, answer to Panel question 41.
[659] China, answer to Panel question 41.
[660] China, first written submission, para. 396; China, answer to Panel question 41.
[661] European Union, second written submission, para. 166.
[662] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.292.

actually compared in the dumping determination, was inconsistent with Article 2.4 of the AD Agreement. Given that conclusion, we see no basis for any different conclusion with respect to China's claim concerning price undercutting, where there is even less guidance on methodology.

7.330 China's second argument is that the method used by the Commission to distinguish standard and special fasteners did not result in an objective determination on price undercutting. China acknowledges that the Commission made a distinction between standard and special fasteners, and that in its price undercutting determination it compared the prices of standard Chinese fasteners with those of the standard EU fasteners.[663] It argues, however, that, as defined in recital 54 of the Definitive Regulation, "the "standard" fasteners produced by the Community producers included not only standard fasteners which merely comply with industry standards but also fasteners which, in addition to complying with industry standards, meet the specific additional requirements of their customers."[664] China describes standard fasteners that only meet the industry requirements as "basic standard fasteners" and those that also meet customer requirements as "standard-plus fasteners".[665] According to China, "the EU investigating authorities should have made a comparison between Chinese-made "basic standard fasteners" and EU-made "basic standard fasteners" and another comparison between Chinese-made "standard-plus fasteners" and EU-made "standard-plus fasteners"".[666]

7.331 The European Union disagrees with China's description and argues that "[a] standard fastener simply meets a norm, which is specified by the producer, if produced for stock, or by the customer, if produced for order".[667] The European Union also maintains that fasteners that conform to the industry requirements but additionally also meet specific customer requirements would be treated as special fasteners irrespective of country of origin. The European Union adds that a customer can "order a "standard" fastener by simply specifying the norm, the strength, the thickness and the diameter".[668]

7.332 In support of its argument that the Commission treated as "standard" fasteners what it calls "standard-plus" fasteners, *i.e.*, those which, in addition to meeting the relevant industry specifications, also met certain customer requirements, China refers to the following part of recital 54 of the Definitive Regulation:

> "While it is recognised that not all types of fasteners can be used for all applications, and that this is particularly the case for 'special' fasteners and high-end applications, it was found that, **within the same standard, all types of fasteners were found to be interchangeable for most of the other applications.**"[669] (emphasis added by China)

We note that this excerpt first underlines the fact that not all types of fasteners can be used for all applications, with specific reference to special fasteners. The part highlighted by China implies that fasteners that satisfy the same standards would generally all be suitable for the same needs. In our view, this does not support China's allegation that in the investigation at issue the Commission compared the prices of the so-called EU-made "standard-plus fasteners" produced with the prices of Chinese "basic standard fasteners". Indeed, it is not even clear to us what the "standard-plus" and "basic standard" categories posited by China consist of. Much less can we find any indication in the Definitive Regulation suggesting that the Commission accepted that these categories existed. Thus, we find that China has failed to make a *prima facie* showing that the Commission compared Chinese-

[663] China, second written submission, para. 851; China, answer to Panel question 93(a).
[664] China, second written submission, para. 850.
[665] China, answer to Panel question 93(a).
[666] China, answer to Panel question 93(a).
[667] European Union, comments of China's answer to Panel question 93(a).
[668] European Union, comments of China's answer to Panel question 93(a).
[669] China, second written submission, para. 850.

made "basic standard fasteners" and EU-made "standard-plus fasteners" (or vice versa), and therefore has failed to demonstrate in this respect that the comparisons made by the Commission resulted in a non-objective price undercutting determination.

7.333 Next, China submits that the Commission failed to take into consideration the quality differences between Chinese fasteners and fasteners produced by the EU producers. In this regard, China notes that in connection with the issue of like product, recital 52 of the Definitive Regulation mentions that any perceived difference between the quality of Chinese and EU fasteners would be dealt with through adjustments. China also notes that recital 125 mentions that in its price undercutting determinations the Commission followed an approach similar to that followed in the dumping determinations in undertaking comparisons by product type, which takes into consideration the characteristics of the product being compared. China then refers to recital 103 which states that an adjustment for differences in quality control costs was made in the context of the dumping margin calculations, and contends that it does not appear from the file that a similar adjustment was made in the context of price undercutting determinations. Even if such an adjustment was made, China contends that this would not be sufficient to address the quality differences between Chinese and EU-made fasteners.

7.334 With respect to the adjustment for differences between costs of quality control, we note that this adjustment was made in the context of the calculation of the dumping margin, and with respect to Indian produced and Chinese produced fasteners. Thus, it is in our view irrelevant to the question before us here, whether the Commission's price comparison of Chinese fasteners exported to the European Union and fasteners produced by the EU industry was consistent with Articles 3.1 and 3.2 of the AD Agreement. Similarly, China's argument with respect to whether or not an adjustment for quality control eliminates a difference in quality[670] is also irrelevant, not only because, as discussed above, "adjustments" in the sense of due allowance under Article 2.4 of the AD requirement are not required in the price undercutting context, but also because the adjustment in question was not related to the comparison of Chinese fasteners exported to the European Union and fasteners produced by the EU industry.

7.335 In addition, China contends that there were quality differences between the raw materials used to make Chinese and EU-made fasteners, and asserts that this difference should have been taken into consideration.[671] We note that, in recital 54 of the Definitive Regulation, the Commission made the following findings regarding alleged quality differences between fasteners made in China and in the European Union:

> "Moreover, notwithstanding the lower prices observed in the PRC, the European Association of the Iron and Steel Industry (Eurofer) confirmed that there is no major quality difference between the steel produced in the PRC and the steel produced in the Community when the steel corresponds to a standardised grade. As a result, it is concluded that raw material quality differences do not affect the comparability between fasteners exported from the PRC and those produced and sold in the Community." (emphasis added)

Thus, it is clear that the Commission concluded, in the context of its discussion of like product, that alleged differences between the quality of the raw materials used in the production of Chinese and EU-made fasteners did not affect the comparability of the two. China further maintains that the issue of quality differences was broader than the differences in raw materials, and included other elements such as coating etc.[672] China does not, however, substantiate this assertion. Thus, we consider that

[670] China, second written submission, para. 855.
[671] China, answer to Panel question 95.
[672] China, answer to Panel question 95.

China has failed to make out a *prima facie* case that there were differences in quality between Chinese and EU produced fasteners, and therefore has failed to demonstrate that the Commission did not undertake an objective examination of price undercutting in this respect.

7.336 Based on the foregoing, we reject China's claim that the Commission's price undercutting determination was inconsistent with Articles 3.1 and 3.2 of the AD Agreement.[673]

8. Whether the European Union violated Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement in its consideration of the volume of dumped imports

(a) Arguments of the Parties

(i) China

7.337 China argues that the Commission violated Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement by treating all imports from China as being dumped. With respect to the first aspect of its claim, China notes that two Chinese producers subject to individual examination in the investigation at issue were found not to be dumping by the investigating authority.[674] China relies on the text of Articles 3.1 and 3.2 of the AD Agreement, two panel reports and one Appellate Body report to support its assertion that the European Union was obliged to exclude imports from these two importers in examining the effects of "dumped imports" on the domestic industry.[675] China acknowledges that while there is no specific methodology to be followed in calculating the volume of "dumped imports", the prerequisite for the examination of dumped imports is that it involves only "dumped" imports as opposed to imports that are found not to be dumped.[676] Thus, China considers that the inclusion of non-dumped imports in the volume of "dumped imports" examined necessarily constitutes a violation of Articles 3.1 and 3.2 of the AD Agreement.[677] China considers the European Union's reliance on the fact that the volume of non-dumped imports in this case was small to be problematic, since it is not possible to know what percentage of non-dumped imports will be sufficiently small to still satisfy the requirements of Articles 3.1 and 3.2.[678]

7.338 With respect to the second aspect of its claim, China argues that taking into consideration the fact that these two individually-examined Chinese producers were found not to be dumping, the Commission could not legitimately treat all imports from Chinese producers for which an individual dumping margin was not calculated as dumped.[679] China recalls that, in view of the large number of exporting producers in China, the EU investigating authority used sampling, and a sample of nine Chinese companies was selected, of which five were granted individual treatment. In addition, three other companies not included in the sample received individual treatment, for two of which, no dumping was found.[680] China submits that the European Union violated Articles 3.1 and 3.2 of the AD Agreement by treating the imports of all Chinese producers who were not sampled or not subject to individual examination as being dumped.[681] China considers that, following the reasoning of previous panel and Appellate Body reports, the fact that individually examined exporters were found not to be dumping must be taken into account, regardless of the fact that those exporters were not

[673] We note that China has not made a claim with respect to the due process aspects of the Commission's price undercutting determination. China, answer to Panel question 40; China, second oral statement, para. 105.
[674] China, first written submission, para. 402.
[675] China, first written submission, paras. 403-408.
[676] China, second written submission, paras. 861, 865.
[677] China, second written submission, para. 864.
[678] China, second written submission, para. 866.
[679] China, first written submission, para. 410.
[680] China, first written submission, para. 409.
[681] China, first written submission, para. 410.

included in the sample.[682] Thus, China asserts that the European Union was not entitled to extrapolate from the sample, without taking into account the evidence that two producers for which individual dumping margins were calculated were found not to be dumping.[683]

7.339 China asserts that, by failing to properly determine the "dumped imports", the European Union also violated Articles 3.4 of the AD Agreement, which requires investigating authorities to examine the impact of "dumped imports" on the domestic industry, and Article 3.5, which requires investigating authorities to demonstrate that the "dumped imports" are causing injury to the domestic industry.

(ii) European Union

7.340 The European Union concedes that the Commission based the consideration of the volume of dumped imports under Article 3.2 on Eurostat data, which statistics did not filter out the import volumes from the two Chinese producers which were found not to be dumping.[684] However, the European Union asserts that imports from these two producers were very small, that these two producers were not included in the sample of Chinese producers, and that all of the sampled producers were found to be dumping at a significant margin.[685] According to the European Union, these facts distinguish this case from the previous panel reports relied on by China.[686] The European Union notes that Article 3 does not establish any particular methodology for the consideration of the volume of dumped imports, and asserts that the Panel should examine whether China has demonstrated that the analysis of whether there was a significant increase in imports was not satisfactory because it included the small volume of non-dumped imports.[687] In this respect, the European Union argues that it is obvious that, given the small volume of non-dumped imports in question, their inclusion in the volume of dumped imports could not affect the outcome, and thus could not affect the objectivity of the injury determination within the meaning of Article 3.1 of the AD Agreement.[688] Excluding imports in such small quantities would not have changed the outcome of the injury determination. The European Union underlines that its argument is not one of "harmless error". Rather it argues that substantively there was no violation of the obligation to conduct an objective examination because of the inclusion of non-dumped imports that accounted for a very small percentage of all imports from China.[689]

7.341 With respect to the second aspect of China's claim, the European Union disagrees with China's contention that the Commission was wrong to treat imports from all non-sampled Chinese producers as dumped in examining the volume of dumped imports. The European Union recalls that the investigating authority conducted its investigation of dumping on the basis of a sample of Chinese producers, found that all producers in the sample were dumping, and pursuant to Article 9.4 of the AD Agreement, calculated a margin of dumping for all non-sampled producers who were not individually examined.[690] The European Union maintains that it was entitled to consider all of these imports for which more than *de minimis* margins were established as dumped imports for the purposes of the volume and injury analysis.[691] The European Union contends that this conclusion is supported by the panel reports relied on by China.[692] According to the European Union, in a situation of

[682] China, second written submission, para. 880.
[683] China, second written submission, paras. 884, 887.
[684] European Union, first written submission, paras. 510-511.
[685] European Union, first written submission, paras. 513-515.
[686] European Union, first written submission, para. 516.
[687] European Union, first written submission, para. 517.
[688] European Union, first written submission, para. 523.
[689] European Union, first written submission, para. 532.
[690] European Union, first written submission, paras. 535-536.
[691] European Union, first written submission, para. 537.
[692] European Union, first written submission, paras. 541-547.

sampling, when not all exports are examined, the only way to make an objective determination about the volume of dumped imports from non-sampled producers is by extrapolation from the sample.[693]

7.342 Finally, the European Union notes that China's claims under Articles 3.4 and 3.5 of the AD Agreement are dependent on a finding of violation of Articles 3.1 and/or 3.2, and should be rejected, and that in any event, China has failed to set out a *prima facie* case of violation of those provisions.[694]

(b) Arguments of Third Parties

(i) Japan

7.343 Japan believes that the European Union violated Articles 3.1 and 3.2 of the AD Agreement to the extent it failed to exclude imports that were found not to have been dumped from the volume of "dumped imports". Japan notes that previous panel and Appellate Body reports have found that imports that were not found to have been dumped must be excluded from the injury analysis.[695] Therefore, for Japan, it follows that, to the extent that the European Union considered non-dumped imports as having been "dumped" for the injury and causation analyses, it violated Articles 3.1 and 3.2 of the AD Agreement in light of past WTO jurisprudence.[696]

7.344 Japan believes that the European Union did not violate Articles 3.1 and 3.2 of the AD Agreement by including in the volume of "dumped imports" all imports from non-sampled exporting producers that were not individually examined, given that the European Union found that all sampled exporting producers were engaged in dumping, and accordingly, its determination that all non-sampled exporting producers that were not individually examined were also engaged in dumping may be considered as based on "positive evidence" and an "objective examination" without additional inquiry.[697] Japan notes that there is no requirement in the AD Agreement for investigating authorities to follow a specific methodology when applying sampling, other than to conduct the investigation on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination",[698] and that investigating authorities have a right to apply sampling as long as they "satisfy the requirements of 'positive evidence' and an 'objective examination,' without having to investigate each producer or exporter individually".[699] In Japan's view, these requirements are not violated where the findings concerning the sample are extrapolated to all non-sampled producers that were not individually examined.[700] Moreover, Japan stresses that nothing in the AD Agreement requires investigating authorities to take into account information from outside the sample when extrapolating the findings of the sample to non-examined producers outside of the sample, and asserts

[693] European Union, second written submission, para. 181.
[694] European Union, first written submission, paras. 551, 553.
[695] Japan, written submission, para. 51, citing, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303; 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. 6.138; 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, paras. 111-112 & 115.
[696] Japan, written submission, para. 55.
[697] Japan, written submission, para. 56.
[698] Japan, written submission, para. 58. Appellate Body Report, *EC – Bed Linen* (*Article 21.5 – India*), paras. 113, 116 and 117.
[699] Japan, written submission, para. 58, citing, Appellate Body Report, *EC – Bed Linen* (*Article 21.5 – India*), para. 117.
[700] Japan, written submission, para. 59.

that such an obligation would vitiate the whole purpose of the sampling.[701] Indeed, Japan observes that the purpose of sampling is to make an assessment for non-examined companies based on findings relating to a representative, albeit limited, group of companies.[702]

(ii) Norway

7.345 Norway notes that Article 3.1 requires the investigating authority to examine objectively "the volume of the dumped imports", and Article 3.2 elaborates on this obligation, requiring examination of whether there has been a "significant increase in dumped imports", while Article 3.5 adds that the authority must demonstrate that "the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury". In Norway's view, these Articles show that it is only dumped imports that are to be included in the determination of injury.[703] Norway considers that panels and the Appellate Body have confirmed this interpretation.[704] Accordingly, the imports of the two Chinese producers that were found not to be dumping should have been treated as non-dumped, and should not have been included in the volume of dumped imports.[705]

7.346 Norway recalls that Article 3.1 requires an "objective examination" of "the volume of the dumped imports", based on "positive evidence".[706] Norway maintains that investigating authorities are precluded from conducting an investigation "in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[707] Norway considers that, by automatically considering that the volume of imported products from all non-sampled and non-examined producers are at dumped prices, it does become more likely that an investigating authority will find that the domestic industry is injured.[708] In Norway's view, by extending conclusions reached regarding the sampled producers to non-sampled producers, in this case, the EU assumed that imports from non-sampled producers were all dumped, despite having found that two exporting producers that were subject to individual examination (although not included in the original sample) were not in fact dumping. Norway asserts that whether it is established through sampling or through individual examination that there are producers that are not dumping is irrelevant. Norway argues that the Panel should reject the European Union's view that this case must be distinguished from the cases cited because all the producers selected for the original sample were found to be dumping.[709] Norway does not generally disagree that there may be cases were extrapolation from sampled producers is warranted, but argues that in this case, the individual examination of two additional companies not included in the sample implies that an automatic extrapolation from the original sample was not warranted.[710] Therefore, Norway considers that the European Union failed to make an "objective examination", on the basis of "positive evidence", of the

[701] Japan, written submission, para. 61. In this regard, Japan refers to Panel Report, *EC – Salmon (Norway)*, para. 7.634 and footnote 780.
[702] Japan, oral statement, para. 21.
[703] Norway, written submission, para. 50.
[704] Norway, written submission, para. 51, citing, Panel Report, *EC – Bed Linen*, para. 6.138; Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 115; Panel Report *Argentina – Poultry Anti-Dumping Duties*, para. 7.303; Panel Report, *EC – Salmon (Norway)*, paras. 7.627-7.628.
[705] Norway, written submission, para. 53.
[706] Norway, written submission, para. 55.
[707] Norway, written submission, para. 56, citing, Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[708] Norway, written submission, para. 57.
[709] Norway, written submission, para. 59, referring to European Union, first written submission, para. 545.
[710] Norway notes that it is not aware of any additional evidence in this respect put forward by the European Union. Norway, written submission, para. 60.

volume of dumped imports from non-examined exporting producers, in violation of Article 3.1 of the AD Agreement.[711]

(c) Evaluation by the Panel

7.347 Before examining China's claims concerning the volume of dumped imports, we recall certain relevant facts, which we understand to be undisputed.

7.348 For purposes of the determination of dumping, the EU investigating authority selected a sample of nine Chinese producers, representing 61 per cent of exports by cooperating companies of the product under investigation, or 39 per cent of total exports from China.[712] All nine responded to the dumping questionnaire in a timely fashion, but four were subsequently deemed to have provided false or misleading information and were thereafter treated as non-cooperating[713], leaving five companies in the sample. Five other companies, not selected for the sample, voluntarily submitted responses to the dumping questionnaire and requested individual examination under Articles 9(6) and 17(3) of the Basic AD Regulation.[714] Four of these requests were granted, but the Commission rejected arguments that the originally-selected sample should be enlarged to include these companies, concluding that the sample comprising the five remaining companies of those originally selected remained sufficiently representative, accounting for 54 per cent of total exports by cooperating companies, and the granting of individual treatment under Article 17(3) of the Basic AD Regulation was distinct and separate from the sampling exercise.[715] One of these four companies was found to have provided misleading information and was thereafter treated as non-cooperating.[716]

7.349 Thus, there remained five cooperating companies in the sample, and three companies granted individual examination under Article 17(3) of the Basic AD Regulation. Each of these requested and was granted IT under Article 9(5) of the Basic AD Regulation.[717] All five of the sampled companies were found to be dumping, with margins ranging from 63.1 per cent to 105.3 per cent.[718] Of the three companies separately granted individual examination, one was found to be dumping, with a margin of 26.5 per cent, while for the other two companies, CELO Suzhou Precision Fasteners Co., Ltd and Yantai Agrati Fasteners Co., Ltd, margins of zero, that is, no dumping, were calculated.[719]

7.350 The volume of imports from China was obtained from Eurostat data, and is reported in recital 121 of the Definitive Regulation. There is nothing in the Definitive Regulation that suggests that the volumes of imports from individual exporters were either specifically requested, or otherwise determined or examined. However, in response to the sampling forms and questionnaires sent to exporters examined individually (whether included in the sample, or granted individual treatment

[711] Norway, written submission, para. 60.
[712] Definitive Regulation, Exhibit CHN-4, recital 16.
[713] Definitive Regulation, Exhibit CHN-4, recital 62.
[714] This request is distinct from a request for individual treatment under Article 9(5) of the Basic AD Regulation. Under Articles 9(6) and 17(3) of the Basic AD Regulation, where the Commission uses sampling, an individual dumping margin will nonetheless be calculated for companies not included in the sample who submit the necessary information in a timely fashion, unless there are so many that to do so would be unduly burdensome and would prevent the completion of the investigation in a timely fashion. These provisions of the Basic AD Regulation reflect Article 6.10.2 of the AD Agreement, and apply in all investigations, regardless of whether the investigation involves a non-market economy.
[715] Definitive Regulation, Exhibit CHN-4, recitals 20-21.
[716] Definitive Regulation, Exhibit CHN-4, recital 78.
[717] Definitive Regulation, Exhibit CHN-4, recitals 83 and 85.
[718] Definitive Regulation, Exhibit CHN-4, recital 107.
[719] Definitive Regulation, Exhibit CHN-4, recital 109. The European Union did not impose a duty on imports from the two producers for which dumping margins of zero were calculated. Definitive Regulation, Exhibit CHN-4, Article 1, paragraph 2.

under Article 17(3) of the Basic AD Regulation) information concerning the volume of imports to the EU market attributable to them was provided by both CELO Suzhou Precision Fasteners Co., Ltd and Yantai Agrati Fasteners Co., Ltd.[720]

7.351 Turning to the issues before us, we note that China's claim with respect to the volume of dumped imports has two aspects: (1) whether, by relying on Eurostat data in considering the volume of dumped imports, without distinguishing or considering the volumes attributable to the two exporters for which dumping margins of zero were calculated in the investigation, the European Union acted inconsistently with the requirements of Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement; and (2), whether, by treating all imports from producers not individually examined, whether by being included in the sample or otherwise, as "dumped imports", the European Union violated Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement.

7.352 Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement provide:

> "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."
>
> "3.2 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."
>
> "3.4 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."
>
> "3.5 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,

[720] EU, answer to Panel question 97, para. 19, and Exhibit EU-27 (BCI).

> 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."

7.353 Turning to the first aspect of China's claim, we note that the question before us requires that we determine whether the references to "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement mean that the European Union's admitted inclusion of imports attributable to the two Chinese producers for which zero margins were calculated in the volume of imports considered under those provisions constitutes a violation of one or more of those provisions.

7.354 We consider that the text of the AD Agreement is perfectly clear in this regard, and that the consideration of "dumped imports" for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than *de minimis* is established in the course of the investigation.

7.355 We note that this is not the first dispute to raise this question, and previous panel and Appellate Body reports have been clear in concluding that the phrase "dumped imports" in Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement refers to imports from a producer or exporter for which a proper calculation results in a dumping margin greater than *de minimis*.[721] For instance, the panel in *EC – Bed Linen (Article 21.5 – India)* observed:

> "the question of which imports are to be considered dumped is readily answered – 'dumped imports' are all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* is calculated."[722]

The original panel in the same dispute observed that, should a proper calculation lead to the conclusion that a producer should be attributed a zero or *de minimis* margin, "the imports attributable to such a producer/exporter may not be considered as "dumped" for purposes of injury analysis".[723] We also note the statement of the Appellate Body on review of this panel report that "if a producer or exporter is found *not* to be dumping, all imports from that producer or exporter must be *excluded* from the volume of dumped imports".[724]

7.356 Our view in this regard is also supported by logic concerning the imposition of anti-dumping measures. It is undisputed that no anti-dumping duties can be imposed in the absence of a finding of dumping. Similarly, Article 5.8 of the AD Agreement provides that there shall be "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*", and

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[721] Panel Report, *EC – Salmon* (*Norway*); Panel Report, *Argentina – Poultry Anti-Dumping Duties*; Panel Report, *EC – Bed Linen*.

[722] 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. 6.133. The European Union notes that this issue was not before the panel in *EC – Bed Linen* (*Article 21.5 – India*), and that therefore the panel's statement in this regard is merely *obiter dictum*. European Union, first written submission, para. 526. However, our understanding of the phrase "dumped imports" as used in the relevant Articles of the AD Agreement is the same as was expressed by that panel, whose views thus lend support to our own conclusion, even though it did not make a legal conclusion in this regard.

[723] 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. 6.138. See also, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

[724] Appellate Body Report, *EC – Bed Linen* (*Article 21.5 – India*), para. 115 (emphasis in original).

no anti-dumping duties can be imposed on such imports. It would seem illogical to allow these imports to be treated as "dumped" for purposes of the injury analysis, when they cannot be treated as dumped for purposes of imposition of anti-dumping duties in the same case.

7.357 We note that in this case, the European Union does not suggest that it was entitled to consider the imports of the two Chinese producers for which dumping margins of zero were calculated as "dumped imports", and acknowledges that it did not exclude those imports from the volume of imports it considered in its examination of the volume of dumped imports and analysis of injury and causation. However, the European Union asserts that since the volume of imports attributable to these two producers was very small[725], their consideration as "dumped" imports did not undermine the objectivity of the injury determination within the meaning of Article 3.1 of the AD Agreement, as excluding them would not have changed the outcome of the injury determination. In this regard, we note that the European Union emphasises that its argument is not one of "harmless error".[726] Rather it argues that substantively there was no violation of the obligation to conduct an objective examination because of the inclusion of non-dumped imports that accounted for a very small percentage of all imports from China in the examination of the volume of dumped imports. The European Union asks the Panel to avoid approaching this matter in a "mechanistic" fashion, asserting that the inclusion of non-dumped imports will only constitute a violation of Articles 3.1 and 3.2 if the failure to exclude such imports "jeopardizes the objectivity of the examination".[727]

7.358 We do not agree. In our view, the question of whether the investigating authority undertook an objective examination is secondary in this context – first comes the question whether the investigating authority considered the relevant "positive evidence". In our view, data concerning imports that includes imports that the investigating authority itself has determined are not dumped cannot simply be substituted for evidence of the actual volume of imports that are properly treated as dumped. This is so regardless of the volume of non-dumped imports involved. Articles 3.1 and 3.2 are perfectly clear that the relevant consideration is of the volume of "dumped imports" without equivocation.[728]

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[725] Although the exact figure is confidential, we accept, and China does not dispute, that the volume of imports attributable to these two companies is, both in terms of absolute volumes, and as a proportion of total imports, justifiably considered "very small". The European Union notes that "99.9% of imports were dumped". European Union, first written submission, para. 531. China noted in its second written submission that the European Union's assertion concerning the volume of imports attributable to the two producers found not to be dumping was "not substantiated" but did not dispute that the volume was small. China, second written submission, para. 867.

[726] European Union, first written submission, para. 532.

[727] European Union, second written submission, para. 179.

[728] We do not exclude the possibility that an investigating authority may in some circumstances rely, in its analysis, on data that includes some imports that are not dumped as a proxy for the actual volume of dumped imports. However, in our view to do so consistently with the requirements of the AD Agreement would entail an explanation by the investigating authority at the time it makes its determination as to why it has done so, and why its consideration of that information is nonetheless reasonable. For instance, we can envision a situation where the volume of imports would be entitled to confidential treatment if the volume attributable to a single producer were excluded. In such a case, should the investigating authority wish to explain its analysis of the volume of imports in a public document, it might rely on public information concerning all imports, but explain that the volume of non-dumped imports included in that data is so small as to have no effect on its conclusions. However, in the absence of such an explanation, the investigating authority will have failed to explain how its consideration of "dumped imports" supports its injury determination. Moreover, *ex post* explanations, even where we might have found them sufficient had they been given at the time of the determination, are not in our view acceptable. A panel reviewing the determination of an investigating authority should base its finding on the authority's reasoning set out in the published determination. See, Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* ("*Japan – DRAMs* (*Korea*)"), WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703, para. 159; Appellate Body

7.359 The European Union does not contend that the investigating authority itself considered and determined, at the time it made the final determination, that the volume of non-dumped imports included in the consideration of "dumped imports" was so small that it could have no effect on the outcome, but rather, asks the Panel to reach that conclusion, relying in this respect on the Appellate Body report in *Japan – DRAMs (Korea)*.[729] In our view, the circumstances of this dispute do not justify our consideration of this question. In *Japan – DRAMs (Korea)*, the Appellate Body faulted the Panel for not considering whether, in the absence of an intermediate finding the Panel found unsupported, the determination ultimately reached by the investigating authority could nonetheless be sustained based on the totality of the other evidence. In doing so, the Appellate Body noted that the investigating authority could not have undertaken this consideration, because it could not "be expected to proceed on the basis that certain aspects of its reasoning would later be found to be faulty".[730] In this case, the European Union did not make an erroneous intermediate finding which may not have been determinative of the ultimate determination, but rather based its consideration of the volume of dumped imports and their effects on erroneous information concerning the volume of dumped imports. The European Union certainly knew or should have known that the information it was considering in examining the volume of dumped imports included imports that were not dumped.[731] The consideration of the volume of dumped imports is a necessary element of the determination of injury under Article 3. Thus, we do not agree that this case presents the same issue as *Japan – DRAMs (Korea)*. In our view, it is not appropriate for us to conclude that the investigating authority could have made an affirmative determination of injury in the absence of consideration of the volume of imports properly treated as dumped.[732] Such an analysis would effectively constitute a *de novo* review of the evidence, which we are not to undertake under the applicable standard of review.

7.360 We therefore conclude that the European Union erred in treating imports attributable to two companies which it found not to be dumping as dumped in the context of its injury determination. As a result, the European Union acted inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports. We do not consider it necessary to address China's consequential claims of violation of Articles 3.4 and 3.5, which are based on the same considerations as addressed above. A finding of violation of Articles 3.4 and 3.5 would add nothing to the resolution of this dispute, nor would it aid in any potential implementation, and therefore we conclude that the exercise of judicial economy in this respect is warranted.

Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ("*US – Countervailing Duty Investigation on DRAMS*"), WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131, paras. 186-188.

[729] European Union, first oral statement, para. 40; European Union, answer to Panel question 47, referring to Appellate Body Report, *Japan – DRAMs (Korea)*.

[730] Appellate Body Report, *Japan – DRAMs* (*Korea*), para. 133.

[731] Moreover, the European Union must be presumed to have been aware of previous WTO dispute settlement concerning this issue, particularly as it was a party or third party in some of those disputes.

[732] At most, we might consider whether, had the investigating authority considered the correct facts regarding the volume of dumping, it could have reached the same conclusion. While the small volume of the imports at issue may well suggest that their inclusion in the volume of dumped imports did not have a significant impact on the ultimate determination, were we to take this into consideration, we would essentially be concluding that the failure to consider only dumped imports in the analysis of injury was harmless. If this were not the conclusion, then we can see no basis on which a panel might decline to consider a similar error involving a much larger and potentially significant volume of imports. The European Union's position would imply that a reviewing panel should not find a violation in any case where the investigating authority based its analysis on erroneous facts, but rather, should in such cases consider whether the same conclusion could have been reached on the basis of the correct facts. In our view, such consideration by a reviewing panel would constitute an inappropriate, *de novo* consideration of the facts that were before the investigating authority.

7.361 The second aspect of China's claim with respect to the volume of dumped imports concerns the treatment of imports attributable to producers/exporters who were not included in the sample used for the dumping determination and not separately granted individual examination ("non-sampled/unexamined exporters") as "dumped imports" for purposes of the injury determination under Article 3. We recall that the EU investigating authority determined that all sampled producers were dumping, and calculated a dumping margin for non-sampled/unexamined producers on the basis of the dumping margins determined for the sampled producers. The question for us is whether, in these circumstances, the European Union acted consistently with Articles 3.1 and 3.2 of the AD Agreement in treating all imports from non-sampled/unexamined producers as dumped, even though two producers who were not included in the sample but were individually examined were found not to be dumping.[733, 734]

7.362 China agrees that an investigating authority may treat imports from non-sampled/unexamined exporters as dumped in its injury analysis if there is evidence to support extrapolating from the selected sampled producers to all imports, but asserts that the facts preclude such treatment in this investigation, because two exporters who were not part of the sample examined by the EU investigating authority were individually examined and found not to be dumping.[735] The European Union recalls that all sampled producers were found to be dumping, and asserts that this constitutes positive evidence from which it was entitled to extrapolate a conclusion regarding all imports from non-sampled/unexamined producers.[736]

7.363 In our view, it is clear that the conclusion of the investigating authority with respect to the sampled producers, that they were dumping, is not undermined by the fact that two producers not included in the sample were found not to be dumping upon being individually examined. The purpose of sampling foreign producers/exporters in an anti-dumping investigation is to allow an investigating authority to extrapolate from the sample to draw conclusions about dumping for all non-sampled/unexamined foreign producers/exporters on the basis of a detailed examination of fewer than all of them. Article 9.4 of the AD Agreement makes clear that, if the sample for the dumping determination is selected consistently with the AD Agreement, a matter China has not challenged in this dispute, then the investigating authority may treat the findings of dumping made with respect to that sample of companies as establishing the existence of dumping by all non-sampled/unexamined companies for purposes of the imposition of anti-dumping duties.

7.364 In our view, a similar result should follow with respect to the treatment of imports as dumped for purposes of the injury determination. That is, if the sample for the dumping determination is selected consistently with the AD Agreement, a matter China has not challenged in this dispute, then the investigating authority may treat the findings of dumping made with respect to that sample of companies as evidence that imports from the non-sampled/unexamined companies are dumped. To

[733] We emphasize that we do not mean to imply that the imports from the two producers not in the sample who were individually examined could be treated as dumped imports – that question is resolved separately in connection with the first aspect of China's claims above. This part of our evaluation refers to the treatment of imports attributable to producers not included in the sample who did not separately request and receive individual examination – the group we refer to as "non-sampled/unexamined".

[734] In this regard, we recall that, pursuant to Article 9.4 of the AD Agreement, the European Union was entitled to apply an anti-dumping duty to imports from non-sampled/unexamined producers, so long as the duty rate did not exceed the weighted average margin of dumping calculated for the sampled producers, excluding any zero or *de minimis* margins and margins based on facts available. China does not challenge either the calculation of a margin of dumping for non-sampled/unexamined producers on the basis of the margins calculated for the sampled producers, or the imposition of anti-dumping duties on imports from all non-sampled/unexamined producers, but only their inclusion as "dumped imports" for purposes of the injury analysis.

[735] China, first written submission, paras.416-417.

[736] European Union, first written submission, paras. 545-547.

do otherwise would limit the utility of Article 6.10 of the AD Agreement, as it would require the investigating authority to gather and consider information for non-sampled/unexamined producers in order to be able to make individual judgments as to whether the imports from non-sampled/unexamined producers are dumped, despite the decision to proceed on the basis of a sample.

7.365 In our view, an investigating authority is not required to consider facts concerning the individual operations of non-sampled/unexamined producers *per se* and decide the extent to which findings for the sampled producers may be relied upon in drawing conclusions concerning whether imports attributable to non-sampled/unexamined producers are dumped. To us, it seems inconsistent and illogical to accept that conclusions about dumping for sampled producers can be the basis for the imposition of anti-dumping duties on non-sampled/unexamined producers, but not to accept that those same conclusions about dumping may serve as evidence that imports attributable to non-sampled/unexamined producers are dumped in the same investigation.

7.366 The question of treatment of imports attributable to unexamined producers was addressed by the Appellate Body in the *EC – Bed-Linen (Article 21.5 – India)* implementation dispute. In that case, the European Communities, in implementing the original panel and Appellate Body reports, re-examined the dumping determinations for sampled producers, and found that three of the five producers in the sample were dumping, and two were not. In its injury analysis in the implementation context, the European Communities excluded the imports attributable to the two non-dumping producers from the volume of dumped imports, but included all imports attributable to producers which were not in the sample. The panel concluded that this was permissible.[737]

7.367 The Appellate Body reversed. The Appellate Body concluded that the fact that sampled producers accounting for 47 per cent of examined imports were found to be dumping was not a sufficient evidentiary basis to justify treating imports from unexamined producers as dumped for purposes of the injury determination. The Appellate Body noted that there was no specified methodology for determining the volume of dumped imports, but stated that any such methodology must be based on positive evidence and an objective examination of relevant evidence. The Appellate Body went on to state that evidence of dumping margins calculated for examined producers is relevant "positive evidence" for determining whether imports from non-examined producers may be treated as dumped.[738] The Appellate Body acknowledged that the calculation of a dumping margin under Article 2 was not required for unexamined producers, given that sampling was authorized in Article 6.10, but observed that there might be "other evidence" that could be relied upon in determining whether imports from unexamined producers were dumped imports.[739]

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[737] Panel Report, *EC-Bed-Linen* (*Article 21.5-India*), para. 6.144.

[738] Appellate Body Report, *EC-Bed-Linen* (*Article 21.5-India*), para. 130. Similarly, the panel in *EC – Salmon* (*Norway*) referred to "the relevance of the findings of dumping for the examined producers as evidence that imports from non-examined producers are dumped for purposes of the injury analysis". Panel Report, *EC – Salmon* (*Norway*), para. 7.630.

[739] In this context, the Appellate Body noted:

> "evidence such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports. In the circumstances of a specific investigation, such categories of evidence may qualify as affirmative, objective, and verifiable, and thus form part of the "positive evidence" that an investigating authority may properly take into account when determining, on the basis of an "objective examination", whether or not imports from non-examined producers are being dumped."

Appellate Body Report, *EC-Bed-Linen* (*Article 21.5-India*), para. 129 and fn. 162.

It may be noted that in some cases, under the Appellate Body's interpretation, imports which are subject to the imposition of anti-dumping duties pursuant to Article 9.4 may not be considered as "dumped imports" for purposes of the injury determination under Article 3. We are troubled by this reasoning, as it seems

7.368 In *EC-Bed-Linen (Article 21.5-India)*, the Appellate Body concluded that the determination that all imports attributable to non-examined producers were dumped was not based on an objective examination of the evidence of the sample, given that the evidence concerning the sample showed that 53 per cent of total imports from sampled producers were attributable to sampled producers who were not dumping.[740] The facts are different in this case – all sampled producers were found to be dumping. Therefore, in our view, that evidence supports the European Union's treatment of all imports from non-sampled/unexamined producers as dumped for purposes of the injury determination.

7.369 We recognize that in this case, there were two exporters not included in the sample who were individually examined separately, and found not to be dumping. However, this difference does not affect our conclusion. That two producers not included in the sample but individually examined were found not to be dumping does not in our view affect the relevance or probative value of the evidence drawn from the sample when all sampled producers were found to be dumping.[741] Thus, in our view, that two exporters not included in the sample were found not to be dumping does not preclude the investigating authority from treating all imports from non-sampled/unexamined producers as dumped in this case, based on the evidence of the sample itself.

7.370 We note that, like the panel in *EC – Salmon (Norway)*, we are troubled by the notion that an investigating authority may consider "different and additional evidence" to evaluate whether imports from non-sampled/unexamined producers are dumped for purposes of injury analysis, given that Article 2.1 of the AD Agreement makes clear that "a product is to be considered as being dumped" only if the export price is less than the normal value, and establishes detailed rules for that calculation. We too consider it unclear "how such "other evidence" can provide a legally sound basis for a conclusion that imports attributable to unexamined producers are dumped" and consider that "the fact that imports from unexamined producers are, under the AD Agreement, recognized as dumped for purposes of the imposition of anti-dumping duties, and that those duties may be collected in amounts limited by calculations made pursuant to Article 2 of the AD Agreement, does establish a legally sound basis for the treatment of those imports as dumped for purposes of the injury analysis".[742] However, we also agree with the panel in *EC – Salmon (Norway)* in seeing "no reason why, if all [sampled] producers are found to be dumping, an investigating authority should be required to consider "other evidence" that might indicate that imports from some unexamined producers are **not** dumped".[743] In this case, as all producers in the sample were found to be dumping, we consider that the Commission was entitled to, relying on that evidence, treat all imports from non-sampled/unexamined producers as dumped for purposes of its injury determination.

7.371 We therefore conclude that the European Union did not err in treating all imports from non-sampled/unexamined producers and exporters as dumped, in the context of its injury determination, and thus did not act inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports. We also dismiss China's consequential claim of violation of Articles 3.4 and 3.5, which are based on the same considerations we have rejected above, for the same reasons.

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to result in a logical inconsistency in anti-dumping practice, in that the same imports may be considered as dumped for purposes of imposition of duty and not dumped for purposes of assessment of injury. However, this inconsistency is mitigated if the finding of dumping based on the sample is considered to constitute positive evidence that imports from non-sampled/unexamined producers are dumped. We note that the panel in *EC – Salmon* (*Norway*), reached the same conclusion. Panel Report, *EC – Salmon* (*Norway*), para. 7.630.

[740] Appellate Body Report, *EC – Bed-Linen* (*Article 21.5-India*), para. 133.

[741] We note that the European Union did not impose a duty on imports from the two producers for which zero margins were calculated. Definitive Regulation, Exhibit CHN-4, Article 1, paragraph 2.

[742] Panel Report, *EC – Salmon* (*Norway*), para. 7.633.

[743] Panel Report, *EC – Salmon* (*Norway*), para. 7.634.

9. Whether the European Union violated Articles 3.1 and 3.4 of the AD Agreement in its consideration of the consequent impact of dumped imports

(a) Arguments of Parties

(i) China

7.372 China argues that the European Union violated Articles 3.1 and 3.4 of the AD Agreement, because the Commission failed to objectively examine the impact of the dumped imports on the domestic industry on the basis of positive evidence. China makes four allegations of error in this regard. First, China argues that the Commission did not examine all injury factors in relation to a domestic industry defined in a consistent manner.[744] In this regard, China notes that the Commission examined the factors of production, production capacity, capacity utilization, sales, market share, employment and productivity for the industry as defined by the Commission, that is the 46 EU producers of fasteners, while it examined the factors of stocks, profitability, cash flow, investments, return on investments, ability to raise capital, wages, magnitude of the dumping margins for the sampled EU producers.[745] China maintains that the Commission should have consistently used the same set of companies with respect to its consideration of all injury factors.[746] China points to differences in the conclusions regarding sales and market share between the Information Document, where the sample was considered, and the Definitive Regulation, where the EU industry was considered, in support of its assertion that the analysis was biased as a result of this lack of consistency.[747] China contends that information for the industry, and information for the sample, cannot be considered interchangeable bases of examining injury to the domestic industry.[748] China argues that the fact that the analysis of data for certain injury factors with respect to the sampled EU producers, or with respect to the EU industry, leads to different results constitutes evidence that the examination was not carried out objectively and was fundamentally biased. China asserts that the Commission selectively used data relating to the EU industry or to the sampled EU producers, and thereby favored the interests of the complainants and made a finding of injury more likely.[749]

7.373 Second, China alleges that the European Union did not objectively examine the profitability of the domestic industry. In this regard, China asserts that the reported data show a substantial improvement in the profitability of the industry, from 2.1 per cent in 2003 to 4.4 per cent during the investigation period.[750] China asserts that the statement that the level of profitability was "low", and the conclusion that the dumped imports had a negative impact on profitability are inconsistent with this evidence, thus demonstrating that the conclusions were not objective.[751] Moreover, China contends that since the increase in profitability "nearly reached the "reasonable" target profit margin of 5%" established by the Commission in considering the injury margin, the conclusions regarding profitability cannot be considered objective.[752]

7.374 Third, China asserts that the Commission's overall assessment of the impact of dumped imports on the EU industry was not objective. In this respect, China asserts that the relevant factors show that the industry was in a positive state.[753] According to China, the only injury factor that possibly showed a negative trend during the investigation period was market share, and China

[744] China, first written submission, para. 435.
[745] China, first written submission, paras. 436-437.
[746] China, first written submission, para. 438.
[747] China, first written submission, paras. 439-443.
[748] China, second written submission, para. 893.
[749] China, second written submission, para. 897.
[750] China, first written submission, paras. 446-447.
[751] China, first written submission, para. 450.
[752] China, second written submission, para. 915.
[753] China, first written submission, para. 451.

contends that a finding of material injury cannot be based on one negative factor.[754] China contends that having found that all factors showed a positive trend, the Commission should have concluded that the EU industry had not suffered material injury.[755] China asserts that the Commission did not explain whether and how positive trends for most injury factors were outweighed by any negative factor.[756] China also considers the Commission's explanation as to why trends for certain factors were "negative developments" to be unpersuasive.[757] China considers that an objective examination of the Article 3.4 factors could only have led to a conclusion that the EU industry had suffered no injury.[758]

7.375 Finally, China contends that the Commission improperly considered the displacement of EU-manufactured fasteners by Chinese imports from certain market segments in making its determination. China relies on the panel report in *EC – Pipe Fittings* to argue that injury cannot be found to result from a displacement of sales from one product segment to another product segment within the same like product.[759] Moreover, China asserts that the entire injury analysis is premised on the distinction between two market segments, and that the European Union's conclusions are based on the industry moving from production of standard fasteners to more production of special fasteners, allegedly because of pressure from dumped imports.[760] According to China, this demonstrates that the injury determination was not based on the like product the Commission had defined, which includes both standard and special fasteners.[761]

(ii) European Union

7.376 With regard to China's first argument, the European Union acknowledges that in the assessment of the consequent impact of dumped imports, the Commission used data pertaining to the sampled domestic producers except for seven factors (production, production capacity, capacity utilisation, sales, market share, employment and productivity).[762] For these, it used data pertaining to the entire domestic industry as defined in the investigation at issue. But, the European Union argues, China has failed to make a *prima facie* case that this led to a non-objective injury determination.[763] In the view of the European Union, information concerning the domestic industry as defined and the sample may both be considered, and for different factors, in making an injury determination, because the data for the sampled producers was reflective of the state of the entire domestic industry as defined.[764] Thus, all the information considered related to the same domestic industry.[765] The European Union considers that nothing in the Commission's analysis reflects a limit on the scope of the analysis to a part or segment of the domestic industry.[766] The European Union adds that, when sampling is used, it is the general practice of the Commission to base its injury analysis regarding "macroeconomic" factors on the entirety of the domestic industry and of "microeconomic" factors on the sampled producers, and maintains that nothing about this practice demonstrates a failure to conduct an objective examination.[767] The European Union contends that the alleged difference in the

[754] China, first written submission, paras. 453-454.
[755] China, second written submission, para. 921.
[756] China, second written submission, paras. 927-929.
[757] China, second written submission, paras. 930-934.
[758] China, first written submission, para. 456.
[759] China, first written submission, para. 460.
[760] China, second written submission, para. 948.
[761] China, second written submission, para. 948.
[762] European Union, first written submission, paras. 561-562.
[763] European Union, first written submission, para. 560.
[764] European Union, first written submission, para. 573.
[765] European Union, second written submission, para. 190.
[766] European Union, first written submission, para. 574.
[767] European Union, first written submission, para. 585. The European Union notes that this is explained in the Information Document, *id.*, footnote 483, referring to Exhibit CHN-17, p. 16.

Information Document and the Definitive Regulation relied upon by China to support its allegation of bias is based on an inaccurate presentation of the facts, and that no such difference exists.[768]

7.377 With regard to China's second argument, the European Union contends that the Commission did take into consideration the slight increase in profitability registered during the period considered, but reasonably found that profitability was low compared to the reasonable target profit margin of 5 per cent.[769] The European Union considers that China's argument asks the Panel to substitute its judgment for that of the investigating authority, which the Panel may not do.[770] Moreover, the European Union maintains that, viewed in context and in light of the explanations in the Definitive Regulation, the conclusion that profitability remained low, particularly in light of the significant increase in consumption, was reasonable.[771]

7.378 In response to China's third argument, the European Union asserts that the Definitive Regulation shows that while only market share showed significant declines, evaluation of a number of other factors, including production, productivity and capacity utilization and profitability also revealed a negative assessment.[772] The European Union further notes that the Definitive Regulation explains how even some positive developments, in context, do not reflect the significant increase in demand, and thus do not undermine the conclusions reached.[773] The European Union maintains that the AD Agreement does not require that there be negative trends with regard to every injury factor in order to determine that the domestic industry suffers injury.[774]

7.379 With respect to China's fourth argument, the European Union submits that the Commission did not find that injury was caused only to one segment of the market.[775] The European Union asserts that the Definitive Regulation examined trends in the different segments of the market, *i.e.*, the standard and special fastener segments, to explain how the EU industry tried to deal with the impact of competition from dumped imports, which was concentrated in the standard fastener segment.[776] The European Union maintains that the Commission's conclusion clearly related that assessment to the finding of injury to the industry as a whole.[777] The European Union urges the Panel to refrain from engaging in a *de novo* review of the Commission's determination.

(b) Third parties

(i) Chile

7.380 Chile considers the determination of injury to the domestic industry made by the European Union to be inconsistent with Article 3.1 and 3.4 of the AD Agreement. In Chile's view, the European Union considered that the displacement of domestic sales of one segment of the product ("special fasteners") was a result of the increase of imports from another segment of the product

[768] European Union, first written submission, paras. 582-588; European Union, second written submission, para. 195.
[769] European Union, first written submission, para. 594.
[770] European Union, first written submission, para. 592.
[771] European Union, first written submission, para. 598.
[772] European Union, first written submission, paras. 607-613.
[773] European Union, first written submission, paras. 617-618.
[774] European Union, second written submission, para. 204, citing, Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.213.
[775] European Union, first written submission, para. 627.
[776] European Union, second written submission, para. 207.
[777] European Union, second written submission, para. 207.

("standard fasteners"). Chile considers this analysis at variance with the basic principles that should guide any investigating authority when determining injury.[778]

(ii) India

7.381 India considers that the European Union's injury determination, based on the sample of domestic producers representing 17.5 per cent of domestic production, was not in accordance with Articles 4.1 and 3.1 of the AD Agreement. India notes that the European Union conducted the injury analysis on the basis of a sample of producers accounting for 17.5 per cent of total EU production of the like product, and that the "Community industry" defined by the European Union consisted of those domestic producers whose collective output constituted 27 per cent of domestic production, and that the European Union considers that it is in respect of this Community industry's total production that one should examine the representativeness of the sample. In other words, India asserts that the European Union argues that the sampled domestic producers need not necessarily represent a major proportion of total domestic production, but are representative of the Community industry.[779] In India's view, this argument raises an important issue whether the European Union's determination on injury was consistent with the requirement of "objective examination". India notes that Article 3.1 requires that a determination of injury be based on positive evidence and involve an objective examination of the effect of the dumped imports on the domestic producers, while Article 3.4 requires the examination of the impact of the dumped imports on the domestic industry concerned. According to India, Article 3.4 does not envisage sampling, and Article 4.1 does not mention sampling. India considers that, for an objective examination of injury under Article 3, the domestic industry has to be interpreted as referring to the domestic producers as a whole of the like products or those whose collective output of the product constitutes a major proportion of the total domestic production. Even if an investigating authority resorts to sampling of domestic producers, the obligation of Article 4.1 regarding the definition of domestic industry must prevail for injury examination under Article 3.[780]

(iii) Norway

7.382 Norway contends that the strict discipline on investigating authorities' injury determination, especially Article 3.1, requires the investigating authority to determine the impact of the dumped products on the domestic producers of the "like products".[781] Norway asserts that, once the European Union determined the product scope to be standard and special fasteners, this product scope remains constant throughout the investigation, and that Article 3.1 entails an obligation to look at the product as a whole, not certain segments or models within the product.[782] For Norway, it follows logically from this that injury cannot be found to result from a displacement of sales from one segment to another, within the same "like product".[783] Therefore, Norway asserts that, to the degree that the Panel finds that the European Union in its determination of material injury did find the displacement of sales from one product segment to another to be a factor, this would be contrary to Article 3.1 of the AD Agreement.[784]

(iv) United States

7.383 The United States maintains that, once an investigating authority defines which entities comprise the "domestic industry" that will form the basis for its injury analysis, an "objective examination" requires that the authority seek and, to the extent possible, use a consistent data set

[778] Chile, oral statement, para. 9.
[779] India, oral statement, para. 6.
[780] India, oral statement, para. 7.
[781] Norway, written submission, para. 41.
[782] Norway, written submission, para. 42.
[783] Norway, written submission, para. 43.
[784] Norway, written submission, para. 44.

reflecting the performance of those entities.[785] The United States recognizes that an investigating authority may be confronted with unreliable or incomplete data furnished by one or more domestic producers. In such situations, if the investigating authority does not receive complete and accurate information through supplementary requests, or resort to a reasonable estimation methodology that will yield results that are reflective of the state of the domestic industry, the investigating authority should, at the very least, provide an explanation as to why it must examine injury factors on the basis of different groupings of domestic producers. Without such an explanation, it could appear that the investigating authority did not conduct an objective examination based on positive evidence as required by Article 3.1, but instead selectively chose data to show injury where it may not exist.[786]

(c) Evaluation by the Panel

7.384 Before addressing the issues raised by China's claim and the parties' arguments, we recall briefly the facts regarding the determination of injury in the investigation in dispute.

7.385 The Commission, the EU investigating authority, addressed the impact of dumped imports in the section of the Definitive Regulation entitled "situation of the Community industry", at recitals 127-161, concluding in the latter recital that "the Community industry suffered material injury". There is no dispute that the Commission considered all the factors set out in Article 3.4 of the AD Agreement. Nor is there any dispute that, in its consideration of some factors, specifically production, production capacity, capacity utilization, sales, market share, average prices, employment, and productivity, the Commission referred to data for the entire domestic industry, as defined in the investigation, that is, the 46 EU fasteners producers.[787] In its consideration of the remaining factors, specifically stocks, profitability and cash flow, investment, return on investments, ability to raise capital, and wages, the Commission referred to data for the sampled EU fasteners producers, the 7 companies included in the sample.[788] The Definitive Regulation addresses the information on profitability at recitals 141-143, and the Commission's overall conclusions are set out at recitals 153-160, in particular recitals 155-157 concerning profitability, and recital 160, concerning "displacement ... in some important market segments".

7.386 We recall that Article 3.1 of the AD Agreement 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."

In turn, Article 3.4 provides:

> "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

[785] United States, written submission, para. 33, referring to Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.326-7.328.
[786] United States, written submission, para. 33.
[787] See Definitive Regulation, Exhibit CHN-4, recitals 127, and sections 5.1, 5.3, and 5.6.
[788] See Definitive Regulation, Exhibit CHN-4, recitals 127, and sections 5.2, 5.4, 5.5 and 5.7.

> exhaustive, nor can one or several of these factors necessarily give decisive guidance."

7.387 China has made four separate allegations of error with respect to the Commission's analysis and determination regarding the impact of dumped imports on the EU industry in support of its claim that the Commission failed to make an objective examination based on positive evidence:

(a) that the Commission did not base its determination on the same group of producers with respect to all injury factors that were analyzed;

(b) that the Commission did not conduct an objective assessment of the profitability of the EU industry, since it disregarded the improvements in profitability observed during the POI and treated the 4.4 per cent profitability rate as being low;

(c) that the Commission's overall assessment of the impact of dumped imports on the EU domestic industry was not objective, since the only injury factor that showed a negative trend was market share, and a reasonable investigating authority would not have concluded under those circumstances that the domestic injury was suffering injury;

(d) that the Commission made a determination that dumped imports displaced the EU products in certain market segments, and this differentiation between different market segments resulted in a determination inconsistent with Articles 3.1 and 3.4 of the AD Agreement.

We will address each of these arguments below in turn.

7.388 In addition to substantively responding to the claims, the European Union asserts, as a preliminary matter, that China has failed to make a *prima facie* case that the EU investigating authority failed to conduct an "objective examination" with respect to the first aspect of its claim of violation.[789] We note 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".[790] It seems to us that China's claim rests in part on its interpretation of the AD Agreement and the definition of domestic industry. Therefore, we consider it appropriate to consider the substantive arguments regarding this claim, and address whether China has presented a *prima facie* case as warranted in the course of that assessment.

7.389 The European Union acknowledges that the Commission based its assessment of certain injury factors on information for the sample and its assessment of the others on information for the entire EU industry. We understand China to argue that such an approach is *per se* inconsistent with Articles 3.1 and 3.4 of the AD Agreement.[791] In response to a question from the Panel, China asserted that:

> "According to China, it is necessary, once the set of producers is defined for the purposes of the injury analysis – either the domestic industry as defined by the IA (as the domestic producers as a whole or a number of them representing a major

[789] European Union, first written submission, para. 560.
[790] Appellate Body Report, *EC – Hormones*, para. 104.
[791] China also asserts that it demonstrates that this approach resulted in a determination inconsistent with the obligations of Articles 3.1 and 3.4 in this case, by showing that whether a specific injury factor is examined with respect to the industry as defined by the Commission or the sample, the outcome is substantially different, such as to influence the outcome of the injury analysis. China, answer to Panel question 50, para. 169. We address this contention further below.

> proportion of total domestic production) or a sample of producers of the domestic industry, as defined – the IA must use consistently that set of producers throughout its injury examination. … China submits that switching back and forth between the domestic industry as defined and a sample of such industry, is not an objective methodology since by selecting the set of producers being examined, one can influence the outcome of the injury analysis."[792]

The European Union has explained that its practice, where sampling is used, is to gather information on "microeconomic" factors from the sampled producers, and take that information into account in its analysis of injury, while information on "macroeconomic" factors is obtained from all producers comprising the domestic industry, and is taken into account in the analysis. We have elsewhere in this report rejected China's arguments with respect to the definition of the domestic industry and the selection of the sample in the underlying investigation.[793] In these circumstances, logic would suggest that the fact that some information is only collected and analysed for the sample, while other information is collected and analysed for all producers in the industry cannot *per se* render the examination not objective. The purpose of a sample is to allow the investigating authority to extrapolate from the sample to the whole. Moreover, the Commission's practice of collecting and examining information on such factors as stocks, profitability and cash flow, investment, return on investments, ability to raise capital, and wages only from the sampled producers is not unreasonable on its face, and China has not argued otherwise.

7.390 China argues that the investigating authority did not consider the injury factors "in relation to a Community industry defined in a consistent manner",[794] suggesting that it considers that the investigating authority changed its definition of the industry in the course of its examination, or relied on different definitions of the industry with respect to different factors.[795] In this regard, we consider China's argument to rest on a false premise. The Commission defined the domestic industry in this case as comprising 46 EU producers of fasteners, and subsequently selected a sample of those producers for purposes of the investigation. It is clear that the sample is not the domestic industry. In our view, if, as we have found in this case, the sample is properly constituted, information for the sample may be relied upon as representative of the entire domestic industry. Thus, reliance on information for the sample for some factors, and on information for the entire domestic industry for others, does not mean that the investigating authority did not consider the injury factors in relation of an industry defined in a consistent manner – there is only one industry defined in this case, the 46 EU producers of fasteners. The sample is not a different "definition" of the domestic industry. We agree with China to the extent that, once the domestic industry has been defined, it is clear that the examination, analysis, and determination of injury must be with respect to that industry. However, this does not limit the right of the investigating authority to rely on information for a properly constituted sample of the domestic industry in that examination, analysis and determination. As the panel observed in *Mexico – Steel Pipes and Tubes*, "once an investigating authority has identified the framework for its analysis ... it must use this identified framework consistently and coherently throughout an investigation".[796] In our view, that is what the Commission did in this case, making a

[792] China, answer to Panel question 50, para. 169.

[793] See Section VII.D.4(c) above.

[794] China, first written submission, para. 435.

[795] China, second written submission, para. 896. See also, China, answer to Panel question 50, para. 169, quoted in text at paragraph 7.389 above.

[796] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.322. We consider China's arguments relying on the report of the panel in *Mexico – Steel Pipes and Tubes* to be based on an incorrect understanding of that report. In that case, the question being addressed in the section of the report cited by China was whether the investigating authority's collection and reliance on certain categories of data pertaining to three firms, and other categories of data pertaining to only one firm, was consistent with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 concerning injury to the "domestic industry" as defined in Article 4.1. There was no allegation that either the one firm, or the group of three firms, constituted a sample of the domestic industry. Indeed, the

determination with respect to the domestic industry as it was defined in this investigation. The use of information relating to both the industry and the sample does not affect this view.

7.391 Finally, we note that this is not the first case in which the Commission's practice in this regard has been considered by a panel. The panel in *EC – Bed Linen* addressed a similar claim in a case in which the Commission considered information for all the producers in the domestic industry for some factors, and information for a sample of that industry for the other factors.[797] The panel, noting that pursuant to Article 3.4, a determination of injury must be reached for the domestic industry that is the subject of the investigation, stated:

> "it would be anomalous to conclude that, because the European Communities chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved. Thus, we consider that the European Communities did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by taking into account in its analysis information regarding the Community industry as a whole, including information pertaining to companies that were not included in the sample."[798]

We agree with these views.

7.392 Based on the foregoing, we reject China's allegation that the fact that the Commission considered some injury factors on the basis of information for the domestic industry as defined, and for the remaining factors on the basis of information for the sample of that industry, demonstrates that the determination was not an objective examination based on positive evidence.

7.393 Having concluded that consideration of information for both the industry as defined and a sample of that industry is not *per se* inconsistent with Articles 3.1 and 3.4, we turn next to consider whether China has demonstrated that, in this case, doing so resulted in an examination of the evidence that was not objective. In this context, we note that China does not dispute the facts relied on by the investigating authority, but rather takes issue with the choice of facts for certain groups, asserting that "the fact that the analysis of injury factors with respect to the domestic industry as constituted by 45 producers or with respect to the sampled producers lead to different results constitutes substantial evidence that the examination was not carried out objectively and was fundamentally biased".[799] In support of its position, China asserts that, in the Information Document, the Commission considered

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definition of the domestic industry was not at issue in that dispute at all. In our view, there is no inconsistency between our conclusion here, and that panel's view that "once an investigating authority defines which entities comprise the domestic industry that will form the basis for its injury analysis, it should seek and use a consistent data-set reflecting the performance of those entities". Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.326. Both information for the entire domestic industry and for a properly-constituted sample "reflect[s] the performance" of the domestic industry with respect to which a determination of injury must be made, and thus, in our view, constitutes a "consistent data-set" for purposes of an injury analysis.

[797] In that case, the investigating authority also considered information concerning producers who were not included in the domestic industry it had defined. The panel concluded that such information, since it did not concern the domestic industry as defined, was not relevant to the determination. Panel Report, *EC – Bed Linen*, paras. 6.182-6.183. However, that factual situation does not arise in this case.

[798] Panel Report, *EC – Bed Linen*, para. 6.181.

[799] China, second written submission, para. 897.

data on sales and market share in relation to the sampled producers, while in the Definitive Regulation, the Commission analysed sales and market share of the entire EU industry.[800] While we have noted elsewhere in this report that the Information Document is not a measure in this dispute, and we accept the European Union's assertion that it is an intermediate working document, in the context of this argument, we consider it appropriate to take the Information Document into account in our consideration whether differences in approach between that document and the Definitive Regulation supports China's allegation that the Commission undertook a selective examination of data in a biased manner. We start by noting, however, that the mere fact of differences between the preliminary views set out in the Information Document and the final conclusions reached in the Definitive Regulation is not sufficient, in our view, to demonstrate that the investigating authorities conducted their investigation in such a way as to "orient the evaluation process an make a finding of injury more likely".[801] As noted, the Information Document is at most a preliminary view of the facts. Thus, the fact that certain conclusions in the Definitive Regulation are based on the information for the entire domestic industry, while the Information Document addresses information for the sample does not alone demonstrate a "selective" review of the facts in the Definitive Regulation, which we recall is the measure before us.[802]

7.394 Turning to the facts, we note that the Information Document sets out the Commission's practice with respect to consideration of information for both the industry and the sample, stating that:

> "[i]n cases of sampling of the Community industry, it is the practice of the Commission's services to examine "macroeconomic" elements (typically production, capacity, sales volume, market share and employment on the basis of information collected at the level of the entire Community industry (not just for the sampled companies). However, as stated above, many producers in the Community did not cooperate in the investigation thereby not allowing for all these elements to be examined for the entire Community industry. As a consequence, the analysis of the situation of the Community industry was carried out for the sampled companies, except for sales and market share, where the figures are for all the cooperating Community producers. The other "macroeconomic" elements will continue to be investigated to the extent possible."[803]

Thus, it is clear that the parties receiving the Information Document were made aware that the analysis in that document was preliminary, that the investigation of certain elements to be analyzed would continue, and that the analysis in the Definitive Regulation might well be undertaken on the basis of different information, as indeed it was in this case, consistent with the Commission's usual practice of examining "macroeconomic" factors on the basis of information for the entire industry, where possible.[804] In our view, this alone suffices as a basis to reject China's argument that the Commission's examination of information in the Definitive Regulation was "selective". Moreover, we note as a matter of fact that, while the specific numbers and degree are different, both the

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[800] China, first written submission, paras. 439-442, citing Information Document, Exhibit CHN-17, pp. 17, 21; Definitive Regulation, Exhibit CHN-4, recitals 136, 154.

[801] China, second written submission, para. 897.

[802] This is in contrast with the situation in *Mexico – Steel Pipes and Tubes*, where the investigating authority, in its final determination, considered facts for two different groups of producers neither of which was a properly-constituted sample of the entire domestic industry in the investigation.

[803] Information Document, Exhibit CHN-17, p. 16.

[804] It is not clear why, having indicated, as quoted above, that the figures for sales and market share were for all cooperating Community producers, the table on page 17 of the Information Document, and the accompanying text at page 18, indicate that information for sales was for the sampled producers. In our view, however, this reinforces the preliminary nature of the information and analysis in the Information Document, and further supports our view that differences between it and the Definitive Regulation do not demonstrate that the analysis in the Definitive Regulation was not objective.

Information Document and the Definitive regulation come to the same essential conclusion, reporting a significant loss of market share by the EU industry.[805]

7.395 Thus, we conclude that China has not demonstrated that the consideration of data for the sample of the EU industry for some factors, and for the entire EU industry for others, resulted in this case in bias in the analysis and outcome, and reject this aspect of China's claim.

7.396 Turning to the allegation that the Commission failed to objectively examine the profitability of the domestic industry, we note that, to the extent China asserts error on the basis that the Commission failed to take into consideration the improvement in profitability during the POI, we find this to be unfounded as a matter of fact, as it is clear that the Definitive Regulation addresses the data on profitability, and notes the increase relied upon by China in its arguments. Indeed, China recognizes as much.[806]

7.397 Thus, we turn to the principal allegation, China's assertion that characterising a 4.4 per cent profit rate as "low", and concluding that dumped imports had a "negative impact" on profitability, in light of evidence that profitability improved from 2003 to the investigation period, is inconsistent with Articles 3.1 and 3.4 of the AD Agreement.[807] In China's view, the Commission's explanation of its conclusion, that the improvement in profitability was due to the domestic industry's concentration on the supply of high quality products generating higher revenues, shows that the investigating authority "ignored" the positive trend.[808]

7.398 We do not agree. We recall that the Commission addressed the profitability of the EU industry at various points in the Definitive Regulation. We note in particular the table preceding recital 141, which shows that the profitability of the industry's sales of the like product in the EU market was 2.1 per cent in 2003, 4.7 per cent in 2004, 3.4 per cent in 2005, 2.9 per cent in 2006, and 4.4 per cent in the investigation period, 1 October 2006-30 September 2007, and the following statements and conclusions:

> "(141) The levels of profits from the sale of the like product by the Community industry fluctuated throughout the period considered while only reaching moderately positive levels.
>
> (142) Profitability was at its lowest level in 2003 (2,1 %) but it has since improved, which is linked partly to the efforts of the Community industry to reduce manufacturing costs and increase productivity and the fact that they concentrated their efforts on the supply of high quality products generating higher revenues than standard products, the former being less affected by dumped imports from the PRC than the latter.
>
> (143) It should be noted that the overall positive profitability during the period under consideration coincided with an expanding market during an expansion phase of the economic cycle which took place during 2004 and beginning of 2008, and it is likely to deteriorate significantly when these trends are reversed. Indeed, as a widespread

[805] Compare, Information Document, Exhibit CHN-17, p. 18 ("the market share of the Community industry declined significantly, by 8.8% in less than three years") with Definitive Regulation, Exhibit CHN-4, recital 139 ("the market share of the Community producers declined by 24% in less than three years).

[806] China, answer to Panel question 51, para. 170, where China observes:

> "China's analysis starts from the facts and evidence on the record, namely recital 140 of the Definitive Regulation which shows that profitability has increased between 2003 to the IP from 2.1% to 4.4%."

[807] China, answer to Panel question 51, para. 170.

[808] China, answer to Panel question 51, para. 171.

> industrial product, fasteners are highly sensitive to the variations of the general economic situation and the industrial production in particular. ...
>
> (154) At the same time, while the Community consumption increased by 29 %, the sales volume of the Community industry only decreased by 1 %. Its market share fell by 24 % and it could not fully pass on the global increase in raw material prices to its customers, resulting in continuing low levels of profitability. ...
>
> (156) The impact of the dumped imports upon the profitability of the Community industry was somewhat mitigated during the period under consideration by the Community market expansion and the favourable economic cycle. However, this situation could be reversed when this cycle comes to an end. ...
>
> (223) The level of any anti-dumping measures should be sufficient to eliminate the 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 injurious dumping, it was considered that any measures should allow the Community industry to obtain a profit before tax that could be reasonably achieved under normal conditions of competition, *i.e.* in the absence of dumped imports. For this purpose, it was considered that a profit margin of 5 % is an appropriate level that the Community industry could be expected to obtain also with regard to the like product in the absence of injurious dumping."[809]

7.399 We note that China does not dispute the facts referred to in these passages, but merely the characterization of the overall profitability of the industry as "low", and the conclusion that the dumped imports had a negative impact on profitability. With respect to the first point, we note that there is nothing in the AD Agreement that prescribes a threshold level of profitability that might be considered sufficiently "low" to support a conclusion of injury. Indeed, it is clear to us that this question is one which must be considered in each case, in light of the nature of the industry and the facts and circumstances of the investigation. In this case, the Commission found, and China does not dispute, that a profit margin of 5 per cent was a level the industry could be expected to achieve in the absence of injurious dumping.[810] In these circumstances, we see absolutely no basis on which we might conclude that the Commission's conclusion that the level of profitability was "low" in the circumstances of this industry demonstrates a failure to examine the facts objectively.

7.400 With respect to the second point, we recall that China does not dispute the facts on which the Commission's conclusion that dumped imports had a negative impact on the profitability of the industry rests. Rather, China asserts that, since the 4.4 per cent profit margin achieved during the investigation period is "close" to the 5 per cent level the Commission considered appropriate, and profitability doubled between 2003 and the investigation period, the Commission "could not objectively conclude" that dumped imports had a negative impact on profitability.[811] This is no more than an alternative interpretation of the facts, and as such, is in our view insufficient to demonstrate that the Commission failed to examine the (uncontested) evidence in an objective manner. Moreover, we note that the industry's profitability did not increase steadily throughout the period 2003-30 September 2007, but rather fluctuated[812], and that even at the end of that period at the top of the business cycle, had not reached the level the industry could be expected to achieve in the absence of injurious dumping. The standard of review we are to apply under Article 17.6(i) makes it clear to us

[809] Definitive Regulation, Exhibit CHN-4, recitals 141-143, 154-156, 223.

[810] We note that this does not necessarily mean that such a level of profit would be "high", or even that there would be no injury to the industry if it operated at this level of profit.

[811] China, first written submission, para. 450; China, second written submission, para. 915.

[812] See paragraph 7.398 above, quoting Definitive Regulation, Exhibit CHN-4, recital 141.

that the mere fact that a different conclusion can be reached, even if that different conclusion were one we might have reached ourselves (which we do not suggest is the case here) is insufficient to warrant overturning the evaluation of the investigating authority. We therefore reject China's allegation that the European Union failed to objectively examine the profitability of the EU industry.

7.401 China's third allegation is that the Commission's overall analysis of the impact of dumped imports on the domestic industry was not objective. In support of this allegation, China asserts that the Commission improperly found that the industry suffered injury, since "examination of the relevant factors pursuant to Article 3.4 shows a positive state of the domestic industry".[813] With regard to this aspect of China's claim, we recall that we are not to engage in a *de novo* review of the Commission's determination. Moreover, we recall also that Article 3.4 contains no methodological guidelines for the required consideration of relevant economic factors, but does provide that the list of factors in that provision is not exhaustive, and that no one or several of the listed factors can give decisive guidance. In particular, we consider that there is nothing in the text of Article 3.4 which requires that any particular factor or group of factors demonstrate "negative trends", which we understand to mean declines, in order for a determination of injury to be made.[814] China focuses on its assertion that market share was the only "negative factor", and argues that, having found that "all factors showed a positive trend over the period concerned" the Commission should have concluded that the EU industry had not suffered material injury.[815]

7.402 In our view, a "negative factor" in the assessment of the condition of the domestic industry is not limited to a factor for which the information demonstrates an actual decline in performance. Our view is supported by the text of Article 3.4, which requires investigating authorities to evaluate all relevant factors, "including actual and potential decline" in certain factors, and "actual or potential negative effects" on certain other factors. The New Shorter Oxford English Dictionary defines "potential" as "Possible as opp[osed] to actual; capable of coming into being or action; latent".[816] The use of the word "potential" in the context of the Article 3.4 non-exhaustive list of relevant economic factors indicates to us that a decline need not have occurred during the period under consideration in order for an investigating authority to find injury.

7.403 Turning to the facts of this case, we recall that the fasteners market in the European Union expanded significantly during the period concerned in the injury analysis, with a reported increase in demand of 29 per cent between 2004 and the investigation period[817], a fact China does not dispute. In this market context, it seems reasonable to us that relevant economic factors which China refers to as "positive trends"[818], because they show increases, may be interpreted as "negative factors" when those increases are significantly less than the expansion in demand.[819] Thus, to us, China's argument

[813] China, first written submission, para. 451.

[814] Thus, it seems to us that it may be possible that even if the evidence before the investigating authority showed a decline only with respect to one factor considered, for instance, market share, this would not necessarily preclude a finding of injury, consistent with Article 3.4. Clearly, in such a case, the other evidence, including the nature of the product, industry, and market, as well as the reasoning of the investigating authority, would be critical considerations for a reviewing panel.

[815] China, second written submission, para. 921.

[816] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[817] Definitive Regulation, Exhibit CHN-4, recital 129.

[818] China, second written submission, para. 922.

[819] We do not mean to suggest that a domestic industry is somehow entitled to benefit from the entirety of an expansion in its domestic market, or that a failure of its performance to increase commensurate with an increase in demand necessarily demonstrates injury, but merely that in such a situation, the fact that certain indicators of the industry's performance increased less than demand may be a negative consideration in an investigating authority's analysis of injury to that industry.

confuses "negative trends", that is, declines in the reported data for injury factors, and "negative factors", which in our view may be found even where the reported data shows increases.[820]

7.404 In this case, the Commission concluded, *inter alia*, that profitability remained low[821], and that the increase in profitability was disproportionately low when compared to the increase in demand[822]; that production capacity grew "only slightly" resulting in low levels of capacity utilization throughout the period[823]; that sales decreased by 1 per cent, while consumption increased by 29 per cent, resulting in a decline in market share of 24 per cent in less than three years[824]; that cash flow declined by almost 20 per cent from 2005 to the investigation period, almost to the level recorded in 2003[825]; and that the margins of dumping were above *de minimis*, and given the volumes and prices of dumped imports, the impact of the margin of dumping could not be considered negligible.[826] Moreover, the Commission recognized certain positive developments, including a decline in the level of stocks, and the fact that return on investments and prices increased.[827] The Commission explained, however, that these improvements did not reflect the significant increase in demand, which might have been expected to result in more rapid positive movement.[828] Based on our review of the Definitive Regulation, and our view of when a factor may be viewed as "negative" for purposes of evaluating injury factors, we reject China's assertion that it is "incorrect, as a matter of fact, to allege that a "significant number of injury factors" were negative".[829] Considering the Commission's evaluation of the data before it with an eye to the specific facts and circumstances of this dispute, and in light of the explanations given by the Commission in the Definitive Regulation, we conclude that the Commission's overall evaluation of the relevant injury factors reflects an objective examination of positive evidence, and its conclusions were such as could reasonably be reached by an objective decision-maker, on the basis of the facts and arguments before it, and we therefore reject China's allegation in this regard.[830]

7.405 China's final allegation of error with respect to the injury determination is that, to the extent the Commission's finding is based on the fact that there was a significant displacement of EU product from some market segments, this conclusion is inconsistent with Articles 3.1 and 3.4 of the AD Agreement.[831] The European Union contends that China's argument goes to the question of causation, not the existence of injury, and is in any event contradicted by the facts, asserting that the Commission made its injury determination with reference to the entire industry, not any segment

[820] We use the terms "increases" and "declines" in this discussion as indicating positive and negative developments. Of course, for some factors, an increasing trend may actually be a negative development, for instance, with respect to inventories.

[821] A characterization which, we recall, we have not found unjustified in this case.

[822] Definitive Regulation, Exhibit CHN-4, recital 141.

[823] Definitive Regulation, Exhibit CHN-4, recital 130.

[824] Definitive Regulation, Exhibit CHN-4, recital 139.

[825] Definitive Regulation, Exhibit CHN-4, recital 144.

[826] Definitive Regulation, Exhibit CHN-4, recital 151. We note that China acknowledges that the margins of dumping were a negative factor, but considers it unclear how they can be an injury factor on their own. China, second written submission, para. 922, 10th tiret. While this is an interesting question, the fact remains that Article 3.4 lists the margin of dumping as a relevant economic factor to be considered, and thus we must treat it as relevant to the investigating authority's evaluation of those factors.

[827] Definitive Regulation, Exhibit CHN-4, recitals 146, 138.

[828] Definitive Regulation, Exhibit CHN-4, recitals 157, 138.

[829] China, second written submission, para. 925.

[830] We do not dispute that an alternative evaluation of the facts, such as proposed by China, might be possible. We note, however, that in this case, China does not even argue that this alternative explanation was raised before the Commission. We consider, moreover, that the explanations provided by the Commission in the Definitive Regulation, and by the European Union in support of that determination, are "reasoned and adequate" even in light of the proffered alternatives. See, Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 117, footnote 176.

[831] China, first written submission, para. 461.

thereof, and explained that the negative impact of the dumped imports was mitigated by the move of the industry into the higher-end, special fastener segment of the market.[832]

7.406 China refers, in support of its position, to recital 160 of the Definitive Regulation, which states:

> "The investigation has since confirmed that *material injury resulted from the significant displacement of Community products by Chinese imports in some important market segments*, with a negative impact on capacity utilisation and profitability, although this impact has been somewhat attenuated by the fact hat [sic] the industry managed to compensate lower production volumes by focusing on market segments and products generating higher revenues." (emphasis added by China)

The European Union refers to the same statement in support of its position, emphasising the conclusion at the end of the recital that "this impact has been somewhat attenuated by the fact [t]hat the industry managed to compensate lower production volumes by focusing on market segments and products generating higher revenues". According to the European Union, China's argument suggests that the loss of market share is due to the industry's decision to move into the higher end market segment, but that in fact, the opposite is true, and the industry was forced out of the lower end, standard fasteners segment, but was able to increase its sales in the higher end, thus avoiding the worst.[833] Moreover, the European Union asserts, the Commission did not make a finding of market displacement, but related its injury finding to fasteners as a whole.[834]

7.407 China asserts for all the injury factors which showed a positive trend, the Commission systematically considered that these should not be treated as "positive", since the positive trend was only due to the fact that the domestic industry produced more special fasteners and fewer standard fasteners.[835] China considers that, by doing so, the Commission examined the injury factors only in terms of standard fasteners, since the positive trends induced by increased production of special fasteners were systematically set aside in the injury analysis. Therefore, China asserts that the entire injury analysis of the Commission is premised on the distinction between the two market segments, and contends that, whether the state of the domestic industry is better because the domestic producers have moved from standard fasteners to the more lucrative segment of the market is irrelevant since both are within the like product.[836] China considers that the Commission's injury analysis is effectively based on the standard fastener market segment, as the conclusion appears to be based on the fact that the EU industry could not continue to produce standard fasteners because of the pressure exerted by dumped imports.[837] China relies on the Appellate Body's report in *US – Hot-Rolled Steel* in support of its view that, by focussing on one segment of the market, the Commission's injury determination is inconsistent with Articles 3.1 and 3.4.[838]

7.408 China's arguments in this regard raise two questions; first, whether the Commission did, in fact, focus its injury determination on one segment of the market, and second, if it did, whether this demonstrates that its determination was inconsistent with Articles 3.1 and 3.4. In our view, China's argument fails because, taking into consideration the entirety of it analysis and conclusions with

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[832] European Union, first written submission, paras. 623-624.
[833] European Union, first written submission, para. 624.
[834] European Union, second written submission, para. 207.
[835] China, second written submission, paras. 944-947.
[836] China, second written submission, paras. 942-943, 948; China, answer to Panel question 52, para. 172.
[837] China, second written submission, para. 948.
[838] China, second written submission, para. 949; China, answer to Panel question 52, para. 172.

respect to injury, it is clear that the Commission did not find injury to only the standard fasteners segment of the market, and thus did not conclude that injury resulted from a displacement of sales from one segment of the market to another. All the data considered by the Commission with respect to the condition of the EU industry refers to the industry as a whole – there is no separate data reported for different market segments. Thus, it is clear to us that, in its evaluation of the relevant factors, the Commission did not focus on one segment, and discount the other, but rather, made a determination with respect to the entire industry, and explained certain aspects of its analysis by referring to developments in different segments of the market. We note in this regard the views of the Appellate Body in *US – Hot-Rolled Steel*:

> "it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake ... an evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole." [839]

In our view, the Commission's evaluation of information and conclusions in the Definitive Regulation are entirely consistent with this statement.

7.409 The factual circumstances of this case, moreover, are entirely different from those in *US – Hot-Rolled Steel*. In that case, the US investigating authority, the United States International Trade Commission ("USITC"), was considering an industry which produced steel for captive consumption, and for sale in the "merchant market". The USITC's final determination contained frequent reference to data for the merchant market, but did not contain, describe, or otherwise refer to, data for the captive market. In these circumstances, the Appellate Body concluded that while the statute which directed the USITC to "focus primarily" on the merchant market in its analysis of injury for an industry with both captive consumption and merchant market sales was not inconsistent with Articles 3.1 and 3.4 as such, the application of the statute in that investigation constituted a selective examination of one part of a domestic industry, and thus was not an objective examination of positive evidence regarding the industry. The Appellate Body observed that:

> "where one part of an industry is the subject of separate examination, the other parts should also be examined in like manner. Here, we find that the USITC examined the merchant market, without also examining the captive market in like or comparable manner, and that the USITC provided no adequate explanation for its failure to do so."[840]

7.410 In this case, by contrast, it is clear that the Commission did not "examine the [higher end specialty fastener] market, without also examining the [lower end standard fastener] market". Indeed, the Commission did not examine separate markets *per se* at all in this case. Rather, it examined the performance of the industry as a whole, and explained how some of the developments observed reflected the shift of the industry to production of more specialty fasteners. Therefore, we conclude that, as a matter of fact, the Commission did not "segment" its analysis of injury, and did not focus only on the standard fastener segment of the market. Thus, China has failed to demonstrate the premise of its final allegation of error, and we therefore reject China's allegation.

7.411 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union's examination of the impact of dumped imports on the domestic industry is inconsistent with Articles 3.1 and 3.4 of the AD Agreement.

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[839] Appellate Body Report, *US – Hot-Rolled Steel*, para. 195 (footnote omitted).
[840] Appellate Body Report, *US – Hot-Rolled Steel*, para. 214.

10. Whether the European Union violated Articles 3.1 and 3.5 of the AD Agreement in its consideration of causation

(a) Arguments of the Parties

(i) China

7.412 China contends that the European Union violated Articles 3.1 and 3.5 of the AD Agreement in concluding that dumped imports from China caused material injury to the EU Industry. China bases its claim on two assertions of error: first, that the Commission failed to demonstrate that the dumped imports, through the effects of dumping, are causing injury; and second, that the Commission failed to ensure that injury caused by factors other than dumped imports was not attributed to dumped imports. [841]

7.413 In support of its first allegation, China submits that the Commission failed to establish a causal relationship between the dumped imports and the injury, as required by Article 3.5. China argues first that the Commission's reasoning, which China asserts is based on a coincidence between the significant increases in the volume of dumped imports and the continuously declining loss of market share by EU producers, does not support the conclusion that dumped imports are causing injury to the EU industry through the effects of the dumping, as China argues is required.[842] China maintains that a mere "coincidence", that is, simultaneity of an increase in the volume of dumped imports and the existence of injury, is insufficient to establish the causal relationship required by the AD Agreement.[843] Second, China submits that the conclusion that there is a causal relationship between dumped imports and injury must be based on positive evidence, and argues that the Commission failed to adduce such evidence in its examination of the reasons why the EU industry produced more special and fewer standard fasteners.[844] According to China, the Commission failed to consider this latter fact, and that the loss in market share was due to this "strategic decision", which may be motivated by factors other than the presence of dumped imports.[845] China considers that it was manifestly necessary, as part of the analysis of causation, to determine why EU producers shifted from producing standard fasteners to producing special fasteners, and contends that the Commission's conclusion that the shift was a reaction to increasing quantities of dumped imports is not based on positive evidence and thus is not substantiated.[846]

7.414 With respect to the second assertion, China contends that the Commission failed to properly assess the injurious effects of increased raw material prices, and the effects of exports to third countries, and failed to ensure that injury caused by these factors was not attributed to dumped imports. Concerning increased raw material prices, China notes that the EC considered it a factor causing injury, but concluded it was not "the decisive factor" and would not *per se* break the causal link between dumped imports from China and the injury to the EU industry.[847] China maintains that the European Union failed to separate and distinguish the injurious effects of the increase in raw

[841] China, first written submission, para. 462. We note that the European Union, in its second oral statement, objected to the second aspect of China's argument, asserting that no claim in this regard was set out in China's panel request. European Union, second oral statement, para. 70. However, as noted, China clearly argued this aspect of its claim in its first written submission. We consider the European Union's objection untimely, particularly in this case, where the European Union had previously made numerous similar objections, and decline to address it.

[842] China, first written submission, paras. 475-476.

[843] China, second written submission, para. 960.

[844] China, second written submission, para. 957.

[845] China, first written submission, para. 476.

[846] China, second written submission, paras. 968-972.

[847] China, first written submission, para. 478, citing Definitive Regulation, Exhibit CHN-4, recitals 176, 179.

material prices from the injurious effects of dumped imports.[848] China argues that the increase in raw material prices made it more attractive to produce high quality fasteners, in which raw material costs are a smaller portion of total costs, and thus led the EU industry to focus on production of high quality fasteners, which explains the decrease in the EU industry's market share.[849] According to China, the Definitive Regulation does not contain a satisfactory explanation of the nature and extent of the injurious effects of this factor, as distinguished from the injurious effects of the dumped imports, as China considers is required by Article 3.5 of the AD Agreement.[850] With respect to exports to third countries, China asserts that that the European Union violated Articles 3.1 and 3.5 of the AD Agreement. China asserts first that the conclusion that export performance was not causing injury was not based on positive evidence and did not involve an objective examination of the evidence submitted.[851] Second, China maintains that the Commission based its assessment of export performance on data which do not relate to the domestic industry as defined in the investigation.[852] China notes that the information in the Definitive Regulation concerning exports, which showed an increase in exports to third countries, is for all EU producers of fasteners, and not for either the industry as defined in the investigation, or the sample examined.[853] China considers that the Commission's conclusions, that exports were only 11 per cent of the EU industry's production in 2006, and were at prices higher than those in the EU market, do not relate to the EU industry, as they are not based on data for that industry.[854] China submits an alternate calculation of changes in exports, which it asserts shows a completely different trend, a decrease of almost 50 per cent.[855] China maintains that the Commission failed to examine to what extent this alleged loss in export sales caused injury to the EU industry.[856] Moreover, China maintains that it is not possible to determine the possible influence of export performance on the injury suffered by the EU industry without assessing the export performance of that industry, which must be based on data for that industry, and not some other, larger group of producers.[857]

(ii) European Union

7.415 The European Union contends that China fails to establish a *prima facie* case with respect to both aspects of its causation claim.[858] The European Union contends that China's argument unduly limits the injury to loss of market share, contrary to the facts of record. It also argues that, concerning causation, China's argument is limited to speculation that if the domestic industry had not decided to move into the specialty fastener segment of the market, it would not have lost market share.[859] For the European Union, this is insufficient to make out a *prima facie* case.[860] The European Union asserts that the actual findings of the Commission are set out in the Definitive Regulation, referring particularly to recitals 163 through 171. The European Union contends that these findings demonstrate that the Commission's analysis was reasonable and well-reasoned. Moreover, the European Union considers that China has not made any argument otherwise with respect to this analysis.[861]

[848] China, first written submission, para. 481.
[849] China, first written submission, paras. 486-488.
[850] China, second written submission, paras. 983-993.
[851] China, second written submission, paras. 994-1004.
[852] China, second written submission, paras. 1006-1017.
[853] China, first written submission, para. 489.
[854] China, first written submission, paras. 490-492.
[855] China, first written submission, para. 492.
[856] China, first written submission, para. 493.
[857] China, second written submission, paras. 1007-1008.
[858] European Union, first written submission, para. 632.
[859] European Union, first written submission, para. 634.
[860] European Union, first written submission, para. 635.
[861] European Union, first written submission, paras. 637-638.

7.416 With respect to the second aspect of China's claim, the European Union contends that, contrary to China's arguments, the Commission did not consider the loss of market share by the EU industry as a cause of injury, but as an indicator of injury caused by the effects of dumped imports, finding a clear and direct link between the increase in dumped imports, their increase in market share, and the consequent loss of market share of the EU industry.[862] The European Union contends that China does not point to any flaws in the Commission's reasoning, or any evidence that would suggest that the Commission failed to separate and distinguish the effects of other factors from the injurious effects of dumped imports. Rather, the European Union asserts, China merely disagrees with the Commission's evaluation of those effects.[863] In any event, the European Union notes that there is no specified methodology for conducting a non-attribution analysis, and that what is important is that injuries caused by other factors are not lumped together with injury caused by the dumped imports.[864] The European Union notes that the Commission addressed the effect of raw material price increases at length, finding that these prices increased worldwide, but that the increases could not be passed on to consumers by EU producers, as would normally be the case, due to pressure on prices in the EU market from dumped imports.[865] For the European Union, this supports the reasonable conclusion that increased raw material prices were not the decisive factor in the injury, as normally they would be passed on to consumers, but in this case could not be.[866] The European Union asserts that the analysis in the Definitive Regulation did not lead to the conclusion that a direct link between increased raw material prices and the injury existed, as the time pattern did not match, the price increases were not specific to the European Union, and these increases could not be passed on to consumers. According to the European Union, this analysis sufficiently addressed the nature and extent of the injury caused by increased raw material prices.[867] With respect to exports to third countries, the European Union asserts that the Commission found that export performance was not a cause of injury to the EU industry, and thus no further analysis of the nature and extent of the effect of this factor was required.[868] With respect to the information considered in the Definitive Regulation, the European Union contends that consideration of data for all EU producers is one way of examining export performance of the EU industry, especially where, as here, no interested party raised export performance as an important "other factor" causing injury.[869] The European Union considers that the alternative information relied on by China in its arguments is not part of the record, and was not raised during the investigation. Thus, the European Union argues that it would be an unwarranted *de novo* review for the Panel to consider this information, which the European Union contends is incorrect.[870]

(b) Arguments of Third Parties

(i) Japan

7.417 Japan requests that the Panel carefully review whether the European Union violated Articles 3.1 and 3.5 of the AD Agreement by attributing to dumped imports injury caused to the EU industry by other known factors, in particular the effects of increased raw material prices.[871] Japan notes the requirements of Articles 3.1 and 3.5, and recalls that investigating authorities must separate and distinguish the injurious effects of the dumped imports from the injurious effects of other known

[862] European Union, first written submission, paras. 642-644.
[863] European Union, first written submission, para. 647.
[864] European Union, first written submission, paras. 650-652.
[865] European Union, first written submission, paras. 653-655.
[866] European Union, first written submission, para. 656.
[867] European Union, second written submission, para. 216.
[868] European Union, first written submission, paras. 661-662.
[869] European Union, first written submission, para. 664.
[870] European Union, first written submission, paras. 665-666.
[871] Japan, written submission, paras. 64, 67.

factors.[872] Japan considers the principle of "separating and distinguishing" the effects of other known factors to be of paramount importance in every anti-dumping investigation.[873]

(ii) Norway

7.418 Norway does not take a position on whether the European Union fulfilled its obligations according to Articles 3.1 and 3.5 in this case, but highlights certain arguments it considers may be important to the Panel's interpretation and application of those provisions.[874] Norway recalls the text of those provisions, and the requirement that the investigating authorities "separate and distinguish" the injurious effect of the dumped imports from the injurious effects of other known factors.[875] Norway notes 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".[876] Norway attaches great importance to these principles, as an important mechanism to ensure that the injury from dumped imports is isolated from the injurious effects of other factors, fulfilling the objective of Article 3.5. Norway therefore asks the Panel to carefully review whether the EU in this case fulfilled its obligation to "separate and distinguish" the effects of the dumped imports from the injurious effects of the increase in raw material prices and exports to third countries by the EU industry, and whether the EU ensured that any injurious consequences from such other factors were not attributed to the dumped imports.[877]

(c) Evaluation by the Panel

7.419 Article 3.5 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, 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."

China's claim alleges error with both the Commission's conclusion that dumped imports from China caused injury to the EU industry producing fasteners, and with the Commission's examination of any "known factors other than dumped imports" which were injuring the EU industry at the same time as dumped imports. We address each of these in turn below.

7.420 First, however, we recall that the Commission addressed causation in the Definitive Regulation at recitals 162-184, concluding in the latter recital that "the dumped imports originating in the PRC have caused material injury to the Community industry". The Definitive Regulation

[872] Japan, written submission, paras. 65-66.
[873] Japan, written submission, para. 67.
[874] Norway, oral statement, para. 18.
[875] Norway, oral statement, para. 19 citing, Appellate Body Report, *US – Hot Rolled Steel*, para. 226.
[876] Norway, oral statement, para. 20, citing, Appellate Body Report, *US – Hot Rolled Steel*, para. 226.
[877] Norway, oral statement, para. 21.

addresses the effect of dumped imports at recitals 163-171, addresses the effect of other factors, specifically, imports from third countries, export performance of the EU industry, and increase in raw material prices, at recitals 172-179, and draws conclusions at recitals 180-184. China does not dispute any of the factual information considered by the investigating authority, except, as discussed below, the use of export data for all EU producers.

7.421 We recall that Article 3.1 of the AD Agreement, also cited by China with respect to this claim, provides that:

> "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."

7.422 In this case, there is no dispute concerning the evidence considered by the Commission in finding causation.[878] Thus, the question before us is whether, in examining the consequent impact of dumped imports on domestic producers of the like products, that is, the EU industry as defined by the Commission in this investigation, the Commission engaged in an objective examination of the evidence. We recall in this regard 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 favouring the interests of any interested party, or group of interested parties, in the investigation".[879] It is, we consider, the task of the investigating authority to weigh the evidence and make a reasoned judgement – this implies that there may well be evidence, and arguments, that detract from the conclusions reached.[880] We 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 so, 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. Moreover, we do not consider that a determination can be sustained on review only if every argument and conflict in the evidence was resolved by the investigating authority in favour of the determination made – that is, it may reach conclusions on some issues that do not support its determination, but so long as its 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.[881]

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[878] There is disagreement between the parties concerning the evidence with respect to the Commission's examination of "other factors", which we address below.

[879] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[880] We note in this regard the statement of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, concerning the role of a panel as a reviewer of agency action, rather than as initial trier of fact: "[A] panel examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions". Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ("*US – Countervailing Duty Investigation on DRAMS*"), WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131, para. 188. While the agency determination at issue in that case concerned the existence of a subsidy, we consider that this view is equally applicable in the context of review of a determination of causation in an anti-dumping investigation.

[881] See, Appellate Body Report, *US – Softwood Lumber VI* (*Article 21.5 – Canada*), para. 117.

7.423 With respect to the first aspect of China's claims, we note that China asserts that the Commission's reasoning for its finding of causation is based on a "mere coincidence" between significant increases in the volume of dumped imports and the decline in the EU industry's market share. China acknowledges that there is no required methodology for the analysis and determination of causation in the AD Agreement. However, referring to the Appellate Body report in *US – Wheat Gluten*, China asserts that the fact that two elements occur simultaneously does not establish that the one element "brings about", "produces" or "induces" the other element, which China considers necessary to demonstrate causation.[882] China considers that, in order to make a determination of causation consistent with Article 3.5, the EU authorities were required to demonstrate with supporting evidence that the loss of production volumes and the loss in market share were caused, *i.e.*, produced, by the dumped imports. China asserts that, by basing the conclusion on a mere coincidence, they failed to do so, and ignored that the factors considered to show injury, and in particular the loss of market share, may well be explained by the domestic industry's increased production of special fasteners.[883]

7.424 However, a review of the Definitive Regulation makes clear to us that while the coincidence in time of the increase in dumped imports and the decline in the EU industry's market share is certainly an element in the Commission's reasoning, it is not the entire basis for the conclusion that dumped imports caused injury to the domestic industry. China does not explain why, in its view, the fact that the increase in the volume of dumped imports coincided with the declining trends in the situation of the domestic industry is insufficient as a basis for finding causation, but merely speculates that the loss of market share might be explained by the EU industry's move to increased production of specialty fasteners. We note that, as the panel in *Argentina – Footwear* observed,

> "While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – *i.e.*, "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present."[884]

Argentina – Footwear was a dispute under the Safeguards Agreement, but we note that the Appellate Body has treated the causation standard under that agreement and under the AD Agreement as similar, and therefore we consider it relevant to our determination.[885] In that dispute, the Appellate Body stated that it saw "no error in the Panel's interpretation of the causation requirements ... of the *Agreement on Safeguards*".[886]

7.425 In this case, as is clear from the Definitive Regulation, the Commission did not find that the EU industry was injured solely because market share declined[887], and did not consider the declining

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[882] China, answer to Panel question 56, para. 191, quoting, Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717, para. 67.

[883] China, answer to Panel question 56, para. 192.

[884] Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575, para. 8.238.

[885] See Appellate Body Report, *US – Hot-Rolled Steel*, para. 229, where the Appellate Body observed that its interpretation of Article 3.5 of the AD Agreement, in particular the non-attribution requirement, is "fortified" by its interpretation of Article 4.2(b) of the Agreement on Safeguards, the causation requirement in that Agreement, citing in this regard the Appellate Body Reports in *US – Wheat Gluten* and *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051.

[886] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para. 145.

[887] See Section VII.D.9(c) above.

market share to be a cause of injury, but rather a factor demonstrating that injury existed.[888] The Commission also found that a number of other injury factors supported the finding of injury, in the context of an industry facing increased demand. Moreover, the Commission explained its conclusion that the decline in market share supported its finding that dumped imports caused injury.[889] We note in particular the statement that:

> "In reaction to the increasing quantities of imports of standard products originating in the PRC, the Community industry has developed its production activities of special parts (based on drawings from customers), thus managing to maintain its production volumes and avoid a further deterioration of profitability. However, these products, belonging to the higher end of the market cannot fully compensate for the loss of high volumes of production of standards [sic] products."[890]

7.426 In our view, this is 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. Moreover, contrary to China's argument, it specifically addresses the question of why EU producers chose to move into production of special fasteners. China acknowledges that the European Union explained this shift as a reaction to increased quantities of Chinese imports of standard fasteners[891], but contends that this explanation is unsubstantiated by evidence, and that there are other reasonable explanations for this shift. However, China has itself proffered no evidence to support its alternative explanations.[892] Moreover, a lack of direct evidence for such reasoning is in our view not fatal, particularly where, as in this case, the reasoning itself is a rational explanation of the observed facts, and is not undermined by evidence before the investigating authority. We consider that China has not demonstrated a failure of reasoning or explanation in the Commission's determination[893], but has rather put forward an unsubstantiated different interpretation of the relevant facts.

7.427 We recall that it is not our role to review the evidence *de novo*, or to choose which of alternative interpretations of the facts is most convincing to us, or would be ours were we to make our own conclusion. It is our task to undertake a careful scrutiny of the Commission'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. We recall, in this regard, the statement of the Appellate Body 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

[888] Definitive Regulation, Exhibit CHN-4, recitals 154, 160.
[889] Definitive Regulation, Exhibit CHN-4, recitals 165-167.
[890] Definitive Regulation, Exhibit CHN-4, recital 167.
[891] China, second written submission, para. 969.
[892] China does not assert that these alternatives were argued before the investigating authority and rejected, and there is no indication in the Definitive Regulation that any party proposed these alternatives during the investigation. Thus, it is difficult for us to see on what basis the investigating authority could now be required to have considered them.
[893] We recall that China does not dispute the facts in question in connection with this aspect of its claim.

> panel may conclude that conclusions that initially, or in the abstract, seemed "reasoned and adequate" can no longer be characterized as such.[176]

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[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". [894]

In our view, the Commission's determination that dumped imports caused the injury it had found the EU industry to be experiencing was a reasonable conclusion, based on the evidence and arguments before it, and we therefore reject this aspect of China's claim.

7.428 Turning to the second aspect of China's claim, China argues that the European Union did not separate and distinguish the effects of other factors, specifically, the increase in raw material prices and the export performance of the EU industry, which might be contributing to the injury suffered by the domestic industry, from the effects of dumped imports, as required by Article 3.5 of the AD Agreement. We recall that Article 3.5 provides in pertinent part:

> "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."

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.[895] As previously discussed, we consider that it is our task to undertake a careful scrutiny of the Commission'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.[896]

7.429 We note, and China does not dispute, that the Definitive Regulation does discuss the effect of "other" factors causing injury, including specifically increased raw material prices[897], and does address the export performance of the EU industry. Thus, the issue for us is whether that discussion and the explanations given in light of the facts fall short of the requirements of Article 3.5 of the AD Agreement. 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"

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[894] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 117.

[895] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189; Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 154.

[896] Panel Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 7.19; Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 112; Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea ("US – Countervailing Duty Investigation on DRAMS")*, WT/DS296/AB/R, adopted 20 July 2005, para. 151 & footnote 278.

[897] The Commission also considered the effect of imports from third countries in this regard, Definitive Regulation, Exhibit CHN-4, recitals 172-174, and concluded that they "could not have contributed to the injury suffered by the Community industry". *Id.*, recital 174. China has not challenged this aspect of the Definitive Regulation.

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 it appropriate to evaluate whether the explanations given by the Commission as to why the increase in the price of raw materials did not *per se* break the causal link between dumped imports and material injury, and why the export performance of the domestic industry was 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.

7.430 Turning first to the Commission's consideration of increased raw material prices, we note that, in the Definitive Regulation, the Commission found that, while there was evidence of some increase in steel prices during the period, increased raw material prices were not a decisive factor in the injury to the EU industry, which was mainly reflected in lost market share. The Commission also found that average selling prices in the European Union increased mainly due to the shift to production of special fasteners, which are more costly to manufacture, by the EU industry. The Commission went on to observe that sales prices could not be increased to make up for these cost increases, due to inflexibility in prices caused by the simultaneous surge in dumped imports at prices significantly below those of the EU producers.[898] Finally, the Commission noted that increased raw material prices should have affected all manufacturers, and therefore could not be considered a particular factor affecting the EU industry, since the unit prices of Chinese product remained stable despite increased raw material prices.

7.431 In light of this, it is clear that the Commission did consider the effect of increased raw material costs. Indeed, China does not dispute this, but rather once more proposes an alternative interpretation of the facts. China posits that the increase in raw material prices made it attractive for the EU industry to focus on special fasteners, where the share of raw material costs in the total cost of production is smaller, and revenues are higher, and thus explains the industry's increasing production of special fasteners. This, China asserts, explains the loss of market share, and thus the injury to the EU industry.[899]

7.432 While China characterizes its explanation as demonstrating errors in the Commission's reasoning[900], in our view, its alternative explanation does not address the Commission's reasoning at all, but rather proposes an alternative analysis. Moreover, it is an alternative that focuses on different considerations, and does not take account of certain salient factors which the Commission considered relevant, such as the increased volume of dumped imports sold at prices significantly below those of the EU producers and thereby exerting pressure on EU prices. Thus, in our view, China has not demonstrated that the Commission's determination, that increased raw material costs did not break the causal link between dumped imports and injury, was not a reasonable conclusion, reached by an unbiased and objective investigating authority in light of the facts and arguments before it.

7.433 With respect to the export performance of the domestic industry, we note that the Commission also addressed this question. The Commission observed that exports were only 11 per cent of the EU industry's production in 2006, increased by 81 per cent between 2003 and the investigation period, and were consistently at prices significantly above sales prices on the EU

[898] The Commission found price undercutting averaging more than 40 per cent. Definitive Regulation, Exhibit CHN-4, recital 126. We recall that we have rejected China's claim with respect to the Commission's price undercutting analysis. See paragraph 7.336 above.

[899] China, first written submission, paras. 483-488. We note that China has not asserted that this alternative was argued to the investigating authority during the course of the investigation.

[900] China, first written submission, para. 483.

market. Thus, the Commission concluded that the export performance of the EU industry "was not a source of material injury to the Community industry".[901]

7.434 China does not dispute that the Commission concluded that the export performance of the EU industry "was not a source of material injury to the Community industry". China considers that this conclusion is not one which could have been reached by an unbiased and objective investigating authority on the basis of the facts before it. China raises a different issue in respect of export performance, asserting that the information with respect to exports considered by the Commission in its analysis was for all EU producers of fasteners, and was not specific to the domestic industry as defined, *i.e.*, the 46 producers, or the sample considered. According to China, this information cannot be extrapolated to the EU industry.[902] China argues that the increase in exports cited by the Commission was equivalent to nearly 4 per cent of the EU market, and was thus substantial, and had it been sold in the EU market, EU producers would have retained most, if not all, of the EU market share.[903] Moreover, China has submitted to the Panel an alternative calculation of the EU industry's export trends, which it asserts is completely different from that relied upon by the Commission.[904] China asserts that the investigating authority could not carry out a proper analysis of whether other factors could have caused injury to the domestic industry by assessing such other factors on the basis of information relating to a broader group of producers than the industry with respect to which the injury determination was made.[905]

7.435 The European Union responds by asserting that China speculates about what might have happened if all export sales had been made on the EU market, which was not the case, and notes moreover that since the export sales were at higher prices, they would not have been competitive in the EU market, where prices were under pressure from dumped imports.[906] The European Union acknowledges that the data concerning exports on which the Commission relied was for all EU producers, but argues that, in a case where, as here, no interested party raised the issue of export performance as an important "other factor", it was reasonable to rely on publicly available data rather than seeking company specific data through questionnaires.[907] In addition, in response to a question from the Panel, the European Union noted its usual practice is to consider macroeconomic factors at the industry level, rather than at the company specific level, and that export performance is also normally examined at the industry level rather than at the company specific level.[908] The European Union further stated that:

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[901] Definitive Regulation, Exhibit CHN-4, recital 175.

[902] China, first written submission, paras. 489-492.

[903] China, first written submission, para. 490.

[904] Specifically, China compares the volume of sales by the EU industry on the EU market with data for EU industry production and stocks of sampled producers, and calculates that exports declined by almost 50 per cent from 2003 to the investigation period. China, first written submission, para. 492.

[905] China, second written submission, para. 1007.

[906] European Union, first written submission, para. 663.

[907] In this regard, we note that, in response to questions from the Panel, the European Union stated that, consistent with its usual practice, in this case, the Commission requested "information relating to sales (both domestic and export sales) in the injury questionnaires sent to the sampled producers". European Union, answer to Panel question 100, para. 37. Thus, it is clear that the Commission had information on exports for the sampled producers, and indeed, it provided an extract from an internal document prepared in the course of the investigation summarising the verified data of the injury indicators for the sampled producers, including data on exports. The European Union asserts that this data confirms both the lack of importance of export sales, and the healthy state of export performance, thus demonstrating that export performance could not have been a cause of injury. However, there is no indication in the Definitive Regulation that this information was actually considered by the Commission in its analysis, and indeed, the European Union does not assert otherwise.

[908] European Union, answer to Panel question 100, para. 37.

> "[s]ince global data for the whole EU industry was available in COMEXT (EUROSTAT) it could be compared with the total Community Industry figure (*i.e.* PRODCOM 1.431 K MT) to assess its relative importance. This approach was consistent with the use of the remaining data quoted under Chapter E. of Council Regulation No 91/2009 on causation which was related to total imports from the rest of the world and imports from a selected number of countries (Taiwan, Japan, USA). COMEXT statistics are an objective and reliable source of information. Such use of general statistical information is all the more permissible given that this factor does not really concern the state of the domestic industry (Article 3.4) but is examined in order to evaluate its possible relevance for determining the impact of factors other than dumped imports (Article 3.5)."[909]

Finally, the European Union disputes China's alternative calculation, contending that it compares information for the EU industry of 45 producers for sales and production with stocks figures for the sampled producers, which the European Union asserts is clearly incorrect, and that this information should therefore not be used.[910]

7.436 We note that, while the discussion of export performance is in the section of the Definitive Regulation entitled "Effect of other factors", it appears that the Commission did not, in fact, find that export performance was an "other factor which was injuring the domestic industry at the same time as dumped imports" within the meaning of Article 3.5 of the AD Agreement. However, it is also clear that this conclusion was based on information for all EU producers of fasteners, and not on information related to either the domestic industry as defined by the Commission, or the sampled producers examined in the investigation. The European Union asserts that the Commission's consideration of this data on exports was nonetheless permissible, particularly since it was compared to data for EU industry production.

7.437 We do not agree. It seems clear that a comparison of data on exports by a larger group of producers, including producers not included in the EU industry, with production data for the EU industry, will not necessarily give an accurate indication of the export performance of the EU industry. We recall that, with respect to the evaluation of the Article 3.4 factors concerning injury, the panel in *EC – Bed Linen* concluded that:

> "information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the "relevant economic factors and indices having a bearing on the state of the industry" required under Article 3.4. This is true even though those companies may presently produce, or may have in the past produced, the like product, bed linen."

The European Union argues that:

> "one cannot simply transpose the *EC – Bed Linen* finding in respect of industry indicators under Article 3.4 to causation indicators under Article 3.5. ... Clearly, since the purpose of Article 3.5 is not to evaluate the state of the domestic industry but rather to examine whether the injury alleged to exist is not caused by other factors, these other factors may be of a general statistical nature."[911]

However, in our view, this ignores the fundamental principle reflected in the statement of the panel in *EC – Bed Linen*, which in our view is that the analysis of injury to the domestic industry should rest

[909] European Union, answer to Panel question 100, para. 37.
[910] European Union, first written submission, para. 666.
[911] European Union, answer to Panel question 99, paras. 34-35.

on information related to that industry, and not some other group of producers. We see no reason why the same fundamental principle should not be adhered to in the context of analysis of causation, including the examination of other factors which may be causing injury to the domestic industry at the same time as imports.[912] It is undisputed that the Commission's conclusions with respect to export performance rest on consideration of information for a broader group of producers than the domestic industry as defined by the Commission in this investigation.

7.438 We therefore conclude that, by relying on information concerning producers not part of the domestic industry in considering whether exports of the EU industry may have contributed to the injury suffered by the industry, the European Union failed to undertake an objective examination of the relevant facts in concluding that the export performance of the domestic industry was not a source of material injury to the EU industry. Thus, we consider that its conclusion concerning the effect of other factors is, in this respect, inconsistent with Articles 3.1 and 3.5 of the AD Agreement.[913]

11. Claims regarding alleged procedural violations

(a) Introduction

7.439 China raises a series of claims of violation with respect to the conduct of the fasteners investigation. While it argues these claims separately, there is a significant degree of overlap in its assertions, and in the factual situations it asserts demonstrate the violations alleged. The relevant provisions under which violations are asserted are Articles 6.1.1, 6.2, 6.4, 6.5, 6.9, 12.2 and 12.2.2 of the AD Agreement. We examine each of China's claims below.

(b) Whether the European Union violated Articles 6.5, 6.2 and 6.4 of the AD Agreement by failing to disclose the identity of domestic producers

(i) Arguments of the Parties

China

7.440 China contends that the Commission did not disclose the identity of the complainants and the supporters of the complaint[914], treating this information as confidential on the grounds that its

[912] We do not preclude the possibility that information for all producers might, in some circumstances, be an appropriate proxy for information specific to the domestic industry at issue, for instance where information for the industry is not available or not provided. However, in such a situation, we would consider it imperative that the investigating authority explain why, in the particular case, it considers reliance on information to be appropriate, and how any weaknesses in the information have been taken into account.

[913] We note that we do not consider it appropriate to consider the information on export volumes and trends submitted by China, as China calculated export information for the EU industry by subtracting data for sales by the entire EU industry from data for production by the entire EU industry, and comparing the result with data for inventories reported by the seven sampled producers, to derive the proffered data on exports. We consider this comparison improper, and that the resulting information on exports constitutes an inappropriate basis for analysis in this case. Moreover, it is clear, and China does not argue otherwise, that no arguments in respect of such information were made before the investigating authority. Similarly, we decline to consider the information submitted by the European Union in response to questioning by the Panel on this issue. While it appears this information was in the record of the investigating authority, there is no indication in the Definitive Regulation that it was considered by the Commission, and the Definitive Regulation itself, as explained by the European Union, indicates that it did not. We do not consider it appropriate to evaluate whether other data, not referred to by the Commission, could have been the basis of the determination actually made. In our view, to do otherwise would require us to engage in *de novo* consideration of the evidence, which we are precluded from undertaking, pursuant to the standard of review in Article 17.6(i).

[914] Although initially China also seemed to take issue with the non-disclosure of the volume of production of the subject product by the complainants and the supporters of the complaint, it subsequently

disclosure could lead to retaliation from complainants' and supporters' customers who import the subject product from China. The identity of complainants is, in China's view, essential information that an application must contain. China first claims that the European Union's failure to disclose the identity of the complainants and supporters of the complaint constitutes a violation of Article 6.5 of the AD Agreement. China maintains that a claim of "potential commercial retaliation" does not amount to "good cause" being shown for confidential treatment within the meaning of Article 6.5 of the AD Agreement. In China's view, the argument presented by the complainants and the supporters of the complaint that disclosure of their identity may trigger commercial retaliation by their customers referred to a hypothetical detrimental effect and did not establish "good cause". Further, China asserts that the companies that were included in the sample for the Commission's injury determination did not request that the Commission keep their identity confidential. Since the sampled companies were all also complainants or supporters of the complaint, China contends that the fact that confidential treatment of their identities was not required during the investigation shows that the ground on which they sought confidential treatment for their identity at the time of the complaint, namely "potential commercial retaliation", was not "good cause" within the meaning of Article 6.5 of the AD Agreement. China also argues that the complainants and the supporters of the complaint did not submit evidence to support their claim of potential commercial retaliation. As China sees it, good cause cannot be established on the basis of allegations or conjecture but must be based on evidence.[915]

7.441 China argues that the identity of the complainants constitutes relevant information used by the authorities in an investigation. Failure to disclose that information therefore also violated Article 6.4 of the AD Agreement, which requires that interested parties be given timely opportunities to see all non-confidential information which is used by the authorities and which is relevant to the preparation of their cases. China is of the view that a violation of the obligation set forth in Article 6.4 necessarily leads to a violation of Article 6.2, and that therefore, by not disclosing the identity of the complainants and the supporters, the European Union also acted inconsistently with Article 6.2 of the AD Agreement. Independently from this, China maintains that the Commission violated Article 6.2 since the non-disclosure of the identity of the complainants and supporters deprived the Chinese exporters of an opportunity to review the information on standing and to make comments.[916]

European Union

7.442 The European Union notes that although in the heading and the introductory part of this claim China refers to Article 6.5.1 of the AD Agreement, along with the chapeau of Article 6.5, it develops the claim essentially on the basis of the latter. The European Union therefore considers China to have dropped the Article 6.5.1 aspect of this claim.[917] With respect to the claim under Article 6.5, the European Union notes that China seems to accept that in principle the identity of complainants can be treated as confidential information within the meaning of Article 6.5, but asserts that in this case no good cause was shown for such treatment. According to the European Union, any detrimental effect that may result from the disclosure of business confidential information is by definition hypothetical.[918] It is, in the European Union's view, impossible to predict with any degree of certainty the consequences of disclosing confidential information. The European Union, therefore, disagrees with China's contention that there had to be compelling evidence to show the existence of commercial retaliation from the customers of the complainants and the supporters of the complaint in the fasteners investigation.[919] The European Union posits that potential commercial retaliation constitutes "good

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clarified that this claim was limited to the non-disclosure of the identity of the complainants and the supporters of the complaint. China, second written submission, para. 1049.

[915] China, second written submission, para. 1052.

[916] China, first written submission, para. 545.

[917] European Union, first written submission, para. 711.

[918] European Union, first written submission, para. 715.

[919] European Union, first written submission, para. 715.

cause" within the meaning of Article 6.5. There was, in the European Union's view, a serious risk that customers importing fasteners from China whose costs would have gone up with the imposition of an anti-dumping measure on fasteners from China would retaliate against the complainants and supporters.[920] The European Union also disputes China's assertion that the sampled EU producers whose identity was disclosed were themselves complainants or supporters of the complaint, maintaining that this assertion has no factual basis.[921]

7.443 As regards China's claims under Articles 6.4 and 6.2, the European Union submits that these claims fall outside the Panel's terms of reference because China's panel request makes no reference to the identity of the complainants in connection with these two provisions.[922] The European Union notes that the panel request refers to "the composition of the domestic industry", but argues that this is not the same as "the identity of the complainants".[923] Assuming China's claims under Articles 6.4 and 6.2 are within the Panel's terms of reference, the European Union argues that, with the exception of the independent claim under Article 6.2, these two claims are purely consequential to China's claim under Article 6.5. According to the European Union, since there is no violation of Article 6.5, there should be no violation of Articles 6.4 or 6.2 either. Assuming that the Panel finds a violation of Article 6.5, the European Union disagrees that this would necessarily lead to a violation of Articles 6.4 and 6.2 of the Agreement without further examination.[924] While recognizing the inter-linkages between the different paragraphs of Article 6, the European Union contends that each such paragraph contains distinct rights and obligations.[925] With respect to China's independent claim under Article 6.2, the European Union contends that China ignores the third sentence of Article 6.2, which excludes confidential information from the scope of the right conferred upon interested parties in that provision. Therefore, argues the European Union, this claim is also dependent on China's claim under Article 6.5, and even if the Panel finds this claim to be within its terms of reference, it should be rejected on substance.[926]

(ii) Arguments of Third Parties

Chile

7.444 Chile submits that a correct application of Article 6.5 of the AD Agreement requires that the reason for the disclosure of confidential information must be known by the interested party that has submitted the information. According to Chile, where the investigating authorities determine that the request for confidentiality is not warranted, they must expressly so state. Chile considers that the disclosure of information considered by the authority to be non-confidential must be properly substantiated and expressly authorized by the party submitting the information. Not so doing would violate that party's due process rights.

(iii) Evaluation by the Panel

7.445 China's claim consists of several distinct allegations. China argues that confidential treatment of the identities of the complainants and the supporters of the complaint violated Article 6.5 of the

[920] European Union, first written submission, para. 716.
[921] European Union, first written submission, paras. 717-718.
[922] The European Union's terms of reference objection in this regard applies both to the claims under Articles 6.2 and 6.4 that the European Union characterizes as being dependent on a finding of inconsistency with Article 6.5 and to the independent claim under Article 6.2. European Union, first written submission, para. 724.
[923] European Union, first written submission, para. 720.
[924] European Union, first written submission, paras. 721-723.
[925] European Union, answer to Panel question 62.
[926] European Union, first written submission, para. 724.

AD Agreement.[927] Since, according to China, the identity of the complainants and the supporters was not confidential information within the meaning of Article 6.5, withholding that information from access by the Chinese producers also violated Article 6.4 of the AD Agreement. In China's view, any violation of Article 6.4 necessarily leads to a violation of Article 6.2.[928] Thus, submits China, by not disclosing the identity of the complainants and supporters, the Commission also violated Article 6.2. This allegation of a violation of Article 6.2 is dependent on a finding of violation of Article 6.4. In addition, China maintains that the Commission violated Article 6.2 because by treating the identity of the complainants and supporters as confidential information, the Commission deprived the Chinese producers of the opportunity to examine whether the standing requirements were met.[929]

7.446 The European Union argues that China's claims under Articles 6.4 and 6.2 are outside our terms of reference because China's panel request does not refer to these two provisions in connection with the non-disclosure of the identity of the complainants and supporters. China objects to this assertion and submits that its panel request does raise a claim under Articles 6.4 and 6.2 with respect to the non-disclosure of the identity of the complainants and supporters. In this regard, China contends that its panel request not only raises this claim but also goes further and identifies some of the arguments supporting the claim. According to China, however, such arguments do not limit the scope of the claim raised in the panel request. Further, China contends that the European Union has not shown that the alleged procedural deficiency in China's panel request prejudiced its ability to defend itself in these proceedings.[930]

7.447 We note that the central element of China's claim is an alleged violation of the chapeau of Article 6.5 of the AD Agreement. China contends that the Commission erred in treating as confidential information the identity of the complainants and the supporters of the complaint. With respect to its claims under Articles 6.4 and 6.2, China disagrees with the European Union's contention that these claims are dependent on China's claim under Article 6.5.[931] We agree with China that these claims do not seem to be dependent on the claim under Article 6.5 in the sense that China does not argue that since Article 6.5 was violated Articles 6.4 and 6.2 were also violated. However, we note that both Articles 6.4 and 6.2 exempt confidential information from the scope of the rights that they confer upon interested parties in an investigation. Article 6.4 gives interested parties the right "to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5". (emphasis added) Article 6.2 which concerns the interested parties' right to defend their interests, and to that end meet other interested parties, provides, in its third sentence, that the "[p]rovision of such opportunities must take account of the need to preserve confidentiality[.]"(emphasis added) Thus, the rights of interested parties set forth in these two provisions do not apply to confidential information. It follows that to find a violation of Articles 6.4 and 6.2, we necessarily have to find a violation of Article 6.5, which would mean that the identity of the complainants and the supporters should not have been treated as confidential information. It is only if that information was wrongly treated as confidential that we can engage in a substantive analysis of China's claims under Articles 6.4 and 6.2. In this regard, we recall that China raises two allegations of violation of Article 6.2, one as a dependent claim on a violation of Article 6.4 and one independently, on the basis that by treating the identity of the complainants and the supporters as confidential information the Commission precluded the Chinese producers from examining properly whether the standing requirements were met in the fasteners investigation. We note that finding a violation of Article 6.2 in the context of China's claim under Article 6.2 which it characterizes as being independent from a violation of Article 6.4, would also require a prior finding, in connection with the claim under Article 6.5, that the identity of the complainants and the supporters was wrongly

[927] China, second written submission, para. 1047.
[928] China, first written submission, para. 544.
[929] China, first written submission, para. 545; China, second written submission, para. 1070.
[930] China, second written submission, paras. 1057-1064.
[931] China, second written submission, para. 1067.

treated as confidential information. In this regard, we see no difference between China's dependent and independent claims under Article 6.2. Consequently, we will start our evaluation with the claim under Article 6.5. If we find that the Commission did not err in treating the information at issue as confidential and that therefore there was no violation of Article 6.5, we will also find that Articles 6.4 and 6.2 were not violated either. We recall, however, the European Union's argument that the claims under Articles 6.4 and 6.2 are not within our terms of reference. Therefore, we will only reject China's claims under these two provisions if we find them to be properly before us. Conversely, if we find that the Commission's treatment of this information violated Article 6.5, we will go on to address the European Union's preliminary objection, and assuming we conclude that the claims under Articles 6.4 and 6.2 are within our terms of reference, will assess China's claims in light of the specific rights and obligations set out in these two provisions.

7.448 With these considerations in mind, we now turn to China's claim under Article 6.5.[932] We note that the facts pertaining to this claim are uncontested. The complaint requesting the initiation of the investigation at issue requested not to disclose the identity of the complainants in order to avoid potential retaliation which could be caused by some of their customers who also buy fasteners imported from China. The complaint reads, in relevant parts:

> "The Complainants and the Supporters have expressed the willing [sic] not to have their names published, to avoid a potential retaliation which could be carried out by some of their Customers who also buy products directly from P.R. China.
>
> A non-confidential summary cannot be subsequently given without disclosing the name of the complainants and the Supporters."[933] (emphasis added)

7.449 The Commission accepted this request for confidentiality and conveyed its decision to the Chinese producers who had questioned the Commission on the complainants' identity.[934] The disagreement between the parties relates to whether or not potential commercial retaliation from customers constitutes good cause within the meaning of Article 6.5 of the AD Agreement, justifying the treatment of the information as confidential.

7.450 The chapeau of Article 6.5 of the AD Agreement reads:

> "6.5 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." (footnote omitted)

7.451 We note that Article 6.5 addresses the treatment of information submitted to the investigating authorities in an anti-dumping investigation by interested parties for which confidential treatment is sought. It states that information which is by nature confidential or which is submitted on a confidential basis must be treated as confidential by the investigating authorities provided good cause

[932] China's claim only relates to the chapeau of Article 6.5 and does not extend to Article 6.5.1. China, first written submission, para. 1050.

[933] Exhibit CHN-15, p. 5.

[934] The relevant communication from the Commission states that "[t]he Commission services have accepted this request from these interested parties in order to avoid eventual adverse commercial consequences". Exhibit CHN-44, p. 1.

is shown. It also provides that such information cannot be disclosed without specific permission from the party submitting the information. We note that it is now well established that the good cause requirement for confidential treatment applies both to information that is by nature confidential and to information submitted on a confidential basis.[935] Thus, whether the identity of the complainants and the supporters was by nature confidential or was submitted on a confidential basis is not relevant to our analysis. Article 6.5 does not, however, explain what "good cause" means. In our view, this is something that has to be assessed by the investigating authorities in light of the circumstances of each investigation and each request for confidential treatment. We also consider that what constitutes "good cause" will depend on the nature of the information at issue for which confidential treatment is sought.[936] The "good cause" alleged to exist, in turn, will determine the kind of supporting evidence that may be needed in order to demonstrate the existence of such "good cause".

7.452 We recall that in this dispute the core of the disagreement between the parties is whether "potential commercial retaliation" constitutes good cause to justify confidential treatment of the identity of the complainants and the supporters of the complaint. On its face, we see nothing in Article 6.5 that would exclude potential commercial retaliation from constituting good cause for the confidential treatment of any information, including the identity of the complainants. China does not contest the factual assertion that some of the customers of the complainants and the supporters of the application also bought the subject product from Chinese producers. The complaining EU producers asserted that they feared commercial retaliation. We understand this assertion to imply that if such customers found out that these producers had requested the initiation of an anti-dumping investigation on fasteners from China, this might have the effect of raising prices on such fasteners, and thus raising the costs of these customers. China has not proffered any evidence, or even argued, that this assertion was unfounded, unreasonable, or untrue. China merely argues that the potential retaliation was "hypothetical", something that "could" happen, but that there was no evidence that it "would" happen. We recall that in elucidating what may constitute information that is by nature confidential, Article 6.5 refers to, *inter alia*, situations where the disclosure of the information "would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". We can certainly see that "potential commercial retaliation" from the complainants' customers who, in addition to buying the subject product from the complainants, also purchase imports from the country subject to the complaint, might have a "significantly adverse effect" upon the complainants.

7.453 China argues that the Commission erred by making its decision without any evidence that showed the existence of the alleged potential commercial retaliation.[937] It is clear that the only "evidence" before the Commission was the complaint, which alleged that the disclosure of the identity of the complainants could trigger commercial retaliation from their customers who also bought the subject product from China. The Commission relied on this statement, although there is no indication that the complainants submitted evidence to support their concern in this regard. However, in the circumstances of this investigation, we do not consider this to be a fatal lack of evidence. First, in our view, "potential commercial retaliation" is not a sufficiently concrete phenomenon that evidence of its existence is likely to be obtainable.[938] Thus, unless there is some reason to believe that the fear of

[935] Panel Report, *Korea – Certain Paper*, para. 7.335; 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. 8.219.

[936] Panel Report, *Korea – Certain Paper*, para. 7.335; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.378.

[937] China, second written submission, paras. 1052-1053.

[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

retaliation is unreasonable, unfounded, or untrue – and China has proffered none – we consider that the allegation of the complainants in this case is a sufficient basis for the Commission's conclusion. We note in this regard that, in our view, the purpose of granting confidential treatment as provided for in Article 6.5 is precisely to make sure that a feared adverse effect, in this case "potential commercial retaliation", remains hypothetical, and does not actually materialize. Second, we note that in this investigation the basis for treating the identity of the complainants as confidential was not a mere assertion by the complainants that disclosing their identity would cause retaliation. The record shows that, by stating that their customers were also themselves importers of the subject product from China, the complainants substantiated their assertion to a certain degree by explaining the circumstances which they thought showed that commercial retaliation could happen. We therefore disagree with China's contention that the "potential commercial retaliation" alleged by complainants did not constitute good cause within the meaning of Article 6.5.

7.454 China argues that the seven EU producers that made up the sample for purposes of the Commission's injury determination were also complainants and supporters and that they did not ask the Commission to treat their identity as confidential information during the course of the investigation after initiation. This, in China's view, shows that there was no logical reason to keep the identity of these companies confidential at the complaint stage.[939] In our view, however, the fact that the names of the companies that made up the sample for purposes of the injury analysis were disclosed does not affect the analysis with respect to the confidential treatment of the names of the complainants and supporters. The sampled companies can clearly be identified as cooperating, otherwise they would not have been included in the sample, but this is not necessarily the same as being identified as complainants themselves, and thus might not cause the same concerns for those companies.[940] We are therefore not convinced by this argument.

7.455 Based on the foregoing, we conclude that the Commission did not err in granting the request of the complainants and the supporters of the complaint to treat their identities as confidential, and therefore reject China's claim under Article 6.5.[941]

7.456 We now turn to China's claims under Articles 6.4 and 6.2 of the AD Agreement. We recall that the European Union argues that these claims are outside our terms of reference because they were not identified in China's panel request consistently with the requirements of Article 6.2 of the DSU. The European Union argues that the panel request does not refer to the non-disclosure of the identity of the complainants in the list of the claims under Articles 6.2 and 6.4. The European Union notes that in this particular section the panel request refers to "the composition of the domestic industry" but maintains that this issue is addressed in a different section of China's first written submission.[942] China disagrees, arguing that the European Union mixes claims with arguments. China maintains that it raised a claim under Articles 6.4 and 6.2 of the AD Agreement arguing, as indicated in its panel request, that the Commission failed to give the Chinese exporters timely opportunities to see all relevant information that was relevant to the presentation of their cases and the opportunity to defend

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what could be proffered as evidence to support a fear of such retaliation, and China has made no suggestions or argument in this regard.

[939] China, first written submission, paras. 537-538.

[940] We recall, moreover, that at least one company included in the sample was not, in fact, either a complainant or supporter of the complaint. See paragraph 7.214 above.

[941] That said, however, we would like to underline that our finding only reflects our view on this issue in light of the particular circumstances of the fasteners investigation. Our reasoning should not be interpreted as giving investigating authorities *carte blanche* to treat the identities of all complainants in all anti-dumping investigations as confidential. Nor should our conclusion here be interpreted to mean that an asserted fear of potential commercial retaliation would always be sufficient, of itself, to justify confidential treatment, or could not be challenged as unfounded, unreasonable, or untrue.

[942] European Union, first written submission, para. 720.

themselves.[943] China contends that it then went on and gave examples as to how these obligations were violated. According to China, the fact that China added arguments as to how the specific rights and obligations found in Articles 6.4 and 6.2 were violated by the Commission does not narrow the scope of these claims so as to justify the conclusion that they do not extend to the non-disclosure of the identity of the complainants and supporters.[944] Furthermore, China submits that the phrase "including, but not limited to" used in the panel request in connection with these claims shows that China intentionally submitted a non-exhaustive list of arguments in support of these claims.[945] Finally, China posits that the Panel should reject the European Union's terms of reference objection since the European Union failed to show that its due process rights were prejudiced by this alleged deficiency in China's panel request.[946]

7.457 We recall that in line with the legal framework outlined above[947], in assessing the European Union's terms of reference objection, we must consider China's panel request, in its entirety, to see whether a claim has been raised under Articles 6.4 and 6.2 of the AD Agreement with respect to the non-disclosure of the identity of the complainants and the supporters of the complaint. We note that the European Union's objection only concerns whether the panel request provides a brief summary of the legal basis for a claim under Articles 6.4 and 6.2 with respect to the non-disclosure of the identity of the complainants and supporters. The panel request provides, in relevant part:

> "China submits that this measure is inconsistent, at least, with the following provisions of the *AD Agreement* and of the *GATT 1994*:
>
> ...
>
> Articles 6.2 and 6.4 of the *AD Agreement* and paragraph 151 (c)(e) of the *Working Party Report on the Accession of China* because the EC failed to ensure throughout the investigation to Chinese producers/exporters the full opportunity for the defence of their interests and failed to provide timely opportunities for them to see all information that is relevant to the presentation of their cases, including, but not limited to the composition of the domestic industry, data concerning normal value determination, information on the adjustments for differences affecting price comparability, Eurostat data on the basis of which are based the total EC production and EC consumption figures[]" (underline emphasis added)

7.458 We note that the request clearly refers to Articles 6.4 and 6.2 of the AD Agreement and argues that the Commission failed to give the Chinese exporters full opportunity for the defence of their interests and timely opportunities to see all the information that was relevant to the presentation of their cases, throughout the fasteners investigation. We also note that this explanation repeats the text of Articles 6.4 and 6.2, which provide, respectively, that "[t]he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases[]" and that "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests". In our view, this made it clear that China sought to bring a claim regarding an alleged violation of the obligations set forth in Articles 6.4 and 6.2 in the fasteners investigation. China's panel request goes further, however, and contains more specific explanations as to the factual circumstances in which Articles 6.4 and 6.2 were allegedly violated in the fasteners investigation. Thus, the panel request asserts that Articles 6.4 and 6.2 were violated, *inter alia*, in connection with the composition of the

[943] China, second written submission, para. 1060.
[944] China, second written submission, paras. 1059-1061.
[945] China, second written submission, para. 1063.
[946] China, second written submission, para. 1064.
[947] See paragraph 7.15 above.

domestic industry, data concerning normal value determination, information on the adjustments for differences affecting price comparability, and Eurostat data on the basis of which the total EC production and EC consumption figures were calculated. These specific explanations are preceded by the phrase "including, but not limited to". Having reviewed China's panel request, we agree with China that the more specific explanations provided cannot be interpreted as limiting the scope of the claims under Articles 6.4 and 6.2 of the AD Agreement. In our view, the nature of the rights and obligations set forth in Articles 6.4 and 6.2 is such that a reference to these provisions, without further explanation, could suffice to put the responding Member on notice of the nature of the claim that the complainant might bring. We therefore find China's claims under Articles 6.4 and 6.2 of the AD Agreement with respect to the non-disclosure of the identity of the complainants and the supporters of the complaint are properly before us.

7.459 Turning to the substance of China's claims, we recall our observation above[948], that the obligations in Articles 6.4 and 6.2 of the AD Agreement do not apply to information which is confidential within the meaning of Article 6.5 of the AD Agreement. Having concluded that the Commission did not err in treating the information as confidential, it is clear that there can be no violation under Articles 6.4 and 6.2 in the non-disclosure of that information. We therefore reject China's claim of violation of Articles 6.4 and 6.2 in connection with the non-disclosure of the identity of the complainants and the supporters of the complaint.

(c) Whether the European Union violated Articles 6.2, 6.4, 6.5 and 6.9 of the AD Agreement by failing to disclose aspects of the normal value determination

(i) Arguments of the Parties

China

7.460 China argues that the Commission violated its procedural obligations under Articles 6.2, 6.4 and 6.9 of the AD Agreement in connection with its dumping determination. First, China argues that the Commission acted inconsistently with the requirements of Articles 6.4 and 6.2 of the AD Agreement by failing to disclose information concerning the product types used in the determination of normal value. China contends that it was in the General Disclosure Document that the Commission informed the Chinese producers for the first time that normal value for the Indian producer was calculated on the basis of product types. However, China maintains that despite repeated requests from the Chinese producers, the Commission did not explain what those product types were. According to China, it was only one working day before the deadline for comments on the General Disclosure Document that the Commission informed the Chinese producers that the normal value had not been calculated on the basis of PCNs. China asserts that by remaining silent despite Chinese producers' repeated requests for information on the product types, the Commission violated the obligations set forth in Article 6.4 of the AD Agreement. China argues that the information on product types was used by the Commission, was relevant to the preparation of the Chinese producers' cases and was not confidential. Therefore, argues China, the Chinese producers should have been allowed to see this information. China also submits that by refusing to provide this information the Commission also violated the more general due process obligation set out in Article 6.2 of the AD Agreement.[949]

7.461 Second, China submits that the Commission violated Article 6.4, and therefore also Article 6.2, of the AD Agreement by failing to disclose information on normal value calculations. China argues that the Chinese producers sought to obtain information on normal value determinations

[948] See paragraph 7.455 above.
[949] China, first written submission, para. 565.

during the investigation at issue.[950] China asserts that the Commission failed to disclose information on normal values calculated for each product type, and the calculations as to whether each product type was sold in representative quantities in the Indian market.[951] China argues that through these violations, the Commission made it impossible for the Chinese producers to properly defend their interests in the investigation at issue.

7.462 Third, China argues that the Commission violated Articles 6.4 and 6.2 of the AD Agreement by failing to disclose information regarding the comparison between the normal value and export price. China maintains that despite repeated requests from the Chinese producers, the Commission refused to provide information on the adjustments that were made. Specifically, China argues that the Commission did not provide any information on how the distinction between standard and special fasteners was made and how the adjustment for quality control costs was made.[952] In the absence of this information, argues China, it was impossible for the Chinese producers to challenge the Commission's normal value determinations and dumping calculations.[953]

7.463 Fourth, China maintains that as a result of these three violations, that is by failing to provide information on product types, normal value determinations and the comparison between the normal value and the export price, the Commission also violated Article 6.9 of the AD Agreement. In this regard, China argues that these three pieces of information constitute "facts" that established the basis of the European Union's decision as to whether or not definitive anti-dumping measures should be applied, and should therefore have been disclosed to the Chinese producers pursuant to Article 6.9.[954]

European Union

7.464 In response to China's claims under Articles 6.4 and 6.2 of the AD Agreement, the European Union generally notes that China bases these claims on the disclosure documents issued by the Commission. The European Union contends, however, that these disclosure documents are susceptible to scrutiny under Article 6.9 of the AD Agreement, not Articles 6.4 or 6.2.[955] With regard to China's first claim, the European Union argues that this claim is not within the Panel's terms of reference because China's panel request refers to "data concerning normal value determination", not to "product types for the normal value calculation".[956] Assuming this claim is within the Panel's terms of reference, the European Union argues that China's claim should be rejected. The European Union notes that in connection with this claim, China refers to the relevant parts of the Definitive Regulation, certain disclosure documents and correspondence between the Commission and a law firm representing Chinese producers. According to the European Union, the Definitive Regulation cannot be challenged under Articles 6.4 and 6.2 in this context, although it could have been (but was not) challenged under Article 12 of the AD Agreement. Therefore, that part of China's evidence is irrelevant.[957] As to the disclosure documents and the correspondence between the Chinese producers and the Commission, the European Union argues that those could in theory only be evidence of an alleged violation of Article 6.9 of the AD Agreement, but not of alleged violations of Articles 6.4 or 6.2. In any case, argues the European Union, the evidence submitted by China shows that the Chinese producers had the opportunity to see all the relevant information which was not confidential

[950] China, answer to Panel question 64, para. 279; China, answer to Panel question 101, paras. 41-42.
[951] China, first written submission, para. 568.
[952] China, first written submission, para. 576.
[953] China, first written submission, para. 578.
[954] China, first written submission, para. 586.
[955] European Union, first written submission, paras. 707 and 726.
[956] European Union, first written submission, para. 725.
[957] European Union, first written submission, para. 726.

and which was relevant to the presentation of their cases.[958] There can therefore be no violation of Articles 6.4 or 6.2 of the AD Agreement in this regard.

7.465 With regard to China's second claim, the European Union posits that given the amount of information provided in the Definitive Regulation, China's claims under Articles 6.4 and 6.2 of the AD Agreement should be rejected. The European Union argues that the pieces of evidence on which China bases its claims, namely the General and Individual Disclosure Documents, fall within the scope of the obligation set forth in Article 6.9 of the AD Agreement, not Articles 6.4 or 6.2, because these two provisions do not impose an active notification obligation on the investigating authorities.[959] The European Union contends that the General Disclosure Document contained enough information on the Commission's normal value determination. According to the European Union, since the information on the normal values of the Indian producer was treated as confidential under Article 6.5 of the AD Agreement, a decision China has not challenged, China's claim under Article 6.2 fails, because the obligation under this provision does not apply to confidential information.[960]

7.466 Regarding China's third claim, the European Union notes that China bases this claim on the disclosure documents which, according to the European Union, are susceptible to a challenge under Article 6.9 of the AD Agreement, not Articles 6.4 or 6.2.[961] Further, the European Union submits that the information on the comparison between the normal value and the export price was treated as confidential information by the Commission, a decision China has not challenged, and is therefore not within the scope of the obligation under Articles 6.4 and 6.2.[962] The European Union also argues that China's factual description with regard to this claim is incomplete and inaccurate.

7.467 In response to China's fourth claim, concerning Article 6.9 of the AD Agreement, the European Union asserts that this claim is not within the Panel's terms of reference, because China has failed to consult on this claim, and it is not properly identified in China's panel request. According to the European Union, as far as alleged procedural violations were concerned, the essence of the consultations was an alleged failure to provide access to the file and an alleged violation of the confidentiality rules. The European Union maintains that the disclosure obligations were not discussed in the consultations.[963] If the Panel is of the view that this claim does fall within its terms of reference, the European Union contends that China's argument is limited to providing a summary of the obligation set forth in Article 6.9, and that China has thus failed to demonstrate a *prima facie* violation of this provision.[964]

(ii) Arguments of Third Parties

Norway

7.468 Norway contends that the requirements of Articles 6.4 and 6.9 of the AD Agreement also serve to achieve the purpose of Article 6.2, namely to enable interested parties to defend their interests. Norway therefore submits that whenever an investigating authority violates Articles 6.4 or 6.9 of the AD Agreement, it also violates Article 6.2. With respect to Article 6.4, Norway argues that whether a particular document is relevant to an interested party's defence should be assessed from the point of view of that party, not that of the investigating authorities. Norway asserts that the only exception to this is confidential information which, if submitted, has to be accompanied by a non-confidential summary. With respect to Article 6.9, Norway maintains that the obligation set forth in

[958] European Union, first written submission, para. 726.
[959] European Union, first written submission, paras. 735-736.
[960] European Union, first written submission, para. 738.
[961] European Union, first written submission, para. 739.
[962] European Union, first written submission, para. 741.
[963] European Union, first written submission, para. 744.
[964] European Union, first written submission, paras. 746-747.

this provision is not to disclose all facts, but those facts which establish the basis of the authorities' decision whether definitive measures will be applied. This obligation, argues Norway, cannot be fulfilled by giving access to all the files in the investigation file. Rather, the investigating authorities should identify the facts that establish the basis of the decision whether definitive measures should be imposed.

United States

7.469 The Unites States agrees with China's contention that Article 6.4 of the AD Agreement requires the investigating authorities to provide access to all non-confidential information submitted during an investigation. The United States also agrees that not doing so would violate not only Article 6.4 but also Article 6.2 of the AD Agreement, since without access to information described in Article 6.4 interested parties cannot have a full opportunity to defend their interests. The United States maintains that an interested party's right to defend its interests is particularly important with respect to information pertaining to normal values and the comparison between the normal value and the export price. The Unites States asserts that without access to such information an interested party cannot be said to have benefited from the right to defend its interests as required under Article 6.2.

(iii) Evaluation by the Panel

7.470 China maintains that the Commission violated the obligations set forth under Articles 6.2, 6.4, 6.5[965] and 6.9 in its dumping determination in the fasteners investigation. In support of this claim, China puts forward four arguments. The first three arguments concern alleged violations of Articles 6.4 and 6.2 of the AD Agreement, and assert that the Commission failed to allow the Chinese producers access to information pertaining to different aspects of the Commission's dumping determinations, namely information on: 1) product types; 2) the normal value determination; and 3) the comparison between the normal value and the export price. With respect to each of these, China argues that despite the Chinese producers' requests, the Commission failed to provide the requested information. Given the commonality of their premise, we consider it appropriate to evaluate these three arguments together. After we have considered these three arguments, we will proceed to China's argument under Article 6.9 of the AD Agreement.

Alleged Violations of Articles 6.4 and 6.2 of the AD Agreement in connection with the Commission's dumping determinations

7.471 China submits that the Commission violated the obligations set forth in Articles 6.4 and 6.2 of the AD Agreement by failing to provide the Chinese producers with access to information pertaining to certain aspects of its dumping determinations in the fasteners investigation. As noted above, China's claim under Articles 6.4 and 6.2 take issue with three specific elements of the Commission's dumping determinations, namely access to information on the product types, normal value determinations, and the comparison between the normal value and the export price. As far as the claim with respect to information on product types is concerned, the European Union argues that this claim is not properly before us. We therefore have to resolve this objection before proceeding to a substantive assessment of China's claim.

7.472 The European Union asserts that this claim is not within our terms of reference because it was not identified in China's panel request. The European Union notes that the claims identified in China's panel request in connection with Articles 6.4 and 6.2 of the AD Agreement refer to "data concerning normal value determination", and maintains that this cannot be the basis of China's claim

[965] See, footnote 989.

regarding the alleged failure to disclose "information on product types". The European Union therefore argues that the Panel should refrain from making findings with respect to this claim.

7.473 China argues that the reference in its panel request to "data concerning the normal value determination" also covers "information on product types" used by the Commission in its normal value determinations. Specifically, China maintains that the word "data" is broad enough to cover all information used in connection with the normal value determination, including that concerning the product types used for that determination.[966] China also argues that in making this terms of reference objection the European Union mixes claims with arguments. Finally, China posits that the European Union's objection should be rejected since it has not shown that the alleged deficiency in China's panel request prejudiced the European Union's due process rights in these proceedings.[967]

7.474 China's panel request provides in relevant part:

> "Articles 6.2 and 6.4 of the *AD Agreement* and paragraph 151 (c)(e) of the *Working Party Report on the Accession of China* because the EC failed to ensure throughout the investigation to Chinese producers/exporters the full opportunity for the defence of their interests and failed to provide timely opportunities for them to see all information that is relevant to the presentation of their cases, including, but not limited to the composition of the domestic industry, data concerning normal value determination, information on the adjustments for differences affecting price comparability, Eurostat data on the basis of which are based the total EC production and EC consumption figures;" (emphasis added)

7.475 Central to the Parties' disagreement is the meaning of the phrase "data concerning normal value determination" as used in China's panel request. Specifically, the issue is whether this phrase may be interpreted as referring to information on product types used by the Commission in making normal value determinations. We recall that dumping determinations are based on a comparison between the export price of a product, that is, the price of a product when sold to the importing country, and the normal value of a like product, that is, the price of a like product when sold in the market of the exporting country. In some investigations, as in the fasteners investigation, the product at issue in the investigation may comprise different types of the product. In such investigations, data concerning normal value determinations may be collected and subsequently compared to the export price on the basis of such product types. In our view, a reference to the data concerning normal value determination may reasonably be understood as also referring to the relevant product types on the basis of which data may be collected and analysed. We therefore consider that China's claim that the Commission acted inconsistently with Articles 6.4 and 6.2 of the AD Agreement by failing to disclose information concerning the product types used in the determination of the normal value is properly before us, and we proceed to a substantive assessment of this claim.

7.476 As discussed above[968], we have rejected China's claim under Article 2.4 of the AD Agreement with respect to the substantive aspects of the Commission's dumping determinations. In rejecting China's claim, we relied, *inter alia*, on the fact that China had not demonstrated that the Chinese producers made a substantiated request for adjustments with respect to differences affecting price comparability between Chinese fasteners and those of the producer in India. China argues that the reason why the Chinese producers did not make such a request in the fasteners investigation is because they were not provided timely opportunities to see information necessary to make such a request, in violation of Article 6.4 of the AD Agreement, and were thus deprived of the opportunity to defend their interests, in violation of Article 6.2 of the AD Agreement.

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[966] China, second written submission, para. 1074.
[967] China, second written submission, para. 1075.
[968] See paragraphs 7.294 to 7.302 above.

7.477 China contends that the Commission violated Articles 6.4 and 6.2 of the AD Agreement by failing to provide information to the Chinese producers with respect to three issues related to its dumping determination. China's arguments seek to show that, as far as the dumping determination was concerned, the fasteners investigation was conducted in a manner that disregarded the basic rights of interested parties under Articles 6.4 and 6.2. We understand China to argue that, by not respecting these rights, the Commission left the Chinese producers in the dark for a long time during the investigation, making it impossible for them to defend their interests, and more specifically, to make requests for adjustments to ensure a fair comparison between the normal value and the export price. We recall that China acknowledges that the Chinese producers did not make a request for adjustments in the investigation at issue.[969] China contends, however, that this was due to their understanding that the comparison between the normal value and the export price would be made on the basis of full PCNs. According to China, by informing the two Chinese producers who had repeatedly requested clarification in this regard of the fact that the comparison would not be based on full PCNs only one working day before the deadline for comments on the Disclosure Documents, the Commission made it impossible for them to request adjustments.[970] The issue for us, therefore is whether the Commission disregarded the rights of the Chinese producers under Articles 6.4 and 6.2 of the AD Agreement, and thereby prevented them from taking necessary steps to ensure that the Commission's determination of dumping was based on a fair comparison.

7.478 Article 6.4 of the AD Agreement provides:

> "6.4 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."

7.479 We note that Article 6.4 generally stipulates that the authorities shall give interested parties "opportunities" to see all information used by the investigating authorities in an anti-dumping investigation. This right, however, is not unlimited. First, it applies to information which is used by the authorities. Second, the information must be relevant to the presentation of the interested parties' cases. Third, this right does not apply to confidential information. Fourth, the investigating authorities have to provide these opportunities "whenever practicable", and on a "timely" basis.[971] The panel in *EC – Salmon (Norway)* explained 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, 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

[969] See footnote 621 above.

[970] China, answer to Panel question 38(b).

[971] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142; Panel Report, *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. 6.82.

> 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 anti-dumping 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."[972]

7.480 In addition, we agree with the European Union that Article 6.4 does not obligate the investigating authorities to actively disclose information to interested parties.[973] China generally recognizes that Article 6.4 requires the authorities to allow interested parties to see all information which is relevant to the presentation of their cases, and bases its claims under Article 6.4 on the assertion that the Commission refused to "provide" certain information to the Chinese producers despite numerous requests.[974] We note, however, that, in its response to question 101 from the Panel, China argues that "the investigating authorities were under the obligation to provide such normal value information even in the absence of a request for disclosure". To the extent this may suggest that China considers the Commission to have been required to actively disclose information under Article 6.4, we reject that view. In our view, a violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential.

7.481 Article 6.2 provides:

> "6.2 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

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[972] Panel Report, *EC – Salmon* (*Norway*), para. 7.769 (emphasis added).

[973] European Union, answer to Panel question 62, para. 143. In this regard, we find support in the finding of the panel in *Korea – Certain Paper* (*Article 21.5 – Indonesia*) that Article 6.4 of the AD Agreement "does not ... impose an independent disclosure obligation on the authorities". Panel Report, *Korea – Certain Paper* (*Article 21.5 – Indonesia*), para. 6.87. We note that Article 6.9, in contrast, does contain an obligation to actively disclose "essential facts". China's claims under that provision are addressed elsewhere in this report.

[974] See, for instance, China, first written submission, para. 563; China, answer to Panel question 61.

> 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."

The Appellate Body has interpreted Article 6.2 to require that interested parties in an anti-dumping investigation be given "liberal opportunities ... to defend their interests".[975] To ensure this, Article 6.2 requires that the authorities provide opportunities for interested parties to meet other parties with opposing views so that an exchange of views can take place, subject to the need to preserve confidentiality. Thus it is clear to us that the rights of interested parties under Article 6.2 do not include any right to see information treated as confidential consistently with the provisions of Article 6.5 of the AD Agreement. We also note that, like Article 6.4, Article 6.2 does not require the investigating authorities to actively disclose information to interested parties.

7.482 Having outlined the requirements of the two provisions that China has cited in connection with its claim, we now turn to the facts of the fasteners investigation to consider whether these provisions were, as argued by China, violated by the Commission. We recall that China's claim under Articles 6.4 and 6.2 alleges that the Commission failed to "provide" three categories of information, that is, information on: 1) product types used in the determination of the normal value; 2) normal value determinations; and 3) the comparison between the normal value and the export price.

7.483 We note that with respect to all three of these alleged violations the European Union submits that China's claim does not pertain to the obligations set forth in Articles 6.4 and 6.2 since these provisions do not require the investigating authorities to actively disclose any information.[976] Thus, the European Union appears to focus on China's use of the word "provide" in its claim and arguments, suggesting that this entails disclosures, and thus China's allegations under Articles 6.4 and 6.2 do not correspond to the obligations in these two provisions. In our view, however, it is clear that China bases its claims under Articles 6.4 and 6.2 on the allegation that two Chinese producers requested information from the Commission which the Commission failed to then make available to them. Thus, it is clear to us that China's allegations fall within the scope of a claim under, at least, Article 6.4, as we have described above.

Product Types

7.484 With respect to information on **product types**, China maintains that the first time the Chinese producers were informed of the fact that the Commission had based its normal value determination on product types, as opposed to PCNs, was in the General Disclosure Document. China asserts that even then, however, the Commission did not explain what those product types were until very late in the period allowed for comments on the General Disclosure. China contends that the Commission refused to provide information concerning the product types, despite repeated requests made by two Chinese producers, until one working day before the period for comments ended.[977]

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[975] 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. 241; Panel Report, *Korea – Certain Paper* (*Article 21.5 – Indonesia*), para. 6.76.

[976] European Union, first written submission, paras. 726, 736 and 739.

[977] China, first written submission, paras. 555-556.

7.485 The General Disclosure Document contains the following information, in relevant parts:

> "*3.3.3 Normal value ...*
>
> (84) It was examined whether each type of the product concerned sold in representative quantities on the Indian domestic market could be considered as being sold in the ordinary course of trade pursuant to Article 2(4) of the basis Regulation. This was done by establishing for each product type the proportion of profitable sales to independent customers on the domestic market during the investigation period.
>
> (85) Where the sales volume of a product type, sold at a net sales price equal to or above the calculated cost of production, represented more than 80% of the total sales volume of that type, and where the weighted average price of that type was equal to or above the cost of production, normal value was based on the actual domestic price. This price was calculated as a weighted average of the prices of all domestic sales of that type made during the IP, irrespective of whether these sales were profitable or not.
>
> (86) Where the volume of profitable sales of a product type represented 80% or less of the total sales volume of that type, or where the weighted average price of that type was below the cost of production, normal value was based on the actual domestic price, calculated as a weighted average of profitable sales of that type only.
>
> (87) Depending on the product type, normal value was established based on weighted average sales prices of all sales or weighted average sales prices of profitable sales only, on the domestic market of the analogue country based on the verified data of one producer in that country."[978] (emphasis added)

Thus, the General Disclosure Document makes it clear that the Commission based its normal value determination on "product types", as opposed to PCNs, but does not provide any information as to the relevant characteristics of those groups, or how they were determined. We note in this regard that the European Union does not contest the fact that the Chinese producers were informed of this for the first time when they received the General Disclosure Document, which, as noted, was issued on 3 November 2008.

7.486 Having received the General Disclosure Document, two Chinese producers wrote to the Commission on 8 November 2008 seeking clarification regarding the product types used to determine normal value:

> "On several occasions, the disclosure document mentions that the comparison for dumping purposes is based on "product type". It would appear that there are no PCN types with the degree of detail as produced by Kunshan and/or Jinding. Kunshan and Jinding would therefore be eager to see a listing of such "product types" and a linkage with the PCNs of Kunshan and Jinding. It should be possible to disclose such information, *i.e.* which Indian fastener type (normal value) was compared to which PCNs (export sales) in the calculation table, without disclosing confidential business information of the Indian company."[979] (emphasis added)

In our view, this letter clearly conveys these two Chinese producers' request to see information regarding the product types that established the basis of the Commission's normal value determination

[978] Exhibit CHN-18, pp. 18-19.
[979] Exhibit CHN-28, p.2.

and the relationship between these product types and the PCNs pertaining to the Chinese producers' products.

7.487 In an email dated 13 November 2008, the Commission replied to this request:

> "Q2: The exact normal values used cannot be disclosed since they would reveal the prices of the analogue country producer. As explained under point 4 below, beside product characteristics as specified in the PCN, a distinction was introduced between standard and special products since this was found to have a significant impact on prices.
>
> Q4: As mentioned in our document, the relevant distinction made was between standard and special products.
>
> For the investigated Community producers, standard products represented about 40% of the produced volume.
>
> For the Indian producer, a very substantial part (the % is confidential) of their domestic sales were also standard products.
>
> For your two clients, their entire export volume was considered as being standard products.
>
> As for the fasteners sold to the automotive sector, they can buy either standard or special fasteners."[980]

We agree with China that this reply does not explain how the product types were established in the determination of normal value, or the relevant characteristics of those product types.

7.488 These two Chinese producers sent another letter to the Commission, dated 17 November 2008:

> "From Pooja Forge's non-confidential files, we cannot find any indication that Pooja Forge did report transaction-by-transaction sales listings on a PCN basis. We likewise cannot see whether Pooja Forge reported any cost tables on a PCN basis. **In abstract terms, was normal value established on a PCN basis, or were more general types of Pooja's fasteners matched with groups of PCNs from our clients? In that context, it would still be very useful for us if we could have a listing simply of which type of fastener or which PCNs of Pooja were matched with the PCNs of our clients**. […] we trust that the (abstract) disclosure of which types/PCNs were used on the normal value side for comparison purposes does in no way constitute confidential information, but it would simply give use an idea of what was compared with what, for the purposes of providing our comments."[981] (emphasis in original)

This letter clearly repeats these Chinese producers' request to see information on the basis of which the product types for the Indian producer were established.

[980] Exhibit CHN-29.
[981] Exhibit CHN-30, p. 2.

7.489 The Commission replied to this request in a letter dated 21 November 2008:

> "The comparison was not made on the basis of the full PCN, but on part [sic] of the characteristics of the product, namely the strength class as well as the abovementioned distinction between special and standard products."[982] (emphasis added)

This letter is the first time the Commission clearly informs these two Chinese producers that the Commission did not make its normal value determinations on the basis of full PCNs, but rather on the "characteristics" of strength class and the distinction between standard and special fasteners. China asserts, and the European Union does not dispute, that this letter came one working day before the deadline to make comments on the General Disclosure Document.

7.490 Thus, it is clear, and largely undisputed, that the two Chinese producers who requested clarification in this regard learned only shortly before the deadline to make comments on the General Disclosure, which we understand to have been the last opportunity for interested parties to present arguments to the Commission with respect to the investigation, that the normal value data were established on the basis of product types, as opposed to PCNs, and of the characteristics on which those product types were determined. In our view, the correspondence between the Commission and two Chinese producers quoted above shows that until the receipt of the General Disclosure Document, the Chinese producers were under the impression that the Commission would make its dumping determinations on the basis of PCNs, as requested in the questionnaires sent to the Chinese and the Indian producers. Shortly before the deadline for their last opportunity to make comments on the Commission's dumping determinations, however, they learned that this was not the case, and two who requested clarification in this regard received some information as to the actual basis on which the price comparisons would be made.

7.491 Ensuring that the comparison of normal value and export price is based on comparable goods is, as provided for in Article 2.4, an obligation on investigating authorities. Foreign producers have a role in that process, by requesting due allowance for differences demonstrated to affect price comparability. In order to fulfil their role, and thus ensure that their interest in a fair comparison is protected, however, it is necessary that they know the basis on which the investigating authority undertakes to make the comparison of normal value and export price, and in sufficient time to allow the exporters to make and substantiate requests for due allowance. In a case such as this one, where it appears from the structure of the questionnaires that such requests will not be necessary because of the categorization of the product according to PCN groups, we consider that it is not unreasonable for exporters to not request specific adjustments which are already reflected in those PCN groups. However, once the investigating authority informs the exporters that the comparison will not be based on those PCN groups, it seems to us that the investigating authority is also obliged to provide an opportunity to see, in a timely fashion, information concerning the basis on which the comparison will actually be made. Without that information, it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison.

7.492 The facts of this case are clear. Chinese producers were informed very late in the proceedings of the product types that formed the basis of the comparisons underlying the Commission's dumping determinations. Two of them requested information pertaining to those product types, but were not given a timely opportunity to see the relevant information by the Commission.[983] The European Union does not argue that the information at issue was not relevant to the presentation of

[982] Exhibit CHN-31, p. 2.

[983] We note, in this context, that an opportunity to "see" information may obviously be satisfied by an active provision of that information, in a letter or other communication. This is different, however, from an affirmative obligation to actively disclose information.

the Chinese exporters' case. Thus, the facts above suggest that the European Union failed to provide a timely opportunity for the Chinese exporters to see information relevant to the presentation of their cases, in violation of Article 6.4 of the AD Agreement.

7.493 However, the European Union disputes the assertion by China that the information on product types at issue was not confidential, arguing that China has not made a claim under Article 6.5 of the AD Agreement regarding the confidentiality of some of the information pertaining to the Indian producer.[984] We do not consider that the fact that China did not make a claim under Article 6.5 in this context undermines its claim under Article 6.4 in this case. There is no indication in the correspondence discussed above that the Commission refused to provide the information on product types, as opposed to the actual normal values, because it was confidential – in fact, in the last communication, the Commission did explain the basis for the product type groups. In these circumstances, we consider that the European Union has failed to demonstrate that the information in question was confidential, or was withheld from access on the basis of confidentiality, and therefore do not consider that China's arguments have been rebutted.

7.494 The European Union also submits that China's allegation that the Commission repeatedly refused to provide information on the product types is contradicted by Exhibit CHN-31.[985] That Exhibit is the 21 November 2008 letter from the Commission which, as discussed above, informed the two Chinese producers who requested clarification in this regard for the first time in the investigation that the Commission had based its normal value determinations on product types, not PCNs, and that those product types were based on strength class and the distinction between special and standard fasteners. Given our view that this information was not provided in a timely fashion, as required by Article 6.4, we consider that the European Union's argument is unavailing, and does not rebut China's arguments. We therefore conclude that the European Union violated Article 6.4 of the AD Agreement by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established, information relevant to the presentation of their case.

7.495 Moreover, while in general we might not consider it necessary to go on to address China's claim under Article 6.2, in this case, we consider that the discussion above is also relevant to a proper application of the obligation to ensure all interested parties a "full opportunity for the defence of their interests". In our view, the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings, when it was no longer feasible for them to request that adjustments be made in order to ensure a fair comparison, which until that time they reasonably considered were not necessary. We therefore conclude that the European Union acted inconsistently with Article 6.2.

Normal Value Determinations

7.496 We turn now to China's allegation that the Commission failed to provide information on **normal value determinations**. China contends that the European Union violated its obligations under Articles 6.4, 6.2 and 6.5 of the AD Agreement by failing to disclose, in the individual and General Disclosure Documents, information pertaining to the determination of the normal value. China puts forward two arguments in support of its claims under Articles 6.4 and 6.2: first, that the Commission failed to disclose the normal values, either on a general basis or on a product type basis; and second that the Commission failed to disclose for each product type the outcome of its determination of whether the product had been sold in representative quantities in the Indian

[984] European Union, first written submission, para. 730.
[985] European Union, first written submission, para. 732.

market.[986] The European Union submits that Articles 6.4 and 6.2 do not require the investigating authorities to actively provide any information. According to the European Union, the disclosure documents that China cites in connection with this claim fall within the scope of the obligation set forth under Article 6.9, not Articles 6.4 or 6.2. With respect to the substantive arguments presented by China, the European Union maintains that the General Disclosure Document contains considerably more information than China suggests.[987]

7.497 We note that this aspect of China's claim is specifically directed at alleged deficiencies in the disclosure by the Commission to the Chinese producers, as reflected in the General and Individual Disclosure Documents. This is clear from the first written submission of China, which clearly links this claim to the General and Individual Disclosure Documents issued by the Commission: "In both the Individual and General Disclosure Documents, the EC failed to provide any relevant information regarding the determination of the normal value".[988] We recall that Articles 6.4 and 6.2 of the AD Agreement do not impose any affirmative disclosure obligations on the investigating authorities. We therefore consider that China has failed to make a *prima facie* case of violation under these two provisions with respect to the alleged non-disclosure of information on the normal value determinations in the General and Individual Disclosure Documents, and therefore reject China's claim.[989]

Comparison between the Normal Value and the Export Price

7.498 With regard to the Commission's alleged failure to provide information on the **comparison between the normal value and the export price**, China submits that since the Individual and General Disclosure Documents sent by the Commission did not contain sufficient information on fair comparison, two Chinese companies requested information on this issue. China contends that despite these Chinese producers' requests, the Commission did not provide the required information and therefore violated Articles 6.4 and 6.2 of the AD Agreement. The European Union repeats its argument that Articles 6.4 and 6.2 do not impose a disclosure obligation on the investigating authorities. The European Union also maintains that China's description of the Commission's disclosure documents and the subsequent exchange of letters between the Commission and the Chinese producers is incomplete and inaccurate.[990]

7.499 The evidence before us indicates that Chinese producers did make a request to see information concerning fair comparison:

> "The individual disclosure documents, in Annex B on dumping, No. 2 "Comparison", only state in general terms that "due allowance in the form of adjustments was made for differences affecting price comparability". Kunshan and Jinding would like to know at least what kind of adjustments of normal value were made for comparison purposes, in particular for physical differences, if any."[991] (emphasis added)

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[986] China, first written submission, paras. 567-568.
[987] European Union, first written submission, para. 737.
[988] China, first written submission, para. 566 (introducing China's argument regarding this claim).
[989] We note that although China cites Article 6.5 in its submissions to the Panel in connection with this claim, it does not articulate this aspect of its claim. In response to questioning in this regard, China states that its argument is that treating normal value information as confidential is inconsistent with Article 6.5 of the AD Agreement, China, answer to Panel question 69, but makes no specific arguments with respect to the information at issue in this case. We do not consider this general statement to be sufficient to make out a *prima facie* case of violation and consider this aspect of China's claim to have been insufficiently elaborated, and therefore do not make findings in this regard.
[990] European Union, first written submission, para. 742.
[991] Exhibit CHN-28, Question 3 on p.2.

In response, the Commission stated:

> "The adjustment was calculated based on the costs of quality control incurred by the Indian producer. The amount of these costs cannot be disclosed, but they were clearly higher than that of the Chinese producers." [992]

In a subsequent letter which mainly addressed the issue of product types used for the dumping determinations, Chinese producers asked whether the Commission had made any adjustment for physical differences between the products of the Indian producer and those of the Chinese producers.[993] In response, the Commission stated:

> "Physical differences are addressed by the division into special and standard types, as described above, and by the adjustment for the cost of quality control which reflects the general difference in quality level."[994]

7.500 This exchange of letters shows that the Chinese producers sought information on the fair comparison made by the Commission and the latter responded to these requests with relevant information. We understand China to recognize that information was provided, but to argue that the explanations provided by the Commission were not sufficient. For instance, China maintains that, in its last communication in this regard, the Commission "failed ... to precisely explain which products were 'standard' fasteners and which products were 'special' fasteners[]"[995] and that "regarding the adjustment for 'costs of quality control', the EU investigating authorities merely noted that an adjustment had been made but failed to provide any detail regarding this adjustment[.]"[996]

7.501 We do not consider that China's allegations in this regard are sufficient to constitute a *prima facie* case of violation of Article 6.4 of the Agreement. China has not shown that a request to see information used by the Commission which was relevant to the presentation of Chinese producers' cases was rejected by the Commission. Indeed, the focus of China's argument is the alleged insufficiency of the explanation given by the Commission, not a lack of information. However, we see nothing in the text of either Article 6.4 or Article 6.2 that requires an investigating authority to give any explanation at all with respect to the information it makes available to the parties.[997] Thus, we consider that China has not made a *prima facie* case of violation of Article 6.4 in this regard, and therefore reject China's claim. Having rejected China's claim under Article 6.4, and in the absence of any additional arguments with respect to the alleged violation of Article 6.2 of the AD Agreement, we also reject China's claim under the latter provision.

Alleged Violation of Article 6.9 of the AD Agreement in connection with the Commission's dumping determinations

7.502 China submits that by failing to disclose information on product types, the normal value determinations and the comparison between the normal value and the export price, the Commission failed to disclose "essential facts" as required by Article 6.9 of the AD Agreement. China contends that these three elements constituted "facts" within the meaning of Article 6.9 and therefore should

[992] Exhibit CHN-29, Response to Question 3.
[993] Exhibit CHN-30.
[994] Exhibit CHN-31, p.2.
[995] China, answer to Panel question 102(b).
[996] China, answer to Panel question 102(b).
[997] Other provisions do require the investigating authority to explain its analysis and conclusions with respect to that information, including Article 12.2 of the AD Agreement, which requires that an investigating authority set forth, "in sufficient detail the findings and conclusion reached on all issues of fact and law considered material".

have been disclosed by the Commission.[998] The European Union submits that China's claim under Article 6.9 of the AD Agreement falls outside the Panel's terms of reference, because this claim was not subject to consultations, and because in China's panel request no reference is made to information on "product types".

7.503 China acknowledges that its request for consultations does not contain any reference to Article 6.9, but argues that this does not necessarily mean that its claim under Article 6.9 in its panel request cannot reasonably be said to have evolved from its request for consultations. China states that the issues of "the data concerning the normal value" and "the adjustments for differences affecting price comparability" were subject to consultations. According to China, the fact that Articles 6.2, 6.4 and 6.5 were cited in this connection in China's request for consultations shows that the Chinese producers raised the concern that they were not provided with adequate opportunities to have access to information which was not confidential. China goes on to contend that:

> "The additional reference to Article 6.9 means that *this very same issue* raised concerns also in terms of the EU's failure to properly disclose the facts. In other words, the additional reference to Article 6.9 in the panel request does, therefore, not change the essence of the dispute which continues to relate to the same issue, namely access to facts and information used by the investigating authority. In that respect the legal basis in the panel request has merely evolved from the legal basis mentioned in the request for consultations."[999] (emphasis in original)

7.504 We begin by observing that it is undisputed that China's request for consultations contains no reference to Article 6.9 of the AD Agreement. China's panel request, on the other hand, states, in pertinent part:

> "China submits that [the Definitive Regulation] is inconsistent, at least, with the following provisions of the *AD Agreement* and of the *GATT 1994*: ...
>
> - Articles 6.2 and 6.9 of the *AD Agreement* because the EC failed to inform the interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures, including, but not limited to the following elements: data concerning the normal value determination and information on how the price comparison was carried out, including data on the adjustments for differences affecting price comparability."

7.505 We recall that, as discussed above[1000], while there does not have to be precise identity between China's request for consultations and its panel request, the request for consultations and the panel request must concern "the same matter" or, put differently, we must be able to conclude that the legal basis of the panel request "may reasonably be said to have evolved from the legal basis identified in the request for consultations", in order for a claim not specifically identified in China's request for consultations, but properly identified in the panel request, to fall within our terms of reference. We do not consider that this standard is satisfied with respect to China's claim under Article 6.9.

7.506 Based on the jurisprudence, China submits that its claim under Article 6.9 "does not change the essence of the issue" and that the legal basis for this claim merely evolved from the legal basis identified in its request for consultations. It follows, in China's view, that its claim under Article 6.9

[998] China, first written submission, paras. 585-586.
[999] China, second written submission, para. 1104.
[1000] See paragraph 7.24 above.

is within the Panel's terms of reference. In this regard, China refers to the Appellate Body's reasoning in *Mexico – Anti-Dumping Measures on Rice*:

> "In our view, the same logic applies with respect to the *legal basis* of the complaint. A complaining party may learn of additional information during consultations—for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations—namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that 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."[1001] (underline emphasis added)

In our view, the facts of this dispute are different from the hypothetical situation posited by the Appellate Body. In this case, there is no reference to Article 6.9 in China's request for consultations nor any narrative description indicating that China might intend to raise a claim under Article 6.9 in the context of the Commission's dumping determinations. Thus there is no indication at all of a legal basis in the request for consultations from which the claim in this regard set forth in the panel request could have evolved.

7.507 In our view, it is clear that the obligation set forth in Article 6.9 of the AD Agreement is different in nature from the obligations set forth in Articles 6.4 and 6.2. We recall the text of Article 6.9, 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 of 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. Thus, as we have noted earlier, and as is clear from the second sentence, Article 6.9 clearly requires an affirmative act of disclosure of information by the investigating authorities, and specifies what information must be disclosed – the "essential facts under consideration which form the basis for the decision whether to apply definitive measures". Moreover, in our view, the disclosure required under Article 6.9 is a one-time act[1002], and, as is clear from the text, takes place near the end of the process ("before a final determination is

[1001] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

[1002] See, Panel Report, *EC – Salmon* (*Norway*), paras. 7.797-7.802, where the panel concluded that Article 6.9 did not require an additional disclosure in a case where, subsequent to the Article 6.9 disclosure and comments thereon by interested parties, the investigating authority changed its views, and reached a different conclusion than that foreshadowed in the disclosure.

made ... in sufficient time for parties to defend their interests"). On the other hand, as we have discussed above, Articles 6.4 and 6.2 do not require any affirmative disclosure by the investigating authority, but rather concern the provision of timely opportunities to see information, and a full opportunity to defend interests. Moreover, both of these obligations apply throughout the course of an anti-dumping investigation – Article 6.2 specifically so states, and Article 6.4 requires the authorities "whenever" practicable to provide "opportunities", in the plural, for parties to see information.

7.508 Thus, in our view, even though China's claim under Article 6.9 is premised on the same factual basis, given that there was no reference whatsoever to Article 6.9 in the request for consultations, nor any explanation that might suggest that this information was not disclosed as required by Article 6.9, we are of the view that this claim cannot be said to concern the "same matter", or to have "evolved from the legal basis", set forth in the request for consultations. We therefore conclude that consultations were not held with respect to China's claim under Article 6.9, and that therefore, pursuant to Article 6.2 of the DSU, this claim is not within our terms of reference, as defined in Article 7.1 of the DSU.[1003]

(d) Whether the European Union violated Articles 6.5, 6.2 and 6.4 of the AD Agreement in connection with the non-confidential version of certain questionnaire responses

(i) Arguments of the Parties

China

7.509 China argues that the non-confidential versions of the questionnaire responses by EU producers, and that of the producer in India, were deficient compared with the requirements of Article 6.5 of the AD Agreement. China submits that this issue was brought to the Commission's attention by the Chinese producers several times during the investigation.[1004] China posits that after the Commission relayed these concerns to the EU producers, some of them submitted additional information in the non-confidential version of their questionnaire responses.[1005] With respect to the alleged deficiencies in the non-confidential version of the EU producers' questionnaire responses, China gives two specific examples, namely the questionnaire responses of A. Agrati S.p.A. ("Agrati") and Fontana Luigi S.p.A ("Fontana Luigi"). With respect to Agrati, China contends that the non-confidential version of this producer's questionnaire response did not contain any non-confidential summary of certain important injury information, and did not contain an adequate statement of the reasons why such a summary was not possible.[1006] As regards Fontana Luigi, China maintains that the non-confidential version of this producer's questionnaire response did not contain any data concerning certain injury factors, and did not contain an adequate statement of the reasons why such a summary was not possible, but stated that the information was by nature confidential because its disclosure would be of significant competitive advantage for a competitor.[1007] China argues that the Commission violated Article 6.5.1 of the AD Agreement by not requiring non-confidential summaries of the confidential information submitted by these two producers which were sufficiently detailed to permit a reasonable understanding of the confidential information.[1008]

[1003] Having found that this claim was not the subject of consultations, we do not consider it necessary to consider whether it was identified in China's panel request consistently with the requirements of Article 6.2 of the DSU.

[1004] China, first written submission, para. 588.

[1005] China, first written submission, para. 589.

[1006] China, first written submission, para. 592.

[1007] China, first written submission, para. 591.

[1008] China, answer to Panel question 103.

7.510 With respect to the non-confidential version of the Indian producer's questionnaire response, China alleges a violation of both Articles 6.5 and 6.5.1.[1009] China contends that the non-confidential version of the questionnaire response does not contain any information at all, particularly with respect to the product types on the basis of which the information was provided by this producer. China argues that the Commission erred by treating the information in this questionnaire response as confidential without good cause and thus acted inconsistently with Article 6.5 of the AD Agreement.[1010] If the Panel finds that the information was properly treated as confidential, China claims a violation of Article 6.5.1 of the AD Agreement on the basis that the non-confidential summaries in the questionnaire response are not sufficiently detailed to permit a reasonable understanding of the information in the confidential version of the questionnaire response and did not contain an adequate statement of the reasons why such a summary was not possible.[1011]

7.511 China also asserts that by failing to make sure that these three questionnaire responses included all relevant information, whether in confidential or non-confidential format, the Commission also violated the Chinese producers' procedural rights under Articles 6.4 and 6.2 of the AD Agreement.[1012]

European Union

7.512 The European Union argues that China has not developed its claim under Articles 6.4 and 6.2 of the AD Agreement.[1013] With respect to the claim under Article 6.5, the European Union argues that China has not developed this claim in connection with the questionnaire response of the Indian producer.[1014] The European Union contends that the domestic producers submitted non-confidential summaries of their questionnaire responses as required under Article 6.5.1. Further, the European Union notes that, on 16 May 2008, the Commission requested all sampled EU producers to make sure that adequate non-confidential versions of their questionnaire responses were provided, specifically, summaries in sufficient detail so as to provide a reasonable understanding of the substance of the confidential information. The producers were also requested to provide copies of all publicly available documents contained in their questionnaires.[1015] Almost all producers replied within the 15-day deadline, submitting additional non-confidential information. The European Union also maintains that China's own evidence regarding one EU producer demonstrates that the allegations are factually unfounded.[1016] Further, most of the information that China refers to is "manifestly and by nature confidential" and not susceptible of summarization.[1017] In any event, the European Union asserts that the non-confidential versions of the questionnaires demonstrate that "it has clearly been possible for the interested parties to defend themselves in respect of injury factors".[1018] The European Union concludes that China has failed to make a *prima facie* case under Article 6.5.[1019]

[1009] China, answer to Panel question 103.
[1010] China, answer to Panel question 71.
[1011] China, second written submission, para. 1114; China, answer to Panel question 103.
[1012] China, second written submission, para. 1117.
[1013] European Union, first written submission, para. 749.
[1014] European Union, first written submission, para. 748.
[1015] European Union, first written submission, para. 751.
[1016] European Union, answer to Panel question 72, para. 178.
[1017] European Union, first written submission, para. 753.
[1018] European Union, answer to Panel question 72, para. 174.
[1019] European Union, first written submission, para. 755.

(ii) Evaluation by the Panel

7.513 China's claim takes issue with the non-confidential versions of the questionnaire responses of two EU producers[1020] and that of the Indian producer whose data was used in the determination of the normal value in the fasteners investigation. China's claim consists of two elements: first, China alleges a violation of Articles 6.5 and/or 6.5.1 with respect to the manner in which confidential information in the questionnaire responses was treated by the Commission; and second, it alleges a violation of Articles 6.4 and 6.2, on the grounds that because of the alleged violations of Articles 6.5 and/or 6.5.1, the Commission also violated the Chinese producers' procedural rights under these two provisions. The claims under Articles 6.4 and 6.2 are, in our view, dependent on a finding of inconsistency with respect to the claims under Articles 6.5 and 6.5.1. We shall therefore start our evaluation with the claims under Articles 6.5 and 6.5.1 and, if necessary, proceed to consider the dependent claims under Articles 6.4 and 6.2.

7.514 With respect to the non-confidential summaries of confidential information in the two EU producers' questionnaire responses, China asserts that the Commission violated Article 6.5.1 of the AD Agreement by failing to make sure that the non-confidential summaries of confidential information in the responses of these two EU producers, Agrati and Fontana Luigi, were sufficiently detailed so as to allow a reasonable understanding of the substance of the confidential information. Article 6.5.1 reads:

> "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."

We recall that, as discussed above[1021], the chapeau of Article 6.5 sets forth the general principle that, provided good cause is shown, information that is by nature confidential and information submitted on a confidential basis must be treated as confidential, and the investigating authorities may not disclose such information without specific permission from the party submitting it. Article 6.5.1, in turn, stipulates that investigating authorities shall require interested parties submitting confidential information to submit a non-confidential summary thereof, which must be prepared in such a way as to allow other interested parties to have a reasonable understanding of the substance of the confidential information. In exceptional circumstances, where such summarization is not possible, Article 6.5.1 requires that the interested party instead indicate that summarization is not possible and state the reasons for that conclusion.

7.515 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

[1020] While China suggests that this claim concerns the non-confidential version of the questionnaire responses of all EU producers, particularly those in the sample, China, first written submission, para. 587, our analysis and conclusions are limited to the two EU producers with respect to which China submitted evidence and arguments. Claims under Article 6.5 (and Articles 6.2 and 6.4) require, as a general rule, a close consideration of the facts, and thus in the absence of specific evidence, we consider it inappropriate to make a more general ruling.

[1021] See paragraph 7.450.

Article 6.5.1 are respected by interested parties.[1022] 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.[1023] 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.

7.516 With these considerations in mind, we now turn to the facts underlying China's claim. With respect to the EU producer Agrati[1024], we note that the non-confidential questionnaire response of this company contains non-confidential summarized information on some injury factors, including employment, sales and re-sales of the subject product (both in volume and value terms), inventories, production, capacity and capacity utilization. However, the questionnaire response does not contain any non-confidential summary of the confidential information on other injury factors, including return on investment, investments, profitability (with respect to the product concerned and the overall company), cash flows, cost of production, suppliers of direct (raw) materials during the investigation period, volume of raw materials used to produce the subject product, extraordinary items with respect to costs, list of all sales to unrelated customers in the European Union, and allocation of different cost elements among different types of products. In each instance, the reason given for the lack of a non-confidential summary is the following:

> "The information cannot be summarized without disclosing confidential information which can cause a damage to our company. The information has been provided as limited."

[1022] We find support for this conclusion in the statement of the panel in *Mexico – Steel Pipes and Tubes*:

> "Although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarization is not possible, we consider that Article 6.5.1 will be meaningfully construed if the interested party on its own initiative gives the reasons why summarization is not possible, in which case it will be for the investigating authority to ensure compliance with the mandate in Article 6.5.1. Accordingly, we consider that Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible."

Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.379. See also, Panel Report, *Guatemala – Cement II* , para. 8.213, where the panel made a similar finding.

We also find support for this conclusion in the report of the panel in *Mexico – Olive Oil*, a dispute concerning Article 12.4.1 of the SCM Agreement, the parallel provision to Article 6.5.1. In that case, the panel concluded that while Article 12.4.1 "imposes an obligation on the interested party claiming confidentiality, in our view it also imposes an obligation on the investigating authority to require that such a statement be provided". Panel Report, *Mexico –Olive Oil*"), para. 7.89.

[1023] Reading Article 6.5.1 to impose an obligation on the investigating authority in this regard is, in our view, consistent with the principle of effective treaty interpretation which, the Appellate Body has observed, is "[o]ne of the corollaries of the "general rule of interpretation" in the Vienna Convention[.]" See, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 23. See also, Appellate Body Report, *Japan – Alcoholic Beverages II* , p. 12; Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*US – Underwear*"), WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, p. 16.

[1024] Exhibit CHN-52.

We recall that Article 6.5.1 requires a party submitting confidential information to also submit a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the confidential information or, if that is not possible, to provide a statement of reasons explaining why such a summary is not possible. Moreover, as discussed above, we consider that the investigating authorities must ensure that the reasons given in this regard are appropriate. There is nothing in the Definitive Regulation, or any other evidence that has been proffered, that would even suggest that the Commission ever considered whether Agrati's stated reason for the lack of a non-confidential summary of such information as profitability, or cash flows was more than *pro forma*. Agrati's statement simply reflects one of the bases on which information may be considered "by nature confidential" - that its disclosure would have a significantly adverse effect on the person supplying it – and asserts that the confidential information cannot be summarized without disclosure. The statement does not, however, relate to any of the specific information for which no non-confidential summary is provided, or to anything having to do with Agrati itself, the party supplying it.[1025] We also note the fact that Fontana Luigi was able to provide non-confidential summaries with respect to some of the information for which Agrati did not provide such a summary[1026], which to us suggests that these categories of information are in fact susceptible of summary. There is certainly nothing in Agrati's stated reason which would demonstrate otherwise. We therefore consider that the Commission failed to ensure Agrati's compliance with the requirements of Article 6.5.1, and thus acted inconsistently with that provision with respect to Agrati.

7.517 Turning to the questionnaire response of the other EU producer, Fontana Luigi, we note that the non-confidential version this producer's questionnaire response contains almost no non-confidential summarized information regarding injury factors, except for total EU consumption and currency exchange rates. In response to a question from the Panel, the European Union explained that the non-confidential version of Fontana Luigi's questionnaire response submitted by China[1027] does not reflect additional non-confidential summaries that were submitted by Fontana Luigi following the Commission's request for additional information. The European Union submitted these additional relevant annexes to Fontana Luigi's questionnaire response as Exhibit EU-28.[1028] Those annexes contain non-confidential summaries of confidential information concerning volume of production, production capacity, capacity utilisation, total purchases in value and volume, stocks in volume of finished goods, sales and re-sales in value and volume both to related and unrelated companies, captive use, cost of production, consumption of raw materials, profitability for the product in question and total company profitability, cash flows, investments, return on net assets, and employment and labour costs both for the product concerned and for the company. China does not dispute that this additional information was made available to the interested parties in the fasteners investigation.[1029] However, there remained other information, such as distribution system and price setting, for which no non-confidential summaries were provided, either originally, or after the Commission's request. In each instance where a non-confidential summary is not provided, the reason given for the lack of a non-confidential summary is the following:

> "This information is by nature confidential because its disclosure would be of significant competitive advantage to a Competitor."

[1025] We note in this regard the conclusion of the panel in *Mexico – Olive Oil*, considering similar facts: "We consider that general statements of this sort are not sufficient as they constitute an unsupported assertion rather than a statement of reasons as required by Article 12.4.1." Panel Report, *Mexico – Olive Oil*, para. 7.101.

[1026] See paragraph 7.517 below.

[1027] Exhibit CHN-60.

[1028] European Union, answer to Panel question 105.

[1029] The European Union submitted documents showing that representatives of the interested parties had access to all of these documents and had taken copies thereof. European Union, answer to Panel question 105, Exhibit EU-29.

There is nothing in the Definitive Regulation, or any other evidence that has been proffered, that would even suggest that the Commission ever considered whether Fontana Luigi's stated reason for the lack of a non-confidential summary of such information as distribution system and price setting was more than *pro forma*. Fontana Luigi's statement does not even assert that the confidential information cannot be summarized, but simply asserts that the information is "by nature confidential". Fontana Luigi's statement is not related to the specific information for which no non-confidential summary is provided, or to anything having to do with Fontana Luigi itself, the party supplying it. We therefore consider that the Commission failed to ensure Fontana Luigi's compliance with the requirements of Article 6.5.1, and thus acted inconsistently with that provision with respect to Fontana Luigi.

7.518 Turning to the questionnaire response of the Indian producer, Pooja Forge Ltd. ("Pooja Forge") we note that the non-confidential version of this company's questionnaire response contains information only on company turnover, production, capacity and capacity utilization, all of which appears to be in indexed form.[1030] No information on sales to independent customers, costs and profits is provided, on the grounds of confidentiality. No non-confidential summary of this information is provided, and no reason for the lack of such a summary is given. In response to a question from the Panel, the European Union confirmed that exhibit CHN-53 contains the latest version of this document, and that the Commission did not ask Pooja Forge to provide more non-confidential information, as it had with respect to the sampled EU producers.[1031] We also note that the questionnaire sent to Pooja Forge contains explanations and guidance concerning the preparation of a non-confidential version of the questionnaire response, including examples of how a respondent may summarize confidential information, for instance, by indexing, which, as noted, Pooja Forge appears to have done with respect to some information.[1032]

7.519 Before considering the parties' arguments on this claim, we note that the development of this claim over the course of these panel proceedings raises concerns for us with regard to due process in dispute settlement proceedings in the WTO. China, in its first written submission, contends that the non-confidential versions of the questionnaire responses of the EU producers and Pooja Forge were "largely deficient", and that this constituted violations of Articles 6.2, 6.4 and 6.5 of the AD Agreement.[1033] Although China provided evidence and made arguments in support of its claim under Article 6.5 with respect to the questionnaire responses of the two EU producers, Agrati and Fontana Luigi, it did not make arguments with respect to the questionnaire response of the Indian producer, Pooja Forge, although it did submit the non-confidential version of its questionnaire response. Further, China's first written submission does not develop its claims under Articles 6.2 and 6.4 of the AD Agreement at all – there is no argument or discussion of Articles 6.2 and 6.4 in this regard. The European Union, in its first written submission, pointed this out, and argued that China appeared to have dropped the part of its claim under Article 6.5 pertaining to the non-confidential version of Pooja Forge's questionnaire response.[1034] The European Union also pointed out that China did not develop its claims under Articles 6.2 and 6.4, and asserted that this indicated that China was not pursuing these claims.[1035]

7.520 In its second written submission, China asserted that it had not dropped its claim under Article 6.5 with respect to the non-confidential version of Pooja Forge's questionnaire response, and

[1030] Exhibit CHN-53.
[1031] European Union, answer to Panel question 109.
[1032] European Union, answer to Panel question 108. Exhibit EU-32 contains the cover letter sent to the Indian producer along with the questionnaire in which it is mentioned that non-confidential summaries have to be provided for confidential information and that such summaries could be prepared in the form of indices.
[1033] China, first written submission, paras. 587-593.
[1034] European Union, first written submission, para. 748.
[1035] European Union, first written submission, para. 749.

clarified its claim, arguing that the non-confidential version of this questionnaire response did not provide any information, in particular with respect to product types on the basis of which information had been submitted and that this violated Article 6.5 of the AD Agreement.[1036] China also elaborated its claims under Articles 6.2 and 6.4, arguing that "[b]y failing to make sure that the questionnaire responses of the Community producers and of the producer in the analogue country included all relevant information (if necessary in the form of non-confidential summary), the EU investigating authorities manifestly violated Articles 6.4 and 6.2 of the AD Agreement".[1037] In response to question 71 from the Panel, China further elaborated its claims, arguing chiefly that the Commission violated Article 6.5 because no good cause was shown for the confidential treatment of certain information in Pooja Forge's questionnaire response. It also argued that the Commission violated Article 6.5.1 because no non-confidential summary was provided for certain confidential information. In its response, China also referred, in one sentence, to its claims under Articles 6.2 and 6.4. In its oral statement at the second meeting, the European Union noted China's explanations and argued that, taking into consideration paragraph 16 of its working procedures, "the Panel should not go any further because China had its opportunity to try to make its case but it failed to even try".[1038] In its second written submission, the European Union made no reference to China's arguments with respect to these claims.

7.521 In response to question 103 from the Panel, following the second meeting, China reiterated that it makes a claim under both Articles 6.5 and 6.5.1 with respect to Pooja Forge's questionnaire response. In comments on China's response to question 103, the European Union contended that China's clarification of the legal basis of its claim in this response was inconsistent with the Panel's working procedures and the basic principles of due process. With respect to China's substantive arguments, the European Union submits that China's argument that the non-confidential version of Pooja Forge's questionnaire response contains no information is counterfactual and, with respect to product types, it argues that the non-confidential questionnaire response mentions that the product concerned is "fasteners" generally.

7.522 We note that the way in which China has pursued this claim in this dispute is far from ideal. We are particularly troubled by the fact that the claim was not developed at all in China's first written submission. In that sense, we share the European Union's due process concerns. It seems to us that, by failing to put forward a fuller explanation of and argument in support of its claim with respect to the Indian producer's questionnaire response at the first opportunity, that is, in the first written submission, China left the European Union in a difficult position in attempting to respond to a claim that was unclear. Indeed, this lack of clarity led us to pose questions to China in this regard, and China subsequently provided, in its second written submission and its answer to our question 71, a sufficiently clear argument in support of its claim to allow the European Union an adequate opportunity to respond, as it did, up to its final submission, with comments on China's answers to questions from the Panel concerning this claim. Moreover, we recall that one of the purposes of the DSU is to provide for the "prompt settlement of situations in which a Member considers that benefits accruing to it" under a covered Agreement are being impaired by another Member's measure, as provided for in Article 3.3 of the DSU. In this regard, we recall the statement of the Appellate Body in *US – FSC* that

> "Article 3.10 of the DSU commits Members of the WTO ... to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". ...The procedural rules of WTO dispute settlement are designed to promote, not the

[1036] China, second written submission, para. 1110.
[1037] China, second written submission, para. 1117.
[1038] European Union, second oral statement, para. 116.

> development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[1039]

Ultimately, in this case, we do not consider that the European Union was deprived of due process by the manner in which China pursued this claim, and we therefore consider it appropriate to make findings on it and proceed to our substantive analysis. We would, however, urge complaining parties to make every effort to pursue their claims with the fullest possible exposition of their arguments in their first written submissions. In our view, this would help ensure that responding parties have a sufficient opportunity to respond to those claims, and demonstrate that Members are engaging in dispute settlement "in good faith in an effort to resolve the dispute", as provided for in Article 3.10 of the DSU.

7.523 Turning to the substance, we note that China's claim with respect to Pooja Forge's questionnaire response is two-fold. China argues, in the first place, that the Commission violated Article 6.5 by treating as confidential certain information in this questionnaire response, particularly product types, which, according to China, do not constitute confidential information. If the Panel finds that this information was properly treated as confidential, China submits that the Commission violated Article 6.5.1 by failing to require Pooja Forge to submit a non-confidential summary which would permit other interested parties to have a reasonable understanding of the confidential information.[1040]

7.524 The European Union argues that China's claim with respect to Pooja Forge's questionnaire response is limited to information on product types. As noted above, we consider that evaluation of a claim under Article 6.5 requires a careful review of the facts with respect to the claim, and note that China has not put forward any evidence or arguments with respect to the confidential treatment of any other category of information than that concerning product types. Therefore, although China's claim takes issue with the treatment of all the information in Pooja Forge's questionnaire response[1041], we limit our analysis to whether the Commission erred in treating information on product types as confidential.

7.525 The European Union asserts that Pooja Forge's questionnaire response mentions that the product concerned is "fasteners" generally, suggesting that in its view, this is sufficient information on product types.[1042] However, China's claim is that the information on product types was treated as confidential inconsistently with Article 6.5 of the AD Agreement because good cause was not shown for such treatment. There is nothing in the evidence before us, and the European Union does not even assert, that a showing of good cause was made for treating this information as confidential. We recall that Article 6.5 clearly requires that "good cause" be shown for confidential treatment of information, whether such treatment is requested for information which is by nature confidential, or information submitted on a confidential basis.[1043] The non-confidential version of Pooja Forge's questionnaire response gives no information concerning the product types for which information was provided, with no assertion or explanation of "good cause" for confidential treatment. We therefore find that the Commission acted inconsistently with its obligations under Article 6.5 of the AD Agreement with respect to the treatment of the confidential information in Pooja Forge's questionnaire response.

[1039] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, para. 166.

[1040] China, answer to Panel questions 71 and 103; China, second written submission, paras. 1110-1115.

[1041] See, for instance, China, second written submission, para. 1110 (non-confidential version of Pooja Forge's questionnaire response "does not contain *any information*, and in particular information on the "product types" on the basis of which the information has been provided by this producer which is obviously not confidential".)

[1042] European Union, comments on China, answer to Panel question 103, para. 24.

[1043] See paragraph 7.451 above.

Having found a violation of Article 6.5, we need not, and do not, make findings with respect to China's claim under Article 6.5.1.[1044]

7.526 With respect to China's claim that the alleged deficiencies in the questionnaire responses of Agrati, Fontana Luigi and Pooja Forge also violated the obligations set forth in Articles 6.4 and 6.2 of the AD Agreement, we recall that, in our view, China's claims under Articles 6.4 and 6.2 are dependent on the claims under Articles 6.5 and 6.5.1. Having found violations of Article 6.5.1 in connection with the non-confidential versions of the questionnaire responses of Agrati and Fontana Luigi, and of Article 6.5 in connection with the questionnaire response of Pooja Forge, we consider that additional findings on China's claims under Articles 6.4 and 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 these claims.[1045]

(e) Whether the European Union violated Articles 6.5, 6.2 and 6.4 of the AD Agreement by failing to disclose the Eurostat data on total EU production of fasteners

(i) Arguments of the Parties

China

7.527 China asserts that, in the complaint underlying this investigation, the complainants calculated total EU consumption of fasteners by adding total imports to total production, and then subtracting total exports from that sum. China contends that although the complaint provided the source data for total exports and imports, data for total production were not provided on the grounds that this was confidential information. According to China, by treating this information as confidential, which China contends was from public sources, the Commission violated Article 6.5 of the AD Agreement.[1046] China goes on to argue that, in the Definitive Regulation, the Commission stated that the figure for total EU production had been estimated on the basis of Eurostat industrial production data, but failed to explain how this estimation had been made. According to China, the Commission violated Article 6.5 of the AD Agreement by treating as confidential the Eurostat data and information as to how the estimation of total EU production was made, and particularly as to whether adjustments had been made to the Eurostat data.[1047] China argues that the Eurostat data and the information as to how the estimation of total EU production had been made, including any adjustments to the Eurostat data, was information used by the Commission and was relevant to the presentation of the Chinese producers' cases. Accordingly, argues China, failing to provide access to such information also violated Articles 6.2 and 6.4 of the AD Agreement.[1048]

European Union

7.528 The European Union contends that Article 6.5 refers to information, not documents or original sources, and asserts that what matters under this provision is the content of the information, not the original document. The European Union maintains that the information on domestic consumption and the methodology for its calculation were disclosed to the Chinese producers in the investigation at issue. Specifically, the European Union asserts that the Chinese producers were

[1044] Thus, we need not address the European Union's contention that a reference to fasteners in general suffices to give a "reasonable understanding" of the product types used in the determination of normal value.

[1045] We would note, however, that the basis for China's claims under Articles 6.2 and 6.4 with respect to the questionnaire responses remains unclear to us, as China has not, in our view, elucidated how, in its view, a failure to require a showing of good cause for the treatment of information as confidential, even if true, constitutes a violation of these provisions.

[1046] China, first written submission, para. 595.

[1047] China, second written submission, para. 1126.

[1048] China, second written submission, para. 1128.

"given access to the relevant Eurostat *information*, including the fact that source of the information was Eurostat".[1049] Therefore, the European Union contends, there was no violation of Article 6.5. The European Union asserts that this information was contained in unlimited Annex C 1-2 to the complaint, and that subsequently it was included in other documents, such as the Information Document and the General Disclosure Document.[1050] The European Union asserts that China's claims under Articles 6.2 and 6.4 are consequential, and requests the Panel to reject them.[1051]

(ii) Evaluation by the Panel

7.529 China argues that the Commission violated Articles 6.5, 6.2 and 6.4 of the AD Agreement[1052] by treating as confidential the original source on which the estimate of total EU production of the like product was based, and by not explaining how the estimation of total EU production was made and whether adjustments to the Eurostat data were made. We note that, in our view, China's claims under Articles 6.2 and 6.4 are dependent on the claim under Article 6.5, since China's allegation of a violation of Articles 6.2 and 6.4 assumes that the Commission erred in treating the information at issue as confidential. We will therefore start our evaluation with China's claim under Article 6.5.

7.530 China maintains that the Commission violated Article 6.5 by treating Eurostat data on total EU production, and how the estimation of total EU production was made, including whether any adjustments were made to Eurostat data, as confidential.[1053] With respect to the second aspect of China's claim, we note that the obligation set forth in Article 6.5 applies to the confidential treatment of information, not the methodology used and determinations made by the investigating authorities. Whether the Commission made adjustments to the Eurostat data in calculating total EU production is not, in our view, information, but rather an aspect of the Commission's analysis and determination in the investigation. In our view, whether or not these matters can be kept confidential or must be disclosed does not fall within the scope of Article 6.5.[1054] We therefore reject this part of China's claim.

7.531 As regards the Eurostat data, we recall that the complainants submitted information on total EU production of fasteners in two annexes: Unlimited Annex C 1-1[1055] and Limited Annex C 1-2[1056]. The table in Unlimited Annex C 1-1 is titled "EU 27 Total Production of the CN Codes Involved in the Complaint in Tons Source: Eurostat" and contains production data, for the period 2004-first quarter 2007, on the basis of CN codes. The table in Limited Annex C 1-2 is titled "EU 27 Total Production of the CN Codes Involved in the Complaint in Tons Original Source". The titles indicate, and a comparison of the two tables shows, that the table in Limited Annex C 1-2 is the source from which the data in the Unlimited Annex C 1-1 have been derived. Complainants asked the Commission to treat Limited Annex C 1-2 as confidential on the grounds that "[t]his information

[1049] European Union, first written submission, para. 761 (emphasis in original).
[1050] European Union, first written submission, para. 761.
[1051] European Union, first written submission, para. 765.
[1052] China's claim does not extend to Articles 6.5.1 and 6.5.2 of the AD Agreement. China, answer to Panel question 104.
[1053] Specifically, China alleges that this information was not placed in the non-confidential investigation file. However, the manner in which the asserted violation took place is not relevant to our analysis of China's claim under Article 6.5, which does not contain any guidelines as to how non-confidential information is to be handled by the investigating authorities in terms of its filing.
[1054] We do not mean to suggest that we take the view that an investigating authority can keep secret its methodology and determinations, merely that any obligations in this regard flow from provisions of the AD Agreement other than Article 6.5. We note in this regard, for instance, Article 12.2 of the AD Agreement, which requires the investigating authority to set forth, in a public notice, and in sufficient detail, its "findings and conclusions on all issues of fact and law considered material by the investigating authorities".
[1055] Exhibit CHN-15, p.45.
[1056] Exhibit EU-11.

[was] by nature confidential because its disclosure would be of significant competitive advantage to a Competitor".[1057] The Commission accepted this request and did not place this annex in the non-confidential file.

7.532 China contends that the Commission violated Article 6.5 by treating Limited Annex C 1-2 as confidential, because "good cause" was not shown to justify such treatment.[1058] China argues that the data in the Limited Annex C 1-2 differs from the data in the Unlimited Annex C 1-1 in that, unlike the latter, the former contains information on the basis of specific PRODCOM codes, not CN codes, and it indicates for each figure whether any of the national figures in the EU 27 were estimated.[1059]

7.533 In response to question 76 from the Panel, the European Union argues:

> "Only the original downloaded screen shot from the EUROSTAT database ([Exhibit] EU-11) was not in the non-confidential file. The Commission did not insist that the complaint be modified in this respect because the same information was available in the non-confidential file and, in fact, also publicly through EUROSTAT's website. In this respect it should be noted that the codes in Exhibit EU-11 correspond exactly to the CN codes on p. 45 in Exhibit CHN-15. The table on p. 45 of Exhibit CHN-15 gives product data by CN code at 8 digit level. Exhibit EU-11 gives production data by PRODCOM code using the NACE 1.1 classification. EUROSTAT publishes a "look-up list" to match CN codes (export codes) to PRODCOM codes (production codes) and this is available on the EUROSTAT website.[69]
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>
> [69] See CN 2006 - PRODCOM 2006 http://ec.europa.eu/eurostat/ramon/relations/index.cfm?TargetUrl=ACT_OTH_REL_DLD&StrNomRelCode=CN%202006%20-%20PRODCOM%202006&StrLanguageCode=EN&StrFormat=HTML (last visited 16 April 2010)."[1060]

7.534 The European Union's explanation confirms that, as China argues, the Eurostat information in Limited Annex C 1-2 was available from a public source, namely the Eurostat website. It seems apparent to us that information that is publicly available is not confidential within the meaning of Article 6.5 of the AD Agreement. However, the Commission treated this information as confidential information, despite that good cause had not been shown. This, in our view, was inconsistent with the letter of Article 6.5 of the AD Agreement, which requires that "good cause" be shown to justify confidential treatment of information. The fact that this information was available in the public domain is not, in our view, an excuse for disregarding the requirements of Article 6.5. This undoubtedly constitutes a fault on the part of the Commission with respect to Article 6.5, even if this violation did not materially affect the ability of Chinese producers to defend themselves in the investigation at issue.

7.535 Turning to China's claim under Article 6.4, we recall that this provision does not require the investigating authorities to actively disclose information to interested parties.[1061] Rather, Article 6.4 requires the authorities "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential ... and that is used by the authorities". We note that in the fasteners investigation, the information in question, total EU

[1057] Exhibit CHN-15, p.178.
[1058] China, second written submission, para. 1122.
[1059] China, answer to Panel question 74; China, second written submission, para. 1121.
[1060] European Union, answer to Panel question 76.
[1061] See paragraph 7.480 above.

production of fasteners, was, available to interested parties, both from public sources, and more importantly, in Unlimited Annex C 1-1. It is therefore clear that the Chinese producers had adequate opportunities to see that information. We therefore reject China's claim that the Commission violated the obligation set out under Article 6.4 of the AD Agreement with respect to this information. Having rejected the claim under Article 6.4, we also reject China's claim under Article 6.2, which concerns the more general right of interested parties with to have a "full opportunity for the defence of their interests". Since the information in question was available to interested parties, we see no basis on which we might conclude that interested parties did not have a full opportunity for the defence of their interests in this regard.

(f) Whether the European Union violated Articles 6.9, 6.2 and 6.4 of the AD Agreement in procedural aspects of the domestic industry definition

(i) Arguments of the Parties

China

7.536 China submits that the Commission's determination regarding the number of producers included in the domestic industry definition was unclear, and specifically, that the Commission indicated in the Information Document that the number of producers in the industry was 114, and in the General Disclosure Document (and in the Definitive Regulation) indicated that the number of producers in the domestic industry was 46.[1062] China contends that by failing to give access to relevant information concerning the definition of the domestic industry, and in particular, how many producers were actually included in the domestic industry definition and their identity as well as the identity of the producers that were excluded from the scope of the domestic industry, the Commission violated Articles 6.2 and 6.4 of the AD Agreement.[1063] China adds that by not disclosing in the Disclosure Document (i) the number of companies constituting the domestic industry, (ii) whether or not such companies supported the complaint, (iii) their identity and (iv) the reason for the reduction from 86 to 46 companies, the Commission also violated Article 6.9 of the AD Agreement.[1064]

European Union

7.537 The European Union asserts that the "evidence" China relies on to support its claims under Articles 6.2 and 6.4 is certain recitals in the Definitive Regulation, and contends that these recitals cannot constitute evidence of a violation of these two provisions.[1065] Moreover, the European Union notes that China's arguments also refer to alleged inconsistencies in the number of domestic producers referred to in two recitals of the Definitive Regulation, and explains that this discrepancy is explained in the Definitive Regulation itself, at recital 112.[1066] The European Union considers that China has failed to make a *prima facie* case in connection with its claims under Articles 6.2 and 6.4.[1067] The European Union contends that China's claim under Article 6.9 is outside the Panel's terms of reference, because the parties did not consult on this claim. If the Panel disagrees, the European Union considers that China has failed to present any evidence or argument in support of this claim, and therefore has failed to make a *prima facie* case with regard to this claim.[1068]

[1062] China, first written submission, paras. 599-604.
[1063] China, first written submission, paras. 605-607.
[1064] China, first written submission, para. 609.
[1065] European Union, first written submission, paras. 766-767.
[1066] European Union, first written submission, para. 768.
[1067] European Union, first written submission, para. 769.
[1068] European Union, first written submission, paras. 770-771.

(ii) Evaluation by the Panel

7.538 China's claim alleges violations of Articles 6.2, 6.4 and 6.9 of the AD Agreement, on the grounds that the Commission failed to provide information on the number and identity of the producers making up the domestic industry.

7.539 The factual basis for China's claim is the Commission's alleged failure to give access to information on the number and identity of the domestic producers making up the domestic industry as well as on the identity of the producers that were excluded from the scope of the domestic industry defined by the Commission in the fasteners investigation. We recall that, as discussed above[1069], in our view, Articles 6.2 and 6.4 do not impose any affirmative obligation on investigating authorities to actively disclose information to interested parties. We also observe that Article 6.4 requires investigating authorities to provide timely opportunities for interested parties to see **information**. However, China's claim does not refer to a failure to provide opportunities to see information. China's claim focuses on the definition of the domestic industry, specifically the number and identity of producers in that industry. In our view, the definition of the domestic industry is an aspect of the Commission's analysis and determination, and does not constitute information *per se*. China acknowledges that the Commission informed parties, at various stages, of its views in this regard, in the Information Document, and in the General Disclosure Document, and ultimately explained its definition of the domestic industry in the Definitive Regulation. The differences between the statements in these documents do not, in our view, have any relevance to a claim under Articles 6.4, as they are not, as we have noted, information *per se*, but conclusions reached by the Commission. Merely because the conclusion at an early stage of the investigation may be different from that ultimately reached does not change this fact. In our view, China has failed to establish a *prima facie* case of violation of Article 6.4 of the AD Agreement because the facts and argument it presents are not relevant to the obligation set out in Article 6.4. Similarly, we fail to see how the fact that the Commission made, and notified parties concerning, conclusions with respect to the definition of the domestic industry at various stages of the proceeding establishes, even *prima facie*, a violation of the Article 6.2 requirement to provide interested parties a full opportunity for the defence of their interests. Indeed, quite the contrary, the fact that the interested parties were notified of these conclusions if anything enabled them to defend their interests by giving insight as to the development of the Commission's analysis, and enabling them to present their own arguments. We therefore reject China's claims under Articles 6.2 and 6.4, as China has failed to substantiate them sufficiently to present a *prima facie* case.

7.540 With respect to China's claim under Article 6.9, we recall that we have concluded that China's claims under Article 6.9 with respect to the normal value calculations were not the subject of consultations, given that the request for consultations contains no reference to Article 6.9, and therefore found these claims not to be within our terms of reference.[1070] In light of the basis for that conclusion, we consider that this claim under Article 6.9 is also not within our terms of reference, and we therefore do not address it further.

[1069] See paragraphs 7.478 to 7.481 above.
[1070] See paragraphs 7.503 to 7.508 above.

(g) Whether the European Union violated Article 12.2.2 of the AD Agreement in procedural aspects of individual treatment determinations

(i) Arguments of the Parties

China

7.541 China argues that determinations concerning individual treatment constitute "matters of fact and law" within the meaning of Article 12.2.2, and that therefore, the Commission was required to explain the reasons for its determination with respect to each request.[1071] However, in the Definitive Regulation, the Commission merely stated that, on the basis of the information available, the requests met the requirements to be granted IT, without explaining the reasons. China asserts that the requirement to explain is not limited to situations where requests for IT are rejected. Therefore, China asserts, by not explaining the basis for its decisions granting the requests for IT, the Commission acted inconsistently with the obligation set forth under Article 12.2.2 of the AD Agreement.[1072]

European Union

7.542 The European Union first asserts that this claim is not within the Panel's terms of reference because China failed to consult with the European Union with regard to Article 12.2.2.[1073] If the Panel disagrees, the European Union submits that the Definitive Regulation states that all Chinese producers that requested individual treatment were granted such treatment because each of them satisfied the criteria set out in Article 9(5) of the Basic AD Regulation. According to the European Union, this is a positive decision for the relevant interested parties, which provides the relevant information on the matters of fact and law and reasons for such determination. Therefore, the European Union maintains that there can be no need to explain such a decision in the Definitive Regulation in any more detail beyond explaining that the relevant conditions have been fulfilled.[1074]

(ii) Evaluation by the Panel

7.543 With respect to the European Union's preliminary objection, we note that China's request for consultations specifically states:

> "2. China considers that the EC's imposition of anti-dumping duties on imports of certain iron or steel fasteners originating in the People's Republic of China is inconsistent with the EC's obligations under Articles VI and X:3(a) of the GATT 1994; Articles 1, 2.1, 2.2. 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the AD Agreement as well as Part I, paragraph 15 of China's Protocol of Accession.
>
> (i) The EC imposed a countrywide duty on the sole basis that China is a non-market economy country and exempted from this duty only those few Chinese exporters that were able to meet the so-called "Individual Treatment" criteria, thereby acting inconsistently with Articles 2, 6.10, 9.2, 9.3, 9.4 and **12.2.2** of the AD Agreement..." (emphasis added)

[1071] China, first written submission, paras. 613-614.
[1072] China, first written submission, para. 615.
[1073] European Union, first written submission, para. 772.
[1074] European Union, first written submission, para. 774.

Thus, it is clear to us as a matter of fact that China's request for consultations encompassed its complaint under Article 12.2.2 with respect to the Definitive Regulation. We therefore reject the European Union's preliminary objection.

7.544 Turning to the substance of China's claim, we recall that 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.[1075] We also found that the application of that provision in the fasteners investigation was inconsistent with the same two provisions.[1076] We consider as a general matter that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is not necessary to consider whether there is a violation of Article 12, as the question of whether the notice is "sufficient" under Articles 12.2 and 12.2.2 is immaterial.[1077]

7.545 In this case, however, we consider that the broader issue raised by China's assertion that the Commission's explanation of its decision granting individual treatment was inconsistent with Article 12.2.2 merits consideration, as this is an issue which may well arise, even if in another context, in implementation. We recall that the Commission explained its decision by stating that each of the producers requesting individual treatment had met all the requirements to be granted such treatment in accordance with the relevant provision of EU law. In our view, China is correct to the extent that it argues that whether a decision in the course of an anti-dumping investigation is favourable to relevant interested parties or not, does not determine whether the notice provided of the decision is sufficient under Article 12.2.2.

7.546 We recall that 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 or the acceptance of a price undertaking, 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 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".

Article 12.2 provides, in pertinent part, that "Public notice ... of any preliminary or final determination … shall set forth, or otherwise make available through a separate report, *in sufficient detail the findings and conclusions reached on all issues of fact and law* considered material by the investigating authorities". (emphasis added)

7.547 It is clear to us that the obligations with respect to explanation of determinations are not limited only to determinations that are unfavourable to a particular interested party or group of interested parties. On the other hand, however, it is also clear to us that the nature and content of the explanation given may well differ depending on the nature of the determination or decision in question. We do not exclude that, in a situation where a relevant provision establishes detailed requirements for factual criteria that must be satisfied in order to justify a particular decision, an explanation that the party in question satisfied the relevant criteria may be sufficient under Article 12.2.2.

[1075] See paragraphs 7.98 and 7.112 above.
[1076] See paragraph 7.149 above.
[1077] Panel Report, *EC– Bed Linen*, para. 6.259.

7.548 In this case, however, since we have found the provisions of Article 9(5) of the Basic AD Regulation at issue in connection with this claim are inconsistent with the European Union's obligations, both as such and as applied, we do not consider it appropriate to rule on whether the Definitive Regulation in this case was consistent with the requirements of Article 12.2.2.

(h) Whether the European Union violated Article 6.5 of the AD Agreement by disclosing confidential information

(i) Arguments of the Parties

China

7.549 China notes that each of the nine Chinese exporting producers included in the sample for the dumping determination requested market economy treatment, and provided information in support of those requests as called for in the MET/IT Claim Form. The information supplied in those forms was verified by the Commission at the premises of the companies. The assessment of the claims for MET was disclosed by the Commission in a single document for all nine producers, which was provided to the nine Chinese producers, to the Chinese authorities, and to the interested parties, including the complainant in the investigation.[1078] China states that the document contains confidential information for each of the nine Chinese producers, concerning ownership of the company, sales, costs, profits, subsidies, accounting systems, assets, etc, which is sensitive and was submitted on a confidential basis, as indicated by the label "LIMITED" on the MET/IT Claim Forms.[1079] China asserts that by failing to treat the information as confidential and disclosing it to interested parties other than the producers whose information it was, the European Union violated Article 6.5 of the AD Agreement.[1080]

European Union

7.550 The European Union contends that China's claim is based on general assertions and that China has failed to make a *prima facie* case of violation.[1081] The European Union also asserts that the information in the document is very general and does not disclose any specific information submitted on a confidential basis. Moreover, the European Union contends that none of the companies concerned have complained about confidential information having been disclosed.[1082]

(ii) Arguments of Third Parties

Chile

7.551 Chile notes that Article 6.5 of the AD Agreement distinguishes between information which is by nature confidential, and information which is provided on a confidential basis by parties to an anti-dumping investigation. Nevertheless, for Chile, the treatment of information as confidential will be contingent upon there being good cause for treating the information in question as such.[1083] Chile considers that for this provision to be correctly applied, the reasons justifying the disclosure of the information provided must be known to those who provided the information, and if the authority concludes, in the course of the investigation, that good cause for maintaining the confidentiality of the information does not exist, it must expressly so state. For Chile, this cannot happen subsequently, still less once dispute settlement proceedings have begun. The disclosure of information considered by the

[1078] China, first written submission, paras. 617-619.
[1079] China, second written submission, para. 1142, citing Exhibit CHN-71.
[1080] China, first written submission, paras. 620-621.
[1081] European Union, first written submission, paras. 777-778.
[1082] European Union, first written submission, para. 779.
[1083] Chile, oral statement, para. 10.

authority to be non-confidential must be properly substantiated and must be expressly authorized by the party that supplied the information, otherwise, the position of the investigated party would be undermined and the rules of due process violated.[1084]

United States

7.552 While it takes no position on the merits of China's factual allegation, the United States agrees with China that, where an investigating authority accepts information being submitted as confidential, the authority's failure to so treat that information, in particular by disclosing it to interested parties other than each of the exporting producers that furnished the information, is inconsistent with Article 6.5 of the AD Agreement.[1085]

(iii) Evaluation by the Panel

7.553 Before turning to the substance of China's claim we recall the salient facts, which we understand to be undisputed. Nine Chinese exporting producers were selected as the sample for the investigation of dumping. All nine requested market economy treatment (MET), and provided information supporting those claims to the Commission, which information was subsequently verified at their premises. The cover pages of the MET/IT forms submitted by three Chinese producers are clearly labelled "limited".[1086] The information submitted in those forms served as the basis for the Commission's analysis and determination with respect to the requests, which were ultimately denied. The assessment of the MET claims by the Commission was set out in a single document entitled "MET Disclosure Document – Assessment of market Economy Treatment Claims by nine producers in the PRC".[1087] That document was made available to all nine Chinese exporting producers in the sample, to the Chinese authorities, and to other interested parties, including the complainants.

7.554 We understand, and the European Union has not asserted otherwise, that in EU practice, the label "limited" on a document indicates that the document so labelled is submitted on a confidential basis as containing confidential information within the meaning of Article 6.5 of the AD Agreement. In response to question 80 from the Panel, the European Union stated that "it is true that the original MET Disclosure Document is labelled "Limited" and contains a footnote stating *inter alia* that it "is for internal use only" and that it "is a confidential document pursuant to Article 19 of Council Regulation EC No 384/96".[1088] The footnote in question reads, in full:

> "This document is for internal use only. It is protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43). It is a confidential document pursuant to Article 19 of Council Regulation EC No 384/96 (OJ L 56 6.3.1996, p.1) and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement)."

7.555 The principal question for us in resolving China's claim is whether, by providing the MET Disclosure Document to each of the nine Chinese exporting producers in the sample, to the Chinese authorities, and to other interested parties, including the complainants, the European Union disclosed confidential information. We recall that Article 6.5 provides, in pertinent part:

[1084] Chile, oral statement, para. 11.
[1085] United States, written submission, para. 38.
[1086] Exhibit CHN-71.
[1087] Exhibit CHN-19.
[1088] European Union, answer to Panel question 80, para. 187. The first three paragraphs of Article 19 of Council Regulation EC No 384/96 largely replicate the provisions of Article 6.5 of the AD Agreement.

> "6.5 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]
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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."

7.556 The European Union does not deny that the MET/IT claim forms submitted by the Chinese producers were submitted on a confidential basis. This is borne out by the fact that the three documents submitted as Exhibit CHN-91 each bears, on the cover page, the indication that it is the "Limited Version", with a footnote to that indication which states:

> "Please note that confidential information falls under the term '*limited*' according to the internal rules of the European Commission. Hence, only documents labelled 'limited' are considered confidential documents pursuant to Article 19 of Council Regulation (EC) No. 384/96 (OJ L 56, 6.3.1996 p.1) and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). Documents which do not contain this label are considered to be non-confidential documents pursuant to these provisions. **Therefore, any replies which contain confidential information must be labelled 'Limited'.**"

We note that the MET/IT Claim Forms were prepared by the Commission, and were provided by it to Chinese exporters to enable them to claim market economy and/or individual treatment in the anti-dumping investigation in question. In addition, we note that the option "Limited Version" is one of two options which can be chosen by the company submitting the form – the other is labelled "Version for Inspection by Interested parties". In light of these facts, it is evident to us that the Chinese exporting producers provided the information in these forms to the Commission on a confidential basis. Moreover, we consider it clear, in view of the footnote, that they were entitled to expect that the information would be treated as confidential by the Commission in the course of the investigation, as required by EU law and the relevant provision of Article 6 of the AD Agreement, that is Article 6.5. While China did not provide copies of the forms submitted by the other six producers, the European Union does not contend that they were not submitted on the same "limited" basis as those in Exhibit CHN-71, and we have no reason to consider that they were any different in this regard. The European Union has made no argument that the Commission denied confidential treatment to any of the information submitted in the MET/IT claim forms by the nine Chinese producers.

7.557 The European Union also does not deny that the MET Disclosure Document[1089] bears the label "*Limited*", with a footnote, which states:

> "This document is for internal use only. It is protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43). It is a confidential document pursuant to Article 19 of Council Regulation EC No 384/96 (OJ L 56 6.3.1996, p.1) and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement)."

[1089] Exhibit CHN-19.

In our view, it is thus clear that the European Union treated the MET Disclosure Document as one containing confidential information, to be treated as such as required by EU law and the relevant provision of Article 6 of the AD Agreement, that is, Article 6.5. Moreover, we note that the MET Disclosure Document reports information concerning, and the Commission's conclusion with respect to each of the nine Chinese producers, individually and by name[1090], and the European Union has not demonstrated that the information reported in that form was not submitted on a confidential basis.

7.558 The European Union asserts that the "Limited" label can be explained on the basis that the document was originally an internal working document, but ceased to be "Limited" once it was sent to interested parties as an MET Disclosure Document, and the "Limited" label, and the footnote, should have been omitted when the document was sent to the parties.[1091] The European Union considers that the labelling of the document cannot itself amount to a violation of Article 6.5, and asserts that the information in the document is "very general and does not disclose any information submitted on a confidential basis", and that none of the companies involved complained about disclosure of confidential information.[1092] We consider the fact that the document was considered to be for internal use only, as indicated by the footnote, to be irrelevant for purposes of our consideration of China's claim. Clearly, it is within the power of the Commission to disclose internal documents to whomever it may choose, provided that it does not, by so doing, violate some other relevant obligation, as China claims it has done in this case.

7.559 We consider the following facts to be indisputable:

(a) nine Chinese producers submitted information in MET/IT claim forms on a confidential basis;

(b) the Commission made no decision concluding that the information so submitted was not properly treated as confidential;

(c) the Commission neither sought nor received the permission of each of the Chinese producers to disclose the information so submitted, either as such, or in generalized or summary form; and

(d) the Commission provided a document, which reports information so submitted for each Chinese producer individually and by name, to all nine Chinese producers, to the Chinese authorities, and to other interested parties, including the complainants, in the fasteners investigation.

In light of these facts, we consider the conclusion that the European Union disclosed confidential information in the anti-dumping investigation underlying this dispute to be inescapable.

7.560 Finally, we note that, in the circumstances of this case, we do not consider it necessary for us to determine whether or not the information in the MET/IT Claim Forms, or in the MET Disclosure Document, was properly treated as confidential under Article 6.5 of the AD Agreement. We agree

[1090] Exhibit CHN-19.

[1091] European Union, answer to Panel question 80, para. 188.

[1092] European Union, answer to Panel question 80, para. 189. With respect to the latter point, we note that, contrary to the European Union's contention that none of the companies mentioned in the MET Disclosure Document voiced such concerns, the MET Disclosure Document specifically refers to one Chinese producer who expressed concerns to the Commission with respect to disclosure of confidential information in the MET disclosure document. China, first written submission, para. 622, Exhibit CHN-61. While it is not clear whether any confidential information of that company was actually disclosed in the document, it is clear that at least one Chinese producer raised concerns about the disclosure of confidential information in the MET Disclosure Document.

with the European Union that merely because a document is labelled as such does not demonstrate that the information it contains is confidential within the meaning of Article 6.5. It is clear that an investigating authority may conclude that information submitted as confidential does not merit such treatment. However, in such a case, Article 6.5.2 of the AD Agreement establishes certain requirements, not least of which is to give the supplier of the information an opportunity to make the information public or to authorize its disclosure in generalized or summary form.[1093] Moreover, even if the investigating authority concludes that a request for confidentiality is not warranted, Article 6.5.2 provides that if the supplier is unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard the information.[1094] Article 6.5.2 does not, however, authorize the authorities to provide the information to other interested parties in the investigation. In any event, even assuming, as the European Union asserts, that the MET Disclosure Document does not contain any data on the volume, value, or unit price of sales, actual costs of the companies concerned, percentage or value of profits, value of any subsidy received, or the value of the assets of the companies examined[1095], this does not, in our view, demonstrate that the document contains only non-confidential information. Information which may properly be treated as confidential under Article 6.5 is not necessarily limited to data of the types referred to by the European Union, but may include any type of information submitted on a confidential basis.

7.561 Based on the foregoing, we conclude that the European Union violated Article 6.5 of the AD Agreement by disclosing confidential information.

(i) Whether the European Union violated Article 6.1.1 of the AD Agreement by failing to provide sufficient time to respond to requests for information

(i) Arguments of the Parties

China

7.562 China notes that Article 6.1.1 of the AD Agreement provides that "foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply", and footnote 15 provides that the time period shall be counted from the date of receipt, as a general rule, deemed to be one week from the date the questionnaire was sent.[1096] China asserts that, in this case, the Commission gave Chinese producers only 15 days from the date of the Notice of Initiation to submit "questionnaires" for companies claiming market economy status and/or individual treatment.[1097] In China's view, the Commission should have given Chinese producers 30 days to submit their claims for market economy treatment and/or for individual treatment, and should have started to count that period from the date of receipt.[1098]

[1093] We recall that Article 6.5.2 of the AD Agreement provides:

> "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 be demonstrated to their satisfaction from appropriate sources that the information is correct." (footnote omitted).

[1094] There is no indication, and the European Union does not contend, that the Chinese producers who supplied the information agreed to make it public or authorized its disclosure in generalized or summary form. We note that the European Union does not contend that the information in the MET Disclosure Document is in "generalized or summary form". We recall in this regard that the information is reported for each submitting Chinese producer individually, identified by name.

[1095] European Union, first written submission, para. 779.

[1096] China, first written submission, para. 625, quoting Article 6.1.1 (footnote omitted).

[1097] China, first written submission, paras. 623-624.

[1098] China, first written submission, para. 628.

European Union

7.563 The European Union notes that the premise of China's claim is that the document in question is a "questionnaire" within the meaning of Article 6.1.1 of the AD Agreement.[1099] The European Union asserts that this premise is fundamentally flawed, asserting that the provision applies to the initial overall questionnaire, citing in this regard the panel report in *Egypt – Steel Rebar*.[1100] According to the European Union, the claim form for MET and IT cannot be a questionnaire for purposes of Article 6.1.1 because it is for a different purpose than the questionnaire foreseen in that provision.[1101] The European Union notes that, according to China's Protocol of Accession, it is for Chinese producers in an anti-dumping investigation to show that market economy conditions prevail, and the claim form is a means to allow that showing.[1102] Moreover, the European Union contends that the decision whether to grant MET and/or IT must be made early in the investigation, as it has important consequences for the investigation, and thus consideration of claims in this regard must not become an obstacle to the conduct of the investigation.[1103] Finally, the European Union asserts that the 15-day period was reasonable, noting that the same period was given to other parties for submission of basic information.

(ii) Arguments of Third Parties

Japan

7.564 Japan shares the European Union's view that Article 6.1.1 of the AD Agreement applies only to the initial questionnaire, and does not require that investigating authorities provide respondents with a minimum 30-day period to reply to all possible information requests.[1104] Japan considers it sufficient that respondents are afforded a reasonable period of time to supply other information, given the time restraints on AD investigations.[1105] Japan notes that an MET/IT claim form is an additional element used only in AD investigations concerning non-market economy countries, and that the deadlines for investigations regarding market economy and non-market economy countries are identical. As the resolution of these claims can have an important impact on the remainder of the investigation, Japan considers that they should be dealt with as swiftly as possible, and that a period of less than 30 days to submit an MET/IT claim form is entirely reasonable.[1106]

United States

7.565 The United States agrees with the European Union that China's claim is premised on a fundamental misunderstanding of the scope of Article 6.1.1.[1107] The United States refers to the report of the panel in *Egypt – Rebar* to argue that the original antidumping questionnaire in an investigation is the single document considered "the questionnaire" for purposes of the AD Agreement.[1108] The United States considers 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 is not subject to the obligations in Article 6.1.1 – indeed, the United States notes that the information submitted enables the investigating authority to

[1099] European Union, first written submission, para. 782.
[1100] European Union, first written submission, para. 783.
[1101] European Union, first written submission, para. 783.
[1102] European Union, first written submission, para. 785.
[1103] European Union, first written submission, para. 786.
[1104] Japan, written submission, para. 71.
[1105] Japan, written submission, para. 75.
[1106] Japan, written submission, paras. 76-77.
[1107] United States, written submission, para. 39.
[1108] United States, written submission, paras. 41-42.

identify those companies that will receive the antidumping questionnaire for which the minimum 30-day response period applies.[1109]

(iii) Evaluation by the Panel

7.566 In order to resolve China's claim under Article 6.1.1, we must answer two questions. First, we must interpret Article 6.1.1 to ascertain the scope of the obligation set forth therein, and second, we must determine, as a matter of fact, whether the documents concerned in China's claim fall within that scope. We address these questions in turn below.

7.567 First, however, we recall the salient facts, which we understand to be undisputed. In the Notice of Initiation, the European Union indicated that "Duly substantiated claims for market economy treatment ... 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. Chinese exporting producers were sent a letter, attaching a copy of the form for requesting market economy treatment and/or individual treatment, stating that companies wishing to "submit a claim for individual treatment in this proceeding ... must submit the attached claim form ... within 15 days, *i.e.* by 26 November 2007".

7.568 The European Union asserts that, having failed to present the document in question as evidence to support its claim, China has failed to make a *prima facie* case. We consider, however, that the failure to submit a copy of the document with its first written submission is not fatal to China's claim. China may well have proceeded on the understanding that the Panel could address this claim without reference to the specific form itself. China did submit a copy of the form, which is entitled "Market Economy Treatment and/or Individual Treatment claim form", with its second written submission.[1110] The European Union also offered to provide us with a copy, but argues that this would undercut the Panel's working procedures, which require the submission of evidence by the first meeting, as a general matter.[1111] We recall that we posed question 81 to China with respect to the basis for the assertion that this document is a "questionnaire" within the meaning of Article 6.1.1. Thus, even were we to take a strict view of our working procedures, which we do not consider is required[1112], China's submission falls within the express provision of our working procedures allowing for the submission of factual evidence necessary for purposes of answers to questions.[1113]

7.569 Turning to the substantive issues, we recall that 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

[1109] United States, written submission, para. 43.
[1110] Exhibit CHN-72.
[1111] See Working Procedures for the Panel, para. 16.
[1112] Our working procedures provide for exceptions, upon a showing of good cause, to the general rule requiring factual evidence to be submitted no later than the first substantive meeting. Working Procedures for the Panel, para. 16.
[1113] Working Procedures for the Panel, para. 16.

> 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."

The fundamental questions for us are what is the meaning of "questionnaire" in this provision, and whether the "Market Economy Treatment and/or Individual Treatment claim form" which is the subject of China's claim is such a "questionnaire".

7.570 We note that the first sentence of Article 6.1.1 clearly requires investigating authorities to allow at least 30 days for replies to "questionnaires". However, neither this sentence, nor any other provision in the AD Agreement, defines the term "questionnaires". The only qualification of the term "questionnaire" in Article 6.1.1 is the fact that the 30-day period is accorded to "exporters or foreign producers receiving questionnaires". Therefore, we examine the ordinary meaning of this term in its context, and in light of the object and purpose of the provision to inform our understanding.

7.571 Neither party has relied on the dictionary definition of the word questionnaire in this dispute. Nonetheless, we note that the New Shorter Oxford English Dictionary defines the word "questionnaire" as "a formulated series of questions by which information is sought from a selected group, usu[ally] for statistical analysis".[1114] While this is an appropriate definition in our view, it does not suffice to answer the question before us. In the course of an anti-dumping investigation, it is not unusual for there to be multiple instances in which the investigating authorities seek information from a selected group through a "formulated series of questions". However, it seems clear to us that Article 6.1.1 cannot apply to each such instance, as this could make it impossible for the authorities to obtain necessary information while still respecting the time limits on investigation set forth in Article 5.10 of the AD Agreement.[1115]

7.572 This was the question considered by the panel in *Egypt – Rebar*. In its report, the panel considered whether "questionnaires" as referred to in Article 6.1.1 are only the original questionnaires in an investigation, or whether this term also includes all other requests for information, or certain types of requests, including requests in addition and subsequent to original questionnaires.[1116] The panel considered that context, referring to the only other use of the term "questionnaire", in paragraphs 6 and 7 of Annex I to the AD Agreement, supported the conclusion that the term "questionnaire" in Article 6.1.1 refers only to the original questionnaires sent to interested parties at the outset of an investigation.[1117] Considerations regarding the conduct of anti-dumping investigations[1118], and the particular requests for information at issue in that case, which were in the nature of follow-up questions to those in the original questionnaire[1119], led the panel to conclude that those requests did not constitute questionnaires in the sense of Article 6.1.1, and that therefore the

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[1114] The New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[1115] We recall that Article 5.10 provides that "[i]nvestigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation". In considering similar questions, the Appellate Body has consistently balanced the due process rights of interested parties against the need of investigating authorities to control the conduct of the investigation and to carry out the multiple steps required to reach a timely completion of the investigation.

> "[T]he due process rights in Article 6 of the AD Agreement—which include the right to 30 days for reply to a questionnaire—'cannot extend indefinitely' but, instead, are limited by the investigating authority's need 'to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion' of the proceeding."

Appellate Body Report on *Mexico – Antidumping Measures on Rice*, para. 282 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 242, quoting in turn, Appellate Body Report, *US – Hot Rolled Steel*, para. 73, in turn quoting Panel Report on *US – Hot Rolled Steel*, para. 7.54).

[1116] Panel Report, *Egypt – Steel Rebar*, para. 7.275.

[1117] Panel Report, *Egypt – Steel Rebar*, para. 7.276.

[1118] Panel Report, *Egypt – Steel Rebar*, para. 7.277.

[1119] Panel Report, *Egypt – Steel Rebar*, para. 7.278.

less-than-30-day deadline imposed for responses to those requests was not inconsistent with that Article.[1120]

7.573 We note in addition that footnote 15 to Article 6.1.1 of the AD Agreement provides further support for the conclusion that the questionnaires referred to in the provision are the original questionnaires sent at the outset of the investigation. This footnote lengthens the 30-day rule by one week for questionnaires sent to exporters, providing generally that "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". This reference to "the questionnaire" in the singular suggests that one questionnaire, sent to all exporters, is the subject of this obligation. However, as noted by the European Union[1121], the information to support requests for market economy and/or individual treatment is sought only from exporters in non-market economies, and thus is not sent to all exporters. Had the drafters intended the term "questionnaires" in Article 6.1.1 to refer to any and all information requests in the form of a series of questions, a plural formulation, or an indefinite formulation such as "any" or "a" "questionnaire", in footnote 15, might be expected.

7.574 To us, these considerations indicate 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[1122] 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).[1123]

7.575 China appears to accept the view that Article 6.1.1 refers to an "original" questionnaire sent at the outset of an investigation.[1124] Indeed, China notes that the documents in question in this dispute "were sent to the interested parties at the outset of the investigation" and therefore argues that they fall within the scope of Article 6.1.1 of the AD Agreement.[1125] China points out that, unlike the requests for information at issue in *Egypt – Rebar*, the documents at issue here were not requests for information in addition and subsequent to the "original" questionnaire.[1126] China asserts that the questions posed in the MET questionnaire are obviously not in the nature of follow-up questions to any "original questionnaire response" - on the contrary, China asserts that the MET questionnaire is

[1120] Panel Report, *Egypt – Steel Rebar*, para. 7.279.

[1121] Third party Japan also made this point.

[1122] For instance, paragraph 6 of Annex I refers to "[v]isits to explain the questionnaire," which suggests that such a questionnaire is a substantial information request, otherwise there would be no need to provide for a possible visit to explain it. Similarly, paragraph 7 of Annex I provides that, as the main purpose of an on-the-spot investigation is to "verify information provided or obtain further details", normally that visit should take place "after the response to the questionnaire has been received". This also suggests that "the questionnaire" is a substantial enough information request to warrant a visit to verify the information, and that it is sent early in the investigation. The procedures required for such a visit, including advance notice and the agreement of the exporting Member, similarly suggest that the visit itself is a significant event, and not something likely to occur repeatedly, with respect to repeated "questionnaires".

[1123] We recognize 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.

[1124] China, second written submission, para. 1147.

[1125] China, second written submission, para. 1148.

[1126] China, answer to Panel question 81, para. 356.

the original questionnaire.[1127] China considers that satisfying the MET and IT tests is of fundamental importance to Chinese exporting producers, as the outcome of those tests determines whether a country-wide duty is applied to them, and asserts that therefore, it is critical that an exporting producer has sufficient time to gather and present the voluminous data requested by the EU investigating authorities.[1128]

7.576 We do not agree that the "Market Economy Treatment and/or Individual Treatment claim form" in question can be considered a "questionnaire" within the meaning of Article 6.1.1, as we understand that term. We certainly do not agree with China's contention that it is the "original questionnaire" as we understand that term, and as the panel in *Egypt – Rebar* understood it. In our view, 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. We consider that the substance of the document is critical to determining whether it is such a questionnaire.

7.577 We have reviewed the form in question, and 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. We consider that these questions, which are not relevant in all investigations, and are not directly related to the determinations of dumping, injury and causation required by the AD Agreement[1129], 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.[1130] We recognize that the resolution of the MET and IT tests is important for the Chinese exporting producers, but we do not consider that this changes the nature of the questionnaire, or brings it within the scope of Article 6.1.1.

7.578 We recall that there is no basis in the text of the AD Agreement to differentiate between different types of requests for information, and that to require at least 30 days response time for every request for information would either make it impossible for investigating authorities to complete their investigation within the allowed overall timeframe, or require them to stop seeking information, and thus base their decision on less complete or less accurate information. Further, we have interpreted the term "questionnaires" in Article 6.1.1 as referring only to the comprehensive questionnaire(s) issued at the outset of the investigation, in part because this strikes an appropriate balance between the due process rights of interested parties and the right of investigating authorities to obtain the information they need to conduct their investigations in the manner and within the time limits prescribed in the AD Agreement. To treat the "Market Economy Treatment and/or Individual Treatment claim form" as a "questionnaire" within the meaning of Article 6.1.1 would mean that a

[1127] China, answer to Panel question 81, para. 363. We note that China also referred to the fact that the information provided in the MET/IT claim forms was verified in support of its contention that they should be considered a "questionnaire" within the meaning of Article 6.1.1 of the AD Agreement, citing the Panel Report in *Egypt – Rebar* in this regard. China, first written submission, para. 137, China, answer to Panel question 81, paras. 364-365.

[1128] China, answer to Panel question 81, para. 371.

[1129] We recall that there is no requirement under the AD Agreement to treat exporters in non-market economies differently with respect to any aspect of an investigation, although such different treatment with respect to the determination of normal value is allowed for by Article 2.7.

[1130] China has not made any claim, independent of Article 6.1.1, that the time for response to the "Market Economy Treatment and/or Individual Treatment claim form" was unreasonable or inadequate, and we therefore need not address that question. We would note, however, that the same 15-day period for response is used by the European Union with respect to other requests for information it considers to be preliminary to the issuance of comprehensive questionnaires, which would suggest that the period is not *per se* unreasonable.

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. This would, in our view, deny exporters precisely the right that is afforded them by that provision, a result we find untenable.

7.579 We therefore conclude that the "Market Economy Treatment and/or Individual Treatment claim form" in question is not a "questionnaire" within the meaning of Article 6.1.1[1131], 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. In light of our conclusion, we consider it unnecessary to address China's claim that, by starting to count those 15 days as from the publication of the Notice of Initiation, the European Union acted inconsistently with the requirements of footnote 15 to Article 6.1.1 of the AD Agreement.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 Having considered the European Union's preliminary objections, we have made no findings with respect to the following claims, which we have concluded are not within our terms of reference for the reasons set out in the foregoing sections of our Report:

(a) Claim under Article 2.6 of the AD Agreement with respect to the definition of like product;

(b) Claim under Article 6.9 of the AD Agreement with respect to the alleged non-disclosure of aspects of the normal value determination; and

(c) Claim under Article 6.9 of the AD Agreement with respect to the procedural aspects of the domestic industry definition.

8.2 In light of the findings we have set out in the foregoing sections of our Report, we conclude 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;

(b) Articles 6.10 and 9.2 of the AD Agreement with respect to the individual treatment determinations in the fasteners investigation;

(c) Articles 3.1 and 3.2 of the AD Agreement with respect to the consideration of the volume of dumped imports in the fasteners investigation;

(d) Articles 3.1 and 3.5 of the AD Agreement with respect to the causation analysis in the fasteners investigation;

(e) Articles 6.4 and 6.2 of the AD Agreement with respect to aspects of the normal value determination;

[1131] 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.

(f) Article 6.5.1 of the AD Agreement with respect to non-confidential versions of questionnaire responses of two European producers and Article 6.5 of the AD Agreement with respect to confidential treatment of information in the questionnaire response of the Indian producer;

(g) Article 6.5 of the AD Agreement with respect to the confidential treatment of the Eurostat data on total EU production of fasteners; and

(h) Article 6.5 of the AD Agreement by disclosing confidential information.

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 5.4 of the AD Agreement with respect to the standing determination in the fasteners investigation;

(b) Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry in the fasteners investigation;

(c) Articles 2.1 and 2.6 of the AD Agreement with respect to the product under consideration in the fasteners investigation;

(d) Article 2.4 of the AD Agreement with respect to the dumping determination in the fasteners investigation;

(e) Articles 3.1 and 3.2 of the AD Agreement with respect to the price undercutting determination in the fasteners investigation;

(f) Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement with respect to the consideration of imports from non-sampled/unexamined producers and exporters as dumped in the fasteners investigation;

(g) Articles 3.1 and 3.4 of the AD Agreement with respect to the consideration of the consequent impact of dumped imports on the domestic industry;

(h) Articles 6.5, 6.4 and 6.2 of the AD Agreement in connection with the non-disclosure of the identity of the complainants and the supporters of the complaint;

(i) Articles 6.2 and 6.4 of the AD Agreement with respect to the confidential treatment of the Eurostat data on total EU production of fasteners;

(j) Articles 6.2 and 6.4 of the AD Agreement with respect to the procedural aspects of the domestic industry definition; and

(k) Article 6.1.1 of the AD Agreement with respect to the amount of time provided for responses to requests for information.

8.4 In light of the findings we have set out in paragraph 8.2, 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,

(b) Article 9.4 of the AD Agreement with respect to the individual treatment determinations in the fasteners investigation;

(c) Articles 3.4 and 3.5 of the AD Agreement with respect to the volume of dumped imports;

(d) Article 6.5.1 of the AD Agreement with respect to the questionnaire response of the Indian producer;

(e) Articles 6.2 and 6.4 of the AD Agreement with respect to the non-confidential versions of questionnaire responses of two European producers and the confidential treatment of information in the questionnaire response of the Indian producer; and

(f) Article 12.2.2 of the AD Agreement with respect to the procedural aspects of the individual treatment determinations.

B. RECOMMENDATION

8.5 Pursuant to 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 the European Union has acted inconsistently with the provisions of the AD Agreement and GATT 1994, it has nullified or impaired benefits accruing to China under those Agreements. We therefore recommend that the Dispute Settlement Body request the European Union to bring its measure into conformity with its obligations under the AD Agreement and GATT 1994.

8.6 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. China asserts that, given the "as such" nature of the violation, the first measure should be withdrawn. China further asserts that the nature and scope of the violations of the AD Agreement and of GATT 1994 with respect to the second measure are such that the measure is devoid of any legal basis, and should be withdrawn. Therefore, China requests that the Panel suggest that the European Union implement the recommendations and rulings of the DSB by withdrawing both contested measures.[1132] The European Union does not address China's request in this respect.

8.7 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.)

Thus, a panel must ("shall") recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity", but has discretion to ("may") suggest ways in which a Member could implement that recommendation. Clearly, however, a panel is not required to make a suggestion should it not deem it appropriate to do so.[1133] We also note

[1132] China, first written submission, para. 634.

[1133] The Appellate Body has explained that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion". 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. 189.

Article 21.3 of the DSU, which requires Members to inform the DSB regarding implementation of panel and Appellate Body recommendations, providing:

> "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).

8.8 Most panels reviewing anti-dumping (and countervailing duty) measures have declined requests for suggestions. Where the panel has explained its reasoning, it has generally noted that, in view of the different violations found, while revocation of the measure is a possible means of implementation, other means might also be available.[1134] Several panels, in declining to make a suggestion, have noted 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.[1135] Many other panels have declined requests for suggestions as well.[1136] In the few cases in which panels have made a suggestion in an anti-dumping dispute, the panels have focussed on the conclusion that one of the violations found concerned initiation, and thus vitiated the entire proceeding, which should never have been initiated, or on the "fundamental and pervasive nature" of the violations, leading the panel to conclude that revocation was the only means of implementation.[1137]

[1134] Panel Report, *US – Hot Rolled Steel*, para. 8.11 (panel declined to make specific suggestions, observing that the variety of different violations found might necessitate differing responses in order to bring the measure concerned into conformity with obligations under the AD Agreement); Panel Report, *US – DRAMS*, para. 7.4 (panel declined to make any suggestions on the grounds that there was a range of possible ways through which the United States could appropriately implement the panel's recommendation); Panel Report, *US – Steel Plate*, para. 8.8 (panel saw "no particular need to suggest a means of implementation"); Panel Report, *US – Stainless Steel (Korea)*, para. 7.10 (panel found the determination regarding the margin of dumping inconsistent with the AD Agreement in a number of respects, but observed that it could not say that had the investigating authority acted consistently with the AD Agreement, it would not have found dumping. Noting that while revocation would be one way in which the United States could implement the recommendation to bring its measure into conformity, the panel was not prepared to conclude that it was the only way to do so, and declined to make a suggestion); Panel Report, *US – Line Pipe*, para. 8.6 (panel declined Korea's request for a specific suggestion on ways in which the United States might implement the recommendations, stating that there may be other ways in which the United States could implement its recommendation); Panel Report, *US – Steel Plate*, para. 8.8 (panel indicated that it was "free to suggest ways in which [it believed] the [defendant] could appropriately implement [the panel's] recommendation" but decided not to do so).

[1135] E.g., 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, as modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769, para. 8.13. The panel in this dispute observed that the means of implementation is, pursuant to Article 21.3 of the DSU, for the Member concerned, in the first instance.

[1136] Panel 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/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, 85, para. 8.2; Panel Report, *US – Softwood Lumber V*, para. 8.6; Panel Report, *US – Softwood Lumber VI*, para. 8.8; Panel Report, *Korea – Certain Paper*, para. 9.4; Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea* ("*EC – Countervailing Measures on DRAM Chips*"), WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, paras. 8.6-8.7; and Panel 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/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, 10225, para. 8.18.

[1137] In *Guatemala – Cement I*, the panel concluded that Guatemala had violated the provisions of the AD Agreement by initiating an investigation when there was not sufficient evidence to justify such an initiation under Article 5.3 of the Agreement. With respect to the request for a suggestion on implementation, the panel stated:

8.9 In this case, although we have found the contested measures inconsistent with the AD Agreement, the GATT 1994 and the WTO Agreement in a number of respects, we do not find it appropriate to make a suggestion with respect to implementation, and therefore deny China's request.

> "[T]he entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation. Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."

Panel Report, *Guatemala – Cement I*, para. 8.6. The second panel to hear the same dispute also suggested revocation of the measure, for similar reasons. Panel Report, *Guatemala – Cement II*, para. 9.7.

In *Argentina – Poultry Anti-Dumping Duties*, the panel concluded that the violations it had found were of a "fundamental nature and pervasive", stated "[i]n light of the nature and extent of the violations in this case, [the panel does] not perceive how Argentina could properly implement [the panel's] recommendation without revoking the anti-dumping measure at issue in this dispute" and suggested that Argentina repeal the measure. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.6-8.7.

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. CLAIMS CONCERNING ARTICLE 9(5) OF COUNCIL REGULATION (EC) NO. 384/96 OF 22 DECEMBER 1995 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EUROPEAN COMMUNITY, AS CODIFIED AND REPLACED BY COUNCIL REGULATION (EC) NO. 1225/2009

1. The first measure that China challenges in this dispute is 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, which has now been codified and replaced by Council Regulation (EC) No. 1225/2009 (the "Basic AD Regulation"). This provision deals with the "Individual Treatment" ("IT") practice of the EC regarding exporting producers in anti-dumping investigations concerning imports from China. The fact that China's challenge is limited to Article 9(5) is without prejudice to its longstanding position that it strongly opposes the treatment by a few WTO Members, in particular the EC, of China as a non-market economy country. After more than three decades of economic changes, China has indeed undoubtedly become a market economy system in which all business operations are carried out under market signals.

2. Article 9(5) of the Basic AD Regulation sets out a number of specific conditions that exporting producers from China involved in EC anti-dumping proceedings must fulfil in order to qualify for an individual dumping margin and an individual anti-dumping duty (so-called "individual treatment" or "IT"). Only if a Chinese exporting producer successfully demonstrates that it fulfils all the conditions listed in Article 9(5) will the EC investigating authorities determine for that producer an individual dumping margin and an individual anti-dumping duty, that is, a dumping margin based on a comparison between the normal value established on the basis of data in the analogue country with the Chinese exporting producer's own export prices. However, if the exporting producer cannot demonstrate that it satisfies all the IT criteria, it will be subject to a country-wide dumping margin and anti-dumping duty which is based on a comparison between the normal value established for the analogue country with the average export price of the cooperating exporting producers in the country concerned or on any other basis. Article 9(5) violates several provisions of the AD Agreement and of the GATT 1994.

3. First, Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement. Article 6.10 requires the investigating authorities to determine, as a rule, individual dumping margins to all known exporters and producers. The sole exception to that rule is where the number of exporting producers is so large as to make the determination of an individual dumping margin impracticable. By introducing another exception, namely for exporting producers in non-market economy countries, among which the EC includes China, that are not able to demonstrate that they meet all the criteria set out in Article 9(5), that provision violates Article 6.10 including its chapeau and Article 6.10.2.

4. Second, Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the AD Agreement which requires the anti-dumping duty to be collected in appropriate amounts on a non-discriminatory basis. Article 9.2 requires anti-dumping duties to be imposed on an individual basis. This conclusion finds further support when that provision is read in its context. By providing that the anti-dumping duty for exporting producers in non-market economy countries in which the EC

includes China, will, as a rule, be a country-wide anti-dumping duty, Article 9(5) violates Article 9.2 of the AD Agreement.

5. Third, Article 9(5) of the Basic AD Regulation violates Article 9.3 of the AD Agreement since the country-wide anti-dumping duty that is imposed on all exporters that do not qualify for IT, is based on a margin of dumping that is calculated by comparing a normal value with an average export price which is not determined in accordance with the rules of Article 2. It necessarily leads to the collection of an anti-dumping duty in amounts which exceed the dumping margin for the exporting producers whose export prices are higher than the average export prices used, thereby violating Article 9.3 of the AD Agreement.

6. Fourth, Article 9(5) of the Basic AD Regulation violates Article 9.4 of the AD Agreement in two respects. First, in cases where sampling is used, the anti-dumping duty applied to the cooperating non-sampled exporting producers is based on the weighted average margin of dumping of all sampled exporting producers, including those which do not qualify for IT and for which the dumping margin is not based on their own export prices, i.e. in violation of Article 2 of the AD Agreement. Second, by requiring non-sampled exporting producers that are individually examined to demonstrate that they comply with the five IT criteria, Article 9(5) violates Article 9.4 which requires the investigating authorities to unconditionally apply an individual anti-dumping duty to such exporters.

7. Fifth, Article 9(5) violates Article I:1 of the GATT 1994 since an individual dumping margin and individual anti-dumping duty is not determined for exporting producers from China and a limited number of other WTO Members unless they demonstrate that they meet the specific conditions set out in Article 9(5) while such treatment is automatically granted to exporting producers from all other WTO Members.

8. Sixth, the EC violates Article X:3(a) of the GATT 1994 by failing to administer the provisions of Article 9(5) in a uniform, impartial and reasonable manner. The administration is not uniform since the country-wide dumping margin used for the exporters that do not qualify for IT is calculated using a wide variety of methodologies and it is impossible for Chinese exporting producers to predict which methodology will be used in a particular investigation. The manner in which the EC administers the provisions of Article 9(5) is also unreasonable since the country-wide dumping margin will in most cases be determined on the basis of "facts available" even where the conditions of Article 6.8 of the AD Agreement are not fulfilled.

9. Finally, in violating Articles 6.10, 9.2, 9.3, 9.4 of the AD Agreement and Articles I:1 and X:3(a) of the GATT 1994, the EC also violates Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the AD Agreement.

II. CLAIMS CONCERNING COUNCIL REGULATION (EC) NO. 91/2009 OF 26 JANUARY 2009 IMPOSING A DEFINITIVE ANTI-DUMPING DUTY ON IMPORTS OF CERTAIN IRON OR STEEL FASTENERS FROM CHINA

10. The second measure that China challenges in this dispute is Council Regulation (EC) No. 91/2009, by which the EC has imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China. This measure violates numerous substantive and procedural provisions of the AD Agreement.

A. THE EC VIOLATED ARTICLES 6.10, 9.2 AND 9.4 OF THE AD AGREEMENT

11. In order to qualify for IT and receive the benefit of an individual dumping margin and an individual anti-dumping duty, the Chinese exporting producers concerned, namely those included in the sample and those non-sampled exporting producers that were individually examined, had to

demonstrate that they fulfilled all five conditions set out in Article 9(5) of the Basic AD Regulation. Thereby, the EC violated Articles 6.10, 9.2 and 9.4 of the AD Agreement.

B. THE EC'S "STANDING" DETERMINATIONS VIOLATED ARTICLE 5.4 OF THE AD AGREEMENT

12. Article 5.4 of the AD Agreement obliges the investigating authorities to play an active role in examining whether the application has been made by or on behalf of the domestic industry. In the anti-dumping investigation which led to the measure at issue, however, the EC failed to properly examine whether the standing thresholds were met before initiating the investigation.

13. First, the EC did not check whether the total EC production actually amounted to 1,430 KT as alleged in the Complaint, before initiating the investigation. Second, the EC did not properly examine the degree of support for, or opposition to, the application by all EC producers, before initiating the investigation.

14. Furthermore, the EC violated Article 5.4 of the AD Agreement since the Complainants did not meet the standing thresholds set out in that provision and in particular the absolute minimum that the application must be expressly supported by producers accounting for at least 25 per cent of total production of the like product produced by the domestic industry.

15. Indeed, the evidence shows that the figure of total EC production relied upon by the EC, namely 1,430 KT for 2006, is largely underestimated. The total EC production of the like product is significantly higher. As a result, the 25 per cent threshold was not met. The EC thus violated Article 5.4 of the AD Agreement by initiating this investigation.

C. THE EC'S DETERMINATIONS OF THE "DOMESTIC INDUSTRY" VIOLATED ARTICLES 4.1 AND 3.1 OF THE AD AGREEMENT

16. The determination of the domestic industry in the anti-dumping investigation which led to the measure at issue suffers from several substantive flaws.

17. First, the EC violated Articles 4.1 and 3.1 of the AD Agreement by excluding from the outset from the definition of the domestic industry all those companies that did not make themselves known within 15 days as of the date of publication of the notice of initiation as well as those companies that did not support the investigation. Article 4.1 only allows the exclusion from the outset of two specific categories of producers. By excluding other categories, the EC violated Article 4.1 of the AD Agreement. This is furthermore contrary to Article 3.1 which requires investigating authorities to carry out an "objective examination" of the domestic industry that is based on positive evidence.

18. Second, the EC violated Article 4.1 of the AD Agreement since the domestic industry, as defined by the EC, did not include domestic producers whose collective output of the like product constituted a major proportion of the total domestic production.

19. In its Definitive Regulation, the EC indicated that the producers constituting the domestic industry represented 27 per cent of the total production of the like product.

20. The volume of total EC production on the basis of which this percentage has been calculated has been largely underestimated, however. The "domestic industry" as defined by the EC represented significantly less than 27 per cent of the actual total production of the like product in the EC and thus did not constitute a "major proportion".

21. In any case, 27 per cent of total EC production does not constitute a "major proportion" within the meaning of Article 4.1 of the AD Agreement. A "major proportion" cannot be equated to

25 per cent or more of total domestic production as the EC seems to consider. A "major proportion" refers to an important, serious or significant proportion of the domestic industry. This has not been satisfied in the context of this investigation. The 27 per cent of total production represented by the domestic industry, as defined by the EC, consisted of only 46 producers out of more than 300 companies (and even more according to the data submitted by the Chinese exporting producers), from which 114 came forward. Thus, these 46 companies represented barely more than one quarter of EC production, less than one sixth of the total number of EC producers estimated by the EC and less than half of those which came forward in the context of the investigation. In such a context, the domestic industry as defined by the EC can hardly be regarded as constituting a "major proportion" and therefore fails to meet the threshold set out in Article 4.1 of the AD Agreement.

22. Third, the domestic industry was defined by relying exclusively on data relating to 2006. By failing to define the domestic industry on the basis of data concerning the Investigation Period (1 October 2006 until 30 September 2007), the EC violated Article 3.1 of the AD Agreement that requires the investigating authorities to make a determination of injury that involves an objective examination of the domestic industry.

23. Fourth, in order to make its injury determination, the EC selected a sample of domestic producers, namely 6 producers amounting only to 17.5 per cent of the total EC production. The EC violated Article 4.1 since the sample thus selected does not represent a major proportion of total domestic production. The EC also violated Article 3.1 since this sample cannot be regarded as representative of the total domestic production.

24. Fifth, the EC violated Article 4.1 of the AD Agreement by failing to exclude from the definition of the domestic industry EC producers that were related to the exporters or importers or were themselves importers of the allegedly dumped product. The evidence in the file demonstrates that the EC included in the definition of the domestic industry (and even selected in the sample) producers that had set up subsidiaries in China whose production was principally destined for the EC market.

D. THE EC'S DETERMINATIONS OF THE "LIKE PRODUCT" VIOLATED ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

25. The EC violated Articles 2.1 and 2.6 of the AD Agreement in concluding that the fasteners produced and sold by the Community industry in the Community, fasteners produced and sold on the domestic market in the PRC, those produced and sold on the domestic market in India and those produced in the PRC and sold to the Community were "alike".

26. The EC noted that the vast majority of – if not all – exports of the product concerned by the investigated companies were "standard" fasteners. Instead, a substantial part of the EC production concerned "special" fasteners.

27. The EC noted that the difference between "standard" and "special" fasteners was so significant that it should be taken into account for the purposes of the dumping and injury margin calculations.

28. The EC considered nonetheless that the products manufactured in China and in the EC were "like" on the ground that "many of the types manufactured in the PRC for export to the Community and those manufactured by the Community industry were largely marketed under similar industry standards." However, the fasteners produced in China for export to the EC and those produced by the EC industry are not like due to their differences in physical and technical characteristics, their lack of interchangeability and their differences in end-uses and prices.

29. The EC industry produced much more sophisticated "special" fasteners which, while normally complying with industry standards, must also comply with additional specific customer requirements. This means that they have different properties than those of standard fasteners and are not "comparable" or "like". Moreover, standard and special fasteners have different end-uses and are not interchangeable. Finally, the significant differences in the average prices between Chinese fasteners and fasteners produced by the EC industry can only be explained by the fact that the EC industry supplies a higher market segment which, as noted by the EC, is "significantly more expensive to produce and to sell" but "generate higher revenues than standard products".

E. THE EC'S DETERMINATION OF DUMPING VIOLATED ARTICLE 2.4 OF THE AD AGREEMENT

30. For all exporting producers, the normal value was determined on the basis of the data provided by one Indian producer. The EC stated that the normal value had been calculated per product type and thus not on the basis of the Product Control Numbers (PCN) that were supposed to be used for making the comparison. Despite repeated requests for clarification, the EC refused to provide relevant information regarding the "product types" and the comparison methodology. It only stated that the comparison had not been made on the full PCN but on part of the characteristics, namely the strength class and the distinction between special and standard fasteners.

31. The EC violated Article 2.4 of the AD Agreement, first, since the EC did not make the comparison between normal value and export price on a PCN basis. By comparing the export price data provided by the Chinese exporters on a PCN basis with normal value data provided by the producer in the analogue country on a "product type" basis, the EC failed to make a fair comparison.

32. Second, the only adjustment made by the EC concerned the alleged difference in quality control costs. The EC violated Article 2.4 since it failed to make adjustments for differences in physical characteristics that affect price comparability and which were reflected in the characteristics used for the construction of the PCNs. It also violated Article 2.4 given that it failed to make further adjustments regarding the differences in quality between the fasteners produced by the Chinese exporting producers and the fasteners produced by the Indian producer.

F. THE EC VIOLATED ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT IN ITS UNDERCUTTING CALCULATIONS

33. The EC has acknowledged that the undercutting margins have not been calculated on the basis of the full PCNs but rather on the basis of simplified product groupings.

34. By eliminating important product characteristics in order to "simplify" the PCNs, the EC grouped together fasteners with very different physical characteristics and prices, thus failing to make an "objective" examination of the impact of prices on the EC industry.

35. These distortions have been compounded by the methodology applied by the EC to differentiate between special and standard fasteners. All or almost all fastener types exported by the Chinese exporting producers were standard fasteners while most fasteners produced by the EC producers were special fasteners.

36. The EC thus violated Articles 3.1 and 3.2 of the AD Agreement.

G. THE EC VIOLATED ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE AD AGREEMENT IN ITS EXAMINATION OF THE VOLUME OF DUMPED IMPORTS

37. When examining the volume of dumped imports, the EC incorrectly treated all imports from China as being dumped.

38. First, while the EC had found that two of the Chinese exporting producers which were subject to individual examination were not dumping, the EC failed to exclude the imports of those two Chinese exporting producers from the volume of dumped imports. The EC thus violated Articles 3.1 and 3.2 of the AD Agreement.

39. Second, the EC incorrectly included in the volume of dumped imports all imports from non-sampled exporting producers that were not individually examined. Indeed, after having found that two exporting producers were not dumping, the EC could not automatically assume that imports from all exporting producers that were not examined were dumped. The EC therefore violated Articles 3.1 and 3.2 of the AD Agreement.

40. By failing to properly determine the "dumped imports" the EC also violated Article 3.4 and 3.5 of the AD Agreement.

H. THE EC VIOLATED ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT BECAUSE IT FAILED TO OBJECTIVELY EXAMINE ON THE BASIS OF POSITIVE EVIDENCE THE IMPACT OF THE ALLEGEDLY DUMPED IMPORTS ON DOMESTIC PRODUCERS OF THE LIKE PRODUCT

41. First, the EC failed to examine the injury factors in relation to an EC industry defined in a consistent manner. In fact, the EC examined production, production capacity, capacity utilization, sales, market share, employment and productivity for the Community industry, as defined by the EC, that is, 46 Community producers claiming to represent 27 per cent of the total EC production. Instead, the other injury factors were examined for the sampled producers only, that is, six producers allegedly representing 17.5 per cent of the total EC production.

42. The EC should have consistently used the same set of companies in order to make its injury analysis rather than examining some injury factors in relation to a domestic industry consisting of 46 producers and other factors in relation to a domestic industry consisting of 6 sampled producers. This lack of consistency is fundamentally non-objective and biased and therefore contrary to Articles 3.1 and 3.4 of the AD Agreement.

43. Second, the EC's analysis of the "profitability" of the domestic industry, namely that the alleged dumped imports had a "negative impact on profitability" and that the level of profitability was "low" while the evidence pointed to the contrary, is not "objective" and is therefore contrary to the requirements of Articles 3.1 and 3.4 of the AD Agreement.

44. Third, the EC incorrectly concluded that the domestic industry suffered material injury while an objective examination of the relevant factors pursuant to Article 3.4 shows a positive state of the domestic industry. In fact, the sole factor possibly showing a negative trend was a declining market share in a rapidly growing market. A finding of injury, however, cannot solely be based on one negative factor. Moreover, the decrease in market share only concerned the relative sales volume of the domestic industry and not the absolute sales volume, sales prices or total sales revenue. Therefore, through its analysis of the impact of the alleged dumped imports on the state of the domestic industry, the EC violated Articles 3.1 and 3.4 of the AD Agreement.

45. Fourth, by concluding that the material injury resulted from the displacement of Community products by Chinese imports in some important market segments, the EC violated Articles 3.1 and 3.4

of the AD Agreement. Indeed, once the EC had defined the "like product" as including both standard and special fasteners, it could not find injury as resulting from a displacement of sales from one product segment to another product segment within the same "like product".

I. THE EC VIOLATED ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT IN CONCLUDING THAT THE ALLEGED DUMPED IMPORTS CAUSED MATERIAL INJURY

46. The EC violated Articles 3.1 and 3.5 of the AD Agreement in two ways.

47. First, the EC failed to demonstrate that the alleged dumped imports "are, through the effects of dumping, causing injury" to the domestic industry. The EC concluded that there was a causal link on the basis that the "significant increase in the volume of dumped imports from the PRC […] coincided with the continuously declining loss of market share of the Community producers." However, a mere temporal coincidence does not demonstrate that the alleged dumped imports are, through the effects of dumping, causing injury. Moreover, the EC failed to consider in its analysis of the "effects of the imports of the PRC" the fact that the EC industry decided to improve its presence in the higher quality market segments by increasingly producing special fasteners which command a higher unit price, but are also produced in smaller quantities.

48. Second, the EC failed to properly assess the injurious effects of other known factors.

49. The EC noted that the "increase in raw material prices" constituted a factor that caused injury but considered that it was not "the decisive factor" without explaining the reasons for such a conclusion. In fact, the increase in raw material prices made it more attractive for the domestic industry to focus on high quality products which generated higher revenues and permitted the industry to arrive at a reasonable profit margin during the IP. This explains why the EC producers lost market share while increasing their sales revenue by 21 per cent. Indeed, high quality fasteners are manufactured in smaller quantities but are sold at higher prices.

50. Regarding the "exports of the EC industry to third countries", the EC reported a substantial increase in export volumes, namely by 81 per cent. The EC, however, noted that these exports were made at prices significantly above the sales prices on the EC market and therefore concluded that they could not have been a cause of injury to the EC industry. This conclusion, however, is based on data relating to EC producers as a whole and cannot be extrapolated to the EC industry as defined by the EC for the purposes of the injury determination.

J. THE EC VIOLATED SEVERAL PROCEDURAL REQUIREMENTS UNDER ARTICLES 6 AND 12 OF THE AD AGREEMENT

51. The anti-dumping investigation which led to the measure at issue is characterized by numerous violations of due process and procedural requirements and a complete lack of transparency of the findings and determinations made by the EC. Throughout the investigation, such lack of transparency has made it impossible for the Chinese exporting producers to properly defend their interests. This affected all stages of the anti-dumping investigation, i.e., standing, dumping and injury.

52. First, the EC violated Articles 6.5, 6.5.1, 6.2 and 6.4 of the AD Agreement by failing to disclose the identity and the volume of production of the Complainants.

53. Second, the EC violated Articles 6.5, 6.2, 6.4 and 6.9 of the AD Agreement by failing to provide information concerning (i) the normal value determinations including on the "product types" that were used to determine the normal value and the comparability with the exported PCNs and (ii) the adjustments for differences affecting price comparability.

54. Third, the EC violated Articles 6.5, 6.2 and 6.4 of the AD Agreement since the non-confidential versions of the questionnaire responses submitted by the EC producers and by the Indian producer in the analogue country were largely deficient.

55. Fourth, the EC violated Articles 6.5, 6.2 and 6.4 of the AD Agreement by failing to disclose the Eurostat data allegedly used to determine the production volume in the EC and by failing to provide an explanation as to how the estimation of the production volume in the EC had been made.

56. Fifth, the EC violated Articles 6.2, 6.4 and 6.9 of the AD Agreement by failing to give access to relevant information on the definition of the domestic industry and by failing to provide such information to interested parties.

57. Sixth, the EC violated Article 12.2.2 of the AD Agreement by failing to indicate all relevant information concerning its IT determinations, i.e., not only whether each company requesting IT was granted IT, but also the reasons for its determination.

58. Seventh, the EC violated Article 6.5 of the AD Agreement by disclosing the document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC" to interested parties other than to each of the exporting producers concerned while the information concerned was confidential.

59. Eighth, the EC violated Article 6.1.1 of the AD Agreement by requesting Chinese exporting producers to submit their questionnaire responses concerning MET/IT within 15 days as of the date of publication of the notice of initiation.

III. CONCLUSIONS

60. For the reasons stated above, China requests that the Panel find that the two measures at issue violate various provisions (as identified above) of the GATT 1994, the AD Agreement and the Agreement Establishing the WTO and that the Panel recommend to the Dispute Settlement Body to request that the EC bring the contested measures into conformity with its obligations under the AD Agreement and the GATT 1994. China also requests that the Panel suggests that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In this submission, the European Union will examine China's claims in the order they were presented in China's First Written Submission. Preliminary issues are addressed under each of the relevant claims. In particular, the European Union will address first China's claims with respect to Article 9(5) of Council Regulation No 384/96, as amended. Then, the European Union will address China's claims against Council Regulation No 91/2009 in the consecutive order followed by China in its First Written Submission.

II. CHINA'S "AS SUCH" CLAIM AGAINST ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96, AS AMENDED

2. The European Union understands the measure at issue, which falls within the mandate of the Panel, to be Article 9(5) of Council Regulation No 384/96, as amended, insofar as that provision provides 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; otherwise, (ii) the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier. China claims that those aspects of Article 9(5) of Council Regulation No 384/96, as amended, are "as such" inconsistent with Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the *Anti-Dumping Agreement*, Articles I and X:3(a) of the *GATT 1994* and Article XVI:4 of the *WTO Agreement*. This results from the manner in which China described the measure at issue in its Panel Request. Thus, the "matter" on which the Panel has to rule with respect to the "as such" claim brought by China is strictly the following: is Article 9(5) of Council Regulation No 384/96, as amended –insofar as it provides that, in case of imports from non-market economy countries, 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 that, otherwise, the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier– as such inconsistent with the provisions of the covered agreements invoked by China? Anything beyond this question would be, in the European Union's view, outside the Panel's terms of reference and, thus, the Panel should refrain from examining any other matter raised by China in connection with its "as such" claim. In particular, the European Union submits that, contrary to the requirements under Article 6.2 of the *DSU*, China's Panel Request failed to present the problem clearly, at least, with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the *Anti-Dumping Agreement* and Article X:3(a) of the *GATT 1994*. Consequently, the European Union requests the Panel not to examine those claims. In addition, the European Union requests the Panel to refrain from examining measures and issues outside its terms of reference in relation to China's "as such" claim, including Article 9(5) of Council Regulation No 1225/2009, any matters pertaining to the calculation or individual determination of dumping margins, or any other matters different from the one specifically identified by China in its Panel Request.

3. In any event, China's claims against Article 9(5) of Council Regulation No 384/96, as amended, are based on a wrong understanding of the relevant provisions in the *Anti-Dumping Agreement* as well as China's Protocol of Accession. Indeed, China fundamentally ignores the meaning of Article 9.2 of the *Anti-Dumping Agreement* and focuses on a parallelism between

Article 6.10 of the *Anti-Dumping Agreement* and Article 9.4 of the *Anti-Dumping Agreement*. Article 9.2 of the *Anti-Dumping Agreement* does not contain a principle to impose individual anti-dumping duties per known exporter or producer; rather, this provision seems to allow for the imposition of anti-dumping duties on a country-wide basis. Even assuming that Article 9.2 of the *Anti-Dumping Agreement* can be read as containing such a principle, the imposition of anti-dumping duties on a country-wide basis is expressly provided for in Article 9.2 of the *Anti-Dumping Agreement* ("if it is impracticable to name all these suppliers"). Seen in its context and in view of its object and purpose, Article 9.2 of the *Anti-Dumping Agreement* implies that the imposition of country-wide anti-dumping duties is permitted in cases where such imposition on individual basis would result in the measure being ineffective. Moreover, contrary to what China alleges, Article 6.10 of the *Anti-Dumping Agreement* cannot be read as providing for only one exception to the determination of dumping margins on an individual basis (i.e., sampling). As the relevant case-law shows, a single dumping margin can be determined for the actual producer and the source of the price discrimination, even if there are several exporters involved. This is fundamentally the situation in non-market economy countries, where State control over the means of production and State intervention in the economy including international trade imply that all imports are considered to emanate from a single producer, which is the source of the alleged price discrimination. In other words, the relevant exporter for which an individual dumping margin should be determined in case of non-IT suppliers (i.e., companies whose export activities are not *de jure* and *de facto* sufficiently independent from the State) is the State. The country-wide dumping margin serves as the maximum ceiling for the proper duty rate which the supplying country, that is the actual supplier including non-IT suppliers, is subject to. The application of a single duty rate is also necessary to avoid circumvention of the duties in those cases where suppliers do not act independently from the State (i.e., in order to avoid the channelling of exports through the supplier with the lowest duty rate). Finally, China advances a partial, very limited reading of its Protocol of Accession. Contrary to what China alleges, its Protocol of Accession, including the Working Party Report, is not strictly limited to derogating from the rules of the *Anti-Dumping Agreement* only as far as the determination of the normal value is concerned. Indeed, China's Protocol of Accession provides useful context to confirm the conclusion that, in the case of imports originating in China, anti-dumping duties can be specified on a country-wide basis when suppliers cannot show that market economy conditions prevail with regard to the manufacture, production and sale of the product concerned.

4. The European Union observes that China's claims under Articles 6.10, 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) of Council Regulation No 384/96, as amended, "as such" infringes Article 9.2 of the *Anti-Dumping Agreement*. Indeed, China's claim under Article 6.10 of the *Anti-Dumping Agreement* is based on a wrong understanding of the parallelism between the imposition of anti-dumping duties and the determination of individual dumping margins. Further, China's claims under Articles 9.3 and 9.4 of the *Anti-Dumping Agreement* are based on the assumption that the investigating authority is obliged to determine an individual anti-dumping duty per company. Likewise, the claim under Article I:1 of the *GATT 1994* depends on a finding as to whether the *Anti-Dumping Agreement* permits an investigating authority to require suppliers in case of imports from non-market economy countries to prove that certain conditions are met. If the *Anti-Dumping Agreement* so permits, in view of the *lex specialis* principle, no violation of Article I:1 of the *GATT 1994* can be found. Similarly, the claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* are entirely dependent on a finding that Article 9(5) of Council Regulation No 384/96, as amended, is "as such" inconsistent with other claims raised by China.

III. CLAIM 1: ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS APPLIED" IN COUNCIL REGULATION NO 91/2009 (ARTICLES 6.10, 9.2 AND 9.4 OF THE *ANTI-DUMPING AGREEMENT*)

5. China's claim is based on the assumption that the application of Article 9(5) of Council Regulation No 384/96, as amended, is inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement* in all cases. As the European Union has shown before, China's "as such" claim is without merit. Therefore, the Panel should also reject China's claim in connection to Council Regulation No 91/2009. In addition, the European Union notes that China's claim under Article 9.4 of the *Anti-Dumping Agreement* is outside the Panel's terms of reference and that China is challenging a non-existent measure.

IV. CLAIM 2: STANDING OF THE EU DOMESTIC INDUSTRY FOR THE PURPOSES OF INITIATION (ARTICLE 5.4 OF THE *ANTI-DUMPING AGREEMENT*)

6. China has not consulted with the European Union on the new claim in the Panel Request, as required by Article 4 of the *DSU*. Moreover, China's Panel Request is not specific and does not set out the problem clearly, as required by Article 6.2 of the *DSU*. The European Union also notes that Notice of Initiation 2007/C 267/11 is not a measure at issue and the relevant matter is outside the Panel's terms of reference. Turning to the substance of the matter, the European Union submits that, manifestly, it did examine the standing issue prior to initiation. Finally, the European Union considers that China's assertion that Eurostat figures are incorrect and that the domestic producers expressly supporting the application accounted for less than 25 per cent of total production of the like product produced by the domestic industry is both outside the Panel's terms of reference and incorrect.

V. CLAIM 3: DETERMINATION OF "DOMESTIC INDUSTRY" (ARTICLES 4.1 AND 3.1 OF THE *ANTI-DUMPING AGREEMENT*)

7. China claims that the EU's determination of "domestic industry" violated Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*. In particular, China presents five sets of claims against the EU's determination of the domestic industry. All five of these claims are to be rejected. First, China claims that the European Union was not allowed to define the domestic industry as consisting of only those cooperating producers supporting the complaint that made themselves known within 15 days of initiation of the investigation. The European Union considers that China's claim is to be rejected for a number of reasons. First, China's claim is not properly before the Panel since it was not subject to consultations and this claim is thus outside the panel's mandate. Second, Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* do not impose a requirement to include any and all producers of the like product in the definition of the domestic industry. Article 4.1 allows an authority to define the domestic industry as consisting of all producers of the like product or of only those producers that represent a major proportion of total domestic production. There is no hierarchy of preference between these two possibilities. It is therefore entirely legitimate to define the domestic industry in the more limited manner that the European Union considered to be appropriate in this case. Article 3.1 deals with the quality of the evidence provided with respect to the industry as defined in accordance with Article 4.1 and the manner in which this evidence is examined by the authority. It does not impose obligations in respect of the definition of the domestic industry as such. In any case, the 15-days deadline that was used as the basis for determining the group of producers that would constitute the domestic industry is an objective criterion that does not favour either side. China has failed to demonstrate that this limitation prevented an objective examination of the state of the domestic industry.

8. Second, China argues that the domestic industry as defined by the European Union does not consist of producers producing "a major proportion" of domestic output since these producers represent "only" 27 per cent of total domestic production. China's interpretation of the term "a major

proportion" in Article 4.1 is in error. China argues that a major proportion has to be as close as possible to 100 per cent. The WTO case law to which China itself refers with approval clearly disavows this erroneous interpretation considering that "a major proportion" is an "important, serious or significant" proportion. It is clear that 27 per cent is a significant proportion of production. China presents no arguments or evidence to contradict this conclusion in the context of the particular circumstances of this case. The European Union therefore requests the Panel to reject China's claim that the EU's definition of the domestic industry violated Article 4.1 of the *Anti-Dumping Agreement*.

9. Third, China argues that the domestic industry was "not defined in relation to the investigation period" and therefore violates Article 3.1 of the *Anti-Dumping Agreement*. China errs both in respect of the facts on the record and in respect of the applicable law. It is not so, as China erroneously argues, that the authority examined injury data for a particular 2006 – 2007 period but examined only 2006 data to determine that the domestic producers represented a major proportion of total domestic production. In addition, Article 3.1 simply does not impose an obligation to expressly determine the existence of a major proportion with respect to the period of investigation for dumping purposes. A recent and relevant period was used consisting mainly of the last full year for which statistical data were available. China does not present evidence to disavow the authority's reasonable conclusion. There is therefore no factual nor legal basis for China's claim of violation in respect of the EU's determination of the domestic industry in the context of the investigation period.

10. Fourth, China argues that the determination of injury on the basis of a sample of domestic producers representing only 17 per cent of total domestic production violates Article 4.1 and 3.1 of the *Anti-Dumping Agreement* since the sampled producers do not represent a major proportion of total domestic production. China fails to demonstrate that Article 4.1 imposes any obligation in respect of sampling. Furthermore, it would not make sense to require a sample to comply with the same "major proportion" obligation that the domestic industry itself is to comply with. The requirement of Article 3.1 is arguably that the sample should be sufficiently representative of the domestic industry as a whole, as defined in accordance with Article 4.1. That is different from requiring that the sample be representative of the totality of the domestic producers as a whole, as China erroneously alleges to be required. China's argument in respect of the volume of total production represented by the sampled producers is without merit.

11. Fifth, China argues that the European Union should have excluded a number of domestic producers from the definition of the domestic industry for the simple reason that these producers were related to producers/exporters in China and that the European Union failed to objectively examine this relationship. However, China acknowledges that no such obligation to exclude all related domestic producers exists in the *Anti-Dumping Agreement*. The Agreement permits, under certain conditions, the authority to exclude related producers, but certainly does not require an authority to do so. No obligation to objectively examine the relationship therefore exists either. In any case, China fails to demonstrate that the facts do not support the reasonable finding of the authority that the centre of interest of these domestic producers remained in the EU and that it was therefore neither necessary nor appropriate to exclude these producers from the scope of the domestic industry.

12. In sum, all of China' claims under Articles 3.1 and 4.1 of the *Anti-Dumping Agreement* in respect of the EU's definition of the domestic industry are to be rejected.

VI. CLAIM 4: SELECTION OF THE PRODUCT CONCERNED (ARTICLES 2.1 AND 2.6 OF THE *ANTI-DUMPING AGREEMENT*)

13. As is well known, the issue of what is the product concerned and the issue of what is the like product are distinct issues. Having no case on either issue, China attempts to collapse both issues into a single line of argument. China ignores the fact that the measure at issue does not contain any determination to the effect that standard fasteners are like special fasteners, so China is referring to a

non-existent determination. Similarly, China ignores the fact that the like product standard does not apply to the selection of the product concerned, so China is invoking a non-existent obligation. Thus, China's claim is based upon impugning a non-existent determination by reference to a non-existent obligation. Therefore, the Panel must reject this claim.

VII. CLAIM 5: DETERMINATION OF DUMPING (ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

14. China alleges that the European Union failed to make a fair comparison as required by Article 2.4 of the *Anti-Dumping Agreement* between normal value and export price because the authority did not base this comparison on the full Product Control Number ("PCN"). China fails to establish a prima facie case of violation. First, China fails to even discuss the relevant sections of the Council Regulation No 91/2009. Furthermore, Article 2.4 of the *Anti-Dumping Agreement* does not specify the methodology to be followed in order to conduct a fair comparison. The mere fact that the comparison was not made on the basis of the full PCN cannot ipso facto constitute a violation of Article 2.4 as erroneously argued by China. China misunderstands the role and relevance of the PCNs. In any case, it is clear that the authority complied with the obligation to make adjustments for those differences that the interested parties demonstrated as affecting the price comparability. In particular, the European Union ensured a fair comparison by distinguishing between products on the basis of strength class and between standard and special fasteners. In sum, China failed to demonstrate that the authority violated its obligations under Article 2.4 of the *Anti-Dumping Agreement*.

VIII. CLAIM 6: PRICE UNDERCUTTING ANALYSIS (ARTICLES 3.1 AND 3.2 OF THE *ANTI-DUMPING AGREEMENT*)

15. China argues that the European Union violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* since the authority allegedly failed to make a price undercutting analysis on the basis of the full PCN. China's claim is to be rejected. First, China's claim was not part of its request for consultations and this matter has therefore not been subject to consultations. This claim is therefore outside the Panel's terms of reference. Furthermore, Article 3.2 of the *Anti-Dumping Agreement* does not require any particular methodology for conducting a price undercutting analysis and China's claim that the European Union violated its obligations simply because it used a "simplified" PCN is thus clearly without merit. Finally, China fails to demonstrate that the undercutting analysis was conducted in a non-objective or biased manner simply because it did not use the full PCN. The adjustment that may be required in the context of the injury analysis are not necessarily the same as those that are required by Article 2.4 of the *Anti-Dumping Agreement* in the context of a comparison between normal value and export price where the focus is on cost-related differences. In a price undercutting analysis the emphasis is on market-related differences. China's proposed parallelism with the fair comparison requirement is thus inapposite. In sum, China's claims under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* in respect of the price undercutting analysis are to be rejected.

IX. CLAIM 7: EXAMINATION OF THE VOLUME OF DUMPED IMPORTS (ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

16. China argues that the European Union violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 because the authority failed to exclude the volume of two exporters that were found not to be dumping from its volume analysis under Article 3.2 and because the authority assumed for the purposes of that same volume analysis that all non-examined exporters were dumping. The European Union requests the Panel to reject China's claim in this respect. First, China's argument in respect of the two exporters for which a zero margin of dumping was found to exist is misguided and elevates form over substance. The European Union submits that the authority objectively considered whether

the volume of dumped imports significantly increased and the fact that it did not exclude imports representing an insignificant amount of total imports from the volume of dumped imports does not detract from this conclusion. Second, China errs that the authority was not entitled to include the imports of all non-examined producers in the total volume of dumped imports. Since all of the sampled producers were found to be dumping, the authority was entitled to conclude by extrapolation that all imports from non-examined producers were equally dumped. This is precisely one method for determining the volume of dumped imports that the Appellate Body considered to be appropriate in a sampling context. China's consequential claims under Articles 3.4 and 3.5 are thus equally flawed. However, even if the Panel were to find that the European Union violated its obligation under Article 3.2 of the *Anti-Dumping Agreement* for reason of the fact that it did not exclude the volume of the two exporters not found to be dumping, it is still clear that this alleged error of marginal importance cannot be considered to vitiate the entire injury analysis. China's claims under Article 3.4 and 3.5 of the *Anti-Dumping Agreement* are therefore in any case to be rejected.

X. CLAIM 8: IMPACT OF DUMPED IMPORTS ON DOMESTIC PRODUCERS (ARTICLES 3.1 AND 3.4 OF THE *ANTI-DUMPING AGREEMENT*)

17. China argues that the European Union violated its obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* to objectively examine the impact of the dumped imports on the situation of the domestic industry. China presents four equally flawed arguments in this respect. First, China asserts that the EU's injury determination is flawed because the authority allegedly did not consistently use the same dataset for examining injury. China's argument is misguided since the authority consistently used data relating to the same domestic industry. The fact that the authority examined certain factors on the basis of data relating to a representative sample of the domestic industry while other factors were examined based on data relating to all producers that are part of the domestic industry does not vitiate the objectivity of the analysis in any way. It is not because sampling is used that it would not be permissible for an authority to base certain of its conclusions on the more complete dataset, where available. China has certainly not demonstrated otherwise. China's only example of an alleged bias does not accurately reflect the facts on the record.

18. Second, China argues that the European Union failed to objectively examine the factor "profitability" and points to allegedly conflicting statements in respect of this factor in the authority's findings. However, China does not actually provide evidence that the authority's findings are not proper but simply points to an alleged difference between the preliminary determination and the final determination. Furthermore, a proper reading of the findings and conclusions of the authority reveals that China appears to base its argument on a misunderstanding of the authority's factual findings. China's argument is thus clearly without merit and is to be rejected.

19. Third, China argues that the European Union failed to conduct an objective examination of the evidence on the record, as the authority allegedly based its injury finding on negative developments in respect of only one of the injury factors of Article 3.4 of the *Anti-Dumping Agreement*, market share. The European Union submits that China's presentation of the facts and of the relevant findings of the authority is not accurate. It is clear that the injury determination was not based on only one factor, and that the authority found that a number of factors showed a negative development when examined in the light of the significant increase in demand. China's argument that the loss of market share was caused by the increase in raw material prices is an argument that is relevant to the question of causation and non-attribution but is not germane to the injury determination under Article 3.4. The European Union submits that China is in reality requesting the Panel to examine the facts on the record and to determine whether it would have reached the same conclusion of injury as the authority did. Article 17.6 of the *Anti-Dumping Agreement* states clearly that this is not the role of the Panel.

20. Fourth, China asserts that the European Union improperly concluded that the injury consisted of the displacement from one market segment to another, while injury should be determined for the product as a whole. China's claim is based on a misunderstanding of the findings of the authority in this respect. The authority referred to such displacement as an indicator of how the industry tried to deal with the competition from the dumped imports (which were concentrated in the standard fastener market) by moving into the special fastener market. The authority's conclusion is that in so doing the industry was able to mitigate the negative effects of the dumped imports. The authority did not make the findings suggested by China.

21. For all of these reasons, the European Union requests the Panel to reject China's claim under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* in respect of the authority's injury analysis.

XI. CLAIM 9: CAUSATION AND NON-ATTRIBUTION ANALYSIS ARTICLES 3.1 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

22. China claims that the EU's causation and non-attribution analysis violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. China's claim is without merit. First, China's argument in respect of the causation analysis is limited to the speculative assertion that if the domestic industry had not decided to move into the specialty fastener segment it would not have lost market share. China's assertion unduly limits the injury to a loss of market share and is contradicted by the facts on the record. China fails to point to any flaws in the authority's findings in respect of the causal link between dumped imports and consequent injury to the domestic industry.

23. Second, China's allegation that the authority did not adequately distinguish the effects of other factors such as the increase in raw material prices and the export performance of the EU industry is equally unsubstantiated. It is clear from the record that the authority examined the role of the increase in raw material prices but found that there did not exist a similar direct link between the increase in raw material prices and the loss of market share as was found to exist in respect of the dumped imports. China simply disagrees with the authority's assessment of the impact of this factor (raw material prices). China does not demonstrate that the authority did not provide a reasonable and reasoned explanation of how the facts support the determination made. China's claim in respect of the authority's treatment of the export performance of the domestic industry is equally without merit. China's unsubstantiated speculation about what could have happened had more of the export sales been made on the domestic market is not relevant and is in any case contradicted by the facts on the record. It was entirely reasonable of the authority to base its conclusions on statistical COMEXT export data of the domestic industry to find that this relatively unimportant factor showed a positive evolution and could not therefore be a cause of injury. China's claims under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* relating to the authority's non-attribution analysis are thus to be rejected.

XII. CLAIM 10: CHINA'S PROCEDURAL CLAIMS UNDER ARTICLES 6 AND 12 OF THE *ANTI-DUMPING AGREEMENT*

24. China has made 13 procedural claims under Articles 6 and 12 of the Anti- Dumping Agreement. These claims allege that the due process rights of interested parties have been violated during the investigation that led to the adoption of Council Regulation No 91/2009.

25. The European Union demonstrates in its First Written Submission that several of these claims are outside the Panel's terms of reference and that, in any event, the claims are unfounded to the extent China has even made a prima facie case. China not only misrepresents the many different obligations under Articles 6 and 12 of the *Anti-Dumping Agreement* but even more importantly appears to confuse the relationship between the obligations that come within the scope of the relevant provisions invoked by China and the relevant facts and evidence provided by China. Under most of its procedural claims, China simply makes an assertion that the European Union has breached a given

obligation in the *Anti-Dumping Agreement*, but fails to develop any coherent argumentation or provide any relevant evidence. In essence, China either expects the European Union to accept that the mere formulation of an abstract claim is sufficient to shift the burden of proof to the defendant or expects the Panel to make the case on its behalf.

26. To the extent the Panel considers some of the claims to be within its jurisdiction, the procedural claims by China are without merit and should be dismissed by the panel.

XIII. CONCLUSION

27. For the reasons set out in this First Written Submission, the European Union requests the Panel to reject all of China's claims and arguments, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the *Anti-Dumping Agreement*, the GATT 1994 and the WTO Agreement.

ANNEX B

EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF BRAZIL

Article 6.2 of the DSU and the Panel's Terms of Reference

1. The first issue that Brazil would like to raise in its written submission refers to arguments made by the European Union concerning Article 6.2 of the DSU and the Panel's terms of reference. Brazil has a systemic interest in such issue and submits the following remarks to the Panel's consideration.

2. In light of the two functions of a panel request – enabling the respondent to prepare its defense and setting the panel's jurisdiction – past jurisprudence has distinguished the threshold question of whether a request fulfills those functions satisfactorily from the substantive issues dealt in the dispute. As per the Appellate Body (AB), DSU Article 6.2 only requires the complainant to indicate "the *nature* of the measure and the *gist* of what is at issue".[1] The complainant must articulate its claims clearly in the panel request, but need not develop legal arguments at that point.[2] Whereas defects in panel requests cannot be "cured" by later clarification, panels are entitled to rely on the parties written submissions in order to interpret the panel request and define the precise scope of its jurisdiction.

3. In brief, the European Union (EU) argues that a number of claims articulated by China concerning the "Basic AD Regulation" are outside the Panel's terms of reference, since there is no connection between the measure at issue – which relates to the imposition of individual AD *duties* – and the corresponding legal provisions – which relate to: the determination of an individual *margin* of dumping (Article 6.10), the proper *level* of anti-dumping *duties* (Article 9.3), the level of anti-dumping duties where *sampling* is used (Article 9.4), and the *administration* of laws, regulations, decisions and rulings.

4. In Brazil's view, the approach proposed by the EU conflates the threshold examination of the Panel Request (relating to its "due process" and "jurisdictional" functions) with the substantive analysis of China's claims (which takes into account the arguments and the evidence produced by the parties throughout the proceedings). From the Panel Request, Brazil understands China to argue that the aforementioned legal provisions relate – each from a different perspective – to the basic measure China challenges. Brazil considers that this understanding of the "*gist* of what is at issue" is confirmed by China's First Written Submission.

5. In addition, based on the thorough rebuttal of all China's claims as contained in the EU's FWS, Brazil fails to see any compromise to EU's due process rights. Moreover, case law has stated that the burden of proof lies on the respondent to establish such compromise.[3] At a minimum, it has been made clear that the "mere assertion" that the panel request does not perform its "due process" function is not enough to exclude claims from the terms of reference.[4] Although the European Union has certainly presented "supporting arguments" to back its assertions, Brazil's view, as explained before, is that those arguments relate to the substantive analysis of the claims China advanced rather

[1] See *US – Continued Zeroing* (AB Report, paragraph 169, emphasis added).

[2] See *Canada – Wheat* (Panel Report, paragraph 6.10).

[3] See *EC – Computer Equipment* (AB Report, paragraphs 58-65), *Korea – Dairy* (AB Report, paragraphs 114-131), and *Canada – Wheat* (Panel Report, paragraph 6.10).

[4] See *US – OCTG Sunset Reviews* (Panel Report, paragraph 7.71).

than to the threshold examination pertaining to the consistency of the Panel Request with Article 6.2 of the DSU.

6. One example of this conflation between the two distinct analyses can be seen where it is stated that "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" (emphasis in the original).[5] This is essentially the argument rejected by the Panel in *Canada – Wheat*, when it found that the US was not required to set forth in its panel request *why* and *how* the challenged measure was inconsistent with Article XVII of the GATT 1994.[6]

Analysis of consistency of Article 9(5) of the Basic AD Regulation "as such" with the AD Agreement

7. Another important issue raised in this dispute is the alleged inconsistency of Article 9(5) of the Basic AD Regulation with provisions of the ADA, namely Articles 6.10, 9.2, 9.3 and 9.4. It is Brazil's understanding that, in light of the ADA, of China's Protocol of Accession and of WTO jurisprudence, the requirements of Article 9(5), seen in its overall context, are consistent with the Agreements and with their underlying economic logic.

8. First of all, it may be recalled that the ADA deals, in distinct provisions, with the determination of dumping margins (Articles 2 and 6.10) and with the imposition of anti-dumping duties (Article 9). Although complementary, these provisions do not create obligations vis-à-vis one another.

9. As regards the dumping margin, Article 2 and its paragraphs contain rules about determination of normal value, export price and comparability. Article 6.10 establishes that the investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer". Article 6.10 also contemplates exceptions in this regard, allowing, for example, for "sampling" in cases where the number of exporters or producers is so large as to make the determination of individual margins impracticable.

10. Such methodologies, however, are only applicable in situations where prices and costs – the parameters for determining both the normal value and export price – are established according to market-economy (ME) rules.

11. For this reason, Article 2.7 of the ADA and its references establish an important exception to the methodologies generally accepted by the ADA. In brief, it states that whenever ME rules do not prevail in the country of the investigated exporters or producers, the investigating authority may resort to a methodology that does not take into account internal costs and prices of that country.

12. In the particular case of China, this conclusion is further supported by paragraph 15(a)(ii) of its Protocol of Accession. Pursuant to this provision, authorities investigating exports of Chinese products may use, in determining the margin of dumping, a different methodology than the one established in Article 2 of the ADA, unless the investigated Chinese producer demonstrates that, in its specific case, ME conditions prevail. However, the relevant provisions (GATT 1994 Article VI, ADA and China's Accession Protocol) offer no guidelines as to what such methodology should be. Therefore, the investigating authority of a Member may enjoy a level of discretion in establishing its methodology.

13. It should be noted that, if the investigated company is able to demonstrate that it does not suffer significant interference from the State, it is entitled to an individual dumping margin as

[5] EU's FWS, paragraph 67.
[6] See *Canada – Wheat* (Panel Report, paragraph 6.10).

provided by ADA Article 6.10, calculated within the methodologies of Article 2. This consequence is logical, given that, if price comparability as required by Article 2.4 is not affected, ME treatment should be applicable.

14. In non-market economies (NMEs), it can be presumed that decisions of companies involving production and marketing are closely dependent from governmental decisions, as the individual companies' objectives intersect, at least to a significant extent, with the objectives of that State. This commonality of objectives would allow investigating authorities to consider NME-based exporters and producers involved in anti-dumping investigations as a single entity and, therefore, subject to a single dumping margin. An analogy can be found, in ME countries, in the case of distinct companies which are part of the same conglomerate. Drawing on WTO jurisprudence[7], it has been accepted, in many situations, for the investigating authority to consider distinct companies as a single producer/exporter.

15. In the case of NMEs, the burden of proof shifts towards the investigated exporter to establish its exception from country-wide treatment. Thus, the fact that the EC maintains legislation with clear and specific criteria for eligibility to that exception does not run counter any AD provision, and seems to provide adequate opportunity for Chinese exporters to discharge their burden of proof properly.

Determination of anti-dumping duties: scope and limits

16. Another issue to be addressed is the determination of the anti-dumping duty. The imposition of an anti-dumping duty requires that the investigating authority finds positive dumping margins that are above *de minimis*, according to the methodology described above.

17. In the light of Article 9 of the ADA, which pertains to the "Imposition and Collection of Anti-Dumping Duties", it can be inferred that: (i) the imposition of an anti-dumping duty by a Member is voluntary. Therefore, the existence of a positive dumping margin does not necessarily imply the imposition of an anti-dumping duty; (ii) however, if the Member's authority decides to impose an anti-dumping duty, it shall be equal to or less than the dumping margin; (iii) there is no explicit obligation to determine an individual anti-dumping duty per exporter/producer; and, (iv) it is desirable that the imposed anti-dumping duty be less that the dumping margin, if such lesser duty is adequate to remove the injury to the domestic industry (*lesser duty rule*).

18. In what regards the determination of anti-dumping duties, the ADA does not set any specific rule pertaining to the methodology of such determination, except that the result shall not be higher that the dumping margin.

19. Finally, it is important to highlight that the obligation stated in Article 9.2 of the ADA, in what refers to the naming of the concerned suppliers, does not establish any other obligation than the naming itself. In other words, the fact that the investigating authority has to name the concerned suppliers (or the supplying countries) does not mean, under any hypothesis, that this authority is obliged to determine individual dumping margins to each of the suppliers. As shown above, the applied dumping duty needs only to conform to the established dumping margin, being permitted that it be the same to all listed suppliers, as long as it be less than such margin.

[7] See *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia* (Panel Report, paragraph 7.161).

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF COLOMBIA

1. Colombia thanks the Panel and the Parties for this opportunity to present its views in this proceeding. While not taking a final position on the specific facts of this case, Colombia provides its views on some of the legal claims advanced by the Parties to the dispute. First, Colombia will address in this submission the alleged violations to Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*"), and Articles 6.10 and 9.2 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*ADA*") by the European Union, through the imposition of specific requirements for the application of individual treatment to producers and exporters from non-market economy countries in anti-dumping proceedings, as provided in article 9 (5) of Council Regulation (EC) No. 384/96, as amended. Second, the challenges raised by China against the definitive anti-dumping duty on imports of certain iron and steel fasteners from China with respect to: i) the determination of domestic industry in light of Articles 3.1 and ii) Article 4.1 of the *ADA*; and the determination of "like product" in light of Articles 2.1 and 2.6 of the *ADA*.

2. In line with the above mentioned, *the second interpretative note to paragraph 1 of Article VI of the GATT 1994* reflects the position of the *GATT* member States, later accepted by the WTO Members, by means of which the price comparability of States with non-market economies can be done on a different basis to the one of States with market economies. This rule is included, for purposes of systematic interpretation, in Article 2.7 of the *ADA*. This differential treatment, entails a lawful differentiation between Member States of the WTO, which is not contrary to the provision of Article I:1 of the *GATT 1994*.

3. This differential treatment has been accorded to certain States in their process of accession to the WTO. This is the case of China, whose Protocol on Accession has specific provisions[1] related to the effects of its production conditions over price comparability in anti-dumping proceedings undertaken by other WTO Member States. It is very important to bear in mind that section 15 of the Chinese Protocol on Accession provides that WTO Member States before 2016 can decide to unilaterally recognize that China is a country that meets the conditions of a market economy and thus render inapplicable the transitional provisions for alternative price comparability in anti-dumping proceedings established in that section.

4. The first measure at issue identified by China is Article 9(5) of Council Regulation (EC) No. 384/96[2], as amended, since according to the claimant, should be declared incompatible, "as such", with certain provisions of the *GATT 1994* and the *ADA*.

5. Rather than focus on the procedural discussion held by the parties, Colombia will elaborate on the substantive legal debate on this first measure. In this respect, China claims that article 9(5) of the Council Regulation (EC) No. 1255/09 is providing a differential treatment that is contrary to Article I:1 of the *GATT 1994*. The European Union considers that the claim brought by China regarding a violation of Article I:1 of the *GATT 1994*, depends on the consistency of Article 9(5) of the Council Regulation (EC) No. 1255/09 with the *ADA*. Therefore, pursuant to the lex specialis

[1] Section 15 of China's Protocol on Accession to the WTO (WT/L/432).
[2] China's First Written Submission, Exhibit CHN-1.

principle, Article II:2(b) of the *GATT 1994* and the *General Interpretative Note to Annex 1A of the WTO Agreement*, since the challenged measure is consistent with the *ADA*, it could not breach Article I:1 of the *GATT 1994*.

6. Colombia agrees with the arguments presented by the European Union, and additionally considers that it can also be said that the conditions required in Article 9(5) of Council Regulation (EC) No. 1255/09, are under the scope of application of the *second interpretative note to the first paragraph* of Article VI of the *GATT 1994*, and thus of Article 2.7 of the *ADA*. Hence, in Colombia's view, Article 9(5) of Council Regulation (EC) No. 1255/09 is consistent with Article I:1 of the GATT.

7. China claims that establishing additional requirements to the determination of individual dumping margins and individual anti-dumping duties, by means of Article 9(5) of Council Regulation (CE) No. 1255/09 constitutes a breach of the European Union's obligations under Articles 6.10 and 9.2 of the *ADA*. The European Union first rebutted that Article 9(5) of the Council Regulation (EC) No. 1255/09 is not subject to the scope of application of Article 6.10 of the *ADA*. Alternatively, the European Union claims that the general rule enshrined in Article 6.10 of the *ADA*, is subject to at least two exceptions: i) the use of sampling, and ii) the general identification of various producers under a single entity. Based on the second exception, the European Union considers that Article 9(5) of the Council Regulation (EC) No. 1255/09 fully complies with Article 6.10 of the *ADA*.

8. Colombia considers that the view of the European Union is correct, and points out that it cannot be overseen, that when conducting the assessment of the relation between the producers and the State (i.e. via a requirement like the one set forth in Article 9(5) of the Council Regulation (EC) No. 1255/09), the national authority and the producers involved in the investigation are bound by the provisions of Article 6.8 of the *ADA*. Hence, Colombia considers that Article 9(5) of the Council Regulation (EC) No. 1255/09 is consistent with the obligations arising from Article 6.10 of the *ADA*.

9. China considers that the obligation contained in Article 9.2 of the *ADA* relative to individually naming all the suppliers of the product concerned, tantamount to an obligation of individually collecting and imposing anti-dumping duties. Under this understanding, China deems that Article 9(5) of the Council Regulation (EC) No. 1255/09 prevents the application of individual anti-dumping duties, on a company to company basis, and is thus contrary to Article 9.2 of the *ADA*. The European Union rebuts China's claim in a two-fold manner. On the one hand it claims that Article 9(5) of the Council Regulation (EC) No. 1255/09 does not fall within the purview of Article 9.2 of the *ADA*, since this provision deals with the collection and not with the determination of anti-dumping duties; and on the other hand it claims that in any case the challenged measure is consistent with Article 9.2 of the *ADA*, since its application renders the duty *appropriate* and *effective*.

10. While agreeing with the arguments of the European Union, Colombia considers that Article 9(5) of the Council Regulation (EC) No. 1255/09 is consistent with the obligations arising from Article 9.2 of the *ADA*.

11. The second measure challenged by China is Council Regulation (EC) No. 91/2009[3], through which the European Union has imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China. According to China this measure violates numerous substantive and procedural provisions of the *ADA*, but Colombia's submission will focus on the alleged violations of Articles 3.1 and 4.1 (relative to the definition of the domestic industry), and, 2.1 and 2.6 (relative to the like product determination) of such instrument.

[3] See China's First Written Submission, para. 122 and Exhibit CHN- 4.

12. China claims that the European Union's determination of the "domestic industry" violates Articles 4.1 and 3.1 of the *ADA*. Particularly by not attending the limitation to the investigating authorities' discretion established on Articles 4.1(i) and 4.1(ii) of the *ADA*. Additionally, China claims that the European Union did not include domestic producers whose collective output of the like product constituted a major proportion of the total domestic production. Finally, China claims that the sample used by the European Union to determine the injury, is not a major proportion of the total domestic productions.

13. In response to these claims the European Union contends that they are flawed mainly because: pursuant to Article 4.1 of the *ADA*, it is possible to determine the domestic production through the identification of a "major proportion" of it. The European Union did this through sampling a percent, which in its view constitutes a "major proportion" of the domestic industry. The European Union also notes that Article 4.1 does not impose an obligation on sampled producers to represent a major proportion of *total* domestic production.

14. Colombia shares the interpretation of the European Union when considering that the purpose of Article 4.1 of the *ADA* is to ensure that the domestic industry is defined in such a way that either all eligible producers (domestic industry as a whole) are included *or* those producers that represent "a major proportion" of the eligible domestic production. It is Colombia's view that for the purposes of the injury determination in an investigation, the national authorities should interpret the concept of "domestic industry" according to both articles 3.1 and 4.1 of the *ADA*; however this does not prevent authorities of sampling during an investigation, bearing in mind that such sampling is sufficiently representative of the domestic industry. In this regard, it is required from the authorities to perform both the investigation, and the injury determination in an objective manner based on positive evidence. In the context of Articles 3.1 and 4.1 of the *ADA*, this means that the decisions taken during these stages should be justifiable and credible.

15. China claims that the finding of the European Union expressed in Council Regulation (EC) No. 91/2009, that all fasteners produced and sold in the European Community, in China or in the analogue country (India) are like, is contrary to the provisions of Article 2.1 and 2.6 of the *ADA*. This claim is grounded in the fact that according to China, Article 2.6 of the *ADA* establishes that the like product analysis has to be narrowly construed, and in the case at hand, the European Union did not respect such a threshold by not recognizing the differences between standard (those produced in China) and special fasteners (those produced in the European Union) for the purposes of determining and applying the anti-dumping duties.

16. In response to China's claims, the European Union clarifies that the Articles 2.1 and 2.6 of the *ADA* do not contain specific obligations regarding the determination of the *product concerned* or the *like product*, since they merely indicate the circumstances in which dumping occurs and the definition of a like product. It also claims that the like product determination was between fasteners (standard and special) produced by the domestic industry, produced and sold in China, produced in the analogue country, and produced in China and sold in the European Union. Thus, China's claims lack factual and legal grounds.

17. Colombia will comment on the flexibility that national authorities enjoy in order to select, based on the evidence available in the investigation, which is the *product concerned* and although not fully discussed by the European Union, which is the standard of likeness that should be applied in anti-dumping investigations in accordance with the WTO law. The determination of the *product concerned* is not subject of a specific obligation under Articles 2.1 and 2.6 of the *ADA*. Rather, when analyzing the likeness comparison between the *product concerned* (freely fixed by the national authority) and the *like domestic product* for the purposes of establishing the existence of dumping, national authorities are bound to follow the terms and conditions set in both Articles 2.1 and 2.6 of the *ADA*. It is Colombia's view that the application of Article 2.6 should be framed in a reasonable

context. Indeed, the definition of the scope of 'like product' in an anti-dumping investigation could not be limited to either identical products or a single group of products sharing just physical characteristics with the product under consideration. Colombia observes that this provision actually entails the possibility of using, not just the "physical characteristics" criteria, but also other criteria of likeness accepted in the context of the GATT 1994 and the different covered agreements, bearing that the investigating authorities construed such criteria in a reasonable manner trying to preserve the scope and spirit of the ADA.

18. As a final point and in order to recap, Colombia considers that this case raises important questions on the interpretation of Articles I:1 of the *GATT 1994* as well as various provision of the *ADA*. 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.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. ISSUES PERTAINING TO THE CALCULATION OF INDIVIDUAL DUMPING MARGINS AND THE IMPOSITION AND COLLECTION OF INDIVIDUAL ANTI-DUMPING DUTIES

1. In the present case, the People's Republic of China ("China") suggests that Article 15(a)(ii) of the *Protocol on the Accession of the People's Republic of China* ("*China Accession Protocol*") and paragraph 151 of the *Report of the Working Party on the Accession of China* ("*Working Party Report*") do not permit the European Union to act inconsistently with Articles 6.10, 9.2, 9.3, and 9.4 of the *Agreement on Implementation of Article VI of the GATT* (the "*AD Agreement*") through Article 9(5) of Council Regulation (EC) No. 384/96, as amended, and as codified and replaced by Council Regulation (EC) No. 1225/2009 (the "Basic AD Regulation").

2. In Japan's view, Article 15(a)(ii) of the *China Accession Protocol* raises two questions in the present case: (i) whether items (a)-(e) provided in Article 9(5) of the Basic AD Regulation may be deemed to be conditions to show that "market economy conditions prevail in the industry"; and (ii) whether the calculation of a country-wide dumping margin and AD duty based on a comparison between the normal value established for an analogue country with the average export price of the cooperating exporting producers in the country concerned may be considered as "a methodology that is not based on a strict comparison with domestic prices or costs in China".

3. Japan considers that the European Union did not violate Articles 6.10, 9.2, 9.3, and 9.4 of the *AD Agreement* through Article 9(5) of the Basic AD Regulation if: (i) pursuant to the first question, items (a)-(e) in Article 9(5) of the Basic AD Regulation may be considered as conditions to show that "market economy conditions prevail in the industry" under Article 15(a)(ii) of the *China Accession Protocol*; and (ii) pursuant to the second question, the calculation of a country-wide dumping margin and AD duty by comparing the normal value established for an analogue country with the average export price of the cooperating exporting producers in the country concerned may be considered as "a methodology that is not based on a strict comparison with domestic prices or costs in China" under Article 15(a)(ii) of the *China Accession Protocol*.

4. Japan asks that the Panel clarify the relationship between Article 15(a)(ii) of the *China Accession Protocol* and Article 9(5) of the Basic AD Regulation, and that it carefully take into account the issues raised above in its consideration of Article 15(a)(ii) of the *China Accession Protocol*, Articles 6.10, 9.2, 9.3, and 9.4 of *AD Agreement*, and Article 9(5) of the Basic AD Regulation.

5. In addition, Japan queries whether satisfying the criteria listed in paragraph 151 of the *Working Party Report* is sufficient for a WTO Member to use "a methodology that is not based on a strict comparison with domestic prices or costs in China" pursuant to Article 15(a)(ii) of the *China Accession Protocol*.

6. With respect to the obligation to determine an individual dumping margin, Japan considers that the first sentence of Article 6.10 of the *AD Agreement* establishes an obligation to determine an individual dumping margin for each individual exporter or producer concerned, with *only one*

exception to that rule. That exception is specified in the second sentence of Article 6.10, which permits sampling "where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable". This view is consistent with past WTO jurisprudence.[1]

7. Japan agrees with the European Union's view that it is permissible to calculate a single dumping margin for legally distinct but related entities to the extent that they may be considered a single "exporter" or "producer" within the meaning of the first sentence of Article 6.10. That is also in line with the panel's considerations in *Korea – Ceramic Paper*.[2] However, this issue relates to the definition of an "exporter" or a "producer" within the meaning of Article 6.10 of the *AD Agreement*; it has no bearing on the relationship between the first and second sentences of Article 6.10.

II. ISSUES PERTAINING TO THE CONDUCT OF ANTI-DUMPING INVESTIGATIONS

(i) "Domestic Industry" – Articles 4.1 and 3.1 of the *AD Agreement*

8. In Japan's view, China's arguments relating to Article 4.1 of the *AD Agreement* raise the following key issues: whether the European Union violated Article 4.1 of the *AD Agreement* (i) by excluding from the definition of the domestic industry all those companies that did not support the investigation[3]; (ii)since the domestic industry, as defined by the European Union, did not include domestic producers whose collective output of the like product constituted a major proportion of the total domestic production[4]; and (iii) since the sample selected by the European Union does not represent a major proportion of total domestic production because the European Union selected a sample of domestic producers, namely 6 producers amounting to only 17.5 per cent of the total EU production, and whether European Union violated Article 3.1 of the *AD Agreement* since this sample cannot be regarded as representative of the total domestic production.[5]

9. **As regards the first issue**, Japan's primary concern is ensuring fairness in the investigation process. Japan believes that domestic producers that do not support an AD complaint but fully cooperate in an AD investigation may not be excluded from the definition of the domestic industry. European Union's interpretation of "domestic industry" could allow investigating authorities to define the domestic industry in a results-oriented way. This would be inconsistent with the obligation of Article 3.1 of the *AD Agreement* to conduct an "objective examination" of injury.

10. The Appellate Body in *US – Hot-Rolled Steel*[6] and in *EC – Bed Linen (Article 21.5 – India)*[7] recognized that investigating authorities must conduct an impartial investigation without favouring the interests of any interested party. Moreover, investigating authorities are not entitled to conduct their investigation in such a way that an affirmative injury determination becomes more likely.

11. In addition, there is a general obligation to conduct AD investigations in an unbiased and objective manner. This is borne out by Article 17.6(i) of the *AD Agreement*.

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[1] *See* Panel Report, *Argentina Ceramic Tiles*, paras. 6.89, 6.90; Panel Report, *Argentina Poultry Anti-Dumping Duties*, para. 7.214.

[2] *See* Panel Report, *Korea – Certain Paper*, para. 7.161.

[3] First Written Submission of China, paras. 233-245.

[4] First Written Submission of China, paras. 246-268.

[5] First Written Submission of China, paras. 273-282.

[6] Appellate Body Report, *US – Hot Rolled Steel*, para. 196.

[7] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114, *quoting* Appellate Body Report, *US – Hot Rolled Steel*, para. 192.

12. Moreover, the European Union's approach is structurally problematic to the extent that it allows *domestic producers* themselves to tailor the "domestic industry" by designating those companies for which injury is more likely to be found as supporting the complaint, whereas those companies for which injury is less likely to be found as not supporting the complaint.

13. **As regards the second issue**, Japan agrees neither with China's argument that 27 per cent of domestic production *a priori* does not constitute a "major proportion" nor with the European Union's argument that 25 per cent is *a priori* sufficient to reach the "major proportion" threshold.[8] The panel in *Argentina – Poultry Anti-Dumping Duties* found that the "major proportion" requirement of Article 4.1 of the *AD Agreement* does not mean that the domestic industry has to account for at least 50 per cent of domestic production, but that an "*important, serious or significant*" proportion of production is sufficient.[9] In Japan's view, it is sufficient that the investigating authority assess what constitutes a major proportion on a case-by-case basis in an *unbiased* and *objective* manner.

14. **As regards the third issue**, although there are no clear provisions in the *AD Agreement* that permit investigating authorities to engage in sampling of the domestic industry[10], the *AD Agreement* allows authorities to conduct sampling on the domestic industry where there are so many domestic industry members that individual examination of all of them would be impracticable.[11] The requirement imposed by Article 4.1 of the *AD Agreement* that the collective output of the domestic industry must constitute at least a "major proportion" of total domestic production must be clearly distinguished from the requirements for the selection of a sample.

15. Japan believes that the second sentence of Article 6.10 would be helpful also in the context of sampling for the injury determination. In Japan's view, the primary requirement for the selection of a sample for the injury determination is that, the sample must be *sufficiently representative* of the domestic industry.[12]

(ii) "Product under Consideration" and "Like Product" – Articles 2.1 and 2.6 of the *AD Agreement*

16. Japan asks the Panel to first *carefully* examine whether the European Union correctly defined the "product under consideration", taking into account the arguments and exhibits of both parties.

17. Next, Japan asks the Panel to carefully consider whether the European Union properly compared products that were "like" the "product under consideration" with the product under consideration. In particular, Japan asks the Panel to carefully consider whether the products produced and sold in the analogue country (India) in the dumping context were "like" the products produced in China and exported to the European Union.

18. Whether two products are "like" is determined pursuant to Article 2.6 of the *AD Agreement*. Article 2.6 defines "like product" to mean "a product which is identical, *i.e.* alike in all respects to the 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".

19. In this respect, Japan considers the finding of the panel in *Indonesia – Autos* in the context of a case under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") as

[8] *See* First Written Submission by the European Union, para. 340 et seq.
[9] *See* Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.
[10] Footnote 13 of the *AD Agreement* appears to provide for the possibility of sampling domestic producers before initiation of an anti-dumping investigation.
[11] Panel Report, *EC – Salmon (Norway)*, para. 7.129.
[12] Panel Report, *EC – Salmon (Norway)*, para. 7.130.

equally applicable under the *AD Agreement*, which note the statement of the Appellate Body in *Alcoholic Beverages* (1996).[13]

20. In the present case, Japan asks the Panel to take into consideration all factors and to make its best judgment as to whether the products produced and sold in the analogue country (India) are "like" the product under consideration under the *AD Agreement*.

(iii) Injury Determination: Volume of Dumped Imports – Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*

21. In Japan's view, China's arguments relating to Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* raise two key issues: (i) whether the European Union violated Articles 3.1 and 3.2 of the *AD Agreement* by failing to exclude the imports of two Chinese exporting producers, found to be not dumping, from the volume of dumped imports[14]; and (ii) whether the European Union violated Articles 3.1 and 3.2 of the *AD Agreement* by including in the volume of dumped imports all imports from non-sampled exporting producers that were not individually examined.[15]

22. As **regards the first issue**, Japan believes that "dumped imports" in Article 3 means that the injury determination set forth in Article 3 must reflect the authorities' assessment of only "dumped imports", and not imports that were not found to have been "dumped."[16]

23. It follows that, to the extent that the European Union considered non-dumped imports as having been "dumped" for the injury and causation analyses, it violated Articles 3.1 and 3.2 of the *AD Agreement* in light of past WTO jurisprudence.

24. As **regards the second issue**, Japan believes that the European Union did not violate Articles 3.1 and 3.2 of the *AD Agreement* by including in the volume of "dumped imports" all imports from non-sampled exporting producers that were not individually examined. That is because the European Union found that *all sampled exporting producers* were engaged in dumping[17], and accordingly, its determination that all non-sampled exporting producers that were not individually examined were also engaged in dumping may be considered as based on "positive evidence" and an "objective examination" without additional inquiry.

25. Investigating authorities have a right to apply sampling in the circumstances described in the second sentence of Article 6.10 as long as they "satisfy the requirements of 'positive evidence' and an 'objective examination', without having to investigate *each producer or exporter* individually".[18]

26. In Japan's view, these requirements are not violated where the findings concerning the sample are extrapolated to all non-sampled producers that were not individually examined.[19] Indeed, the approach of extrapolating the findings of the sample to all companies that were not individually examined is "unbiased" and does not "favour the interests" of any interested party in the investigation.

[13] Panel Report, *Indonesia – Autos*, para. 14.174.
[14] First Written Submission of China, paras. 402-408.
[15] First Written Submission of China, paras. 409-417.
[16] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303. Panel Report, *EC – Bed Linen*, para. 6.138. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 111, 112 and 115.
[17] First Written Submission by the European Union, para. 535.
[18] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 117.
[19] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 137.

27. Moreover, Japan stresses that there is no requirement anywhere in the *AD Agreement* that *requires* investigating authorities to take into account information from outside the sample when extrapolating the findings of the sample to non-examined producers outside of the sample.[20]

(iv) Injury Determination: Causation and Non-Attribution Factors – Articles 3.1 and 3.5 of the *AD Agreement*

28. Under Article 3.5 of the *AD Agreement*, as explained by the Appellate Body in *US – Hot-Rolled Steel*, investigating authorities must *separate and distinguish* the injurious effects of the dumped imports from the injurious effects of other known factors.[21]

29. Japan considers it of paramount importance that the principle of "separating and distinguishing" the effects of other known factors be upheld in every anti-dumping investigation. Accordingly, Japan requests that the Panel carefully review whether the European Union adhered to this principle in the present case.

(v) Procedural Issues – Article 6.1.1 of the *AD Agreement*

30. Japan shares the European Union's view that Article 6.1.1 of the *AD Agreement* applies only to the initial questionnaire (*i.e.*, the initial dumping questionnaire)[22]; the *AD Agreement* does not require that investigating authorities provide respondents with a minimum 30-day period to reply to all possible information requests, "questionnaires" or claim forms.[23]

31. Indeed, given the procedural and practical time restraints of an anti-dumping investigation, it would be unreasonable and unworkable to impose a minimum 30-day period for respondents to be able to submit information other than the response to the initial questionnaire.[24]

32. In effect, Article 6.1.1 of the *AD Agreement* is a mere application of the general principle reflected in the chapeau of Article 6.1 of the *AD Agreement* that respondents must be given sufficient time to present their views in writing. Thus, while the chapeau of Article 6.1 of the *AD Agreement* reflects the understanding that it may be necessary to impose different deadlines on a case-by-case basis for responding to certain information requests in the course of an anti-dumping investigation, Article 6.1.1. of the *AD Agreement* requires that there must in any event be a minimum time period for responding to the initial questionnaire.[25]

33. Japan stresses that information requests other than the initial questionnaire, *e.g.*, a sampling questionnaire and MET/IT claims, should not be considered subject to the 30-day period imposed by Article 6.1.1 of the *AD Agreement*.

[20] Panel Report, *EC – Salmon (Norway)*, para. 7.634 and fn. 780.
[21] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222-223 (emphasis added).
[22] First Written Submission by the European Union, para. 783.
[23] *See* Panel Report, *Egypt – Steel Rebar*, para. 7.276.
[24] Appellate Body Report, *US – Hot Rolled Steel*, para. 73.
[25] Panel Report, *Egypt – Steel Rebar*, para. 7.277.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF NORWAY

TABLE OF CONTENTS

I. INTRODUCTION

1. As a third party to this dispute, Norway would in the following like to address certain interpretative issues, discussed in the First Written Submissions of China and the EU.

II. THE DETERMINATION OF THE DOMESTIC INDUSTRY

2. Norway will first address the EU's exclusion of certain categories of domestic EU producers, that produced the domestic "like product" during the relevant period, from the determination of the domestic industry. The EU seems to argue that an investigating authority has the discretion to exclude whichever producers it wishes, provided that the remaining producers represent a "major proportion" of the industry.[1] Norway strongly disagrees that Article 4.1 of the *Anti-Dumping Agreement* permits such a determination, which would prevent an objective examination of the industry, as required by the *Anti-Dumping Agreement*. The only category of producers that may be entirely excluded from the industry according to Article 4.1 is "related" producers. The focal point of Article 4.1 is the totality of the domestic industry, ensuring that the determination made is representative of the domestic industry as a whole.[2] The injury determination is one of the pre-conditions for the imposition of anti-dumping duties, which protect all domestic producers. An authority cannot impose duties unless that is warranted by the need to protect the domestic producers, as a whole, and not just a select group of them.

3. Accordingly, the investigating authority cannot define the industry "on a selective basis" that involves examination of just "one part" of the industry.[3] Nor can it define the industry in such a way that an injury determination becomes "more likely" or such that it "favours the interests of any interested party"[4], something that would typically be the case if the domestic industry is restricted to the complainants only. The panel in *EC – Salmon* thus found that Article 4.1 does not permit the exclusion from the domestic industry of a group of producers who did not express a view during the investigation.[5]

4. Hence, it is Norway's firm view that an investigating authority cannot exclude categories of producers from the definition of the domestic industry, whether these categories are based on the production of a particular type or model of the "like product" or their opposition or silence in respect of the investigation.

III. THE DETERMINATION OF THE PRODUCT SCOPE

5. China claims that the EU failed to determine the "product under consideration" and the "like product" consistently with Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.[6] Norway points to consistent jurisprudence that establishes that investigating authorities must make determinations consistently with any definitions in the covered agreements.[7] Panels and the Appellate Body have furthermore frequently interpreted words that were not defined in the covered agreements.[8] The notion that Articles 2.1 and 2.6 do not impose obligations should therefore be rejected.

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[1] First Written Submission of the EU, paras. 296-297.
[2] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190.
[3] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 190 and 211.
[4] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 193 and 196.
[5] Panel Report, *EC – Salmon*, para 7.122.
[6] First Written Submission by China, para 300.
[7] Appellate Body Report, *US – Lamb*, para. 96, Panel Report, *Argentina – Poultry*, para. 7.338, Panel Report, *EC – CVDs on DRAMS*, paras. 8.1 (a), 8.1 (b) and 8.1 (c).
[8] Panel Report, *US – Hot-Rolled Steel*, para. 7.108 and Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 139.

6. According to Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*, the pricing comparison must be made between home and exported products that are "*identical*", or, by way of exception, "closely resembling" products. Hence, where an authority wishes to group multiple products together in a single investigation, Article 2.6 requires that *any* given category of the "like product" must be "like" *each and every* category of the product under consideration. Article 2.6 contains no exception, or other qualifying language, that allows an authority to establish likeness with respect to one category of the product under consideration, but not with respect to other categories.

7. The term "product under consideration" thus has an ordinary meaning that does not permit the bundling of "non-like" products. The authorities can of course choose to sub-divide the investigated product into models for purposes of comparison. However, in that event, the different models cannot involve different products that are not like. Rather, the models must all be sub-categories of a group of products that meet the definition of likeness.[9] The authorities must thus ensure likeness within the entire group of sub-products that constitutes the investigated product.

8. If this was not so, the importing Member could manipulate the product scope of an investigation to secure dumping and injury determinations that would not otherwise be possible. As a result, the carefully drafted disciplines on dumping and injury determinations could be easily undermined, contrary to the object and purpose of the *Anti-Dumping Agreement*, and the *GATT 1994*.

9. It is Norway's view that all models of the "product under consideration" are required to be "like" each other. To the extent that the Panel finds that standard and special fasteners are not in fact "like" each other, this would in Norway's opinion entail a breach of Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.

IV. THE DETERMINATION OF INJURY

10. Norway will address the claim that the EU improperly considered the displacement of EU products by imports from China in some market segments as being relevant. Article 3.1 of the *Anti-Dumping Agreement* requires the investigating authority to determine the impact of the dumped products on the domestic producers of the "like products". In this case, the EU had determined the product scope to be standard and special fasteners. Once this is determined, the product scope remains constant throughout the investigation.[10] The reference in Article 3.1 to the "like product" entails an obligation to look at the product as a whole, not certain segments or models within the product.[11]

11. It follows from this that injury cannot be found to result from a displacement of sales from one segment to another, within the same "like product". It would be contrary to Article 3.1 to find the displacement of sales from one segment to another to be a factor in the determination of injury.

V. THE EXAMINATION OF THE VOLUME OF DUMPED IMPORTS

12. Norway will first comment on the EU's failure to exclude imports from two Chinese producers that were found not to have dumped, in the volume of dumped imports.[12] As the text of Articles 3.1, 3.2 and 3.5 shows, it is only the *dumped* imports that are to be included in the determination of injury. The *Anti-Dumping Agreement* does not provide any exceptions to this rule.

[9] Appellate Body Report, *EC – Bed Linen (AB)*, para. 58.
[10] Panel Report, *EC – Tube or Pipe Fittings*, para 7.149.
[11] Appellate Body Report, *US – Softwood Lumber V*, para. 99 and Panel Report, *EC – Salmon*, para. 7.54.
[12] First Written Submission by China, paras. 397 and 402.

Several panels and the Appellate Body have confirmed this interpretation.[13] In *EC – Salmon*, the panel rejected the EC's argument that the inclusion of imports from companies with *de minimis* margins in the volume of dumped imports for injury analysis was appropriate as the exclusion of these imports would not have had any significant effect on the injury analysis.[14] The panel stated that the term "dumped imports" in Article 3 of the *Anti-Dumping Agreement* could not be interpreted so as to allow the inclusion of imports attributable to producers/exporters for which a *de minimis* margin had been calculated, and therefore found the EC to have acted inconsistently with Articles 3.1 and 3.2.[15]

13. Hence, the imports of the two Chinese producers that were found not to be dumping should clearly have been treated as non-dumped, and should have been excluded from the volume of dumped imports.

14. Secondly, China argues that the EU erred in treating the imports of all non-sampled and non-examined Chinese exporting producers as being dumped, for purposes of the injury determination.[16] Article 3.1 of the *Anti-Dumping Agreement* requires an "objective examination" of "the volume of the dumped imports", based on "positive evidence". Importantly, the text does not contain any exceptions from this obligation. Jurisprudence has confirmed the strict nature of Article 3.1.[17] By automatically considering that the volume of imported products from all non-sampled and non-examined producers is at dumped prices, it becomes more likely that an investigating authority will find that the domestic industry is injured. In light of this, the Appellate Body has stated that such an approach, which is applied irrespective of whether there are examined or sampled exporting producers found *not* to be dumping, cannot be objective.[18] Accordingly, the panel in *EC – Salmon* found that the investigating authority erred in concluding that all examined producers were dumping, as one producer had been found not to be dumping, and further extrapolating this conclusion to all imports.[19]

15. This is parallel to the case before this Panel. Whether it is established through sampling or through individual examination that there are producers that are not dumping is irrelevant for the determination. The investigating authority faces the same uncertainty regarding the non-sampled and non-examined exporting producers in both cases. The expansion of the investigation from the original sample to allow two more companies individual treatment, and the results from the investigation of these companies (being that no dumping took place), implies that an automatic extrapolation from the original sample was not warranted. Further evidence would be required before an extrapolation from the original sample would be justified.

VI. PROCEDURAL REQUIREMENTS

16. Norway will not go into the factual details of the case, but rather outline how to interpret the requirements of Articles 6.2, 6.4 and 6.9 of the *Anti-Dumping Agreement*.

17. Article 6.2 of the *Anti-Dumping Agreement* sets out that all interested parties shall have a "full opportunity for the defence of their interests", throughout the anti-dumping investigation. As opposed to what the EU's approach seems to be[20], it is Norway's view that when an investigating authority

[13] Panel Report, *EC – Bed Linen*, para. 6.138; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 115; Panel Report *Argentina – Poultry*, para. 7.303, Panel Report, *EC – Salmon*, paras. 7.627-7.628.

[14] Panel Report, *EC – Salmon*, para. 7.627.

[15] Panel Report, *EC – Salmon*, para 7.628.

[16] First Written Submission by China, para. 410.

[17] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 192, 193 and 196, Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133.

[18] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

[19] Panel Report, *EC – Salmon*, para. 7.634.

[20] First Written Submission of the EU, paras. 684-687.

violates Article 6.4 and/or 6.9, it also violates Article 6.2 of the *Anti-Dumping Agreement*. The requirements of Articles 6.4 and 6.9 – the opportunity to see all relevant and used information and the proper disclosure of essential facts – serve, among others, the purpose of enabling interested parties to defend their interests as set forth in Article 6.2.

18. Article 6.4 of the *Anti-Dumping Agreement* confers on interested parties a right of access to evidence in the non-confidential record of the investigation. The Appellate Body has ruled that the relevance of information must be assessed from the perspective of the interested parties.[21] An authority cannot, therefore, second-guess whether a particular document could be "relevant" to an interested party's "presentation". The Appellate Body has also held that the phrase "used by the authorities" in Article 6.4 refers to information that the authority must *evaluate* in making its determinations.[22] An authority must evaluate all of the information submitted to it that relates to its determinations, and cannot ignore any of it.[23]

19. Article 6.9 of the *Anti-Dumping Agreement* requires the investigating authority, before the final determination is made, "to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.[24] Rather, the investigating authority must actively identify the facts on which it will rely in making its determination.[25] Panels have distinguished "facts" from "reasons".[26] The duty of disclosure thus relates to *evidence*. As to what evidence the investigating authority has an obligation to disclose, the words "essential" and "form the basis of" indicate that the duty relates to the important facts that provide the foundation on which the final determination is constructed.[27]

20. Under the second sentence of Article 6.9, disclosure must occur "in sufficient time for the parties to defend their interests". Absent disclosure of the essential facts, interested parties cannot make effective comments on the factual basis for the authority's intended decision.

VII. CONCLUSION

21. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

[21] Appellate Body Report, *EC – Tube or Pipe Fittings (AB)*, para. 145.
[22] Appellate Body Report, *EC – Tube or Pipe Fittings (AB)*, para. 145.
[23] Panel Report, *EC – Salmon*, para 7.771.
[24] Panel report, *Guatemala – Cement II*, para. 8.230.
[25] Panel report, *Argentina – Ceramic Tiles*, para. 6.125.
[26] Panel report, *Argentina – Poultry*, para. 7.225.
[27] Panel report, *EC – Salmon*, para. 7.807.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF TURKEY

I. INTRODUCTION

1. Turkey takes no position as to the defense and allegations presented by the parties. Turkey wishes to contribute by focusing on two major issues, namely Market Economy Treatment and Individual Treatment Assessments within the framework of dumping margin calculation.

II. MARKET ECONOMY TREATMENT (MET)/INDIVIDUAL TREATMENT (IT) ASSESSMENTS WITHIN THE FRAMEWORK OF DUMPING MARGIN CALCULATION

2. According to Article 2.1 of the Anti-Dumping Agreement, an investigating authority has to work on two data groups (normal value and export price) to determine whether dumping is present. 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.

3. Furthermore, GATT 1994 Article VI, Ad Article VI.1, paragraph 2 and Articles 2.2 and 2.3 of the Anti Dumping Agreement point out certain sources which the investigating authority shall take into consideration if either the normal value or the export price can not be determined from the data provided by the producer/exporter due to the reason that the internal sales do not permit a proper comparison or because of the absence or unreliable nature of export prices.

4. In Turkey's view, Ad Article VI.1, paragraph 2 of GATT 1994 and Anti Dumping Agreement Article 2.2 permits the investigating authority to rely on an unbiased calculation method in order to determine the normal value in the event of exports from a country in which the prices are not set by dynamics of a free-market economy.

5. In addressing the IT assessment, it is understood that Article 9.5 of the EU Basic Regulation envisages the use of the export price of the producer/exporter itself if it can fulfill the criteria stipulated in the Article. If the exporter/producer fails, however, the EU investigating authority has the option to employ weighted average export price of cooperating producer/exporter companies for comparison.[1]

6. Therefore, the IT assessment is not solely an evaluation whether the producer/exporter has properly proved that it is fulfilling the criteria of Article 9.5, but a legal instrument directly affecting the calculation of the dumping margin by determining data group to be used as the export price which has been argued to be an indispensable component of the dumping margin calculation pursuant to the GATT 1994 Article VI and Article 2.2 of the ADA.

7. In this regard, both the MET and IT assessment are instruments that directly relate to the *calculation of the dumping* margin which provides the investigating authority with alternative routes on the question of which group of data will be used to determine the *normal value* and *export price*.

[1] EU First Written Submission, para. 23.

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

8. It can be clearly understood from Article 6.10 of the Anti Dumping Agreement that individual treatment, i.e. calculation of individual dumping margin for each known exporter/producer is a **general rule**. However there are always exceptions to general rules when the conditions prevail. The PRC rightly mentions that the second sentence of the Article 6.10, i.e. sampling, provides an exception to the general rule of individual treatment.

9. The legal question here is whether sampling is the sole exception to the general rule of IT, or Members can require in their domestic legislation some conditions to have met in order to provide IT. Turkey is of the view that this may not be the sole exception.

10. The Anti Dumping Agreement provides rules for economies operating in market economy conditions. There are no specific rules or exceptions for economies that are not operating under market economy conditions. It is not reasonable to look for a non-market economy exception in Article 6.10 itself.

11. Furthermore, Ad Article VI.1, paragraph 2 of GATT 1994 provides a special provision for the calculation of prices regarding countries that do not operate under full market economy conditions. This provision mentions 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 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.

12. When the object and purpose of Ad Article VI.1, paragraph 2 of GATT 1994 and paragraph 150 of PRC's Working Party Report (WT/ACC/CHN/49) are considered; it is understood 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.

13. Moreover, taking into account the AB Report in the *US – Corrosion Resistant Steel*, and Panel Report in the *Korea – Certain Paper cases*, Turkey understands that treating several distinct legal entities as a single entity, in the event where the conditions require to do so, is approved by case-law and sampling is not the only exception to the general rule of IT.

IV. CONCLUSION

14. Turkey reserves its rights to make further comments at the third party session of the first substantive meeting of the Panel. Turkey thanks the Panel for the opportunity to present its views in this proceeding and welcomes any questions that Panel may have.

ANNEX B-6

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

1. The United States addresses in this submission the proper interpretation of the following provisions: (1) Article 6.10 and Article 9 of the *Agreement on Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"); (2) Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); (3) Article 5.4 of the AD Agreement; (4) Articles 2.1 and 2.6 of the AD Agreement; (5) Article 3.1 of the AD Agreement; and (6) Articles 6.1.1, 6.2, 6.4, and 6.5 of the AD Agreement.

I. ARTICLE 9(5) OF COUNCIL REGULATION NO. 1225/2009 UNDER THE AD AGREEMENT

A. ARTICLE 6.10 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.

3. The United States notes that the AD Agreement neither defines "exporter" or "producer", nor sets out criteria for the investigating authority to examine before concluding that a particular firm or group of firms constitutes an "exporter" or "producer". Therefore, 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. This includes the right of the investigating authority to establish those factors that may be relevant to identifying an "exporter" or "producer", including by reference to the actual commercial activities and relationships of companies rather than their status as legally distinct entities. The reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement.

4. 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. In a non-market economy, such as China, the government's interference in the functioning of market principles could lead to the government making business decisions for the individual companies, the government forcing the companies to harmonize their business activities to fulfill the government's objectives, or the government shifting production between the companies. Consistent with the panel report in *Korea – Paper*, each of these factors would support a finding by the investigating authority that companies should be treated as a single exporter and subject to a single dumping margin.

5. Furthermore, given the presumption of government interference reflected in paragraph 15 of Part I of the *Protocol of the Accession of the People's Republic of China* ("Protocol"), it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in a non-market economy country without first confirming, at the very least, that the company functions as an exporter separate from the government. Otherwise, if the exporter's prices

were set by the government, there would be no objective basis for assigning that company its own dumping margin.

B. ARTICLE 9 OF THE AD AGREEMENT

6. As an initial matter, the United States notes that Article 9 discusses the *imposition* of antidumping duties with respect to *products*, not individual exporters or producers. In this regard, the concept of *imposing* antidumping duties on an individual exporter or producer, as advanced by China, is found nowhere in Article 9 of the AD Agreement.

7. Furthermore, it does not follow from China's interpretation of Article 9 that an investigating authority would necessarily be required to impose or apply an individual antidumping duty for each company. 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.

II. ARTICLE 9(5) OF COUNCIL REGULATION NO. 1225/2009 UNDER ARTICLE X:3(A) OF THE GATT 1994

8. To the extent that China is challenging Article 9(5) under Article X:3(a) of the GATT 1994, the United States submits that this measure does not fall within the scope of Article X:3(a). The Appellate Body has recognized that laws and regulations themselves may be challenged under Article X:3(a) only *where they reflect the administration* of an instrument set out in Article X:1. However, Article 9(5) appears to provide substantive rules on how antidumping duties are to be imposed rather than embody the administration of any other legal instrument. 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).

III. ARTICLE 5.4 OF THE AD AGREEMENT

9. While it takes no position on the merits of China's factual allegations, the United States shares China's view that, pursuant to Article 5.4, an investigating authority may not initiate an investigation unless it has conducted an examination of the evidence and determined that the requisite industry support exists. This determination and the underlying examination must take place *prior to* the authority's decision whether to initiate an investigation, and thus must be based on evidence available to the investigating authority prior to initiation. It would be neither consistent with the terms of Article 5.4 nor logical for an investigating authority to take into account facts that are revealed *subsequent to* its initiation decision in order to bolster its examination of the degree of industry support that is required *prior to* initiation.

IV. ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

10. While it takes no position on the merits of China's factual allegations, the United States disagrees with China's understanding of the definition of "like product" in antidumping proceedings. The United States notes, first, that as a purely definitional article, Article 2.6 itself imposes no obligation on WTO Members. This provision alone therefore provides no basis for a finding of inconsistency.

11. Second, Article 2.6 calls for a comparison between the "*product* under consideration" and the "like *product*". As recognized by the panels in *US – Softwood Lumber AD Final* and *EC – Salmon*, there is no requirement that each *individual* item within the "like product" be "like" each *individual*

item within the imported product subject to consideration. This is confirmed by the context of Article 2.6, including Articles 2.4 and 6.10.

V. ARTICLE 3.1 OF THE AD AGREEMENT

12. As the Appellate Body has recognized, "an 'objective examination' 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*". In light of this understanding of Article 3.1, an investigating authority's inclusion of only supportive domestic firms, to the exclusion of other domestic firms, in its examination of the domestic industry appears to show a selection bias *ab initio*. Furthermore, where an investigating authority has failed to conduct an "objective examination" as required by Article 3.1, that error permeates the investigating authority's analyses of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5, respectively. Similarly, once an investigating authority defines which entities comprise the "domestic industry" that will form the basis for its injury analysis, an "objective examination" requires that the authority seek and, to the extent possible, use a consistent data set reflecting the performance of those entities.

VI. CHINA'S 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. While it takes no position on the merits of China's factual allegations, the United States respectfully requests the Panel to take into account the following general points in assessing the claims of China under Article 6 of the AD Agreement.

A. ARTICLES 6.2 AND 6.4

14. The Appellate Body has recognized that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States therefore 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".

15. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. The United States therefore agrees with China that where such information is not disclosed, and the interested parties are therefore not able to see relevant information, those parties may be denied a full opportunity to defend their interests as required by Article 6.2 of the AD Agreement.

B. ARTICLE 6.5

16. China also raises a claim with respect to Article 6.5 of the AD Agreement, which requires that information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation, shall be treated as such by the investigating authorities upon a showing of good cause. While it takes no position on the merits of China's factual allegation, the United States agrees with China that, where an investigating authority accepts information being submitted as confidential, the authority's failure to so treat that information, in particular by disclosing it to interested parties other than each of the exporting producers that furnished the information, is inconsistent with Article 6.5 of the AD Agreement.

C. ARTICLE 6.1.1

17. The United States agrees with the EU that China's claim under Article 6.1.1 of the AD Agreement is premised on a fundamental misunderstanding of the scope of that provision. 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 producer should be given at least 30 days to respond to every such request made in the course of an investigation.

18. However, as the panel in *Egypt – Rebar* explained, the context of Article 6.1.1, in particular paragraphs 6 and 7 of Annex I to the AD Agreement, reveals that the term "questionnaire" for purposes of the AD Agreement refers to the original antidumping questionnaire in an investigation. Given the breadth of information requested in this initial antidumping questionnaire, it is logical that the Agreement seeks to provide a minimum time period for respondent firms to collect the information needed to be responsive to the investigating authority. The obligation in Article 6.1.1 to provide thirty days for reply therefore applies only to the original antidumping questionnaire and not to the MET and IT claim forms that are the subject of China's claim under this provision.

19. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, at least China's investigating authority appears 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 for 30 days to respond to questionnaires in CVD investigations. In an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, the Chinese Bureau of Fair Trade for Imports and Exports (BOFT) has issued multiple requests for information to the US Government following the original questionnaire. For *none* of these requests for information, attached at Exhibit US-1, did China provide an initial period of 30 days to respond.

ANNEX C

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

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. In this dispute, China challenges two measures: (i) Article 9(5) of Council Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the EC, as amended, as codified and replaced by Council Regulation (EC) No. 1225/2009; and (ii) Council Regulation (EC) No. 91/2009 which imposes a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

2. In its First Written Submission, the EU has raised a broad range of *procedural* arguments. If these procedural deficiencies are so substantial, China fails to understand why the EU did not request such a preliminary ruling. Unfortunately, the absence of a request for preliminary ruling has denied China the opportunity to reply in writing to the procedural objections before this first substantive meeting. China fears that the EU's unwillingness to request a preliminary ruling is just one more element of the EU's litigation tactics. China recalls that procedural arguments are important where they are invoked to ensure due process rights and that they should not be abused as tactical instruments to prevent a panel from addressing the substantive issues underlying the dispute.

3. In its Oral Statement, China will address the main procedural arguments raised by the EU and reply to the remaining procedural objections in its second written submission. Likewise, China will not enter into a detailed refutation of all substantive arguments but will focus on demonstrating the fundamental errors in the EU's arguments relating to China's main claims.

II. CLAIMS CONCERNING ARTICLE 9(5) OF COUNCIL REGULATION (EC) No. 384/96 OF 22 DECEMBER 1995 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EC, AS CODIFIED AND REPLACED BY COUNCIL REGULATION (EC) No. 1225/2009

4. As a preliminary remark, China rejects the EU's allegation that there is a common understanding that China is not yet a market economy country. Following its WTO accession, China has gradually evolved into a market economy country. This view is shared by many WTO Members that have granted full market economy status to China. In any case, whether China is a market economy or a non-market economy country is not relevant in this dispute.

5. It is therefore regrettable that the EU seems to confuse the rules governing "Market Economy Treatment" or MET and "Individual Treatment" or IT. In the EU's anti-dumping regime, MET and IT are completely different issues. MET relates to the question whether the domestic prices and costs of the exporting producer in the non-market economy country can be used for determining normal value (Article 2(7)). The provisions on IT, on the contrary, only relate to the question whether an individual dumping margin and duty must be calculated for the exporting producer on the basis of his own export prices or, on the contrary, such exporting producer must be subjected to the country-wide residual duty (Article 9(5)). China does not address the WTO consistency of the EU's rules contained in Article 2(7) of the Basic AD Regulation which deal with the normal value determination. China's "as such" claim is only directed at Article 9(5) of the Basic AD Regulation and thus only relates to the "individual treatment" issue.

6. The EU intentionally ignores the difference between both sets of rules. Instead, it tries to transform the limited exceptions which concern the normal value determination into a legal justification for all forms of different treatment applied to non-market economy countries. This tactic becomes obvious in the section entitled "background"[1], where the EU invokes Article 8 of the Kennedy Round Anti-Dumping Code to support its position, contrary to the documented negotiating history thereof, and in the EU's analysis of China's Protocol of Accession.[2]

7. China submits that a correct application of the rules of treaty interpretation can only lead to the conclusion that Article 9(5) of the Basic AD Regulation violates *inter alia* Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement. Contrary to what the EU alleges, there is no rule or "codified understanding" in the AD Agreement according to which the provisions of that Agreement would only be applicable to market economy countries.

8. The procedural arguments raised by the EU against the claims made by China relating to the first measure can be grouped into two main categories. The EU first submits that China's Panel Request failed to satisfy the requirements of Article 6.2 since the Panel Request failed to present the claims relating to Articles 6.10, 9.3 and 9.4 of the AD Agreement and Article X:3(a) of the GATT 1994 sufficiently clearly because there is allegedly no connection between the measure at issue, i.e. Article 9(5) of the Basic AD Regulation, and the WTO provisions that China claims this measure violates.[3]

9. The EU submits that Article 9(5) only deals with the issue of the imposition of anti-dumping duties while the provisions that China claims this measure violates deal with other issues. This issue is however a substantive issue that has nothing to do with the procedural requirements of Article 6.2 of the DSU, which merely requires the complaining party to identify in its Panel Request the specific measure at issue and the claims so as to enable the defending party to know the problem at issue. On the basis of China's Panel Request, the EU was manifestly aware of the specific measure challenged and the legal basis for the alleged nullification or impairment of China's WTO benefits.

10. Furthermore, when submitting that the "*explanation* provided by China"[4] with respect to these claims fails to plainly connect the specific measure at issue with the specific claim so that the problem is presented clearly, the EU obviously confuses the "claims" with the "arguments" that refer to the explanations. While "claims" must be set out in the Panel Request in a precise manner, arguments will necessarily be expanded upon and clarified progressively during the proceeding. Finally, the EU failed to demonstrate that China's alleged failure to "present the problem clearly" has prejudiced its ability to defend itself.

11. The second set of procedural arguments relate to "issues" that have been raised by China in its First Written Submission and which were allegedly not covered by the Panel Request. First, the EU claims that Council Regulation (EC) No 1225/2009 is outside the Panel's terms of reference because the measure identified in the Panel Request is Council Regulation No 384/96, "*as amended*" while Council Regulation (EC) No 1225/2009 does not *amend* but *repeal* Council Regulation No 384/96. This is a purely formalistic argument which, if adopted, would seriously undermine the effectiveness of the dispute settlement system. Since the wording and content of the measure at issue has not changed, the Panel has to conclude that Article 9(5) of Council Regulation (EC) No 1225/2009 is within its terms of reference.

[1] EU FWS, para. 11 – 14.
[2] EU FWS, para. 123 – 129.
[3] EU FWS, para. 51.
[4] EU FWS, para. 53, 56, 61, 65 and 67.

12. Second, the EU submits that China has sought to "expand the scope of the measure at issue to cover other issues".[5] According to the EU, the measure identified in the Panel Request is Article 9(5) of the Basic AD Regulation which deals only with the imposition of anti-dumping duties[6] and China's First Written Submission "seeks to incorporate issues dealing with the calculation and determination of individual margins within the scope of the measure at issue".[7] The EU's claim appears to take issue with the "content" of the measure at issue. However, contrary to what the EU alleges, Article 9(5) deals not only with the imposition of anti-dumping duties but also determines whether or not an individual dumping margin will be calculated. China's views on the scope of the measure are clear from its Panel Request.

13. With respect to the substantive issues raised by the EU regarding China's challenge of Article 9(5) of the Basic AD Regulation, China's comments will, for the purposes of this Oral Statement, be limited to some observations concerning the EU's arguments relating principally to Articles 6.10 and 9.2 of the AD Agreement and Article I of the GATT 1994. The other issues will be addressed in China's second written submission.

14. As a preliminary remark, China would like to emphasize the fundamental error in the approach taken by the EU when interpreting the provisions concerned. Rather than starting from the ordinary meaning of the terms read in their context, the EU follows a teleological approach. China also considers it necessary to respond to the EU statements that Article 9(5) of the Basic AD Regulation has a much more limited scope than that claimed by China. The EU submits that Article 9(5) deals only with the very specific issue which refers to the imposition of definitive anti-dumping duties and that it does not address the determination of margins of dumping which is allegedly governed by Article 9(4) of the Basic AD Regulation. The EU's analysis is incorrect. Whether an individual or a country-wide dumping margin is determined for a particular exporting producer is not governed by Article 9(4) but by Article 9(5) of the Basic AD Regulation. The EU actually confirms this in paragraphs 81 of its First written Submission where it explains how anti-dumping duties and dumping margins are determined in case of imports from non-market economy countries. As such, Article 9(5) concerns both the determination of an individual duty and an individual dumping margin.

15. China will now briefly elaborate on its claims that Article 9(5) violates several WTO provisions. China will start with the Article 9.2 ADA claim. The EU seems to consider that it would always be permissible for WTO Members to limit their examination to the exporting country as a whole and to impose one country-wide duty. Article 9.2 would merely require that the investigating authority name the supplier or suppliers of the product concerned. Yet, the above interpretation is wrong, *inter alia* because it would make no sense to require the suppliers to be named on an individual basis if the intention was to impose a country-wide duty. The EU's interpretation of Article 9.2 is also dangerous since it would allow investigating authorities to disregard the individual dumping margins calculated for specific exporters as long as the duty imposed on them does not exceed the country-wide dumping margin.

16. The EU further submits that the ordinary meaning of the word "impracticable" used in Article 9.2 of the AD Agreement is "ineffective". However, based on the *New Shorter Oxford Dictionary*[8], "impracticable" refers to something which is not feasible in practice or impossible in practice while the word "ineffective" refers to something which has no effect or result. Moreover, the EU's reference to Article 8.3 of the AD Agreement does not support its position either, but, on the contrary, demonstrates the erroneous nature of the EU's interpretation. Thus, the word "impracticable" only refers to situations in which the specific action is not feasible for practical

[5] EU FWS, para. 77.
[6] EU FWS, para. 78 – 80.
[7] EU FWS, para. 79.
[8] The New Shorter Oxford English Dictionary, 1993, 3rd edition, Volume I, p.1325 and p.2317.

reasons. The typical situation where this arises is where the number of exporters is too large or where certain exporters are not known. This interpretation of the term "impracticable" is furthermore confirmed by the negotiating history of the Kennedy Round Anti-Dumping Code.

17. The EU's arguments relating to Article 6.10 must similarly be rejected. China submits that Article 9(5) of the Basic AD Regulation violates Article 6.10 of the AD Agreement because it provides specific conditions that exporting producers from non-market economy countries must fulfil in order to receive individual treatment, i.e. an individual dumping margin and an individual duty rate. The EU argues that the departure from the general rule contained in Article 6.10 first sentence is permissible in situations different from the sampling scenario.[9] However, Article 6.10 expressly limits the possibility to derogate from this general rule to this one specific case, as also confirmed by consistent case-law.[10]

18. The EU further refers to the Panel's findings in *Korea – Certain Paper* and *Norway – Salmon*[11], to argue that the terms "exporter or producer" in Article 6.10, first sentence, cannot be interpreted *strictu senso* as a "company that exports" or a "company that produces" but rather in a manner which also permits to combine separate entities into a single supplier which is the actual source of price discrimination, and in case of non-market economy countries, the State.[12] However, Article 9(5) deals with a different issue than the question examined by the Panel in *Korea – Certain Paper*, namely whether several legal entities are related and should be regarded as one exporter. Article 9(5) of the Basic AD Regulation is both different from and additional to the criteria used to determine whether different legal entities should be considered as one "exporter" or "producer" for the purposes of the dumping margin determination. The "individual treatment" test of Article 9(5) applies **in addition to** the examination of whether several exporters are related and should be treated as a single exporter or producer. The criteria of Article 9(5) are also stricter than the general criteria used by the EU investigating authorities to determine whether distinct legal entities should be treated as a single exporter or producer.

19. China can agree with the finding reached by the Panel in *Korea – Certain Paper* that the terms "exporter" or "producer" in Article 6.10 do not necessarily refer to a single legal entity and that one individual dumping margin may be determined for several legal companies that are found to be related. China maintains, however, that this margin still has to be "individual" for that group of companies. However, under Article 9(5), exporting producers from non-market economy countries who cannot demonstrate that they fulfil the criteria set out in that provision will be subject to the residual ***country-wide dumping*** margin and anti-dumping duty. This is plainly inconsistent with the requirement of Article 6.10 that the dumping margin be determined on an individual basis, no matter whether the "exporter" or "producer" is a single legal entity or a group of companies. Also, the country-wide dumping margin is not based on the data concerning all exporters/producers found to be "related".

20. The EU tries to defend the use of the additional and stricter criteria of Article 9(5) and the imposition of a country-wide duty where such criteria are not met by referring to the State as being the actual producer and the source of the dumping.[13] The EU does not explain, however, why State-owned or State-controlled companies should be treated differently from other related group companies. Neither does the EU justify why such companies should be made subject to the higher residual duty.

21. Finally, the obligation to impose a country-wide duty unless a company demonstrates that it meets the IT criteria of Article 9(5), does not apply to all State-owned or State-controlled companies,

[9] EU FWS, para. 142, 147 and 152.
[10] See, e.g., Panel Report, *Mexico – Beef and Rice*, para. 7.137.
[11] EU FWS, para. 144 – 147.
[12] EU FWS, para. 147.
[13] EU FWS, para. 153.

but only to such companies in countries classified as non-market economy countries by the EU. There is no objective justification for this discriminatory treatment.

22. With respect to the Protocol of Accession, it does not allow any derogation as to the export prices which must be used or from the rule that dumping margins and anti-dumping duties must be determined on an individual basis.

23. However, the EU considers that such specific provision would not be required and that it is sufficient as a legal justification that the Protocol of Accession contains a "common understanding that China is not a market economy country" to make "the specific provisions" dealing with non-market economy countries contained in the AD Agreement applicable, namely Articles 6.10 and 9.2 of the AD Agreement.[14] This conclusion is wrong on both counts, since (i) China's Protocol of Accession does not contain a "common understanding that China is not a market economy country"; and (ii) neither Article 6.10 nor any provisions of Article 9 specifically address issues in connection with non-market economy countries.

24. In conclusion, the imposition of additional and stricter criteria for obtaining an individual anti-dumping duty on exporting producers from China compared to the criteria applicable to exporting producers from market economy countries has no legal justification in the AD Agreement or in China's Protocol of Accession.

25. Moreover, this discriminatory treatment also violates Article I:1 of the GATT 1994. The EU submits that no violation of Article I.1 can be found, on the basis of the *lex specialis* principle and Article II:2(b) of the GATT.[15] However, this reasoning is flawed as (i) Article II:2(b) of the GATT 1994 only relates to Article II:1 but not to Article I of the GATT 1994; and (ii) there is no "conflict" of provisions within the meaning of the General Interpretative Note to Annex 1A of the WTO Agreement since the AD Agreement or the Protocol or Accession does not contain a legal justification for treating exporters from non-market economy countries differently.

III. CLAIMS CONCERNING COUNCIL REGULATION (EC) No 91/2009 OF 26 JANUARY 2009 IMPOSING A DEFINITIVE ANTI-DUMPING DUTY ON IMPORTS OF CERTAIN IRON AND STEEL FASTENERS FROM CHINA

26. China will address various aspects of its claims concerning the determination of the "**domestic industry**". China submits that the domestic industry determination made by the EU violates Article 4.1 of the AD Agreement in several respects.

27 First, China considers that the EU has violated Article 4.1 of the AD Agreement by excluding from the definition of the "domestic industry" all producers that did not make themselves known within 15 days as of the date of publication of the notice of initiation as well as those producers that did not support the investigation.[16] According to the EU, Article 4.1 gives the investigating authorities the discretion to choose the producers to be included in the "domestic industry" as long as the producers thus selected represent a "major proportion" of the total domestic production.[17]

28. This theory was expressly rejected by the Panel in *EC – Salmon*. The Panel stated that it is not permissible to exclude from the outset from the "domestic industry" certain categories of producers of the like product other than those set out in Article 4.1. Contrary to what the EU alleges, the Panel's findings in *EC – Salmon* were not limited to categories of producers "which produce a

[14] EU FWS, para. 127.
[15] EU FWS, para. 173.
[16] China FWS, para. 233-245.
[17] EU FWS, para. 292-297.

particular type of the like product" but concern *any* category of producers of the like product other than those set out in Article 4.1.

29. The EU did exactly what the Panel so clearly condemned. It excluded from the definition of the "domestic industry" all producers that did not make themselves known within 15 days following the notice of initiation as well as those producers that did not support the complaint. These exclusions alone already introduced a bias in the "domestic industry" definition in favour of a finding of injury.

30. Second, the producers thus selected did not represent "a major proportion" of the total domestic production of fasteners. The EU did not even check whether the producers thus selected constituted "a major proportion" of the total domestic output. The EU automatically assumes that the major proportion criterion is fulfilled as long as the selected producers meet the major proportion definition in Article 5(4) of the Basic AD Regulation which deals with the standing requirements for the complainants. The EU thus interprets Article 4.1 of the AD Agreement as allowing it to define the domestic industry as consisting only of producers expressly supporting the complaint as long as the latter represent more than 25 percent of the Community production.

31. The EU tries to defend the automatic equation between the producers supporting the complaint and the "domestic industry" by stating that meeting the 25 per cent test creates a *legitimate presumption* that the producers represent a major proportion of total production.[18] Since the producers constituting the domestic industry represented 27 per cent of the total domestic production, they did, according to the EU, satisfy the major proportion test of Article 4.1.

32. The EU's interpretation finds no basis in the relevant provisions when examined in the light of the principles of treaty interpretation. In order to represent a "proportion" and thus a *fortiori* "a major proportion", the domestic producers concerned must constitute a "part", a "share" of the whole, that is of the domestic production as a whole. In other words, they must be representative of the whole. This has also been underlined by the Appellate Body in *US – Lamb*.[19] By failing to include in the definition of the domestic industry domestic producers that opposed the complaint or remained neutral, the EU investigating authorities defined a domestic industry that is not "representative" of the whole and does not constitute a "proportion" of the total domestic production and *a fortiori* a "major proportion" of the total domestic production.

33. The Panel in *Argentina – Poultry* merely takes note of the fact that the "major proportion" requirement does not imply a precise quantitative threshold, such as 50 per cent. It states that whether a collective output constitutes a "major proportion" is to be assessed **on the basis of the circumstances of the case**.[20] It is certainly incorrect to deduce from this that meeting the 25 per cent threshold would automatically constitute a presumption that the "major proportion" test has been met. The EU, however, did precisely this. It did not examine whether this conclusion was justified on the basis of the circumstances of the case.

34. China submits that the circumstances in this case demonstrate that the collective output of the 45 producers allegedly representing 27 per cent does not constitute a "major proportion" of the total domestic production. The first relevant circumstance is the "practicability" for the investigating authorities to include more producers in its definition of the domestic industry. In the case at hand, the investigating authorities had identified at the beginning of their investigation, at least, 114 producers representing 45 per cent of the total domestic production. These producers account for almost double the output represented by the producers finally included in the domestic industry definition. In view of this circumstance, it is hardly possible to argue that 27 per cent constitutes a "major proportion".

[18] EU FWS, para. 348.
[19] Appellate Body Report, *US – Lamb*, para. 91.
[20] Panel Report, *Argentina – Poultry*, para. 7.342.

35. Another circumstance that needs to be taken into account is the number of producers constituting the domestic industry in relation to the total number of domestic producers. As noted by the EU itself, there are more than 300 producers of the like product in the EU.[21] Thus, 45 producers amount to only one sixth of this estimated total.

36. In a last-ditch effort to justify its practice, the EU seems to argue that it is irrelevant how the domestic industry is defined when sampling is used.[22] This is obviously not correct.

37. Moreover, the determination of "domestic industry" also violates Article 3.1 of the AD Agreement. If the investigating authorities define the domestic industry by excluding from the domestic industry producers because they oppose the complaint, they act with bias. According to the EU, a violation of Article 4.1 would have no bearing on the obligations imposed on investigating authorities under Article 3.1. China strongly disagrees with this view. It is only possible to conduct an "objective examination" of injury if the result of this examination is not predetermined by the way the domestic industry has been defined. By excluding *inter alia* producers that opposed the complaint, the EU conducted their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

38. Finally, China would like to make a few comments regarding the claims it has made with respect to numerous violations of **due process obligations** by the EU. When reviewing the EU's arguments with respect to these claims, one is struck by how the EU tries to avoid going into the substance of China's claims. The EU consistently claims that China has failed to make a *prima facie* case because the claims are not understandable, are presented in a confusing way, the evidence submitted is irrelevant or inexistent or for other obscure reasons. China believes that the real reason is other, namely that the EU simply lacks any substantive arguments and evidence to rebut China's claims. These procedural arguments should not be allowed to obscure the real issue before the Panel, namely that the Chinese exporting producers were never given an effective opportunity to exercise their due process rights.

[21] EU FWS, para. 322.
[22] EU FWS, para. 284 and 302.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE FIRST MEETING OF THE PANEL

I. CHINA'S "AS SUCH" CLAIM AGAINST ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96, AS AMENDED

1. 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. 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 Council Regulation No 384/96, as amended. The concrete aspects this provision requires or provides for 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 to examine other provisions of Council Regulation No 384/96, as amended; any of the provisions of Council Regulation No 1225/2009; the "individual treatment" or "individual treatment regime or practice" of the European Union; any matters pertaining to the calculation or individual determination of dumping margins; or any other matters different from the one specifically identified by China in its Panel Request. Moreover, the European Union has already shown that the Panel should reject most of China's claims since, contrary to the requirements under Article 6.2 of the *DSU*, China's Panel Request failed to present the problem clearly and, on 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, 6.10, 9.3 and 9.4 of the *Anti-Dumping Agreement* and Article X:3(a) of the *GATT 1994*. In any event, like the third parties expressing a view on this issue, the European Union considers that China's claims against Article 9(5) of Council Regulation No 384/96, as amended, are based on a wrong understanding of the relevant provisions in the *Anti-Dumping Agreement*, the *GATT 1994* as well as China's Protocol of Accession. In particular, China fails to show why Article 9.2 of the *Anti-Dumping Agreement* contains a principle to impose individual anti-dumping duties per known exporter or producer. It is rather the contrary. This provision seems to allow for the imposition of anti-dumping duties on a country-wide basis.

2. Even assuming that Article 9.2 of the *Anti-Dumping Agreement* can be read as containing such a principle, *quod non*, imposition of country-wide anti-dumping duties is permitted in cases where such imposition on individual basis would result in the measure being *ineffective*. This is precisely the case of China as non-market economy. Indeed, the objective of offsetting or preventing dumping would be undermined if individual duties were to be imposed on suppliers which do not act sufficiently independent in their export activities from the State, i.e., the actual producer of the product concerned. China's Protocol of Accession also provides useful context to confirm the conclusion that, in the case of imports originating in China, anti-dumping duties can be specified on a country-wide basis when suppliers cannot show that market economy conditions prevail with regard to the manufacture, production and sale of the product concerned.

3. Moreover, as several panels have clarified, Article 6.10 of the *Anti-Dumping Agreement* permits that a single dumping margin can be determined for the actual producer and the source of the price discrimination, even if there are several exporters involved. This is fundamentally the situation

in non-market economy countries, where State control over the means of production and State intervention in the economy including international trade imply that all imports are considered to emanate 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, i.e., non-IT suppliers, is 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 do not differ much from a situation where the investigating authority is confronted with several exporters all dependent from one single producer, which is the actual source of price discrimination.

4. The European Union observes that China's claims under Articles 6.10, 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) of Council Regulation No 384/96, as amended, "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.

II. ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS APPLIED" IN COUNCIL REGULATION NO 91/2009

5. The European Union observes that China's first claim is based on the assumption that the application of Article 9(5) of Council Regulation No 384/96, as amended, is inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement* in all cases. Since this is not the case, the Panel should also reject China's claim in connection to Council Regulation No 91/2009.

III. STANDING OF THE EU DOMESTIC INDUSTRY

6. The European Union would like to indicate that China has not consulted with the European Union on this new claim in its Panel Request, as required by Article 4 of the *DSU*. Moreover, China's Panel Request is not specific and does not set out the problem clearly, as required by Article 6.2 of the *DSU*. The European Union also notes that Notice of Initiation 2007/C 267/11 is not a measure at issue. In view of all these, China's claim is outside the Panel's terms of reference. In any event, on the substance of the matter, the European Union submits that, manifestly, it did examine the standing issue prior to initiation, thereby complying with Article 5.4, third sentence, of the *Anti-Dumping Agreement*.

IV. DEFINITION OF THE DOMESTIC INDUSTRY

7. As a preliminary matter, it is important to recall the very general nature of the two provisions that are being invoked by China. Article 4.1 sets forth a fairly general definition of the term domestic industry as consisting of all producers of the domestic like product as a whole *or* those producers whose collective output constitutes a major proportion of total domestic production. The only "obligation" to be derived from this provision is to *define* the domestic industry in a manner that is consistent with this definition. Similarly general in nature is Article 3.1 which requires that the state of the domestic industry, as defined in accordance with Article 4.1, is examined in an objective manner and based on positive evidence, i.e., based on reliable data. China errs when it asserts that these two very general obligations impose very specific obligations. The five claims of China are clear evidence of this erroneous approach. The European Union respectfully requests the Panel to reject all five.

8. First, China claims that the European Union was not allowed to define the domestic industry as consisting of only those cooperating producers that made themselves known within 15 days of initiation of the investigation. As explained in our submission, this brief summary of the legal basis

of China's claim – which is part of the "matter" before you – is nowhere to be found in China's Consultations Request. Since no consultations were held on this matter, China's claim is not properly before the Panel. Moreover, and on the merits, China ignores the fact that Article 4.1 defines the domestic industry as consisting of all producers of the like product *or* of those producers that represent a major proportion of total domestic production. The text of Article 4.1 does not establish a hierarchy of preference between these two possibilities. WTO case-law has confirmed this. The EU's determination that the domestic industry consisted of all those producers willing to cooperate and which made themselves known within 15 days following the initiation of the investigation is thus entirely legitimate as long as these producer represented "a major proportion" of total domestic production. Such was the case, as these producers represented 27 per cent of domestic production. Nothing in Article 4.1 disallows the use of a 15-day deadline for practical reasons. The EU did not "deliberately exclude" any type of domestic producers, and the subparagraphs (i) and (ii) of Article 4.1 are therefore not relevant to the situation at hand. The European Union wishes to clarify one important factual point which appears to have caused some confusion among the third parties. It is *not* so that the European Union excluded all producers that did not support the investigation. The views of the domestic producers were requested by the EU authorities and were relevant for the standing determination *before* the initiation of the investigation. However, once the investigation began, the domestic producers' views on the initiation became irrelevant. In the Notice of Initiation of the investigation, the European Union simply requested domestic producers that wished to cooperate in the investigation to make themselves known within 15 days, without further enquiry as to whether they supported or opposed the investigation. Then, the EU authorities decided to define the domestic industry as consisting of those producers expressing a willingness to cooperate. In other words, contrary to the understanding of some third parties, no producer which made itself known within 15 days was excluded for reason of the fact that it would not support the initiation of the investigation. Any exclusion took place merely because of the express statement by domestic producer of its will not to cooperate in the investigation. Needless to say, if a domestic producer decides not to cooperate, it will be impossible to obtain the relevant data during the investigation. In addition, and insofar as Article 3.1 would impose any requirements in respect of the definition of the domestic industry, *quod non*, there is no basis for the argument that the mere fact that a 15-days cut off date was used for practical reasons would require the Panel to find that the investigation was not conducted in an unbiased or objective manner. The 15-days deadline that was used as the basis for determining the group of producers that would constitute the domestic industry is an objective criterion that does not favour either side. China has failed to demonstrate that this limitation prevented an objective examination of the state of the domestic industry.

9. Second, China argues that the domestic industry as defined by the European Union does not consist of producers producing "a major proportion" of domestic output since these producers represent "only" 27 per cent of total domestic production. China's interpretation of the term "a major proportion" in Article 4.1 is in error. China argues that "a major proportion" has to be as close as possible to 100 per cent. The WTO case-law to which China itself refers with approval clearly disavows this erroneous interpretation considering that "a major proportion" is rather an "important, serious or significant" proportion. It is clear that 27 per cent is a significant proportion of production. China presents no arguments or evidence to contradict this conclusion in the context of the particular circumstances of this case as it was required to do. The European Union wishes to clarify that the legal question before the Panel is not, as some third parties seem to suggest, whether 25 per cent is sufficient in all circumstances to constitute a major proportion. Indeed, the European Union considers that a percentage that is higher than 25 per cent should legitimately be considered as constituting a major proportion, unless there is evidence that shows that, in the particular circumstances of the case, such a percentage is not a major proportion. In sum, the European Union requests the Panel to reject China's claim that the EU's definition of the domestic industry violated Article 4.1 of the *Anti-Dumping Agreement*.

10. Third, China argues that the domestic industry was "not defined in relation to the investigation period" and therefore violates Article 3.1 of the *Anti-Dumping Agreement*. China errs both in respect of the facts on the record and in respect of the applicable law. To begin, the facts. China refers to the October 2006 – 2007 period as the period for determination of injury while this is actually primarily the period of investigation for dumping as the injury trends were examined using a longer period of time starting in 2003. The injury data examined thus covered the period January 2003 – October 2007. The determination of a "major proportion" was based on data relating to the last full year prior to initiation for which statistics were available, the year 2006, thus including part of the period of investigation for dumping purposes. Absent any evidence to the contrary, this is an objective and entirely reasonable approach to take. And to continue, the law. Article 3.1 simply does not impose an obligation to expressly determine the existence of a major proportion, let alone that it would require such a determination to be made in relation to the exact same period as the period of investigation for dumping purposes. Article 3.1 is entirely silent on this issue and relates only to the manner in which the data of the domestic industry are to be examined (objectively) and the reliability of the evidence that is to be examined (positive evidence). In any case, and applying for the sake of argument the generally applicable reasonableness standard to the determination of "a major proportion", it is clear that a recent and relevant period was used consisting of the last full year prior to initiation for which statistical data were available, including part of the period of investigation for dumping purposes. There is therefore no factual nor legal basis for China's claim of violation in respect of the EU's determination of the domestic industry in the context of the investigation period.

11. Fourth, China argues that the determination of injury on the basis of a sample of domestic producers representing 17 per cent of total domestic production violates Article 4.1 and 3.1 of the *Anti-Dumping Agreement* since the sampled producers do not represent a major proportion of total domestic production. First, China fails to demonstrate that Article 4.1 imposes any obligation in respect of sampling. Furthermore, it would not make sense to require a sample to comply with the same "major proportion" obligation that the domestic industry itself is to comply with. As rightly noted by Japan in its Third Party Written Submission, "accepting China's argument … would vitiate the purpose of sampling". The requirement of Article 3.1 is arguably that the sampled data should be sufficiently representative of the *domestic industry as defined in accordance with Article 4.1*. That is different from requiring that the sample be representative of the *totality of the domestic producers* as a whole, as China erroneously alleges to be required. As explained in our First Written Submission, the sample chosen was representative of the domestic industry both in terms of volume, types of products and size of the producers. China's argument in respect of the volume of total production represented by the sampled producers is thus without merit.

12. Fifth, China argues that the European Union should have excluded a number of domestic producers from the definition of the domestic industry for the simple reason that these producers were related to producers / exporters in China and that the European Union failed to objectively examine this relationship. However, it is clear that the *Anti-Dumping Agreement permits*, under certain conditions, the authority to exclude related producers, but certainly *does not require* an authority to do so. Even China accepts this. That leads to two conclusions: first, without an "obligation" to do something there can be no "violation"; second, it is only when the authority would want to exclude such related producers that there exists a prior obligation to determine in an objective manner whether such a relationship exists and whether this relationship was such to cause the related producer to behave differently. The EU authorities did not exclude any related producers and therefore no obligation to make an objective determination could have been violated. In any case, China fails to demonstrate that the facts do not support the reasonable finding of the EU authorities that the centre of interest of these domestic producers remained in the European Union and that it was therefore neither necessary nor appropriate to exclude these producers from the scope of the domestic industry.

V. SELECTION OF THE PRODUCT CONCERNED

13. The European Union further submits that the Panel should reject China's claim that the European Union acted inconsistently with Articles 2.1 and 2.6 of the *Anti-Dumping Agreement* because it included in the scope of the product concerned both standard and special fasteners as "like" products despite their readily apparent differences and uses. Fundamentally, China ignores that like product and product concerned are two distinct issues in the *Anti-Dumping Agreement*, and that there is nothing requiring investigating authorities to carry out a likeness analysis within the product concerned. Moreover, China ignores the fact that the measure at issue does not contain any determination to the effect that standard fasteners are like special fasteners, so China is referring to a non-existent determination. Thus, China's claim is based upon challenging a non-existent determination by reference to a non-existent obligation, something which the Panel must reject.

VI. FAIR COMPARISON UNDER ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

14. We now turn to China's claim under Article 2.4 of *the Anti-Dumping Agreement* – the need to conduct fair comparison between normal value and export price. Once again, China refers to a very "general and abstract" obligation in order to impose very specific obligations that are nowhere to be found in the *Anti-Dumping Agreement*. China alleges that the European Union failed to make a fair comparison between normal value and export price because the EU authorities did not base this comparison on the *full* Product Control Number ("PCN"). It is clear however that Article 2.4 of the *Anti-Dumping Agreement* does not specify the methodology to be followed in order to conduct a fair comparison. The mere fact that the comparison was not made on the basis of the full PCN can therefore not *ipso facto* constitute a violation of Article 2.4 as erroneously argued by China. Importantly, China misunderstands the role and relevance of the PCNs which are merely a tool for gathering information in a particular manner that may allow the authority to compare identical products without the need to make any adjustments. The PCN is determined at the beginning of the investigation when it is not even clear which elements are actually affecting price comparability. It is thus not correct that the PCN necessarily identifies product characteristics affecting price comparability or that, simply because the information was requested to be provided on the basis of a particular PCN, the authority would be precluded from adopting a different methodology for comparing normal value and export price. What is necessarily unfair, biased, or not "even-handed" about the fact that the comparison was not made on the basis of the full PCN? China does not seem to have answered this question yet.

15. In respect of China's claim of lack of making adjustments for differences affecting price comparability, it is recalled that the EU authorities complied with the obligation under Article 2.4 to make adjustments for those differences affecting the price comparability in this case. In particular, the European Union ensured a fair comparison by distinguishing between products on the basis of strength class and between standard and special fasteners. These were the two main characteristics referred to by the Association of Chinese Exporters and Importers of Fasteners. It is thus incorrect of China to argue that the PCN *necessarily* identifies *the* factors affecting price comparability for which adjustments should have been made. In sum, China clearly failed to demonstrate that the EU authorities violated their obligations under Article 2.4 of the *Anti-Dumping Agreement*.

VII. PRICE UNDERCUTTING

16. China argues that the European Union violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* since the EU authorities allegedly failed to make a price undercutting comparison between export prices and prices of domestic producers on the basis of the full PCN. As an important preliminary matter, we would note that this claim was not part of China's Consultations Request and, thus, this claim is outside the Panel's terms of reference. In any case, Article 3.2 of the *Anti-Dumping*

Agreement does not require any particular methodology for conducting a price undercutting analysis and China's claim that the European Union violated its obligations simply because it used a "simplified" PCN is thus clearly without merit. Nor is it clear why the alleged failure to use the full PCN would necessarily reveal a bias against Chinese exporters. The most important aspect of the price comparison between EU fasteners and Chinese fasteners was the difference between special versus standard fasteners. This difference was taken into account by the EU authorities. Given the "considerable discretion" that is to be given to authorities in respect of the price undercutting analysis and taking into consideration the fact that the more detailed methodological obligations of Article 2 on dumping cannot simply be transposed into the provisions of Article 3, there simply is no basis for China's claim that the price undercutting analysis was not even-handed or was biased simply because the full PCN was not used to make this comparison. In any case, the relevant PCN characteristics were taken into consideration as well as the important distinction between special and standard fasteners, and the EU authorities thus clearly complied with any obligation of reasonableness that could be imposed in this respect. In sum, China's claims under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* in respect of the price undercutting analysis are to be rejected.

VIII. VOLUME OF DUMPED IMPORTS

17. China argues that the European Union violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 because the EU authorities failed to exclude the volume of two marginal exporters that were found not to be dumping from its volume analysis under Article 3.2 and because the EU authorities assumed for the purposes of that same volume analysis that all non-examined exporters were dumping. The European Union requests the Panel to reject China's claim in this respect.

18. First, the European Union recalls that the two exporters that China claims should have been excluded represented a *totally negligible* amount of exports. This marginal amount of non-dumped imports is incapable of undermining the objectivity of the determination which remains based on almost 100 per cent of imports. This is even more so since the actual examination is to determine whether there exists a "significant" increase in dumped imports. The failure to exclude this marginal amount which is simply incapable of impacting on the "significance" of the increase found to exist cannot be the basis for a finding of violation of Article 3.1 and 3.2. We thus urge the Panel not to adopt a formalistic approach but to look at what the European Union did and whether, as a whole, it objectively determined that there existed a significant increase in dumped imports when it found that imports increased by 103 per cent. The answer to that question is and remains, yes. It is clear that if the volume of non-dumped imports had been excluded, the outcome would have been exactly the same, dumped imports would have been found to have significantly increased. The European Union requests the Panel not make the same mistake that was made by the panel in *Japan – DRAMs (Korea)* when that panel considered that to conduct this type of examination of whether the determination by the authorities still stood, irrespective of the alleged error that was made, would constitute a *de novo* review. The Appellate Body faulted the panel for not having conducted such an examination, and rightly so.

19. Second, China errs when it asserts that the EU authorities were not entitled to include the imports of all non-examined producers in the total volume of dumped imports. Since all of the sampled producers were found to be dumping, the EU authorities were entitled to conclude, by extrapolation, that all imports from non-examined producers were equally dumped. This is precisely one method for determining the volume of dumped imports that the Appellate Body in *EC – Bed Linen* considered to be appropriate in a sampling context. All of China's claims in respect of the volume analysis are thus to be rejected including its consequential claims under Articles 3.4 and 3.5.

IX. INJURY FACTORS UNDER ARTICLE 3.4 OF THE *ANTI-DUMPING AGREEMENT*

20. First, China asserts that the EU's injury determination is flawed because the EU authorities allegedly did not consistently use the same dataset for examining injury. But the EU authorities *did* consistently use data relating only to the *same domestic industry*. The fact that the EU authorities examined certain factors on the basis of data relating to a representative sample of the domestic industry while other factors were examined based on data relating to all producers that are part of the domestic industry does not vitiate the objectivity of the analysis in any way. It is not because sampling is used that it would not be permissible for an authority to base certain of its conclusions on the more complete dataset, where available. In the words of the panel in *EC – Bed Linen* in respect of an identical argument by India, to require an authority to ignore such information would be "anomalous" and "inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence". Article 3.4 says nothing about the particular methodology to follow in case of injury sampling. And China has certainly not demonstrated that there is anything inherently biased about this approach either. The example of market share to which China refers is based on an inaccurate presentation of the facts as the conclusions of the EU authorities are essentially similar, whether based on the sampled data or on the data for the industry as a whole. The situation in this case is thus entirely different from that discussed in the WTO case-law referred to by China which concerned situations in which the authorities did not examine the domestic industry as defined in accordance with Article 4.1 in a consistent manner, but used a broader or narrower approach depending on the kind of factors examined. Such was not the case in the fasteners investigation.

21. Second, China argues that the European Union failed to objectively examine the factor "profitability" and points to allegedly conflicting statements in respect of this factor in the EU authorities' findings. In fact, however, China is quoting *selectively* from the findings of the authorities. A proper reading of Council Regulation No 91/2009 clearly shows that the authorities reached the reasonable and reasoned conclusion, supported by the facts on the record that profitability remained low. China effectively blames the EU authorities for their detailed discussion of this factor and their nuanced approach to "profitability". China is simply asking the Panel to substitute its judgment for that of the EU authorities, something the Panel is clearly not allowed to do under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the *DSU*.

22. Third, China argues that the European Union failed to conduct an objective examination of the evidence on the record, as the EU authorities allegedly based their injury finding on negative developments in respect of only one of the injury factors of Article 3.4 of the *Anti-Dumping Agreement*, market share. In our First Written Submission, we have explained that China's presentation of the facts and of the relevant findings of the EU authorities is simply not accurate. It is clear from the record that the injury determination was not based on *only* one factor. A reasonable and reasoned determination was made in respect of *all* injury factors, leading the EU authorities to the conclusion that a number of factors were negative when examined in the light of the significant increase in demand: significant decrease in market share, decrease in sales volumes, low profitability, low cash flow and return on investment and low capacity utilisation as well as high dumping margins were *all* examined in their proper context and were all considered to support the conclusion that the domestic industry was suffering "injury". Once again, China is simply requesting the Panel to examine the facts on the record and to determine whether *it* would have reached the same conclusion of injury as the EU authorities did. This, however, is not the role of the Panel as is clear from Article 17.6 of the *Anti-Dumping Agreement* as well as Article 11 of the *DSU*.

23. Fourth, China asserts that the European Union improperly concluded that the injury consisted of the displacement from one market segment to another, while injury should be determined for the product as a whole. However, the EU authorities did not make such a finding of market displacement, but related its injury finding to fasteners as a whole. The EU authorities referred to the move of the

domestic industry in the direction of a greater focus on special fasteners as an indicator of how the industry tried to deal with the competition from the dumped imports (which were concentrated in the standard fastener market) by moving into the special fastener market. The EU authorities' conclusion is that in so doing the industry was able to mitigate the negative effects of the dumped imports, but that, in respect of the product as a whole, producers still were suffering injury. Again, it seems that China objects to the nuanced and balanced discussion of this development by the EU authorities.

X. CAUSATION AND NON-ATTRIBUTION

24. China's claim in respect of the causation analysis of the EU authorities is actually limited to the speculative assertion that if the domestic industry had not decided to move into the special fastener segment it would not have lost market share. Not only does China's assertion unduly limit the injury found to exist to a mere loss of market share, China also fails to point to any flaws in the EU authorities' reasonable and reasoned findings in respect of the existence of a causal link between dumped imports and consequent injury to the domestic industry.

25. In terms of the non-attribution requirement, China's allegation that the EU authorities did not adequately distinguish the effects of other factors such as the increase in raw material prices and the export performance of the EU industry is equally unsubstantiated. It is clear from the record that the EU authorities examined the role of the increase in raw material prices but found that there did not exist a similar direct link between the increase in raw material prices and the loss of market share as was found to exist in respect of the dumped imports. The time pattern did not match, the increase in raw material prices was not specific to the EU industry and should have affected all producers, and in any case, under normal circumstances such price increases would have been passed on to consumers. China simply disagrees with the EU authorities' assessment of the impact of the raw material prices factor. However, China fails to demonstrate that the EU authorities did not provide a reasonable and reasoned explanation of how the facts support the determination made.

26. China's claim in respect of the EU authorities' treatment of the export performance of the domestic industry is equally without merit. The reasonable and reasoned conclusion of the EU authorities was that export performance, although relatively unimportant, was very good, and that export sales were made at prices significantly higher than domestic sales prices. Therefore, export performance was not a source of material injury. China's unsubstantiated speculation about what could have happened had more of the export sales been made on the domestic market is not relevant and is in any case contradicted by the facts on the record.

XI. CHINA'S PROCEDURAL CLAIMS

27. Of the 13 procedural claims China advances in its First Written Submission only one relating to Article 6.1.1 of the *Anti-Dumping Agreement* does not suffer of some fundamental problem, be it jurisdictional, presentational or both.

28. China claims that the European Union has breached Article 6.1.1 of the *Anti-Dumping Agreement* because the EU authorities granted to Chinese suppliers only 15 days to submit their claim forms for MET and IT. China asserts that the claim from is actually a "questionnaire" within the meaning of Article 6.1.1 and therefore be subject to the minimum 30-days rule therein. As Japan correctly observes in its Third Party Written Submission, "an MET/IT claim form is an additional element that is present only in the context of anti-dumping investigations concerning non-market economy countries like China, while the overall deadlines for investigations regarding market economy and non-market economy countries are identical". It simply cannot be the initial questionnaire. If all requests for information in an anti-dumping investigation were subject to the 30-day rule in Article 6.1.1, investigating authorities would never be able to complete the investigation within the prescribed time limits. Indeed, as the United States correctly observes in its Third Party

Written Submission, China itself does not practice what it preaches. The European Union considers that the Panel should apply the same logic as that applied by the panel in *Egypt – Rebar* and reject China's claim under Article 6.1.1 of the *Anti-Dumping Agreement*.

29. Finally, we would also like to address some other systemic observations on the relationship between some of the relevant provisions under Article 6 of the *Anti-Dumping Agreement*. First, contrary to what Norway appears to imply, the European Union is not in any way trying to limit the obligation in the first sentence of Article 6.2 of the *Anti-Dumping Agreement* when it has expressed caution on the relationship between Article 6.4 and 6.2. The European Union simply observes that the text of the provisions does not provide for the suggested necessary consequential violation of Article 6.2 if a violation of Article 6.4 would be established in a given case. The European Union invites the Panel to be very cautious on the interpretation of the relevant provisions when confronted with China's very general and erroneous assertions. Indeed, an example of China's broad brushed way of presenting its claims is its position that the Appellate Body would have already found that a violation of Article 6.4 always leads to a violation of Article 6.2. With regard to the relationship between Articles 6.4, 6.5 and 6.9 of the *Anti-Dumping Agreement*, the European Union considers that China has fundamentally misunderstood the respective scope and content of these provisions. In the view of the European Union the most blatant misunderstanding concerns the relationship between Articles 6.4 and 6.9. China systematically accuses the European Union of a breach of Article 6.4 because the disclosure documents or the final regulation is drafted in a certain way. The European Union fails to understand how the drafting of the disclosure documents or the final regulation could possibly provide evidence of a violation of a provision regulating the right to have access to information unless these documents would actually state that access to the file was denied.

ANNEX C-3

CLOSING STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, the Distinguished Members of the Panel,

During the last two days, the EU has argued that the EU's "individual treatment" regime is somehow justified by a common understanding contained in China's Protocol of Accession that China is a "non-market economy". When questioned, the EU was, however, unable to point to any specific wording in the Protocol which would confirm the existence of such an understanding which would be common to the WTO membership. If anything, the third party interventions of this morning have clarified that no such "common understanding" exists. This is not surprising. Paragraph 15 of China's Protocol of Accession only deals with one very limited issue, namely the possibility for some WTO members to determine normal value on the basis of data other than the domestic prices and costs in China. Nothing more, nothing less. In the present dispute, China does not challenge this possibility which is expressly provided for in the Protocol of Accession. It is unacceptable, however, that the EU tries to read into this provision and, in particular, into the word "sale", a justification to ignore the clear obligations contained in Article 6.10 and 9.2 of the AD Agreement.

Whatever the situation may have been in the past, China can no longer be considered as a so-called non-market economy country. In any event, this question is irrelevant since neither Article 6.10 nor Article 9.2 distinguish between any such different categories of WTO Members.

The EU has also tried to convince you that its injury determination was based on an objective and unbiased analysis of the impact of the dumped imports on a domestic industry which had been determined in full compliance with Article 4.1.

China would like to point out that the EU's allegations are not supported by the evidence in the file.

Contrary to what the EU stated, its own documents confirm that it excluded those producers which did not support the complaint from the definition of the domestic industry and that it did not check whether the remaining producers still constituted a major proportion, other than verifying the 25 per cent threshold was met. We understand that, as the EU stated, these documents may not have been phrased as precisely as they should have been. The EU has, however, not submitted any evidence to the contrary.

Similarly, the facts on the file show that during the investigation period used for the injury determination imports from China increased by more than 100 per cent and Chinese prices undercut the prices of the EU producers by more than 40 per cent. Yet, during the same period, the domestic industry not only doubled its profit, the EU producers also increased their sales volume and sales revenue while other injury indicators remained stable. It is true that the EU producers did not increase their sales as rapidly as the market grew. Is it, however, reasonable to base a finding of material injury solely on a loss of potential sales?

The foregoing facts also raise a more fundamental question. Is it really credible that the EU producers were able to increase their selling pries and sales volumes if the Chinese producers offered comparable product types at a price which was more than 40 per cent lower? This flies in the face of economic logic. Yet, the EU wants you to believe that the comparison for both dumping and injury

was made by comparing identical products. Indeed, the EU has acknowledged that no adjustments were made for differences in physical characteristics. In other words, no differences were found which had an effect on price comparability.

The EU does not provide a reasonable explanation for the fundamental inconsistency between its findings and economic logic. Its defence consists in stating that it is free to choose its own methodology for making price comparisons. Moreover, the EU states that China has provided no evidence that the EU's methodology was not objective or unfair. The EU itself stated in the questionnaires sent to the Chinese exporting producers that the information on a PCN basis was necessary to "ensure a fair comparison" and that it would be used "to compare prices of imports from the country concerned and prices charged by the Community industry and to compare sales data to the cost of production". This constitutes evidence that the PCN factors were necessary to make a fair comparison. Furthermore, it was only after repeated requests by the Chinese exporting producers and at a very late stage in the investigation, that is, a few days before the deadline for the submission of comments on the definitive disclosure, that some information on the methodology used was provided. In fact, the criteria used to distinguish standard from special fasteners were never clearly identified. Neither were the Chinese exporters told which PCNs of the EU producers had been grouped together into the newly created "product types" with which their products would be compared. The latter is essential. As demonstrated by China in paragraph 394 of its First Written Submission, prices of PCNs which were grouped into single "product types" by the EU may differ by 80 per cent. Such differences are larger than the price undercutting found. These price differences are based on the only data the Chinese producers had access to, i.e. their own data. China, however, submits that these data are sufficient to make a *prima facie* case. China submits that until now, the EU has failed to provide a satisfactory rebuttal.

The EU has invoked on several occasions the fact that China has been unable to submit specific evidence demonstrating that the determinations made by the EU were incorrect. With all due respect, the EU itself has simply made it impossible for Chinese exporters to have access to most data used by the EU in reaching its standing, injury and dumping determination. In doing so, the EU has violated the due process rights of the Chinese exporters and breached Articles 6.1.1, 6.2, 6.4, 6.5, 6.9 and 12.2.2 of the AD Agreement.

China submits that its First Written Submission includes the necessary evidence to make a prima facie case. The EU, however, simply chooses to ignore such evidence. The clearest example of this tactic is the approach taken by the EU with respect to the Information Document and the disclosure documents which the EU summarily dismisses as being irrelevant for China's claims.

Finally, China considers that the debate during the last two days has clarified that the many procedural objections raised by the EU are purely formalistic or factually unfounded. Moreover, nowhere has the EU been able to shown that any of the alleged procedural violations has prejudiced its ability to defend itself.

This concludes our closing statement. China thanks the Panel and the secretariat for their attention and detailed questioning during this meeting. China is ready to provide any further information and evidence you may require to bring this dispute to a satisfactory solution.

ANNEX C-4

CLOSING STATEMENT OF THE EUROPEAN UNION AT THE FIRST MEETING OF THE PANEL

1. The European Union would like to thank you again for all your efforts. We look forward to the next steps in the procedure in order to facilitate your tasks in the present dispute.

2. We would like to be brief in our closing statement and insist on some points which we believe should be relevant for the proper assessment of the matter before you.

3. First, the European Union has engaged in these proceedings in good faith, as required by Article 3.10 of the DSU. Contrary to China's assertion which attempts to put into doubt the good faith of the EU in its procedural handling, we have not made "procedural allegations" to mask our measure, avoiding any discussion on the substance of the issue. The reality is rather the contrary. Even if China has failed to make its prima facie case in its First Written Submission, the European Union has been more than forthcoming and has extensively provided both clarification of the facts of the case and interpretations of the legal provisions invoked by China. The so-called "procedural allegations" - as China qualifies them - are fundamental rules under the DSU granting rights to the parties and governing dispute settlement proceedings which must be respected for a proper functioning of the multilateral trading system.

4. Second, the European Union considers that, under the Panel's Working Procedures and the provisions of the DSU, China should have presented all the evidence and should have made its case, at the latest, during this first hearing. However, China has mentioned that a more precise rebuttal of the EU's arguments will be reserved only for its Second Written Submission. In this respect, the European Union cautions the Panel to avoid making the case for the complainant. Once more, we would like to note that China not only has to rebut the arguments the European Union has provided for in its First Written Submission – again, arguments that we have made in good faith although we still do not know what China's arguments are – but also has to make its case with respect to many of the claims included in China's Panel Request.

5. Third, on China's as such claim against Article 9(5) of Council Regulation No 384/96, as amended, we would like to briefly elaborate on your question about any other situations where the exception mentioned in Article 6.10 of the ADA may apply. In this respect, in addition to the case at hand, where it is permissible to impose a country-wide duty in view of the existence of a single producer, there may be cases where the authority would not be required under Article 6.10 of the ADA to calculate individual dumping margins to known exporters or producers. For instance, a known exporter may decide to drop its cooperation in the middle of the investigation. In that case, that exporter would be subject to the residual country-wide duty for the non-cooperating exporters and thus, in other words, an individual dumping margin would not be calculated for such exporter. Another example can be mentioned for the sake of completeness. Indeed, it may occur that in a particular case an exporter has not produced the product concerned during the Period of Investigation but merely has exported the products of another supplier. Such an "exporter" would be considered as a mere trader of the product concerned and thus would be subject to the anti-dumping duty found for the actual supplier.

6. Fourth, and since this is a matter that has received particular attention in China's oral statement, on the question of the definition of the domestic industry, we would like to reiterate that no producers were "arbitrarily excluded" – as China claims –, but rather all producers were invited to

participate and make their willingness to participate known within a reasonable and objective time period of 15 days and no producers were excluded for reason of the fact that they at one point in time had opposed the investigation. These producers constituted a major, important, significant proportion of total domestic production and China is unable to point to any particular circumstances of this case that would demonstrate that 27 per cent of production represented by these producers was anything other than "major". Even China in the course of this hearing has accepted that 25 per cent or even less of production can be a major proportion for the purposes of Article 4.1. Mr. Chairman, what more can we add to this admission which is a far cry from China's original position as expressed in its First Written Submission that 27 per cent cannot be a major proportion.

Mr. Chairman, Members of the Panel, this concludes our closing statement. Thank you again for your efforts.

ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX D-1

THIRD PARTY ORAL STATEMENT OF CHILE

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as third party in this dispute, would like to thank the Panel for the opportunity to present its views on certain systemic aspects of this case.

2. Chile does not propose to evaluate the substance of the dispute, nor will it question whether the procedure used by the European Union to determine whether or not the granting of Market Economy Treatment or Individual Treatment to Chinese producers is contrary to the rules of the GATT 1994 or the Anti-Dumping (AD) Agreement.

3. The first systemic issue that we would like to address is the determination of the domestic industry. Regarding the criteria used to exclude certain categories of domestic producers, it is my delegation's view that investigating authorities are not entitled to choose, at their own discretion, the producers to be excluded from the concept of domestic industry.

4. Articles 3 and 4.1 of the AD Agreement clearly stipulate that the investigating authority must carry out an objective examination of the totality of the domestic industry. The application of criteria that deviate from this principle means that the authority is "choosing" the producers that perform less well within that industry as part of the investigation.

5. Similarly, the determination, without the necessary evidence, of a given percentage of domestic production as constituting a major proportion of the total domestic production is, in our view, at odds with Article 4.1 of the AD Agreement.

6. A second issue that we consider important is the determination of the volume of dumped imports. A correct reading of Article 3.2 and 3.5 of the AD Agreement precludes the inclusion of the imports that are not being dumped in the volume of dumped imports.

7. This is particularly important when it comes to assessing the injury and the causal relationship. We think that it is wrong to extrapolate the results of surveys directed at all non-examined exporters, thereby including them in the volume of dumped imports.

8. Thirdly, with respect to the comparison of the normal price with the export price, Article 2.1 and 2.6 of the AD Agreement preclude the comparison of the price of products that are not identical without first separating them into categories. Indeed, the AD Agreement requires the investigating authority to conduct a thorough analysis of the characteristics of the product in question before making the comparison between the normal price and the export price.

9. At the same time, we consider the determination of injury to the domestic industry made by the European Union to be inconsistent with Article 3.1 and 3.4 of the AD Agreement. Indeed, the European Union considered that the displacement of domestic sales of one segment of the product ("special fasteners") was a result of the increase of imports from another segment of the product ("standard fasteners"). This analysis is very much at variance with the basic principles that should guide any investigating authority when determining injury.

10. The fourth and last issue of importance to us is the application of Article 6.5 of the AD Agreement, which requires the investigating authority to safeguard the confidential nature of the information provided. The mentioned article distinguishes between two types of confidential information: (a) information which is by nature confidential, and (b) information which is provided

on a confidential basis by parties to an anti-dumping investigation. Nevertheless, the treatment of information as confidential will be contingent upon there being good cause for treating the information in question as such.

11. Chile considers that for this provision to be correctly applied, the reasons justifying the disclosure of the information provided must be known to those who provided the information. If in the course of the investigation the authority sees no good cause for maintaining the confidentiality of the information, the authority must expressly so state. It is not something that can be done subsequently, still less once the dispute settlement proceedings have begun, in the first written submission. The disclosure of information considered by the authority to be non-confidential must be properly substantiated and must be expressly authorized by the party that supplied the information. If this were not the case, the position of the investigated party would be undermined and the rules of due process violated.

ANNEX D-2

THIRD PARTY ORAL 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 this opportunity to express our views on this important matter.

2. Our participation as a third party in this dispute is based on our systemic interest in the interpretation of the Antidumping Agreement. In our written submission, Colombia commented on a number of legal aspects pertaining to this dispute and we do not intend to repeat those comments today. Rather this intervention will focus in two issues: first, the relation between articles 3.1, 4.1 and 5.4 when identifying the domestic industry in an antidumping proceeding; and, second, the conditions in which a fair price comparison should be undertaken for the purposes of the dumping determination.

II. DOMESTIC INDUSTRY DETERMINATION IN LIGHT OF ARTICLES 3.1, 4.1 AND 5.4 OF THE ANTIDUMPING AGREEMENT

3. We consider that in the discussion of the determination of the domestic industry, the Panel has an interesting opportunity to clarify the relation between articles 3.1, 4.1 and 5.4 of the Antidumping Agreement.

4. Article 4.1 establishes how Members have to define the concept of domestic industry. This general definition affects both the application of articles 5.4 and 3.1 of the Antidumping Agreement.

5. Article 5.4 establishes a general obligation of Members to assess, before the initiation of an anti-dumping investigation, if the request is being made by or on behalf of the domestic industry.

6. Article 3.1, read in conjunction with article 4, contains the conditions that have to be met in order to identify the domestic industry, for the purpose of determining the injury caused by the dumped products.

7. The threshold set in article 5.4 does not have to be reviewed throughout the development of the investigation. Indeed, the panel in *Mexico – Steel Pipes and Tubes*, affirmed that there is no obligation arising from article 5.4 that would imply an assessment of the support of the request of the investigation at any different time than its initiation. Nonetheless, it is important to clarify that the requirements of article 5.4 set a threshold that has to be met in order for an authority to commence an antidumping investigation.

8. On the other hand, the evaluation of injury caused to domestic industry pursuant to the conditions set out in article 3.1 has to be rendered in light of the investigation as a whole, considering all positive evidence provided during the proceedings, and not just those submitted at the initiation of the investigation; hence in this case the notion of domestic industry, as presented by article 4.1, should be taken into account during all the stages of the investigation.

9. In light of the above, the analysis of the compliance of the requirements of articles 3.1 and 4.1 of the Antidumping Agreement for the purpose of injury determination is independent from the standing requirement as established in article 5.4.

10. Moreover, the obligation of article 5.4 is different from that of articles 3.1 and 4.1. National authorities should make an appropriate identification of the domestic industry before the investigation commences. At a later stage of the investigation, the concept of domestic industry, meeting the standards set in articles 3.1 and 4.1 of the Antidumping Agreement, could change without breaching the Agreement.

11. While not taking a final position on the facts of this case, it is our view that the Members of the Panel should assess whether the European Union's authorities followed this procedure, and as such complied with their obligations under the Antidumping Agreement.

III. FAIR PRICE COMPARISON

12. At this point we will like to draw your attention to the debate between the parties, as to the conditions in which a fair price comparison should be undertaken.

13. On this issue, China claims that the European Union failed to make a fair price comparison between normal value and export price, in accordance with article 2.4 of the Antidumping Agreement, due to the fact that the European Union did not take into consideration the full Product Control Number used for the investigation, and that it did not adjust the prices taking due allowance of certain conditions that might affect price comparability, such as the different physical characteristics, terms of sale, taxation, levels of trade and quantities.

14. In response, the European Union holds that China failed to make a *prima facie* case with respect to the alleged unfair price comparison, since it did not take into account relevant recitals of the measure at issue, which are evidence of the compliance with article 2.4 of the Antidumping Agreement. Additionally, the European Union claims that not using all the criteria of the Product Control Number does not *per se* constitute a breach of the mentioned provision.

15. We consider that this part of the dispute brings forth the discussion of how the due allowance of conditions that affect price comparability should be undertaken in an antidumping investigation.

16. When doing a price comparison, the national authority is bound to make a due allowance of the differences and their merits that may affect the price comparability of the products. This obligation has a two – fold burden, one on the investigating authority and the other on the producers of the products under investigation. The first burden is on the authority to request the necessary information to make a fair price comparison. As a response, the producers have to provide evidence of which are the differences in the products that affect their price comparability. Faced with that evidence, the authority is bound to make an assessment of the merits of that difference, in order to adjust the prices for the purposes of making a fair price comparison.

17. The panel in *Argentina – Ceramic Tiles* clarified that although the decision with respect to the adjustment of the prices due to specific conditions that affect the price comparability has to be based in the evidence provided by the representatives of the producers, it still has a minimum burden to make an evaluation of, at least, the physical differences of the products according to the best information available. Based on such minimum evaluation, the authority should make the appropriate price adjustments to ensure a fair price comparison.

18. Once again, while not taking a final position on the facts of this case, it is Colombia's opinion, that in as much as the European Union's authorities can demonstrate that they duly evaluated the physical differences and all others mentioned by the producers in order to adjust the prices for the purposes of a fair price comparison, their action may be considered by the Members of the Panel, to be in accordance with the requirements of article 2.4 of the Antidumping Agreement. If the Panel

concludes that the European Union did not satisfy this burden, then a breach of article 2.4 of the Antidumping Agreement would have to be acknowledged.

19. Mr. Chairman, distinguished Members of the Panel, with these comments, Colombia expects to have contributed to the legal debate of the parties of this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate of the interpretation of the Antidumping Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF INDIA

1. India welcomes this opportunity to present its views as a third party in this dispute brought by the Peoples Republic of China (China) regarding the consistency of European Union's definitive anti dumping measures on iron or steel fasteners from China with certain provisions of Anti Dumping Agreement, GATT 1994. India understands that important systemic issues were raised in this dispute which merits careful consideration by the Panel. While not taking any particular position on the facts of the case presented by the Parties, India would like to express its systemic views in the proper legal interpretation of certain provisions of the Anti Dumping Agreement, GATT 1994 and China's Protocol of Accession to the WTO.

2. India would like to address two important systemic issues which have been raised in the dispute:

(i) China's challenge of Article 9 (5) of European Union's basic AD Regulation on the ground that whether the European Union's determination of anti dumping duty in respect of exporters not granted Individual treatment was consistent with Article 6.10 of AD Agreement. Related to this issue are the consequential alleged violation of Article 9.2, 9.3 and 9.4.

(ii) Whether the European Union's injury determination based on sample of domestic producers representing 17.5 per cent of domestic production was in accordance with Article 4.1 and Article 3.1 of AD Agreement.

3. First on the issue of China's challenge of Article 9 (5) of the EU' s basic AD Regulation and the alleged inconsistency with Article 6.10 of AD Agreement, India considers that this allegation of inconsistency can be scrutinized in the light of the pertinent Articles of the Anti-Dumping Agreement, and of China's Protocol of Accession. Article 6.10 of the Anti-Dumping Agreement requires, as a general rule, for the Investigating Authority (IA) to determine an individual margin of dumping for each known exporter or producer concerned. As per the second sentence of Article 6.10, the authorities may limit their examination (i.e. resort to sampling) where the number of exporters, producers is so large as to make such an individual determination impracticable. However, it is India's understanding or would like to seek more clarification on our understanding from the Panel, that there is a possibility of other exceptions, besides the above provision of sampling, to the general rule of determining individual margin of dumping. Article 2.7 of ADA gives reference to the Supplementary provisions to Article VI.1 of GATT 1994 (Ad Article VI 2) as under:

> *"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. (emphasis added)"*

4. In this regard it is our view that Paragraph 15 (a) of China's Protocol of Accession may be relevant, which inter-alia provides that:

> *(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.*

5. The question that arises is whether the word "sale" used in the above provisions of the Protocol covers domestic sales and export sales or only the domestic sales. Both the above provisions in paragraph 15 (i) of the Protocol refer to market economy conditions prevailing in the industry producing the like product with regard to manufacture, production and sale of that product. Costs for the industry are normally associated with the determination of normal value in the exporting country. However under sub para (ii) above a WTO Member may use a methodology that is not based on a strict comparison with domestic prices in China. In India's view Whether the words "domestic prices" referred here cover prices of domestic sales as well as prices of export sales is not amply clear. The Panel may be required to interpret the meaning of domestic prices in the above provisions of the Protocol. In case the word "domestic prices" includes prices of goods sold in home market as well as export prices, then this may support the view that there is another exception to the requirement to determine an individual dumping margin under Article 6.10 of AD Agreement.

The other systemic issue on which India would like to express its views is with respect to the question, whether the European Union's injury determination based on the sample of domestic producers representing 17.5 per cent of domestic production was in accordance with Article 4.1 and Article 3.1 of AD Agreement.

6. China has alleged that EU's injury determination is flawed and violates, amongst others, obligations under Article 3.1 and 4.1 of the Anti-Dumping Agreement. The EU conducted the injury determination on the basis of a sample of producers accounting for 17.5 per cent of total EU production of the like product. European Union contends that the "Community industry" consisted of those domestic producers whose collective output constituted 27 per cent of domestic production is "a major proportion" of domestic production and therefore EU's definition of domestic industry is consistent with Article 4.1. The European Union also contends that Article 4.1 does not refer to sampling. Further, it does not impose any obligations on the representativeness of sample producers in terms of the percentage of the production that they should cover. A sample is a representative subset of something. It is thus essentially less than the total. The domestic industry was defined by EU as consisting of those producers representing a major proportion of total production. They form the "Community industry". It is in respect of this Community industry's total production that one should examine the representativeness of the sample. In other words EU argues that the sampled domestic producers accounting for 17.5 per cent of total production need not necessarily represent a major proportion of total domestic production. Instead the sampled domestic producers are representative of the Community industry.

7. In India's view, this argument by the European Union raises an important issue whether the EU's determination on injury was consistent with the requirement of "**objective examination"**. Article 3.1 requires determination of injury based on positive evidence and involve an objective examination of the effect of the dumped imports on the domestic producers. Further, Article 3.4 requires the examination of the impact of the dumped imports on the domestic industry concerned. Article 3.4 does not envisage sampling. Nor does Article 4.1 speak about sampling. Article 4.1

defines domestic industry. India considers, for an objective examination of injury under Article 3, the domestic industry has to be interpreted as referring to the domestic producers as a whole of the like products or those whose collective output of the product constitutes a major proportion of the total domestic production. **Even if an investigating authority resorts to sampling of domestic producers, the obligation of Article 4.1 regarding the definition of domestic industry must prevail for injury examination under Article 3.**

8. India appreciates the opportunity to express its views and hopes the view points furthered in these submissions may assist the panel in examining the matter before it.

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Not re-stating its written submission, Japan will draw the Panel's attention to five points.

II. ARTICLE 15(A)(II) OF CHINA'S ACCESSION PROTOCOL

2. First, with respect to the scope of the application of Article 15(a)(ii) of *China's Accession Protocol*, two questions arise in the context of the present dispute:

(i) whether items (a)-(e) provided in Article 9(5) of the Basic AD Regulation may be used to show that "market economy conditions prevail in the industry"; and

(ii) whether the calculation of a country-wide dumping margin and AD duty based on a comparison between the normal value established for an analogue country with the average export price of the cooperating exporting producers in the country concerned may be considered to be "a methodology that is not based on a strict comparison with domestic prices or costs in China".

3. Several third parties to this dispute suggest in their submissions that, in determining the dumping margin of Chinese exporters, investigating authorities may apply a methodology different than the one provided in the *AD Agreement* unless an individual exporter can demonstrate its independence from the State. The methodology is calculating a country-wide dumping margin and AD duty by comparing the normal value established for an analogue country with the average export price of the cooperating exporting producers in China. The earlier mentioned questions are particularly relevant in determining the discretion of investigating authorities in that regard.

4. Japan respectfully asks the Panel to pay due regard to the relationship between Article 15(a)(ii) of the *China Accession Protocol* and both Article 9(5) of the Basic AD Regulation and Definitive Regulation, and to clarify the scope of application of the Article 15(a)(ii) to the extent necessary to secure a positive solution to this dispute.

III. ARTICLE 6.10 OF THE ADA: TREATMENT OF MULTIPLE LEGAL ENTITIES AS A SINGLE EXPORTER OR PRODUCER

5. Second, the *AD Agreement* allows investigating authorities to calculate a single dumping margin for legally distinct but related entities to the extent that they can be considered a single "exporter" or "producer" in the sense of the first sentence of Article 6.10.[1]

6. Nevertheless, the treatment of legally distinct entities as a single exporter or producer is allowed only in the case where "the structural and commercial relationship between the companies in questions is sufficiently close to be considered as a single exporter or producer".[2]

[1] *See* Panel Report, *Korea – Certain Paper*, para. 7.161.
[2] *See* Panel Report, *Korea – Certain Paper*, para. 7.162.

7. A broader interpretation would undermine the rule set forth in Article 6.10 of the *AD Agreement* that an individual dumping margin must be established for each exporter or producer concerned, with *only one exception* to that rule, namely sampling. Granting investigating authorities overly broad discretion in treating separate legal entities as a single exporter or producer would allow investigating authorities to circumvent this rule, which would be inconsistent with the Article 6.10 of the *AD Agreement*.

IV. ARTICLES 4.1 AND 3.1 OF THE ADA: DEFINITION OF THE DOMESTIC INDUSTRY

8. Third point, the concept of "domestic industry" as provided in Article 4.1 of the *AD Agreement* is "*critical* to an injury determination, as it defines the framework for data collection and analysis".[3] Article 3.1 of the *AD Agreement*, which requires that investigating authorities base their injury determination on "positive evidence" and on an "objective examination", is an "overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to injury determination.[4] Logically, it is only possible to conduct an "objective examination" of injury if the outcome of the examination is not predetermined by the manner in which the investigating authority defines the domestic industry.

9. Therefore, the definition of the domestic industry must capture the *whole* domestic industry[5] and not just part of the domestic industry. Any other interpretation could allow investigating authorities to define the domestic industry in a results-oriented way, which would be inconsistent with the obligation of Article 3.1 of the *AD Agreement*.

10. In a similar vein, the injury examination "must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry".[6]

V. ARTICLE 2.6 OF THE ADA: DETERMINATION OF THE SCOPE OF THE "PRODUCT UNDER CONSIDERATION"

11. The fourth point is that there is no requirement that the "product under consideration" include only "like" products, and that there is no requirement that each individual item within the "like product" be "like" each *individual item* within the "product under consideration".

12. The first step in determining the scope of products subject to an anti-dumping investigation is to identify the allegedly dumped product, *i.e.* to define the product under consideration.

13. The *AD Agreement* does not provide any guidance as to how the "product under consideration" should be determined.[7] Similarly, the *AD Agreement* does not impose an obligation that all items included in the product under consideration must be "like" each other in the sense of Article 2.6 of the *AD Agreement*.[8]

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[3] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.321 (emphasis added).

[4] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114, referring to Appellate Body Report, *US – Hot Rolled Steel*, para. 192, quoting, *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, para. 106.

[5] *See* Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 12 January 2000, para. 7.54 (interpreting "producers as a whole," a phrase in Article 4.1(c) of *Safeguard Agreement* identical to Article 4.1 of the *Anti-Dumping Agreement*).

[6] Appellate Body Report, *US – Hot Rolled Steel*, para. 190. For a more detailed discussion, *see* Japan's Third Party Submission at paras. 29 and 30.

[7] Panel Report, *US – Softwood Lumber (V)*, para. 7.153.

[8] Panel Report, *US – Softwood Lumber (V)*, para. 7.157.

14. The second step in determining the scope of products subject to an anti-dumping investigation is to identify those products that are "like" the product under consideration. Article 2.6 of the *AD Agreement* defines what constitutes a "like product".

15. There is no requirement that each *individual* item within the "like product" must be "like" each *individual* item within the product under consideration.[9] Rather, what is required is a comparison of the overall scope of the product under consideration with the overall scope of the "like product".

VI. ARTICLE 3.1 OF THE ADA: DETERMINATION OF THE VOLUME OF DUMPED IMPORTS

16. The fifth and final point is that Japan disagrees with the view, when assessing the "volume of dumped imports" in the context of an injury determination under Article 3.1 of the *AD Agreement*, that information from non-sampled but individually examined producers *must per se* be taken into account when extrapolating findings to non-sampled producers.

17. In particular, there is no requirement in the *AD Agreement* for investigating authorities to follow a specific methodology when applying sampling, other than being required to conduct the investigation on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination".[10] An "objective examination" requires that the investigation be conducted in an *unbiased* manner, *without favoring the interests of any interested party*, or group of interested parties, in the investigation.[11]

18. Extrapolating the findings of the sample to all companies that were not individually examined is "unbiased" and does not "favor the interests" of any interested party in the investigation. Given that, a sample must be selected on the basis of its representativeness of the domestic industry as a whole, the approach does not in any way prejudge the outcome of the investigation.[12] Indeed, the purpose of sampling is to make an assessment for non examined companies based on findings relating to a *representative*, albeit limited, group of companies.

[9] Panel Report, *US – Softwood Lumber (V)*, para. 7.157.
[10] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 113, 114 and 117.
[11] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114.
[12] Panel Report, *EC – Salmon (Norway)*, para. 7.130.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF NORWAY

A. Introduction

1. Norway would like to thank you for this opportunity to make a brief statement at this meeting.

2. In its written submission, Norway addressed a number of interpretative issues raised by China and the EU in this case. Norway focused on the determination of the domestic industry, the product scope, the impact of dumped imports in the injury determination, the volume of dumped imports and the fulfilment of certain procedural requirements. The arguments in respect of these issues are explained in our written submission and I shall here only refer you to the arguments presented therein.

3. Today, Norway would like to address two additional issues raised by China and the EU in their written submissions:

- *First*, Norway would like to offer its views on China's claim that the EU violated Article 5.4 of the *Anti-Dumping Agreement* by initiating the investigation without ensuring that the application was supported by producers accounting for at least 25 per cent of the total production of the like product produced by the domestic industry.

- *Second*, Norway would like to address certain interpretative aspects related to China's claim that the EU violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* in concluding that the alleged dumped imports caused material injury, without properly assessing the injurious effects of other known factors.

B. The threshold for initiation

4. As to the first question, China claims that the EU failed to properly examine whether the industry support thresholds were met before initiating the investigation, as required by Article 5.4 of the *Anti-Dumping Agreement*.[1]

5. To recall; Article 5.4 requires that the investigating authorities "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry". Support for the initiation of an investigation is measured by reference to the collective volume of production of the supporters, seen in relation to the "total production of the like product" by domestic producers.

6. Simply put; to initiate an examination the EU needs to determine the relationship between two production volumes: the volume of its total domestic production and the collective volume of production of the companies that supports initiation of the investigation. And this determination needs to be made, objectively and based on an examination of positive evidence, at the time of initiation.

7. Article 5.4 expressly sets out that this examination and determination has to take place *no later than* at the time of initiation of the investigation. Reference is made to the wording "an investigation shall not be initiated" and "no investigation shall be initiated". It follows from this that

[1] First Written Submission of China, paras. 198-224.

the investigating authority cannot put forward facts received or revealed *after* the initiation of the investigation as evidence for the existence of the requisite industry support at that earlier point in time. Consequently, lack of the requisite support *at the time of initiation* cannot be *repaired* by adding new supporters later on in the investigation.

8. Furthermore, this determination is subject to scrutiny by Panels and the Appellate Body. It must, thus, be set out in the relevant notices and reports with sufficient clarity for interested parties to become acquainted with its basis and be able to contest it. Determinations that are mere statements, without proper explanation, do not suffice.

9. Now, China claims that the EU:

(i) *for total domestic production,* simply relied on the figure of 1.430 KT given by the complainants, without further investigation[2]; and

(ii) *for the collective volume of production of the supporters* included volumes not just from the complainants and supporters as the situation stood at the date of initiation, but also the production volumes of those domestic producers that made themselves known *after* the initiation.[3]

10. Norway leaves aside the question of whether this issue is properly before this Panel, something that is contested by the EU, or the appropriateness of relying on Eurostat data.

11. Norway simply wishes to highlight a few factual points raised by China in its First Written Submission, and that do not seem to be contested by the EU.

12. Norway notes that the contested Notice of Initiation[4] simply states that the complainants (alone) represent more than 25 per cent of total community (EU) production. No figures are given for either total domestic production or for the collective production volume of the complainants.

13. Furthermore, the *identity* of the complaining companies was not disclosed to China or to the exporters or producers.[5] China thus had no possibility to double-check the reliability of the declaratory statement regarding the sufficient support figure given in the notice of initiation.

14. China also states, with reference to a letter sent by the European Commission to certain Chinese exporters, that the EU included 46 new companies as supporters of initiation *after* the determination referred to in the Notice of Initiation was made.[6]

15. And, finally, the Definitive Regulation provides that the collective production of all domestic producers supporting the investigation – including those that came forward after initiation – represented 27 per cent of total community production.[7]

[2] China, First Written Submission, para 207.
[3] China, First Written Submission, para 216.
[4] Notice of initiation of an anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China; Official Journal of the European Union (2007/C 267/11).
[5] China, First Written Submission, paras. 527 – 528.
[6] China, First Written Submission, para. 211.
[7] China, First Written Submission para. 216, with reference to Recital 114 of the Definitive Regulation (Exhibit CHN-4).

16. It seems credible, as argued by China[8], that the determination of the standing threshold *at the time of initiation* was flawed, in light of the later addition of these companies and their production volumes.

17. The Panel will have to assess, however, whether these points, together with other evidence and arguments presented by China, represents a *prima facie case* of a breach of Article 5.4. And, furthermore, whether the EU has been able to rebut.

C. Causation

18. Norway would next like to address the second issue previously identified: whether the EU violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* in concluding that the alleged dumped imports caused material injury, without properly assessing the injurious effects of other known factors. In particular, China argues that the EU failed to properly assess the effects of the increase in raw material prices, as well as the EU industry's exports to third countries.[9] Norway does not take a position on the issue of whether the EU has fulfilled its obligations according to Articles 3.1 and 3.5 in this case. Norway will only highlight certain arguments that may be of importance to the Panel when interpreting and applying the requirements of Articles 3.1 and 3.5.

19. According to Article 3.1 of the *Anti-Dumping Agreement*, the injury determination must be based on "positive evidence" and an "objective examination". Article 3.5 further requires a demonstration that "the dumped imports are, through the effects of dumping, ... causing injury". The investigating authority must "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and must not attribute "the injuries caused by these other factors" to the dumped imports.

20. Both Parties recognise[10] the investigating authorities' obligation, as established by the Appellate Body, to "separate and distinguish" the injurious effect of the dumped imports from the injurious effects of other known factors.[11] The Appellate Body has furthermore found this process to require "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".[12]

21. Norway attaches great importance to these principles, as they represent an important mechanism to ensure that the injury from dumped imports is isolated from the injurious effects of other factors, thus fulfilling the objective of Article 3.5. If not adhered to, an injury determination becomes more likely and the requirement of an "objective examination" in the words of Article 3.1 would not be fulfilled. Norway therefore respectfully asks the Panel to carefully review whether the EU in this case fulfilled its obligation to "separate and distinguish" the effects of the dumped imports from the injurious effects of the increase in raw material prices and exports to third countries by the EU industry, and, furthermore, whether the EU ensured that any injurious consequences from such other factors were not attributed to the dumped imports.

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[8] China, First Written Submission, para. 216.

[9] First Written Submission of China, paras. 478-493.

[10] First Written Submission of China, para. 480 and First Written Submission of the EU, paras. 647 and 650.

[11] Appellate Body Report, *US – Hot Rolled Steel*, para. 226.

[12] Appellate Body Report, *US – Hot Rolled Steel*, para. 226.

Mr. Chairman, distinguished Members of the Panel,

22. This concludes Norway's statement here today. Thank you for your attention.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM"), as a third party in this dispute, would like to thank the panel for this opportunity to present its views in this proceeding brought by the People's Republic of China ("China") over the consistency with the Agreement on Implementation of Article VI of the GATT (the "AD Agreement") of European Union's ("EU's") measures imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China.

2. TPKM has systemic interests in ensuring fair and objective interpretation and application of the AD Agreement. While there are several issues that deserve more thorough treatment, TPKM would only pick one issue to express its views in the hope that Panel would benefit from its observations. Without taking a final position on the merits of this dispute, TPKM would like to comment on the issue regarding interpretation of the term "like product" and the concept of "products under consideration" in Articles 2.1 and 2.6 of the AD Agreement.

II. THE INTERTWINED ISSUES INVOLVING THE CONCEPTS OF "LIKE PRODUCT" AND THE "PRODUCT UNDER CONSIDERATION" IN ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

3. China argued in this dispute that the EU erred in concluding that "standard" fasteners and "special" fasteners are "like" products.[1] China asserted that Chinese producers essentially produce standard products designed for the tradesmen, building, maintenance, Do-it-Yourself markets and supermarkets, whereas EU producers generally produce special fasteners that focus on the high-end aeronautic, automotive, auto assembly and other safety-critical markets.[2] Those special fasteners require extra features that go beyond what is described in the relevant ISO/DIN standards.[3] China further argued that such differences in the physical and technical characteristics, interchangeabilities, end-uses and prices of the standard and special fasteners that are manufactured in China and the EU respectively are so significant that renders Chinese and EU-made fasteners not comparable, and thus, not "like products" under the AD Agreement.[4]

4. Rebutting China's assertions, the EU argued that as long as items are used to mechanically join two or more elements in construction, engineering, and … etc., they can be identified as fasteners. Based on their basic physical and technical characteristics and end uses, all fasteners are considered to constitute a single product for the purpose of the proceeding in a wide variety of industrial sectors, as well as by consumers. Therefore, the investigating authority does not need to differentiate markets such as industrial use or daily use and it also has nothing to do with prices or purposes. Moreover, the EU asserted that "fasteners (standard or special) are like fasteners (standard

[1] First Written Submission of China, paras. 297-356.
[2] First Written Submission of China, para. 143.
[3] First Written Submission of China, para. 143.
[4] First Written Submission of China, paras. 340-356.

or special)".[5] In other words, the EU considered that "fasteners (standard or special) produced by the domestic industry, fasteners (standard or special) produced and sold in China, fasteners (standard or special) produced in the analogue country, and fasteners (standard or special) produced in China and sold in the European Union are all alike."[6]

5. While not taking any final position on the factual arguments presented by both Parties to this dispute, TPKM found it not in a position to fully agree with the EU's framing of the issue as merely one regarding the "selection of product concerned" or with the associated string of arguments asserting that Articles 2.1 and 2.6 are neither applicable nor having any bearing in this regard.[7]

6. Distinguished Members of the Panel, one of the most significant issues before you today is whether the EU has properly determined that fasteners produced in China for both China and EU markets, the fasteners produced in analogue country such as India, and fasteners produced by EU domestic industries, either standard or special, are all like products according to the AD Agreement, or whether the EU has properly determined which fasteners, standard or special, shall be products under consideration.

7. To answer this question, we urge the Panel to look closely at both Articles 2.1 and 2.6 of the AD Agreement. Article 2.1 of the AD Agreement provides rules on how dumping is determined and the roles of the "product exported", i.e., "product concerned" as well as "like product" in such determination. Article 2.1 of AD Agreement provides 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.

8. According to Article 2.1 of the AD Agreement, before a Member's investigating authority decides whether certain "product exported" constitutes dumping or not, the investigating authority will first need to determine the scope of the "product exported", i.e., the "product concerned" so that it can conduct the rest of the anti-dumping investigation process including making the necessary comparisons on "likeness". Determining the scope of the products concerned is therefore one of the most important decisions to be taken in the entire AD investigation proceedings as it set forth the perimeter of the pivotal steps in those proceedings.

9. It is of fundamental importance that an investigating authority determines the scope of products concerned and the like product according to the relevant provisions of the AD Agreement, in particular, Article 2.6. Article 2.6 of the AD Agreement defines "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration", or, in the absence, and only in the absence of such an identical product, a product that "has characteristics closely resembling those of the product under consideration". According to such definition agreed by all WTO Members, "like product" shall first be interpreted to mean an identical product, and if such is not the case, then it could be interpreted to cover products with characteristics closely resembling those of the product concerned. In interpreting the term "like product" under Article 2.1 and 2.6 of the AD Agreement, TPKM believes that even though two products may share the same functions, such as being used to mechanically join two or more elements in construction, engineering and so on, or fall within the same HS Code, there might still be significant differences between them that prevent these products from being considered like products.

[5] First Written Submission of the EU, para. 441.
[6] First Written Submission of the EU, para. 441.
[7] First Written Submission of the EU, paras. 424-442.

10. The Appellate Body and panels in various prior disputes have already laid down grounds for interpretation of the term "like products" albeit not in the context of the AD Agreement. While we are not going to repeat all those jurisprudence here, TPKM reckons that the panel's approach in interpreting the term "like product" in the dispute *Indonesia – Autos*[8] may be helpful for the Panel's consideration in the present dispute. Although *Indonesia – Autos* was a dispute in the context of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), the wordings of the relevant provision[9] on "like product" are exactly identical in the SCM Agreement and Article 2.6 of the AD Agreement. What we would like to point out today is that while EU has shaped its argument based on an issue it framed over the selection of products concerned, one of the core issues to be determined in the dispute between China and the EU remains how like products shall be determined and how the scope of the product under consideration shall be delineated according to the AD Agreement, and in particular, Articles 2.1 and 2.6.

11. The EU's written submission rebuts China's claim that EU has allegedly considered its domestically produced fasteners, Chinese fasteners for both EU and Chinese markets and Indian fasteners, either standard or special, are all like products. Questions and uncertainties remain. Are these fasteners identical? Probably not. Do they all have characteristics closely resembling each other? It seems that the EU sees no need to further elaborate whether the characteristics of all those types of fasteners closely resemble each other or not. TPKM considers that the intertwined relationship between the issue how the scope of the products concerned be determined and the issue whether the like product definition as provided in Article 2.6 of the AD Agreement is somehow connected to that determination, which may need to be further clarified by the Panel. Thus, we would respectfully urge the Panel to look into how the EU evaluates the characteristics and other relevant aspects among domestic fasteners, Chinese fasteners and Indian fasteners, either standard or special.

12. Furthermore, how an investigating authority determines the scope of the term "product concerned" or "product under consideration" and how much latitude the AD Agreement allows the investigating authority in this regard would be another significant question that the Panel may need to tackle. While TPKM is not providing a clear-cut suggestion on how the Panel should approach these difficult questions, it would like to respectfully remind the Panel that it is of utmost importance to preserve a sophisticatedly-struck balance between the respective interests of exporting Members in enjoying the benefit of market access and the interests of importing Members in protecting its industry from injury caused by dumping. Any alleged "latitude" or "flexibilities" that the investigating authorities may enjoy while delineating the scope of the products under consideration would need to be carefully restrained so as to maintain such carefully designed balance under the AD Agreement.

13. In light of the systemic implications of this dispute, TPKM respectfully requests the Panel to consider its views in examining the facts and arguments presented by the parties to ensure fair and objective interpretation of the relevant provisions of the AD Agreement. We appreciate this opportunity to express our views in this proceeding and would be glad to respond to any question the Panel may have.

[8] Panel Report, *Indonesia-Autos*, paras. 14.173-14.177.
[9] Footnote 46 to Article 15.1 of the SCM Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF TURKEY

I. Introduction

1. Turkey takes no position as to the defense and allegations presented by the parties. Turkey wishes to contribute by focusing on two major issues, namely Market Economy Treatment and Individual Treatment Assessments within the framework of dumping margin calculation.

II. Market Economy Treatment (MET)/Individual Treatment (IT) Assessments within the Framework of Dumping Margin Calculation

2. According to Article 2.1 of the Anti-Dumping Agreement , an investigating authority has to work on two data groups (normal value and export price) to determine whether dumping is present. 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.

3. Furthermore, GATT 1994 Article VI, Ad Article VI.2 and Articles 2.2 and 2.3 of the Anti Dumping Agreement point out certain sources which the investigating authority shall take into consideration if either the normal value or the export price can not be determined from the data provided by the producer/exporter due to the reason that the internal sales do not permit a proper comparison or because of the absence or unreliable nature of export prices.

4. In Turkey's view, Ad Article VI.2 of GATT 1994 and Anti Dumping Agreement Article 2.2 permits the investigating authority to rely on an unbiased calculation method in order to determine the normal value in the event of exports from a country in which the prices are not set by dynamics of a free-market economy.

5. In addressing the IT assessment, it is understood that Article 9.5 of the EU Basic Regulation envisages the use of the export price of the producer/exporter itself if it can fulfill the criteria stipulated in the Article. If the exporter/producer fails, however, the EU investigating authority has the option to employ weighted average export price of cooperating producer/exporter companies for comparison.[1]

6. Therefore, the IT assessment is not solely an evaluation whether the producer/exporter has properly proved that it is fulfilling the criteria of Article 9.5, but a legal instrument directly affecting the calculation of the dumping margin by determining data group to be used as the export price which has been argued to be an indispensable component of the dumping margin calculation pursuant to the GATT 1994 Article VI and Article 2.2 of the ADA.

7. In this regard, both the MET and IT assessment are instruments that directly relate to the *calculation of the dumping* margin which provides the investigating authority with alternative routes on the question of which group of data will be used to determine the *normal value* and *export price*.

[1] EU First Written Submission Para. 23.

III. Setting a Threshold In Order To Provide for Individual Treatment

8. It can be clearly understood from Article 6.10 of the Anti Dumping Agreement that individual treatment, i.e. calculation of individual dumping margin for each known exporter/producer is a **general rule**. However there are always exceptions to general rules when the conditions prevail. The PRC rightly mentions that the second sentence of the Article 6.10, i.e. sampling, provides an exception to the general rule of individual treatment.

9. The legal question here is whether sampling is the sole exception to the general rule of IT, or Members can require in their domestic legislation some conditions to have met in order to provide IT. Turkey is of the view that this may not be the sole exception.

10. The Anti Dumping Agreement provides rules for economies operating in market economy conditions. There are no specific rules or exceptions for economies that are not operating under market economy conditions. It is not reasonable to look for a non-market economy exception in Article 6.10 itself.

11. Furthermore, Ad Article VI.2 of GATT 1994 provides a special provision for the calculation of prices regarding countries that do not operate under full market economy conditions. This provision mentions 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 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.

12. When the object and purpose of Ad Article VI.2 of GATT 1994 and paragraph 150 of PRC's Working Party Report (WT/ACC/CHN/49) are considered; it is understood 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.

13. Moreover, taking into account the AB Report in the *US – Corrosion Resistant Steel*, and Panel Report in the *Korea – Certain Paper* cases, Turkey understands that treating several distinct legal entities as a single entity, in the event where the conditions require to do so, is approved by case-law and sampling is not the only exception to the general rule of IT.

IV. Conclusion

14. Turkey reserves its rights to make further comments at the third party session of the first substantive meeting of the Panel. Turkey thanks the Panel for the opportunity to present its views in this proceeding and welcomes any questions that Panel may have.

ANNEX D-8

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

1. The US oral statement will focus on the following three issues: (1) the identification of the relevant "producers" or "exporters" under Article 6.10 of the AD Agreement; (2) the identification of the"like product" as defined in Article 2.6 of the AD Agreement; and (3) the identification of the "domestic industry" under Article 4.1 of the AD Agreement.

"Producers" and "Exporters" Entitled to an Individual Margin of Dumping

2. One of China's principal claims is that Article 9(5) of the EU's Basic AD Regulation violates the covered agreements by requiring the investigating authority to apply a single dumping margin to multiple firms unless certain conditions are met. According to China, 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 makes impracticable the application of individual dumping margins for specific exporters or producers. China argues that because Article 9(5) 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. However, these economic realities do not provide an *additional exception* to Article 6.10. Instead, evaluation of the economic realities of the firms is part of the investigating authority's task in determining the "exporters" and "producers" for which it must generally determine an individual margin.

5. We begin with the text of Article 6.10, which 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 exporter or producers is so large as to make such a determination impracticable. As this provision makes clear, investigating authorities are generally required to determine an individual margin of dumping for each known exporter or producer. Thus, a fundamental question an investigating authority must answer when fulfilling this requirement is what "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.

6. The United States recalls that the AD Agreement does not define an "exporter" or "producer", nor does it establish criteria for an investigating authority to evaluate when making this determination. As other Members 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.

7. Under such circumstances, it would not make sense to assign the firm and its parent company separate margins of dumping because, as the EU points out, 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 antidumping measures. Nothing in Article 6.10 of the AD Agreement requires such a result.

8. The panel's reasoning in *Korea – Paper* fully supports this understanding of Article 6.10:

> Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations. Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.

9. The United States respectfully submits that, consistent with this reasoning, this 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. 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. The United States would also like to address China's assertion that Article 9(5) unfairly singles out firms from non-market economies for further analysis before these firms can qualify for an individual margin. There is nothing unfair or WTO-inconsistent in an investigating authority analyzing the independence of the firms included in the investigation. 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*.

11. Among the distinguishing features of a non-market economy is that the role of the government distorts the functioning of market principles. 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 interference in the Chinese economy is reflected in both China's Protocol of Accession and Working Party Report.

12. Such interference can result in the government exerting influence over companies, including decisions related to production and pricing. As we have discussed, 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. Thus, firms in non-market economies operate under economic realities that make it particularly important for an investigating authority to analyze closely the particular structures and operations of these firms to evaluate their independence.

13. China is also incorrect in suggesting that companies from non-market economies face a heavy burden to demonstrate that they qualify for individual margin results. This so-called burden could be easily discharged, for example, by providing the investigating authority with evidence of a firm's structure and operations that would demonstrate that it functions as an exporter or producer separate from the government. Permitting firms to demonstrate independence also allows investigating authorities to make such evaluations on the basis of the facts in a given investigation and thereby respond to economic changes that occur over time in these non-market economies. Indeed, the investigation at issue in this dispute appears to reflect precisely that type of flexible response to such changes in the Chinese economy, given that *all* the cooperating Chinese companies that requested individual margins received them.

"Like Product"

14. China argues that "standard" fasteners and "special" fasteners are significantly different from each other. In its view, most fasteners from China were of the "standard" variety, whereas the EU had included "special" fasteners within the scope of the "like product". According to China, this failure of the EU to appreciate the distinction between "standard" fasteners and "special" fasteners when identifying the "like product" in this investigation was inconsistent with Articles 2.1 and 2.6 of the AD Agreement. This argument, however, fundamentally misunderstands the nature of the "like product" determination.

15. First, China appears to consider that the mere fact that both "standard" and "special" fasteners were included within the EU's "like product" evidences a violation of Article 2.6 because these two types of fasteners are themselves not "like" each other. In its third party submission, Norway similarly argues that Article 2.6 "requires that *any* given category of the 'like product' must be 'like' *each and every* category of the product under consideration".

16. This is an incorrect understanding of Article 2.6. That provision defines a "like product" to be "a *product* which is identical, i.e. alike in all respects to the *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". (Emphasis added) The requirement of "likeness" is therefore determined at the level of the *product*, by comparing the specific product under consideration with another product. Nothing in the AD Agreement requires an investigating authority to make a determination at a more micro level, namely, by examining the "likeness" of models or categories within that particular product.

17. To the contrary, Article 2.4 specifically contemplates that meaningful "differences which affect price comparability" may exist among models within a single product definition. It is in this respect that the EU appears to have recognized the differences between "standard" and "special" fasteners.

18. Ultimately, what China appears to be complaining about is that the EU considered "fasteners" – including "standard" *and* "special" fasteners – to be the "product under consideration" or, in the words of Article 2.1, "the product exported". By characterizing this action as a failure to identify the "like product" properly, China confuses the "product under consideration" with the "like product". These two concepts, however, are distinct under the AD Agreement. Article 2.6 of the AD Agreement provides a definition of "like product", which contemplates that an investigating authority will evaluate the "likeness" of a given product by reference to the "product under consideration" that has already been identified. In contrast, as multiple panels have recognized, the AD Agreement imposes no definition or specific obligation in respect of the identification of the "product under consideration". The AD Agreement therefore provides no textual basis for China's complaint about the EU's selection of the "product under consideration".

"Domestic Industry"

19. China claims that the EU violated Articles 3.1 and 4.1 of the AD Agreement by excluding from the definition of the domestic industry all companies that did not make themselves known within 15 days of the date of publication of the notice of initiation, as well as those companies that did not support the investigation. Although the United States takes no position on the merits of China's factual allegations, the United States explained in its written submission why it agreed with China that a biased exclusion of certain producers from the injury examination would violate Article 3.1. That is, by fashioning an investigation so as to exclude all companies that did not support the investigation, an investigating authority fails to undertake an "objective examination" of the impact of dumped imports on the domestic industry as required by Article 3.1. The United States will focus now on how the deliberate exclusion of such producers from the "domestic industry" is also inconsistent with Article 4.1.

20. A proper definition of the domestic industry in accordance with Article 4.1 is essential to ensure that the investigating authority's examination under Articles 3.2, 3.4, and 3.5 addresses the impact of dumped imports on the appropriate set of domestic producers. Indeed, if an investigating authority fails to define the domestic industry consistently with Article 4.1, its consideration under Article 3.4 of the relevant economic factors having a bearing on the "domestic industry", and its examination under Article 3.5 of a causal link between dumped imports and injury to the "domestic industry", will be fatally flawed from the outset.

21. Article 4.1 obliges an investigating authority to define the domestic industry as "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". This provision is subject to two exceptions that do not apply here, but, as we will discuss, these exceptions illustrate why it is inconsistent with this provision to selectively exclude a group of domestic producers from the "domestic industry".

22. The EU appears to argue that, by virtue of the "major proportion" language, an investigating authority has virtually unfettered discretion to exclude whichever producers it wishes, as long as the remaining producers represent a "major proportion" of the industry's production. The EU's unduly narrow reading is not supported by the text.

23. First, the United States notes that the term "major proportion" is not simply a *quantitative* criterion indicating that an investigating authority need only include a certain *number* of producers in its "domestic industry". As the panel in *Argentina – Poultry* recognized, the word "major" as used in Article 4.1 is not a fixed percentage benchmark, but instead refers to producers of "an important, serious or significant" proportion of total domestic production. The text of Article 4.1 indicates that the "importance" of this proportion could be examined not only by reference to quantity of output. For example, Article 4.1(i) allows for an exception from the "major proportion" requirement in situations where "related" producers have been excluded. By focusing on the nature of the relationship between producers, this sub-paragraph indicates a *qualitative* element that may be considered when evaluating whether a "major proportion" of the industry has been included.

24. Second, one of the relevant qualitative factors is the extent to which the firms that an investigating authority seeks to exclude from the "major proportion" are themselves a distinct category of producers. As already noted above, Article 4.1(i) explicitly authorizes the exclusion of "related" producers from the "domestic industry". Similarly, Article 4.1(ii) sets out the only circumstances where an investigating authority may focus its definition of "domestic industry" on the extent to which a *certain defined group* of producers is uniquely injured, which is by virtue of the geographic concentration of imports and of domestic shipments. The language of Article 4.1 thus reveals that the only categories of producers that may be entirely excluded from the domestic industry

as a category are "related" producers and those falling under the regional industry exception. As the *EC – Salmon* panel noted, "[N]othing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision."

25. By spelling out the narrow exceptions in sub-paragraphs (i) and (ii), Article 4.1 ensures the inclusion of domestic producers from various segments and sectors of the industry in an unbiased manner. An approach to interpreting "major proportion" that allows an investigating authority to exclude from the "domestic industry" a defined group of producers that does not meet the conditions in sub-paragraph (i) or (ii), would appear to be inconsistent with the limited exceptions spelled out in Article 4.1.

26. The United States submits that, when viewed in this light, a domestic industry definition that is framed to exclude all or virtually all non-petitioning and non-supporting producers does not represent an important, significant, or serious proportion of domestic production.

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. CLAIMS CONCERNING ARTICLE 9(5) OF COUNCIL REGULATION (EC) No. 384/9 OF 22 DECEMBER 1995 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EUROPEAN COMMUNITY, AS CODIFIED AND REPLACED BY COUNCIL REGULATION (EC) No. 1225/2009

1. China claims that Article 9(5) of Council Regulation No 384/96 as amended and as codified and replaced by Council Regulation (EC) No 1225/2009 is, as such, inconsistent with Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the AD Agreement, Articles I and X:3(a) of the GATT 1994 and Article XVI:4 of the WTO Agreement.

2. The EU starts its First Written Submission with a number of **procedural arguments**. First, the EU submits that China's Panel Request failed to meet the requirement of Article 6.2 of the DSU since it failed to "present the problem clearly" with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the AD Agreement and X:3(a) of the GATT 1994. However, in making this argument, the EU confuses the procedural requirements of Article 6.2 of the DSU with the substantive analysis of the measure at issue. Indeed, Article 6.2 does not impose obligations regarding the substantive question of whether the "scope" or "content" of the measure at issue is related to the obligations that are claimed to be violated. The latter question forms part of the substantive issues. Furthermore, the EU's argument that China failed to plainly connect the challenged measure with the provisions claimed to be violated confuses "claims" and "arguments". By alleging that China's Panel Request failed to meet the Article 6.2 requirement because it did not explain how the provisions that deal with specific legal obligations are violated by the measure at issue, the EU is in fact taking issue with the "arguments" relating to the claims made by China. In the Panel Request, however, only the "legal basis" of the complaint must be precisely identified. The arguments relating thereto may be progressively developed and clarified during the proceedings. China further points out that the EU fails to demonstrate that the alleged failure to meet the Article 6.2 requirements has prejudiced its ability to defend its interests, although this is a prerequisite in order to establish a violation of Article 6.2 of the DSU. Finally, China stresses that, in addition to these general comments which should already be sufficient for the Panel to reject the EU's claim that China's Panel Request failed to meet the Article 6.2 requirements, a claim by claim analysis leads to the same conclusion.

3. Second, the EU claims that China has expanded the scope of this dispute to "other measures and issues" which are outside the Panel's terms of reference. First, the EU argues that, since "China's Panel Request described the measure at issue as "Article 9(5) of Council Regulation No 384/96 as amended", and because "Council Regulation No 1225/2009 did not amend, correct or rectify the measure identified by China" but "repeals" Council Regulation No. 384/96, Article 9(5) of Council Regulation No. 1225/2009 is "a measure outside the Panel's terms of reference". However, this argument is purely semantic and ignores the fact that there is absolutely no difference in substance between the two provisions. Second, the EU argues that China's First Written Submission contains "other issues which fall outside the Panel's terms of reference", in particular the calculation and determination of dumping margins. This, however, is a substantive issue that is not relevant for the definition of the Panel's terms of reference. In any event, it is perfectly clear from China's Panel

Request that China considers that Article 9(5) effectively governs not only the imposition of anti-dumping duties but also the determination of individual dumping margins.

4. Having made these procedural arguments, the EU still addresses China's claims on its merits. At the outset, it is necessary to address the **nature and scope of Article 9(5) of the Basic AD Regulation**, an issue which underlies several arguments (both of a procedural and substantive nature). Article 9(5) does not deal with Market Economy Treatment (MET) but only with Individual Treatment (IT) which relates to the question whether dumping margin and anti-dumping duty must be calculated for the exporting producer from China on an individual or a country-wide basis. Contrary to what the EU argues, Article 9(5) is not limited to the "very specific issue which refers to the imposition of definitive anti-dumping duties". Whether the conditions set out in Article 9(5) of the Basic AD Regulation are fulfilled do not only determine for an individual exporting producer whether the anti-dumping duty is imposed on an individual basis or a country-wide basis but also whether the dumping margin is calculated on an individual basis or country-wide basis. Contrary to what the EU submits, whether the dumping margin is determined on an individual or country-wide basis does not flow from Article 9(4) of the Basic AD Regulation which only lays down the broad principle that the amount of the anti-dumping duty may not exceed the dumping margin, but from Article 9(5). This position is supported by the description provided by the EU itself in its First Written Submission of how anti-dumping duties and dumping margins are determined in case of imports from non-market economy countries, in particular at paragraph 81 of its First Written Submission. This is further supported by the statements of the EU in various EU anti-dumping investigations concerning imports from, *inter alia*, China.

5. Turning to the **claim by claim analysis**, China's rebuttal is as follows.

6. China's claim in relation to **Article 9.2 of the AD Agreement** is that the obligation in Article 9(5) requiring that exporting producers from non-market economy countries fulfill additional criteria in order to receive an individual anti-dumping duty instead of a country-wide anti-dumping duty is inconsistent with Article 9.2 of the AD Agreement. The EU first argues that the measure at issue does not fall within the scope of Article 9.2 of the AD Agreement and that Article VI of the GATT and Article 9.2 do not require a company specific approach to the imposition of anti-dumping duties. China fails to see the connection between this statement and the scope of the obligation in Article 9.2. Whether investigating authorities are permitted to impose anti-dumping duties on a country-wide basis in the case of imports from China is a question of interpretation of Article 9.2 itself and does not relate to the scope of Article 9.2. It should, therefore, not be examined as a preliminary issue. In any event, Article 9.2 does not permit an interpretation which would, as a rule, require or allow the imposition of anti-dumping duties on a country-wide basis.

7. The EU further submits that Article 9.2 does not require that anti-dumping duties are imposed on an individual basis for each supplier involved and that, even assuming that such a principle exists, it is not correct to argue that the only exception to this principle is where it is impracticable to do so because of the large number of suppliers involved. China submits that a correct interpretation of Article 9.2 pursuant to the principles of treaty interpretation leads to the conclusion that anti-dumping duties must, as a rule, be imposed on an individual basis and that, even if this principle is not absolute, Article 9.2 does not allow investigating authorities to impose automatically a country-wide duty on exporting producers from non-market economy countries. This position is supported by the "ordinary meaning" of the relevant terms of Article 9.2, in particular, the terms "appropriate amounts", "sources" and the obligation to "name the supplier(s)" and the exception thereto when this is "impracticable". The ordinary meaning of the word "impracticable" or "not practicable" as defined in the relevant edition of the New Shorter Oxford Dictionary implies something which is not feasible, unable to be carried out, impossible in practice. This position is further supported by the context of the provision, in particular Articles 6.10 and 9.4 of the AD Agreement, the object and purpose of the AD Agreement, that is, to set out the specific conditions under which anti-dumping measures may be

imposed and the preparatory works of Article 8 of the Kennedy Round Anti-Dumping Code. Finally, China points out that the EU's argument that China's Protocol of Accession codifies the understanding that China is not yet a market economy country and that this implies that all provisions of the AD Agreement, including Article 9.2, must be interpreted as authorizing a special treatment for exporting producers from China, fails. It is factually incorrect since no such understanding is included in China's Protocol of Accession. Moreover, China is now a market economy country, as acknowledged by many WTO Members. In any event, whether or not China is a market economy country is irrelevant for this dispute. The obligations in Article 9.2 and 6.10 do not distinguish between market economy and non-market economy countries.

8. With respect to China's claim that Article 9(5) of the Basic AD Regulation violates **Article 6.10 of the AD Agreement**, including the chapeau of Article 6.10 and Article 6.10.2, the EU's preliminary argument that Article 9(5) does not fall within the scope of Article 6.10 must be rejected since Article 9(5) effectively deals with the question whether dumping margins for Chinese exporting producers are determined on an individual or a country-wide basis. On the substance of the claim, the EU argues that there would be exceptions other than the one referred to in Article 6.10 second sentence (i.e. sampling) to the rule requiring that dumping margins are determined on an individual basis and that in the case of imports from non-market economy countries, the State, and not the individual exporting producers, is to be regarded as the actual "producer" for which a margin of dumping will be determined. It is, however, clear from the wording and context of Article 6.10 that the use of sampling is the only permissible exception to the general rule contained in the first sentence of Article 6.10. Furthermore, the reasoning applied by the Panel in *Korea – Certain Paper* cannot be used by analogy in the context of Article 9(5) since the examination under the latter provision is totally different from the situation examined by the Panel in that case. Even considering that one could apply the reasoning of *Korea – Certain Paper* by analogy, it is clear that that the Article 9(5) of the Basic AD Regulation test applies criteria which go far beyond the conditions found to be acceptable in that case. Moreover, Article 9(5) is discriminatory as it only applies in the case of imports of non-market economy countries. There is no objective justification for this treatment since there is no reason why the risk or "circumvention" or "manipulation" would be less in countries considered as being market economy countries than in those regarded as being non-market economy countries. Finally, the object and purpose of the AD Agreement and the preparatory works of Article 6.10 support the finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement.

9. In relation to China's claim that the EU violates **Article 9.3 of the AD Agreement** by applying an anti-dumping duty which is determined on the basis of a country-wide dumping margin for those exporting producers that do not fulfill the conditions set out in Article 9(5) of the Basic AD Regulation, the EU first argues that Article 9(5) does not fall within the scope of Article 9.3 of the AD Agreement. Article 9(5), however, will determine whether the duty is based on an individual or a country-wide dumping margin and thus falls within the scope of Article 9.3. On the substance, the EU argues that Article 9(5) does not violate Article 9.3 of the AD Agreement because it is permitted under Articles 9.2 and 6.10 to determine a single country-wide anti-dumping duty and a country-wide dumping margin for "the actual source of price discrimination", namely the State, in the case of imports from non-market economy countries. However, this argument fails since these provisions do not permit investigating authorities to determine automatically a single country-wide dumping margin and a country-wide anti-dumping duty for all exporting producers who fail to meet the IT criteria. The application of Article 9(5) leads to a result where exporting producers who sold at export prices which are higher than the average export price determined for non-IT exporting producers are subject to a duty which exceeds their individual dumping margin as established under Article 2. The imposition of an anti-dumping duty which is higher than the individual dumping margin is a clear violation of Article 9.3 of the AD Agreement.

10. With respect to China's claim under **Article 9.4 of the AD Agreement**, the EU's preliminary claim that Article 9(5) does not fall within the scope of Article 9.4 must be rejected. Indeed, Article 9(5) imposes specific conditions that must be met before exporting producers included in the sample or which have obtained individual examination can receive an individual anti-dumping duty. Article 9(5) thus clearly falls within the scope of Article 9.4 since this Article specifically deals with the imposition of duties where sampling is used. China's claim under Article 9.4 is twofold. First, China claims that Article 9(5) violates Article 9.4 since the anti-dumping duty applied to the cooperating non-sampled exporting producers pursuant to Article 9(6) of the Basic AD Regulation is based on the weighted average margin of dumping of all sampled exporting producers, including those that do not qualify for IT and for which the dumping margin is not based on their own export prices. The rebuttal by the EU is contradicted by its own practice. Second, China claims that Article 9(5) of the Basic AD Regulation also violates Article 9.4 since it requires that the non-sampled exporters who benefit from an "individual examination" demonstrate that they comply with the IT criteria laid down in Article 9(5) while Article 9.4 expressly requires investigating authorities to unconditionally "apply an individual anti-dumping duty 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". China notes that the EU does not submit any argument in rebuttal to that second part of its claim.

11. China further claims that the EU violates **Article I:1 of the GATT 1994** since the specific conditions imposed by Article 9(5) only apply to so-called "non-market economy countries". Contrary to what the EU alleges, there is no conflict between the AD Agreement and Article I:1 of the GATT 1994. Furthermore, it needs to be stressed that a product is not different in nature, as alleged by the EU, depending on whether it originates in a market economy or a non-market economy country and that the conditions to be met under Article 9(5) are not origin-neutral. On the contrary, the advantage granted depends exclusively on the origin of the product under investigation. As such, these conditions amount to discrimination with respect to the origin of like products.

12. China further challenges the *manner in which Article 9(5) of the Basic AD Regulation is administered* by the EU under **Article X:3(a) of the GATT 1994** since it is not administered in a uniform and reasonable manner.

13. Furthermore, since Article 9(5) of the Basic AD Regulation "as such" violates Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement and Articles I:1 and X:3(a) of the GATT 1994, it automatically follows that the EU is also in violation of **Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the AD Agreement**.

II. CLAIMS CONCERNING COUNCIL REGULATION (EC) No 91/2009 OF 26 JANUARY 2009 IMPOSING A DEFINITIVE ANTI-DUMPING DUTY ON IMPORTS OF CERTAIN IRON AND STEEL FASTENERS FROM CHINA

14. China first claims that by making the benefit of an **individual dumping margin and the imposition of an individual anti-dumping duty dependent on compliance with the conditions set out in Article 9(5) of the Basic AD Regulation**, the EU violated Articles 6.10, 9.2 and 9.4 of the AD Agreement. The EU's defense is limited to two arguments. First, it submits that China's claim under Article 9.4 is outside the Panel's terms of reference. However, as is clear from the Panel Request as a whole, the issue which is being challenged "as such" is being challenged "as applied" with respect to the second measure at issue and given that Article 9.4 of the AD Agreement has been included in China's Panel Request in connection with its challenge of Article 9(5) "as such", China's claim that Article 9(5) as applied in the anti-dumping fasteners investigation violates Article 9.4 is properly within the Panel's terms of reference. Second, the EU submits that China is challenging a non-existent measure since in the anti-dumping investigation concerned IT was granted to all sampled and individually examined cooperation suppliers that requested IT. The EU, however, distorts China's

claim since China does not challenge the fact that the sampled and individually examined cooperating exporters did not receive IT or could, hypothetically, have failed to meet the Article 9(5) conditions. Instead, China challenges the non-automatic character of the benefit of an individual dumping margin and an individual anti-dumping duty for the Chinese exporting producers in the anti-dumping investigation which led to the measure at issue.

15. China claims that the **EU's standing determination** violated Article 5.4 of the AD Agreement. The EU raises on a preliminary basis three procedural objections which must all be rejected. Indeed, (i) China has consulted with the EU concerning its Article 5.4 claim as required by Article 4 of the DSU; (ii) China's Panel Request is specific and presents the problem clearly, as required by Article 6.2 of the DSU; and (iii) the EU erroneously submits that the standing determination is governed exclusively by the Notice of Initiation 2007/C 267/11 and not by Council Regulation (EC) No. 91/2009. China's claim that the EU's standing determination violated Article 5.4 of the AD Agreement is based on three main arguments. First, the EU failed to examine whether the figure for total EU production was reliable and correct. In this respect, the EU in fact argues that it is permissible for investigating authorities to base themselves exclusively on the information submitted in the Complaint when making their standing determination. However, the approach proposed by the EU is not consistent with the "examination" requirement in Article 5.4 which imposes on investigating authorities the obligation to "investigate", that is, "inquire into" the degree of support for, or opposition to, the application and this imposes something more than merely accepting the information provided by the complainants. Second, the EU did not properly examine the degree of support for, or opposition to, the application expressed by domestic producers of the like product prior to the initiation. A mere statement that the matter has been "examined" and/or "determined" is not enough to demonstrate that the EU effectively conducted an examination. Third, the EU improperly concluded that the application had been made by or on behalf of the domestic industry. According to the EU, China failed to make a *prima facie* case. However, in order to determine whether the threshold of Article 5.4 of the AD Agreement is met, it is necessary to at least identify, on the one hand, the production figure of those producers expressly supporting the application and, on the other hand, the total domestic production of the like product. In its First Written Submission, China provided substantial evidence which demonstrates that neither the determination of the production figure of the complainants, nor the figure of total domestic production was correct and that the threshold of 25% was not met. These elements are sufficient to meet the *prima facie* case threshold. The EU, however, fails to rebut the evidence and even remains silent with respect to some of the arguments raised. In other words, the EU failed to rebut the *prima facie* case made by China.

16. China further demonstrated that the EU's **determination of the "domestic industry" violated Articles 4.1 and 3.1 of the AD Agreement**, for at least five reasons. First, by excluding from the domestic industry EU producers that did not make themselves known within 15 days of the initiation of the investigation or that did not support the complaint, the EU violated Articles 4.1 and 3.1 of the AD Agreement. As a preliminary remark, it must be noted that China's claim is covered by the Request for Consultations. With respect to China's claim that there is a violation of Article 4.1, the EU submits that there is no violation given that Article 4.1 gives investigating authorities the discretion to choose the producers to be included in the "domestic industry" as long as the producers thus selected represent a "major proportion" of the total domestic production. However, apart from the two explicit exclusions provided in Article 4.1, there are no other categories of producers that the investigating authorities may exclude *from the outset* from the definition of the domestic industry. This is plainly consistent with the Panel's findings in *EC – Salmon (Norway)*. Furthermore, these findings are not limited to categories of producers "which produce a particular type of the like product" but concern any category of producers of the like product other than those set out in Article 4.1. Moreover, the justification given by the EU to explain why it did exclude certain categories of producers is not relevant. This exclusion also constitutes a violation of Article 3.1 of the AD Agreement. Contrary to the assertions of the EU, it is clear that the objective determination of the domestic industry is an integral part of an objective injury examination. By restricting the definition

of the domestic industry to only those producers that came forward within the 15-day period, the EU investigating authorities made it more likely that the Community industry only included producers supporting the investigation and, as a result, made it more likely that injury would be found.

17. Second, the domestic industry as defined by the EU does not include domestic producers whose collective output constitutes a major proportion of the total domestic production for two reasons. First, the total EU production figure is underestimated and based on unreliable data. Second, the Community producers included in the definition of the domestic industry do not represent a "major proportion" of the total domestic production of the like product. In relation to this argument, it has to be pointed out that, although the EU states that a major proportion "is not something that can be determined in the abstract or based on specific percentages", it immediately contradicts itself by submitting that "there exists a legitimate presumption that producers representing 25% or more of total domestic production constitute "a major proportion" of such production". Moreover, the Basic AD Regulation expressly provides that the "major proportion" requirement of Article 4.1 is identical to the 25% test which is used in the framework of the standing determination. This link established by the EU between the "major proportion" test in Article 4.1, which deals with the domestic industry definition, and the 25% test in Article 5.4 which concerns the standing determination, even in the form of a "presumption", is manifestly erroneous and legally flawed. In the investigation that led to the measure at issue, the EU did not examine whether the domestic producers constituting the domestic industry fulfilled the major proportion requirement. Moreover, the producers constituting the domestic industry failed to meet the major proportion requirement in light of the specific circumstances of the case: they are not representative of the whole domestic production; it was practically feasible for the investigating authorities to include more producers than those actually included in the domestic industry; the producers included in the "domestic industry" represented only a small portion of the total number of producers; and the investigating authorities excluded categories of producers other than the ones referred to in Article 4.1 (i) and (ii).

18. Third, the domestic industry was not defined in relation to the Investigation Period and this constitutes a violation of Article 3.1 of the AD Agreement. This is confirmed, *inter alia*, by the Panel's findings in *Argentina – Poultry Anti-Dumping Duties*.

19. Fourth, the EU violated 3.1 of the AD Agreement since it made an injury determination with respect to a sample that was not representative of the domestic industry, first, to the extent that the "domestic industry" was defined in violation of Article 4.1 and, second, even assuming that the domestic industry has been defined correctly – *quod non* –, the sample has not been selected in conformity with Article 3.1 since the only criterion used by the investigating authorities was the producers' volume of production.

20. Fifth, the EU's determination of the "domestic industry" violated Articles 4.1 and 3.1 of the AD Agreement since it included in the domestic industry and the sample a number of producers that were related to the exporters or importers or were themselves importers of the allegedly dumped product.

21. China further claims that the **EU's determinations concerning the product concerned and the like product violated Articles 2.1 and 2.6 of the AD Agreement**. First, the investigating authorities included in the product concerned products that were not like. The EU argues that Article 2.1 of the AD Agreement only imposes obligations with respect to the meaning of "dumping" and "margin of dumping" and how they are calculated and not with respect to the selection of the product concerned. However, a correct interpretation of Articles 2.1 and 2.6 of the AD Agreement, based on the ordinary meaning of their terms and in their context and in light of the object and purpose of the AD Agreement, leads to the conclusion that the product concerned must include only "like" products. By including in the scope of the product concerned both special and standard fasteners, which are not "like", the EU thus violated Articles 2.1 and 2.6 of the AD Agreement.

Second, the EU violated Articles 2.1 and 2.6 of the AD Agreement by concluding that the fasteners produced and sold by the Community industry in the Community, the fasteners produced and sold on the domestic market in China, those produced and sold on the domestic market in India and those produced in China and sold to the Community are alike. The EU argues that China's claim is without object. This is, however, based on a distortion of China's claim.

22. With respect to China's claim that the **EU's determinations of dumping violated Article 2.4 of the AD Agreement**, it must be noted that the EU's preliminary argument that "China fails to refer to the relevant Section of Council Regulation No. 91/2009 on the comparison between normal value and export price and has thus failed to establish a *prima facie* case" is manifestly contradicted by China's First Written Submission. China's claim is two-fold. First, the EU investigating authorities failed to make the comparison between the export price and the normal value on the same basis, namely, on the basis of the Product Control Numbers ("PCNs") that the investigating authorities themselves had identified at the beginning of the investigation as being necessary to enable a "fair comparison". The EU rephrases China's claim to make it state that investigating authorities must *always* follow a particular methodology when making the comparison between export price and normal value, namely that the comparison must always be made between the export price and the normal value on the basis of the PCNs in the abstract. However, what China claims is that, in light of the specific circumstances of the fasteners investigation, the physical characteristics reflected in the PCNs had to be taken into account when making the comparison between normal value and export price since such characteristics affect the price comparability between export price and normal value. By failing to do so, the EU did not make a "fair comparison" and, therefore, violated Article 2.4 of the AD Agreement. It has to be pointed out that the EU erroneously presents the PCNs as constituting only an "information gathering tool". That the PCN factors are necessary to make a fair comparison is clear, *inter alia*, from the EU standard questionnaires used in the anti-dumping investigation concerned. With respect to the fair comparison standard itself, the EU considers that requesting the necessary information from all interested parties on a PCN basis was sufficient for it to comply with the obligations under Article 2.4 of the AD Agreement. However, to the extent that a comparison is made without taking into account differences that affect price comparability, such comparison is not "fair". In addition to the fact that the physical characteristics identified in the PCN affect price comparability, the EU failed to make a "fair comparison" for two other reasons. The investigating authorities did not evaluate and *a fortiori* did not determine whether the differences in physical characteristics reflected in the PCN factors affected price comparability and whether they had to be taken into account for making a "fair" comparison. Moreover, the investigating authorities had included in the PCNs those physical characteristics that they considered relevant for making a "fair" comparison. Logically, this implied that they had to make at least an evaluation of these differences in order to determine whether they were necessary to ensure a fair comparison. To the extent that the investigating authorities subsequently decided to ignore most of the PCN factors previously identified as relevant and used another methodology, they were required to properly and expressly inform all interested parties in a timely manner. By failing to do so, they prevented the exporting producers from making claims that adjustments for differences in physical characteristics needed to be made.

23. Second, the EU investigating authorities failed to make appropriate adjustments for the differences that affect price comparability, namely the differences in physical characteristics as reflected in the PCN as well as for quality differences. The EU investigating authorities never examined, once they decided to exclude from the PCNs a number of physical characteristics initially used to categorize products, whether the excluded characteristics were to be considered as differences in physical characteristics affecting price comparability and, *a fortiori*, never determined whether or not an adjustment was required. However, it is clear that the characteristics identified in the PCNs constitute physical differences that affect price comparability. The decision to exclude certain physical characteristics from the PCNs had nothing to do with an evaluation that these physical characteristics had no effect on price comparability, but, as admitted by the EU itself, related to the fact that the Indian producer did not provide the necessary information on a PCN basis. However, this

cannot be a justification for the EU to simply ignore those physical characteristics that affect price comparability. In its First Written Submission, the EU tries to defend why it disregarded these factors for the purposes of making the comparison. It has to be emphasized that the mere *a posteriori* rationalizations given by the EU can neither obscure nor cure the fact that during the investigation the investigating authorities did not examine whether the differences in question affected price comparability when making the comparison. Similarly, no adjustment was made for quality differences. Moreover, the EU appears to argue that, in order for it to comply with the obligation to carry out a fair comparison pursuant to Article 2.4, it was sufficient for it to take into account those physical characteristics which appeared to be the most important. However, *all* differences affecting price comparability must be taken into account. Finally, China stresses that the Chinese exporting producers were not informed of the information which was necessary to ensure a fair comparison and that the Chinese exporting producers as a whole were never informed that the comparison had not been made on a PCN basis.

24. China claims that the EU violated **Articles 3.1 and 3.2 of the AD Agreement when making the price undercutting calculations** by failing to make a product comparison on the basis of the full PCNs and by comparing standard and special fasteners without making any adjustments for the differences affecting price comparability when determining the price undercutting margin. On a preliminary basis, it must be noted that China's claim was subject to consultations and is within the Panel's terms of reference. On the substance, the EU erroneously considers that the absence of requirement in Article 3.2 as to a specific methodology that should be used for the undercutting calculation implies that any methodology is necessarily consistent with Articles 3.1 and 3.2 of the AD Agreement. However, only methodologies which are objective, i.e. unbiased and even-handed, are consistent with Articles 3.1 and 3.2 of the AD Agreement. In order to ensure such an unbiased and even-handed undercutting calculation, adjustments may be necessary. Product characteristics, such as length and diameter, which were disregarded by the EU in its price undercutting analysis, are differences which not only affect costs for the producers but "have a perceived importance to the customer" and must, therefore, be taken into account in the framework of the price undercutting analysis. The EU's sole defense is to allege that "China has failed to adduce evidence that the methodology that was followed was not "objective" or not "even-handed"". In its First Written Submission, China has, however, explained and provided supporting evidence as to why the price undercutting calculations made by the EU investigating authorities were not unbiased and even-handed.

25. China makes two claims in connection with the **examination by the EU investigating authorities of the volume of dumped imports**. China claims that the EU violated its obligations under **Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement** first because the EU included in the volume of "dumped imports" imports from Chinese producers that were found not to be dumping and second, because it included in the volume of dumped imports all imports from non-sampled producers. With respect to the first claim, the EU argues that no violation can be found in view of the low percentage of the imports originating from the two Chinese exporting producers that were found not to be dumping. The examination of the volume of "dumped imports" which does not exclude outright the volume of imports from producers which were found not to be dumping is, however, contrary to the direct and clear text of Articles 3.1 and 3.2 of the AD Agreement. As to the second claim, the conclusion that two non-sampled producers which were individually examined in accordance with Article 6.10.2 were found not to be dumping constitutes "positive evidence" within the meaning of Article 3.1 of the AD Agreement. To the extent that such information has been ignored by the EU investigation authorities when determining the volume of dumped imports, their determination that all imports from all non-individually examined producers are "dumped imports" is not based on "positive evidence". As a consequence of these violations of Articles 3.1 and 3.2, the EU also violated Articles 3.4 and 3.5 of the AD Agreement.

26. China also demonstrated that the EU failed to make an **injury determination** consistent with its obligations under **Articles 3.1 and 3.4 of the AD Agreement**. First, the EU failed to examine the injury factors in relation to a Community industry defined in a consistent manner. Certain injury factors were examined on the basis of the data of the Community industry as a whole, whereas other factors were examined on the basis of the data of the sampled producers only. China strongly disagrees with the EU's view that both data sets "are essentially the same and both are interchangeable bases for examining injury to the domestic industry". Furthermore, in the investigation that led to the measure at issue, evidence shows that the analysis of certain injury factors with respect to the domestic industry or the sampled producers leads to different results, thereby demonstrating the biased nature of the examination carried out by the investigating authorities.

27. Second, China submits that, on the basis of the evidence gathered, the EU could not objectively conclude that the level of profitability was "low" and that the dumped imports had a "negative impact on profitability".

28. Third, the EU's overall analysis of the impact of dumped imports on the domestic industry is not objective and not based on positive evidence. The EU improperly concluded that the domestic industry suffered injury since an examination of the relevant factors pursuant to Article 3.4 of the AD Agreement shows a positive state of the domestic industry. The overall examination of the injury factors could not have led to a finding that material injury had been suffered by the domestic industry. Indeed, almost all factors regarding the situation of the EU industry showed a favorable trend between 2003 and the IP. The EU's statement that several factors are to be considered as negative developments is manifestly incorrect and contradicted by its own findings. The sole factor possibly showing a negative trend was a loss of market share in a rapidly growing market. A finding of material injury, however, cannot solely be based on one negative factor. Having found that all factors showed a positive trend over the period concerned, the EU should have concluded that the EU industry had not suffered material injury. Furthermore, there is no thorough and persuasive explanation as to whether and how the positive trends of most injury factors were outweighed by any negative factor. Finally, the EU authorities failed to provide a persuasive explanation as to how or why the trends for market share, sales volume, profitability, cash flow, return on investments, margins of dumping and capacity utilization, effectively constitute "negative developments".

29. Fourth, the EU improperly considered the displacement of EU products by imports from China in some market segments as being relevant. The injury analysis is premised on the distinction between the two market segments of special and standard fasteners. For all injury factors which showed a positive trend, the EU investigating authorities claimed that they should not be regarded as "positive" since this "positive" aspect was merely due to the shift from standard to special fasteners which merely attenuated the alleged injurious consequences of dumping. As a result, the injury analysis is *de facto* exclusively based on the standard fastener market segment and is, therefore, inconsistent with Articles 3.1 and 3.4 of the AD Agreement.

30. China further submits that the EU violated **Articles 3.1 and 3.5 of the AD Agreement** in concluding that dumped imports **caused** material injury to the domestic industry, for two main reasons. First, the EU failed to demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry. This includes two sets of arguments. The first argument is that a causal link cannot be demonstrated on the sole basis of a mere "coincidence" in time between the alleged injury and the increase in the volume of alleged dumped imports. The second argument is that a finding of a causal relationship between dumped imports and injury must necessarily be based on positive evidence. The EU did not produce any evidence showing that the shift by the domestic industry towards the production of special fasteners was due to the dumped imports. There is, therefore, no basis for the investigating authorities to conclude that dumped imports have caused injury to the domestic industry.

31. Second, the EU failed to properly assess the injurious effects of other known factors, more in particular, the increase in raw material prices and the export performance of the Community industry. The non-attribution test as developed in the WTO case law requires an identification of the nature and extent of the injurious effects as well as 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. The latter explanation must be clear and unambiguous and the reason provided cannot be a mere "assertion". However, the EU's analysis of the "increase in raw material prices" does not meet this requirement. With respect to the export performance, China's main claim is that, on the basis of the facts on the record, the investigating authorities could not come to the conclusion that the export performance of the domestic industry was not a source of material injury. The EU thus violated Articles 3.1 and 3.5 of the AD Agreement by considering this factor as not causing injury and, therefore, by failing to conduct the non-attribution test. In addition, the EU violated Articles 3.1 and 3.5 of the AD Agreement by using the data concerning all producers in the Community while the injury determination was made with respect to the domestic industry as defined by the EU.

32. China's last claim relates to the violation by the EU of the **procedural requirements imposed by Articles 6 and 12 of the AD Agreement**. The fundamental lack of transparency permeating all stages of the investigation has prevented Chinese exporting producers from effectively defending their interests. The breach of their due process rights is so substantial that it should lead this Panel to recommend that the measure be withdrawn. The EU tries to dismiss China's claims on the basis of a number of procedural tactics, i.e. by claiming that China did not submit any evidence or that the evidence is not relevant, that the claims and arguments are presented in a confusing way or for other obscure reasons. The EU, however, does not present any valid evidence that could rebut China's *prima facie* case on the substance. At the outset, it is necessary to make some general comments. In China's view, the obligation set out in the first sentence of Article 6.2 is so broad that a finding of violation of Article 6.4 necessarily entails a violation of Article 6.2 first sentence. Furthermore, contrary to what the EU seems to consider, a complaining party may claim the violation of different obligations, in this case Articles 6.4 and 6.9, with respect to the same set of facts. Moreover, the EU intends to create confusion between, on the one hand, the claims made by China and, on the other hand, the arguments and evidence submitted to support such claims. As evidence to support its claims under Article 6.4, China has referred to the Definitive Regulation, as well as to the Disclosure Documents and the correspondence between certain Chinese exporting producers and the EU investigating authorities. When China refers to the Disclosure Documents and/or the Definitive Regulation as part of the evidence concerning its claim under Article 6.4, China is not claiming that these documents do not contain the essential facts as required under Article 6.9. In fact, the EU is forced to rewrite China's claims and arguments in order to be able to rebut them.

33. China demonstrated the following due process violations by the EU: (i) the EU failed to disclose the identity of the complainants, thereby violating Articles 6.5, 6.2 and 6.4 of the AD Agreement; (ii) the EU failed to disclose information concerning the normal value determination including product types and the comparison with export prices including any adjustments for differences affecting price comparability thereby violating Articles 6.5, 6.2, 6.4 and 6.9; (iii) the EU violated Articles 6.5, 6.2 and 6.4 since the non-confidential versions of the Community producers' questionnaire responses and the questionnaire response of the producer in the analogue country were largely deficient; (iv) the EU violated Article 6.5, 6.2 and 6.4 by failing to make Eurostat data available in the non-confidential file and by failing to provide an explanation as to how the estimation of the production in the EU had been made; (v) the EU violated Articles 6.2, 6.5 and 6.9 through its findings on the domestic industry; (vi) the EU violated Article 12.2.2 by failing to state all relevant information concerning its IT determinations; (vii) the EU violated Article 6.5 by disclosing a document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC"; (viii) the EU violated Article 6.1.1 of the AD Agreement by limiting the time period for the submission of MET and/or IT questionnaire responses to 15 days as of the date of publication of the Notice of Initiation.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union takes issue with China's attempt to disregard the numerous and precise arguments raised by the European Union under Articles 4.2, 4.3, 4.5, 4.7, 6.2, 7.1 and 11 of the *DSU*. As a matter of fact, the European Union's First Written Submission has addressed *all* the claims raised by China in its Panel Request and its First Written Submission, going even beyond in many aspects of what was required, due to the lack of both factual evidence and clarity of the legal arguments made by China. Pursuant to Article 11 of the *DSU*, the European Union requests the Panel to examine whether China has complied with the fundamental rules contained in the *DSU* when making its claims in the present dispute.

II. CHINA'S "AS SUCH" CLAIM AGAINST ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96, AS AMENDED

A. PANEL'S TERMS OF REFERENCE

2. 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 Anti-Dumping Agreement and Article X:3(a) of the GATT 1994. The European Union disagrees with China's views on Article 6.2 of the DSU. Article 6.2 of the DSU thus does not require that the brief summary of the legal basis of the complaint amounts to an "argument" (something which is developed at a later stage in the course of the panel proceedings); however, it requires that the brief summary of the legal basis of the complaint explains how and why the measure at issue violates the WTO obligation in question in a sufficient manner to present the problem clearly. Put simply, if a panel request identifies a measure in a precise manner but then includes legal claims which do not directly pertain to the operation of the measure, the respondent Member is left wondering how that measure can be the source of the alleged impairment.

3. In its Panel Request, China challenged a precise measure (i.e., Article 9(5) of Council Regulation No 384/96, as amended) as being "as such" inconsistent with certain provisions of the Anti-Dumping Agreement and the GATT 1994. In view of the "as such" nature of China's claim and the requirement that the complaining Member has to state unambiguously the specific measures which are subject to "as such" claims, the European Union was puzzled when reading in China's Panel Request as well as its First Written Submission that the brief summary of the legal claims related to other issues (such as the calculation or determination of dumping margins, the level of anti-dumping duties, and the imposition of anti-dumping duties in a specific context such as sampling) which are not addressed by the specific measure at hand. In any event, the European Union considers that, in view of the "as such" nature of China's claim, any disagreement between the parties on the scope of the measure at issue should be resolved by examining the text of Article 9(5) of Council Regulation No 384/96. The text of Article 9(5) of Council Regulation No 384/96 leaves no doubt that the issue contained in that provision refers to the imposition of anti-dumping duties. When Article 9(5) of Council Regulation No 384/96 is seen in the context of its other provisions, the same conclusion is reached about its meaning and content. In any event, the European Union has also explained in its First Written Submission how Article 9(5) of Council Regulation No 384/96 operates in practice.

Consequently, the measure at issue identified by China in its "as such" claim the Panel is requested to examine is Article 9(5) of Council Regulation No 384/96, on its face, and not everything which may derive from the determination provided for by that provision, or anything under the other provisions of the same regulation that may sequentially come after the Article 9(5) determination during the investigation.

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 European Union submits that the Panel should refrain from examining China's claims under Articles 6.10, 9.2, 9.3 and 9.4 of the Anti-Dumping Agreement 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 Council Regulation No 384/96) does not fall within the scope of the obligations contained in the provisions of the covered agreements invoked by China.

5. The European Union also requests the Panel to refrain from examining measures and issues outside its terms of reference in relation to China's "as such" claim, including Article 9(5) of Council Regulation No 1225/2009, any matters pertaining to the calculation or individual determination of dumping margins, or any other matters raised by China in its First Written Submission or in any other subsequent submission which is different from the one specifically identified by China in its Panel Request (i.e., Article 9(5) of Council Regulation No 384/96, insofar as it provides for 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).

B. ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS SUCH" IS IN CONFORMITY WITH THE PROVISIONS INVOKED BY CHINA

6. For the reasons mentioned in our First Written Submission, the European Union maintains that Article 9(5) of Council Regulation No 384/96 is as such consistent with the provisions invoked by China. In particular, the European Union will address China's claim under Article 9.2 of the Anti-Dumping Agreement, by examining that provision and referring to Article 6.10, where relevant, as context to address the relationship between these two provisions, and to China's Protocol of Accession. The European Union will also briefly address China's claim under Article I:1 of the GATT 1994.

1. Claim under Article 9.2 of the Anti-Dumping Agreement

7. China's understanding of Articles 6.10 and 9.2 of the Anti-Dumping Agreement is flawed on numerous grounds. First, Article 6.10 does not contain a strict rule requiring investigating authorities to always determine dumping margins on an individual basis.; rather, that provision contains a preference for determining individual dumping margins and then refers to one affirmative situation (i.e., sampling) where such a preference "may" not be followed. 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 individual basis. The second sentence of Article 6.10 on sampling is simply an affirmative statement relating to (i) the conditions for sampling and (ii) the composition of the sample. There is no direct link between the general principle of the first sentence and the possibility of sampling in the second sentence. These two sentences are simply two affirmative statements of what an authority ought to do in general (individual margin determination), and what it is allowed to do (sampling). 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. Investigating authorities are allowed to determine one dumping margin for related companies as a whole. Article 6.10, first sentence, would require the identification of the actual exporters/producers in an investigation as a condition precedent to the determination of the dumping margin. Once the single producer has been identified, investigating authorities would be able to impose anti-dumping duties on the basis of that identification. Fourth, Article 9.2 does not contain a strict rule to impose anti-dumping duties on individual basis; rather Article 9.2 expressly allows for the imposition of anti-dumping duties on a country-wide basis. This is also the consequence of the preference or guiding principle contained in Article 6.10, first sentence. Fifth, even if Article 9.2 could be read as requiring the imposition of anti-dumping duties on an individual basis, its third sentence provides for exceptions to that obligation (other than sampling) when it is "impracticable" to do so. Even by its own admission, China concedes that such situation arises not only in cases where sampling is used but also in other situations, such as when certain suppliers are not known. The fact that anti-dumping duties do not need to be imposed on individual basis in other situations (e.g., non-cooperating suppliers) mirrors the fact that there are more situations (other than sampling) where the investigating authorities can depart from the general rule contained in Article 6.10, first sentence. In sum, the European Union considers that Article 9.2, when interpreted by using Article 6.10 as a context, does not support China's claim that there is a strict obligation to impose anti-dumping duties on an individual basis, with the only exception of the sampling situation. Indeed, Article 6.10 allows investigating authorities to depart from the general rule to determine dumping margins on an individual basis in other situations than in the sampling scenario. Likewise, Article 9.2 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.

8. Following the rationale of Article 9.2 of the Anti-Dumping Agreement, Article 9(5) of Council Regulation No 384/96 contains certain criteria to assess when it is impracticable to impose anti-dumping duties on an individual basis in the case of imports from non-market economy countries. These criteria serve to identify whether the applicant company is related to the State, i.e., the actual supplier, or is an independent, non-related supplier. If the applicant company is considered as a supplier acting independently from the State, that IT supplier is considered an independent exporter or producer and the source of the alleged price discrimination. Then, an individual anti-dumping duty will be specified for that IT supplier in the provisional and/or definitive measure. In contrast, if the applicant company is considered as a supplier not acting independently from the State, that non-IT supplier is not considered a genuine exporter or producer, but related to State (which is ultimately the actual producer and the source of the alleged price discrimination). Then, that non-IT supplier will be subject to the country-wide duty rate. If the supplier is not acting independently of the State, there is also a risk that the actual producer of the product concerned (i.e., China) would 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.

9. The European Union also disagrees with China's contention that Article 9.2 requires the imposition of anti-dumping duties on an individual basis since this provision refers to the collection of anti-dumping duties in the "appropriate amounts (…) from all sources found to be dumped and causing injury". The European Union also disagrees with China's argument that the term "impracticable" in the third sentence of Article 9.2 refers to something which is "not feasible in practice", rather than "ineffective" and covers only situations in which the specific action (i.e., of naming the suppliers and determining the duties applicable to them) is not feasible for practical reasons.

10. China argues that the European Union has separate rules to deal with the issue of related companies and that Article 9(5) of Council Regulation No 384/96 applies in addition to them. The European Union considers that the application of rules to consider related companies or companies

belonging to the same group as one single entity either before or after or in addition to Article 9(5) of Council Regulation No 384/96 is irrelevant in the present dispute.

11. The European Union also considers that the relationship between non-IT suppliers and the State is similar to that addressed by the panel in *Korea – Certain Paper*. In that case, the reasoning of the panel sought to identify the actual source of price discrimination and thus determine an individual dumping margin for the actual supplier reflecting its real economic structure, duly delineated in legal and factual terms. In order to do so, the panel examined the close relationship of three companies and concluded that they were related in view of the fact that (i) one company owned a majority of shares of the three companies and thus had a considerably controlling power over the operations of its three subsidiaries; (ii) there was a significant commonality with respect to the management of the three companies, where most of the directors of each company were present as directors of the other companies; (iii) the three companies concerned had the ability to shift products among themselves to harmonise their commercial activities to fulfil common corporate objectives; and (iv) the three companies made almost all their domestic sales through one company. Similarly, the criteria under Article 9(5) of Council Regulation No 384/96 examine whether the Chinese suppliers act sufficiently independently from the State by examining, inter alia, that (i) the majority of the shares belong to private persons, and not to the State; that (ii) State officials appearing on the board of Directors or holding key management positions are in minority; that (iii) export prices and quantities, and conditions and terms of sale are freely determined, rather than directed or controlled by the State; and that (iv) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty. In this sense, the criteria contained in Article 9(5) of Council Regulation No 384/96 aim at examining whether the applicant companies are related through the State. Thus, like in *Korea – Certain Paper*, the reasoning behind these criteria is to identify the actual source of price discrimination, the single supplier of the product concerned. Only by doing so, the anti-dumping duty imposed will address the actual source of price discrimination effectively.

12. Moreover, the European Union observes that the notion of whether producers are "related" appears in Article 4.1(i) of the Anti-Dumping Agreement and thus may serve as context to interpret this implicit notion in Article 6.10.

13. Finally, the European Union considers that China's Protocol of Accession cannot be read in such a narrow manner. The term "domestic" in Paragraph 15(a) of China's Protocol of Accession seems to address the fact that domestic prices in China are significantly distorted due to State intervention in the economy. However, the term "market economy conditions" also encompasses 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. This is the case of China. Likewise, the term "sale" also includes "export" sales. Thus, the terms "market economy conditions" in Paragraph 15(i) and (ii) of China's Protocol of Accession would appear to allow investigating authorities to have recourse to "a methodology that is not based on a strict comparison with domestic prices or costs in China (…) in determining price comparability under Article VI of the GATT 1994 and the Anti Dumping Agreement". A methodology which considers the State as the actual producer of the product concerned and uses information available to compare export prices of the actual producer with an analogue country normal value is also "a methodology that is not based of a strict comparison with domestic prices or costs in China".

2. Claim under Article I:1 of the GATT 1994

14. The European Union notes that China's argument is based on the presumption that the Anti-Dumping Agreement 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) of Council Regulation No 384/96 violates certain provisions of the Anti-Dumping Agreement) 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 Anti-Dumping Agreement which allow WTO Members to treat non-market economy countries differently.

III. CLAIM 1: ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS APPLIED" IN COUNCIL REGULATION NO 91/2009 (ARTICLES 6.10, 9.2 AND 9.4 OF THE *ANTI-DUMPING AGREEMENT*)

15. The European Union observes China has not raised any additional arguments in connection with this claim. Thus, the European Union requests the Panel to reject China's claim that Council Regulation No 91/2009 is inconsistent with Articles 6.10, 9.2 and 9.4 of the Anti-Dumping Agreement.

IV. CLAIM 2: STANDING OF THE EU DOMESTIC INDUSTRY FOR THE PURPOSES OF INITIATION (ARTICLE 5.4 OF THE *ANTI-DUMPING AGREEMENT*)

16. The European Union observes China has not raised any additional arguments in connection with this claim. In fact, by implication, it would appear that China acknowledges that the standing determination was properly made. Thus, the European Union respectfully requests the Panel to reject China's claims.

V. CLAIM 3: DETERMINATION OF "DOMESTIC INDUSTRY" (ARTICLES 4.1 AND 3.1 OF THE *ANTI-DUMPING AGREEMENT*)

17. China claims that the EU's determination of "domestic industry" violated Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*. In particular, China presents five sets of claims against the EU's determination of the domestic industry. In its first written submission, the EU explained why all five of these claims are to be rejected. In its oral statement, China has failed to rebut any of the EU's arguments. The EU therefore refers to the arguments presented in its first written submission.

18. The EU clarifies that the EU authorities did not exclude any domestic producers but simply defined the domestic industry based on all those producers which made themselves known within 15 days following initiation and which expressed a willingness to cooperate. China has acknowledged that it is permissible to use reasonable deadlines to determine the scope of the domestic industry. China has failed to even attempt to demonstrate that this deadline was not reasonable. The use of this deadline for purposes of defining the domestic industry was an entirely reasonable and objective way of grouping all cooperative domestic producers, and was thus a method which did not "favour either side".

19. Article 4.1 does not require an authority to include producers that indicate from the outset that they are not going to cooperate. The EU's approach is an entirely reasonable approach which is consistent with the discretion that is given to authorities by Article 4.1 and the lack of a hierarchy of preference in this provision.

20. In respect of the question whether 27% of production is a "major proportion", China accepted in the course of the oral hearing that "a major proportion" could be much less than 100%, and even less than 25 % depending on the circumstances of the case. Given this acknowledgement it is all the more revealing that China has still failed to demonstrate why 27 % is not an important, significant or serious proportion in the particular circumstances of this case, even though this is what the panel in *Argentina – Poultry Anti-Dumping Duties* considered it was required to do in order to demonstrate a violation of Article 4.1. The only two particular "circumstances" that China refers to are either completely irrelevant such as the number of producers or simply a different packaging of the erroneous argument made in its first written submission that the term "a major proportion" has to be

as close as practically possible to 100%. Neither explains why 27% of production is not an important part of production.

21. China did not even attempt to re-but the EU's arguments in respect of the lack of merit of China's claims in respect of the time period for the determination of the major proportion requirement, the representativeness of the sampled producers when compared to total production or the need to exclude related producers.

22. In sum, the EU reiterates its request that the Panel reject all of China' claims under Articles 3.1 and 4.1 of the *Anti-Dumping Agreement* in respect of the EU's definition of the domestic industry.

VI. CLAIM 4: SELECTION OF THE PRODUCT CONCERNED (ARTICLES 2.1 AND 2.6 OF THE *ANTI-DUMPING AGREEMENT*)

23. The European Union observes China has not raised any additional arguments in connection with this claim. Thus, the European Union requests the Panel to reject China's claim that Council Regulation No 91/2009 is inconsistent with Articles 2.1 and 2.6 of the Anti-Dumping Agreement.

VII. CLAIM 5: DETERMINATION OF DUMPING (ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

24. China alleges that the EU failed to make a fair comparison as required by Article 2.4 of the AD Agreement between normal value and export price because the authority did not base this comparison on the full Product Control Number ("PCN"). In the first written submission, the European Union explained why China's claims based on the alleged failure to use the full PCN are in error and should be rejected by the Panel. China did not address any of these arguments in its oral statement. The EU therefore reiterates its view that China has failed to establish a prima facie case of violation.

25. In the absence of any prescribed methodology and taking into consideration the fact that comparisons were made between normal value and export price between products based on the two main drivers that the exporters themselves considered to be affecting price comparability, it is clear that China has failed to demonstrate that the comparison that was made was not a "fair comparison" as required by Article 2.4.

26. China's argument raised in the course of the hearing that it did not know what the difference was between special and standard fasteners, and that this lack of transparency hindered the defence of the Chinese exporters' interests at the time of the investigation and of China in the current proceedings is clearly contradicted by the facts on the record.

27. In sum, China failed to demonstrate that the authority violated its obligations under Article 2.4 of the *Anti-Dumping Agreement.*

VIII. CLAIM 6: PRICE UNDERCUTTING ANALYSIS (ARTICLES 3.1 AND 3.2 OF THE *ANTI-DUMPING AGREEMENT*)

28. China argues that the EU violated Articles 3.1 and 3.2 of the AD Agreement since the authority allegedly failed to make a price undercutting analysis on the basis of the full PCN. In the first written submission the EU explained the reasons why China's claim is to be rejected. Once again, none of the EU's arguments were addressed in China's opening oral statement. In addition, and as clarified in response to a number of the Panel's questions, China cannot seriously argue that it was not aware of how the product groups were constituted or what the methodology was that was followed

for the price undercutting analysis. China's own exhibit CHN-50 which is an example of a disclosure document sent to the Chinese producers clearly explains it all in great detail. Three weeks were given to exporters to comment on this approach. No comments challenging the reasonableness of the methodology of the price undercutting comparison were received. China has failed to provide any evidence to show that the price undercutting analysis was not conducted in an objective manner given the broad discretionary power given to authorities under Article 3.2 in this respect.

29. In sum, China's claims under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* in respect of the price undercutting analysis are to be rejected.

IX. CLAIM 7: EXAMINATION OF THE VOLUME OF DUMPED IMPORTS (ARTICLES 3.1, 3,2, 3.4 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

30. China argues that the EU violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 because the authority failed to exclude the volume of two exporters that were found not to be dumping from its volume analysis under Article 3.2 and because the authority assumed for the purposes of that same volume analysis that all non-examined exporters were dumping. For the reasons explained in its first written submission, the EU requests the Panel to reject China's claim in this respect. China did not even attempt to rebut the EU's arguments at the time of the first substantive meeting with the Panel.

31. The European Union requests the Panel not to approach this matter in a mechanistic fashion. The Appellate Body has warned against such a mechanistic approach on many occasions, thus calling for a substantive over a formalistic approach. It is not so that any inclusion of non-dumped imports would necessarily, and ipso facto constitute a violation of Articles 3.1 and 3.2. A violation will exist only if the failure to do so jeopardizes the objectivity of the examination. As explained before, as well as in our First Written Submission, such was not the case in respect of the fasteners investigation.

32. Furthermore, the facts on the record show that in the fasteners case, all sampled producers were found to be dumping. Indeed, in the fastener case, 100% of the sampled producers representing 61% of exports from the cooperating companies and 39% of total exports from the People's Republic of China were all found to be dumping. Clearly the authority's extrapolation of dumping in respect of the non-sampled exporters on this basis was not in error.

33. China's claims under Articles, 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* are therefore to be rejected.

X. CLAIM 8: IMPACT OF DUMPED IMPORTS ON DOMESTIC PRODUCERS (ARTICLES 3.1 AND 3.4 OF THE *ANTI-DUMPING AGREEMENT*)

34. China argues that the EU violated its obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* to objectively examine the impact of the dumped imports on the situation of the domestic industry. China presents four equally flawed arguments in this respect. In the first written submission, it was clearly demonstrated why all four are in error. China failed to even attempt to rebut these arguments in its oral statement.

35. It is recalled that China's claim lacks merit since the record clearly shows that the EU authorities *did* consistently use data relating only to the *same domestic industry*. WTO case law confirms that China is wrong to suggest that the mere fact that the EU authorities examined certain factors on the basis of data relating to a representative sample of the domestic industry while other factors were examined based on data relating to all producers that are part of the domestic industry vitiated the objectivity of the analysis.

36. China's claim in respect of the treatment of the factor profitability is based on an incorrect understanding of the reasonable and nuanced explanation provided by the EU authorities. Moreover, in the first written submission, the European Union explained at length that it is simply not so that market share was the "sole factor possibly showing a negative trend", as erroneously argued by China. It is certainly not so that the EU authorities concluded that injury existed "after having found that all factors showed a positive trend over the period concerned", as China wants the Panel to believe. Nor, of course is it factually correct to argue, as does China in its Closing Oral Statement, that the injury determination was based "solely on a loss of potential sales". The EU authorities made an objective determination of the facts in respect of all of these important factors, and provided a reasonable and reasoned analysis of how these facts support a determination of injury to the domestic industry. China's argument in respect of market displacement is also simply factually incorrect since the EU authorities did not make a finding of market displacement, but related its injury finding to fasteners as a whole.

37. In view of the foregoing, the European Union requests the Panel to reject China's claim that Council Regulation No 91/2009 violates Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

XI. CLAIM 9: CAUSATION AND NON-ATTRIBUTION ANALYSIS ARTICLES 3.1 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

38. China claims that the EU's causation and non-attribution analysis violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. For the reasons explained in the first written submission, China's claim is without merit. Once again, in the oral statement China completely failed to address let alone rebut any of the EU's arguments in respect of the causation and non-attribution analysis.

39. It is recalled that China's causation-related argument unduly limits the injury to a loss of market share and is contradicted by the facts on the record. China's allegation that the authority did not adequately distinguish the effects of other factors such as the increase in raw material prices and the export performance of the EU industry is equally unsubstantiated. It is clear from the record that export performance was not a factor of injury and that the authority examined the role of the increase in raw material prices but found that there did not exist a similar direct link between the increase in raw material prices and the loss of market share as was found to exist in respect of the dumped imports. China's claims under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* relating to the authority's non-attribution analysis are thus to be rejected.

XII. CLAIM 10: CHINA'S PROCEDURAL CLAIMS UNDER ARTICLES 6 AND 12 OF THE *ANTI-DUMPING AGREEMENT*

40. Rather than clarifying its position on its procedural claims under Articles 6 and 123 of the *Anti-Dumping Agreement*, China preferred to add to the confusion in its first oral statement. Not a single serious argument was advanced on the procedural claims, no evidence was provided. Instead, a new 14th claim seemed to be in the making when China asserted that "no information was given on how price undercutting was calculated". However, it is wholly unclear on what basis this claim is made. In these circumstances the European Union is not in a position to defend itself in the face of speculation and mere assertions. It is simply not acceptable to accuse the European Union of "obscure reasons" when China continuously and repeatedly fails to respect the most basic rules of dispute settlement procedures. The "matter" before the Panel is not a continuously moving target. It is fixed in the Panel request in which the complainant has to ***present the problem clearly***.

XIII. CONCLUSION

41. In view of the foregoing, the European Union requests the Panel to reject all of China's claims and arguments, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the *Anti-Dumping Agreement*, the *GATT 1994* and the *WTO Agreement*.

ANNEX F

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

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

I. CLAIMS CONCERNING ARTICLE 9(5) OF COUNCIL REGULATION (EC) No. 384/96 OF 22 DECEMBER 1995 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EC, AS CODIFIED AND REPLACED BY COUNCIL REGULATION (EC) No. 1225/2009

1. Procedural arguments raised by the EU

1. The EU's first procedural claim, namely that the Panel Request failed to meet the Article 6.2 requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the AD Agreement and Article X:3(a) of the GATT 1994, confuses the requirements of Article 6.2 which are merely *procedural* with the analysis of the content of the measure at issue which is *substantive*. The same comment applies to the EU's second procedural objection, namely that China sought to incorporate issues dealing with the calculation and determination of individual margins within the scope of the measure at issue while these issues are not covered Article 9(5) of the Basic AD Regulation which is the measure identified in the Panel Request.

2. The EU's third procedural argument, namely that the Panel should refrain from examining Article 9(5) of Council Regulation No. 1225/2009 since this measure is outside the Panel's terms of reference, should be rejected for at least two reasons. First, if China's Panel Request covers the amendments to Council Regulation (EC) No. 384/96, it *a fortiori* and necessarily covers a subsequent measure which merely codifies Council Regulation No. 384/96 as amended into one consolidated text. Second, since Article 9(5) of Council Regulation (EC) No 384/96 as amended is identical in its content to Article 9(5) of Council Regulation (EC) No. 1225/2009, the latter is necessarily within the Panel's terms of reference since both measures are "in essence" the same.

2. Substantive Issues

a) The "scope" or "content" of Article 9(5) of the Basic AD Regulation

3. The EU claims that the only issue which results from [Article 9(5)] is, *strictu senso*, the imposition of anti-dumping duties on a country-wide basis or on an individual basis and that Article 9(5) does not deal with the issue of the calculation or determination of individual dumping margins. Such a restrictive interpretation of the scope of Article 9(5) is manifestly unjustified in particular when Article 9(5) of the Basic AD Regulation is seen in the context of the other provisions of the Basic AD Regulation. **None** of the provisions quoted by the EU, namely Articles 2, 9(4) and 9(6) of the Basic AD Regulation, deals with the specific issue of whether the dumping margin for exporting producers from non-market economy countries is to be determined on an individual or a country-wide basis. Why? Because this issue is directly dealt with by Article 9(5) of the Basic AD Regulation. This is in fact acknowledged by the EU itself when stating that "[T]he EU authorities do not calculate individual dumping margins for non-IT suppliers".

4. Finally, the EU erroneously submits that "[w]hat China pretends […] is that *any consequences* from the determination provided by Article 9(5) of Council Regulation No 384/96 should be included in the measure at issue". The EU appears to submit that the measure at issue could only be challenged with respect to one single provision of the AD Agreement. A measure, even "as

such", may be found to violate several distinct provisions of the AD Agreement. China is not challenging issues which are not covered by Article 9(5) of the Basic AD Regulation.

b) Articles 6.10, 9.2 and 9.4 and China's Protocol of Accession

5. The EU claims that **Article 6.10** first sentence does not contain a strict obligation requiring investigating authorities to always determine dumping margins on an individual basis but merely a "preference" that, by definition (since it is not an obligation), investigating authorities may disregard, whenever they wish. The EU further claims that Article 6.10 second sentence is not an exception to the rule included in Article 6.10 first sentence but merely includes an "affirmative statement relating to (i) the conditions for sampling and (ii) the composition of the sample". The EU's interpretation is manifestly flawed: it is contrary to the text of Article 6.10, its structure and context as well as its negotiating history.

6. The EU bases its view that Article 6.10 first sentence only contains a preference on the words "as a rule". The EU, however, manifestly ignores the word "shall" which clearly establishes the mandatory nature of the rule. The terms "as a rule" rather than relaxing the obligation of the first sentence further strengthens such obligation. The words "as a rule" are necessary as they create the link between the obligation contained in Article 6.10 first sentence which constitutes the rule and the exception to that rule included in Article 6.10 second sentence.

7. The EU argues that the negotiating history of Article 6.10 confirms its reading of the first sentence. A close examination of the evolution of the texts in the successive drafts, however, clearly shows the firm intention of the drafters to establish a strict obligation for the investigating authorities to determine an individual dumping margin since even in those cases where sampling is used, such an individual dumping margin shall be determined for those companies not included in the sample which provide the necessary information in time except only "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".

8. The EU's interpretation is also contrary to the structure of Article 6.10. That the sampling scenario of the second sentence constitutes the exception to the rule included in Article 6.10 first sentence is obvious. Article 6.10 second sentence refers to cases where the number of exporters, producers, importers or types of products involved is so large as to make impracticable "***such a determination"*** – that is the "***determination***" of an individual margin of dumping for "each known exporter or producer concerned" pursuant to Article 6.10 first sentence. Moreover, even in those cases where sampling is used, Article 6.10.2 requires investigating authorities to determine ***an individual margin of dumping*** for those exporters or producers not included in the sample but which submit the necessary information in time. Thus, and as confirmed by panels and the Appellate Body in various disputes, Article 6.10 is structured in the manner of a rule / only exception.

9. In support of its argument, the EU provides several examples allegedly presenting cases in which "the preference for the individual determination of dumping margins does not need to be followed". None of them is, however, relevant. The examples provided by the EU merely reflect its own practice and cannot as such legitimize the EU's interpretation. Furthermore, the legality of the EU's practice appears to be dubious.

10. Furthermore, the WTO case-law to which the EU refers, namely *Korea – Certain Paper* and *EC – Salmon (Norway)* does not support the EU's contention that there are situations other than sampling where Article 6.10 first sentence does not need to be followed. These Panel Reports merely clarify the meaning of the term "exporter" and "producer" in Article 6.10 first sentence.

11. Finally, contrary to what the EU submits, Article 9.2 does not support the view that there are exceptions to the rule that dumping margins must be determined on an individual basis other than the

sampling scenario. By limiting the exception to the imposition of an individual anti-dumping duty to those situations where it is impracticable to do so, Article 9.2 supports the view that the rule in Article 6.10 first sentence is a general obligation having as its sole exception the one set out in Article 6.10 second sentence.

12. Regarding the application of the reasoning followed by the Panel in *Korea – Certain Paper* to Article 9(5) of the Basic AD regulation, it must be pointed out, at the outset, that the *Korea – Certain Paper* case is entirely irrelevant in the context of the present dispute. Indeed, the issues examined in *Korea – Certain Paper* and in the present dispute are fundamentally different in nature. The most fundamental difference is that while *Korea – Certain Paper* deals with the issue of whether different entities are in a relationship that is close enough to be treated as a single "exporter" or "producer" within the meaning of Article 6.10 first sentence, the Article 9(5) test focuses on the relationship of each identified exporter or producer with the State. The different nature of the two tests is also demonstrated by the fact that they are applied sequentially by the EU in its anti-dumping investigations.

13. Even if the Panel were to consider the Panel Report in *Korea – Certain Paper* as relevant, it is obvious that there is no similarity between the facts in *Korea – Certain Paper* and the Article 9(5) test.

14. Finally, it is very important to correct the misleading presentation by the EU of how the country-wide dumping margin is determined for non-IT exporting producers. Contrary to what the EU claims, the methodology applied by the EU to determine the *country-wide* dumping margin in the case of imports from non-market economy countries is fundamentally different from that applied by the EU to determine the dumping margin in the case of a group of related companies. In the case of non-IT exporting producers, the EU does not merely examine the information provided by each of them. Instead, it considers that all co-operating non IT-exporting producers must be treated together and even assume that all exporting producers which do not co-operate are equally non-IT exporting producers. The investigating authorities only base the dumping margin on the information provided by the co-operating non-IT exporting producers if the latter represent more than 80% of all exports not accounted for by MET or IT suppliers. This is a very high threshold which is not met in most cases.

15. Regarding **Article 9.2**, the arguments put forward by the EU must be rejected. The meaning of the term "impracticable" put forward by the EU as "ineffective, not feasible or not suited for being used for a particular purpose" is not consistent with the ordinary meaning of that term. Furthermore, Article 8.3 of the AD Agreement supports China's position.

16. The EU repeatedly refers to the alleged need to identify "the actual source of the price discrimination" as a justification for imposing a country-wide duty in the case of imports from a non-market economy country. The EU, however, fails to explain or define this vague concept. China notes that this concept does not have any legal basis and that it cannot be found in either Article VI of GATT 1994 or in the AD Agreement. As underlined by the Appellate Body, the "notion of dumping […] relates to the foreign producer's or exporter's pricing behaviour". Thus, under the AD Agreement, only producers or exporters which are found to be dumping can be the "actual source of the price discrimination".

17. China would also like to briefly address **Article 9.4** of the AD Agreement. In the context of Article 9.4, if even producers not included in the sample must receive an individual anti-dumping duty, it logically follows that producers in the sample are also entitled to receive such an individual anti-dumping duty. This *a fortiori* applies to cases where no sampling is used. Thus, this rule, either directly in cases where sampling is used or as relevant "context" when interpreting Article 9.2, confirms that the authorities must apply individual anti-dumping duties for exporters or producers.

18. Regarding China's **Protocol of Accession**, the EU claims that China's recognition by a large number of WTO Members as a full market economy country is a "concession" made by other parties in the framework of bilateral negotiations "precisely because China is not yet a market economy country". This is clearly a distorting reading of the facts. That many WTO Members have acknowledged that China is a market economy country simply confirms that there is no common "understanding that China is not yet a market economy country".

II. CLAIMS CONCERNING COUNCIL REGULATION (EC) No 91/2009 OF 26 JANUARY 2009 IMPOSING A DEFINITIVE ANTI-DUMPING DUTY ON IMPORTS OF CERTAIN IRON AND STEEL FASTENERS FROM CHINA

1. The EU's determination of the domestic industry violated Articles 4.1 and 3.1 of the AD Agreement

a) The Information Document

19. As a preliminary issue, China would like to address the relevance and status of the "Information Document". The facts and determinations in the Information Document are important and relevant for the Panel to assess the WTO-consistency of certain parts of the measure that is challenged. The Information Document is part of the record. China can therefore refer to it as relevant evidence in support of its claims.

20. As to the status of this "Information Document", the EU's claim that the Information Document "cannot, and should not, be considered as equivalent to a preliminary determination on the basis of which provisional measures are imposed under Article 7 of the *AD Agreement*" is in sharp contradiction with the description of that document in the cover letter which was sent to all interested parties together with the Information Document. The EU itself even referred in its SWS to the Information Document as containing its "preliminary determination".

21. In any event, the Information Document is clearly not, as claimed by the EU, a "working document" and "thus an informal and essentially internal preliminary document". The Information Document has been drafted with a view to ***actively*** inform all interested parties about the investigation. The EU investigating authorities even requested the interested parties to comment on the Information Document. It seems reasonable to expect that a Document which is prepared with a view to inform all interested parties about the "preliminary findings" of the investigating authorities and on which they are invited to comment is "factually and legally correct".

b) By excluding from the definition of the Community industry all producers that did not make themselves known within 15 days as of the date of publication of the Notice of Initiation, the EU violated Articles 4.1 and 3.1 of the AD Agreement

22. The EU claims that "it is not so that any producers were "arbitrarily excluded" from the scope of the domestic industry" and that "[i]t is not correct that more producers came forward and were subsequently excluded". That statement is contradicted by the evidence on the record. Indeed, what the Information Document shows is that the Community industry was first defined on the basis of the 114 Community producers that had come forward and submitted the necessary information. Of these 114 companies, only the 86 producers supporting the complaint were included in the domestic industry. Thus, by excluding from the scope of the domestic industry, all producers which did not come forward within 15 days as of the date of Initiation, the investigating authorities deliberately excluded numerous producers that they had initially taken into account for the purposes of defining the Community industry.

23. Even assuming that the investigating authorities could legitimately limit the definition of the domestic industry to those producers which came forward within a certain time limit, limiting the

composition of the domestic industry to those producers that came forward within 15 days was not appropriate and constitutes a violation of both Articles 4.1 and 3.1. First, the 15-day period is the time period given for producers to lodge requests to be included in the sample, while 40 days is the deadline granted to the parties to make themselves known. Second, the 15-day limit is very short. Third, the EU incorrectly linked the possibility of being included in the definition of the Community industry to the willingness to be included in the sample.

c) By excluding the producers that did not support the complaint, the EU violated Articles 4.1 and 3.1 of the AD Agreement

24. The EU submits that 70 EU producers came forward during the 15-day period and that 25 were excluded, not because they did not support the investigation but because (i) they did not produce the product concerned (ii) they did not wish to cooperate or (iii) they refused to provide, or did not send, an open version of their reply. China notes that this claim is not substantiated by any evidence.

25. Furthermore, the EU claims that the EU's position "is *not*, as stated in the question, that "an investigating authority may define the domestic industry in an anti-dumping investigation by focusing exclusively on known producers of the like product **expressing support for the application**" (emphasis added). This claim is directly contradicted by the EU's own longstanding practice in anti-dumping investigations. China refers to various EC anti-dumping cases which show that support to the complaint is a necessary condition for a domestic producer to be included in the domestic industry.

26. As regards the anti-dumping investigation concerning fasteners in particular, China would like to draw the Panel's attention to the following elements. First, the Information Document shows that all producers that opposed the investigation or that did not express any opinion were excluded from the scope of the domestic industry. Second, the fact that the EU investigating authorities limited the domestic industry to those producers that supported the complaint is further demonstrated by the definition of the Community industry at Recital 114 as "the Community producers that supported the complaint **and** fully cooperated in the investigation". Third, the EU claims that if producers which came forward within the 15-day period were excluded, it is not because they did not support the initiation of the investigation. However, it is clear from Recital 114 of the Definitive Regulation that, even if a producer opposing the complaint would have expressed its willingness to be included in the sample, it would have been excluded from the definition of the domestic industry by the very fact that it did not support the complaint. Fourth, it is further clear from the Notice of Initiation that only companies ***supporting the complaint*** were to be included in the domestic industry from which the sample would be selected.

d) The domestic industry as defined by the EU does not include domestic producers whose collective output constitutes a major proportion of the total domestic production

27. The Definitive Regulation (in particular from the reference in the last sentence of Recital 114 to Articles 4(1) and 5(4) of the Basic AD Regulation) shows that the EU investigating authorities never examined the circumstances in the anti-dumping investigation to determine whether the producers effectively represented a "major proportion" and limited themselves to examining the percentage the production of the producers included in the domestic industry represented in comparison to the total production of the domestic producers. The considerations to which the EU refers are merely *a posteriori* rationalizations.

28. The EU claims that "[a]s with any determination by the authorities, the interested parties at the time of the determination may challenge this determination. They did not do so". The EU investigating authorities, however, never informed the interested parties about the details of the

domestic industry's determination. The EU never disclosed the identity of the producers which were included in the scope of the domestic industry.

29. Furthermore, it is fundamentally and legally erroneous to claim that a presumption of "major proportion" exists when the producers constituting the domestic industry together constitute more than 25%. Such a presumption has no legal basis and is legally incorrect. Moreover, nothing in the EU practice suggests that this alleged "presumption" is refutable. On the contrary, the inclusion of an express reference in Article 4(1) of the Basic AD Regulation to Article 5(4) makes the 25 per cent threshold a legally binding criterion rather than a "presumption".

30. Finally, as explained in China SWS, the specific circumstances of this case show that the producers making up the domestic industry did not represent a "major proportion".

2. The EU's determinations of dumping violated Article 2.4 of the AD Agreement

31. Contrary to what the EU claims, China does not argue that "simply because the information was requested to be provided on the basis of a particular PCN, any other method would be unfair or not even-handed".

32. China first submits that having identified the characteristics in the PCN as being relevant for the purposes of making the fair comparison, the EU should have examined and determined to which extent these differences affected price comparability and by failing to do so, it violated Article 2.4 of the AD Agreement. Second, China submits that, to the extent the investigating authorities decided not to make their comparison on the basis of the PCN, they should have informed the Chinese exporting producers in order to allow them to claim adjustments for differences in physical characteristics. Third, China submits that all the PCN characteristics affected price comparability and thus had to be taken into account by the investigating authorities when making the comparison.

33. The EU is putting forward a legally erroneous interpretation of Article 2.4 when claiming that it could limit itself to the "two main characteristics referred to by the interested parties in the course of the investigation", namely the strength class and the distinction between standard and special fasteners. It is first of all incorrect, as a matter of fact, to claim that these were the only two characteristics referred to by the interested parties during the investigation. It is furthermore legally erroneous to state that investigating authorities could limit themselves to those differences which they consider to be the most important. Moreover, the fact that the PCN mechanism could not be used in the dumping determination because the Indian producer did not provide the information in this manner does not relieve the investigating authorities from their obligation to take account of the differences reflected in the PCN to ensure that the comparison made is a fair comparison. Finally, China notes that the EU does not comment on the second aspect of China's claim which relates to the absence of adjustments for differences affecting the "quality" of the products being compared.

3. The EU violated Articles 3.1 and 3.2 of the AD Agreement when making the price undercutting calculations by comparing products which were not comparable

34. The EU claims that it did comply with Articles 3.1 and 3.2 in view of the fact that (i) Article 3.2 does not impose the use of any particular methodology when making a price undercutting determination, (ii) does not even require that adjustments be made and (iii), even assuming that any requirement to make adjustments exists, in this case the comparison was made on the basis of 5 out of the 6 PCN features.

35. First, it is simply not correct to claim that Article 3.2 does not require adjustments to be made. Second, there is ample evidence that the methodology followed by the EU in its price undercutting analysis is not unbiased and even-handed.

4. The EU violated the procedural requirements imposed by Articles 6 and 12 of the AD Agreement

a) General Comments

36. First, the EU claims that several of China's claims concerning procedural deficiencies are outside the Panel's terms of reference. However, none of these objections is justified. Second, contrary to what the EU claims, China has submitted the necessary evidence and legal arguments to make its case. Third, the EU claims that, pursuant to paragraph 16 of the Panel's working procedures, "China is barred from presenting new evidence to the Panel except in the specific circumstances foreseen by the working procedures". More specifically, the EU claims that because China did not submit the MET/IT questionnaire "as evidence in support of its claim", China failed to make a *prima facie* case because it did not present "the MET claim form "no later than during the first substantive meeting"". The EU appears to make a very dangerous confusion between the rules in the Panel's Working Procedures regarding the timing of the submission of ***factual evidence*** and the requirement for the complainant to make a *prima facie* case which is not limited in time. As to the very specific issue of whether the MET/IT Questionnaire which was submitted by China as Exhibit CHN-72 is admissible, China notes that the purpose of the rule in paragraph 16 of the Panel's Working Procedures is to ensure that the other party has the time to inspect the relevant evidence and to comment on it. Being the author of the MET/IT Questionnaire, the EU knows the content of that document. Furthermore, that document was necessary for purposes of the rebuttal. It is thus plainly admissible.

b) The EU failed to disclose the identity of the complainants and supporters thereby violating Articles 6.5, 6.2 and 6.4 of the AD Agreement

37. China notes that "good cause" for the confidential treatment of the complainants' identity has not been shown. First, the complainants referred to a potential retaliation of a purely hypothetical nature in the sense that retaliation could but was not likely to happen. Second, the complainants did not submit any evidence about such "potential retaliation".

c) The EU violated Articles 6.5, 6.2 and 6.4 of the AD Agreement since the non-confidential versions of the Community producers' questionnaire responses and the questionnaire response of the producer in the analogue country were largely deficient

38. Regarding the EU's claim that "the alleged deficiencies in the questionnaire response by the producer in the analogue third country" should be rejected since "China has in any event failed to provide evidence in accordance and within the deadlines set out in paragraph 16 of the Panel's working procedures", China notes that the Indian producer's questionnaire was submitted together with China's FWS as Exhibit CHN-53.

39. In order to rebut China's claim that the non-confidential questionnaire response of Agrati was largely deficient, the EU refers to a presentation made by interested parties (Exhibit CHN-21) which was, however made on 10 April 2008 on the sole basis of the information which was provided by Agrati in the non-confidential version of its sampling form. However, the information provided in the sampling form is limited to certain injury factors and no information for other injury factors has ever been provided in the deficient non-confidential version of Agrati's questionnaire response.

40. Regarding Fontana Luigi, the EU questions the evidence put forward by China and claims that China only submitted Fontana Luigi's initial questionnaire. A more complete questionnaire would have been attached to the cover letter submitted as Exhibit EU-25. The date of the stamp on the front page of Exhibit CHN-60 bears, however, the date of 02.06.08. This is a date later than that of Fontana Luigi's letter in Exhibit EU-25, namely 30.05.08. China further notes that the EU does not provide any evidence in support of its claims. Furthermore, the fact that the non-confidential version

of Fontana Luigi's sampling form would include information regarding certain injury factors is not relevant. Indeed, the information provided in the main questionnaire covers many additional injury factors other than those referred to in the sampling form.

d) The EU violated Article 6.5 of the AD Agreement by disclosing a document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC"

41. First, the EU's claim that "information that was submitted in those claim forms as confidential […] remained confidential throughout the investigation" is blatantly contrary to the facts on the record. Indeed, a significant amount of information provided on a confidential basis was reproduced in the document entitled MET assessment and thus was not kept confidential as requested by the exporting producers. Second, regarding the labeling "LIMITED" on the top of the MET Disclosure Document, the EU submits that it refers to its status as an "internal working document". According to the EU, "the internal working document ceases to be a "Limited" document once it is sent out to interested parties as an MET Disclosure Document". This is a rather surprising explanation. Indeed, as noted in the original Questionnaire for MET/IT as well as on the MET Disclosure Document, the word "*limited*" means not only that it is a document for internal use only in the sense that it is protected in accordance with Article 4 of Council Regulation (EC) No 1049/2001 regarding public access to the EP, Council and Commission documents, but also that it is a *confidential* document pursuant to Article 19 of the Basic AD Regulation and Article 6 of the AD Agreement.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

I. CHINA'S "AS SUCH" CLAIM AGAINST ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96, AS AMENDED

1. China argues that "whether China is a market economy country or not is totally irrelevant for this dispute". The European Union strongly disagrees. If anything the uncontested fact that China is a non-market economy country is the only reason we are here today discussing this "as such" claim. The international rules disciplining the imposition of anti-dumping measures primarily aim at addressing the actual source of price discrimination, i.e., a supplier which introduces a product into the commerce of another country at less than its normal value. This presupposes the existence of market economy conditions, including a degree of independency of the supplier concerned in setting its prices, terms and conditions in the ordinary course of trade. If that is the case, the supplier's dumping behaviour and the product in question can be subject to anti-dumping duties in accordance with the Anti-Dumping Agreement. However, in a situation where market economy conditions are absent, it is by definition difficult to determine the mere existence of dumping. This was recognised by the GATT Contracting Parties when introducing the Ad Note to Article VI of the GATT 1947 in 1955; and was further incorporated into Article 2.7 of the Anti-Dumping Agreement. Moreover, where market economy conditions are not present, it is difficult to apply the anti-dumping rules to address the actual source of price discrimination effectively. Indeed, in a non-market economy country, the means of production and the economy, including international trade, are under strict control by the State. All imports from non-market economy countries are therefore considered to emanate from a single producer, the State. In view of the State's control over international trade, it would not be relevant to specify exporting companies separately since they collectively constituted one single supplier or exporting entity, i.e., the State. It is the EU's contention that the Anti-Dumping Agreement (as well as its predecessors) allows for the imposition of anti-dumping duties on a country-wide basis against imports from non-market economy countries, precisely in order to address the actual source of price discrimination, i.e., the State.

2. As for the scope of the measure at issue, the European Union has explained in detail that Article 9(5) of Council Regulation No 384/96 on its face refers strictu sensu to the imposition of anti-dumping duties. More precisely, Article 9(5) amounts to a threshold question at the beginning of the investigation: in view of the specific particularities of non-market economy countries, can the applicant company be considered as a supplier acting independently from the State (in which case that IT supplier is considered responsible for any dumping found and its imports are subject to an individual anti-dumping duty)? Or, is the applicant company controlled by the State (in which case that non-IT supplier is considered to be a related export branch of the actual producer and the source of the alleged price discrimination, and its imports are subject to the country-wide duty rate)? China's contradictory attempts to bring other issues, such as the individual determination of dumping margins or how the level of duties is established, within the scope of Article 9(5) should be rejected. A Member cannot identify a specific measure, bring an "as such" claim against it and pretend that any consequence or subsequent step derived from the determination provided by that measure is part of it; and definitively not so when other unchallenged provisions deal specifically with those other issues.

3. The European Union has also shown that China's claims are based on a wrong interpretation of the covered agreements. First, Article 9.2 of the Anti-Dumping Agreement permits the imposition of anti-dumping duties on a country-wide basis also in the particular case of imports from non-market economy countries. Indeed, absent market economy conditions, the State is considered the actual supplier and the "source" of the alleged price discrimination, and any "amounts" collected from the State or its export branches (i.e., non-IT suppliers) are "appropriate". Second, the possibility to impose anti-dumping duties on a country-wide basis also follows the general principle or preference contained in Article 6.10 of the Anti-Dumping Agreement to calculate dumping margins on an individual basis, and confirms that sampling is not the only situation where this preference does not need to be followed. Third, in any event, the third sentence of Article 9.2 of the Anti-Dumping Agreement 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. Regardless of the dictionary you take, 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 from the actual supplier, the State). The context of similar terms in other parts of the Anti-Dumping Agreement and in other covered agreements (notably the DSU), and other provisions, such as Article 6.10, together with the object and purpose of the provisions of the Anti-Dumping Agreement and the Anti-Dumping Agreement as a whole, fully support this conclusion. The negotiating history of Article 8 of the Kennedy Round Anti-Dumping Code, which China omits, further confirms that the imposition of anti-dumping duties on a country-wide basis is permitted, provided that subsequent refunds could be granted.

4. Article 9(5) of Council Regulation No 384/96 mirrors the language of Article 9.2 of the Anti-Dumping Agreement as far as possible, and establishes a mechanism, in a situation where market economy conditions are absent, to allow for the imposition of anti-dumping duties 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). Needless to say, if in the context of a request for a refund an importer can show that the supplier subject to the country-wide duty rate acts independently from the State, a refund would be granted (to the extent that the dumping margin has been eliminated or reduced). Article 9(5) is also in line with China's Protocol of Accession, which recognises China as a non-market economy and provides that, in the absence of "market economy conditions" investigating authorities may have recourse to "a methodology that is not based on a strict comparison with domestic prices or costs in China (…) in determining price comparability under Article VI of the GATT 1994 and the Anti Dumping Agreement". A methodology for the purpose of determining the existence of dumping which considers the State as the actual producer of the product concerned and uses information available to compare export prices of the actual producer with an analogue country normal value is also "a methodology that is not based on a strict comparison with domestic prices or costs in China".

5. China's claim under Article I:1 of the GATT 1994 should also be dismissed. China argues that a conflict only exists where "obligations" (as opposed to "rights") in the different agreements cannot be complied with simultaneously. In the EU's view, this interpretation of conflict is very narrow. The Anti-Dumping Agreement delimits the situations where those measures can be imposed. Since the decision to impose anti-dumping duties is a "right" granted to the Member concerned, every decision to do so would amount to a violation of the MFN principle. This cannot be the case. Finally, China argues that Article 9(5) of Council Regulation No 384/96 discriminates against non-market economy countries. In this respect, China ignores that the European Union also applies country-wide anti-dumping duties on imports from market economy countries in situations where it is impracticable to specify individual duties; and that there is a substantive difference between imports from market and

non-market economy countries: the role of the State is different. Consequently, to the extent that the Panel needs to examine this claim, the Panel should reject it in its entirety.

II. ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS APPLIED" IN COUNCIL REGULATION NO 91/2009

6. This claim made with respect to Council Regulation No 91/2009 is the same as the "as such" claim made in connection to Article 9(5), and the Panel should address it accordingly. In any event, since all the applicant companies obtained IT in the Fasteners investigation, the European Union considers that the measure at issue (i.e., Council Regulation No 91/2009) did not cause any nullification or impairment to China.

III. STANDING OF THE EU DOMESTIC INDUSTRY

7. As regards China's claim on the standing determination, the European Union considers that this claim is outside the Panel's terms of reference. On substance: China's claims, in addition to misstating the EU's argument, seem to be based on a confusion as to the methodology used by the EU authorities in examining standing in the Fasteners investigation. Contrary to China's assertions, the EU authorities checked the EU total production figure and verified the support/opposition to the application before the initiation of the investigation in accordance with Article 5.4 of the Anti-Dumping Agreement. China also claims that the EU producers expressly supporting the application accounted for less than 25% of total production of the like product produced by the domestic industry. In this respect, the European Union observes that China confuses the percentage of total production of the complainants (26.7%) with the percentage of domestic producers expressly supporting the application (37%). China ignores that 37% is not close to 25% and struggles to argue that the percentage of total production of the complainants (26.7%) is close to 25% by means of several assertions. The European Union considers that China's assertions are irrelevant since the figure of domestic producers expressly supporting the application is 37%.

IV. DEFINITION OF THE DOMESTIC INDUSTRY

8. From China SWS it can be observed that the main, if not only, claim that China is actively pursuing in this context concerns the alleged violation of Article 4.1 for the reason of the fact that the EU authorities imposed a 15 days deadline on domestic producers to come forward and express their interest in cooperating in the investigation such that they would be part of the "domestic industry". The mere fact that China's focus is now entirely on this claim is revealing of the weakness of China's claims in respect of the definition of the domestic industry in general. First, the EU recalls that this 15 days-claim was not the subject of consultations between the parties and is thus outside the terms of reference of the Panel. China cannot deny that this claim is nowhere to be found in the Request for Consultations. Even China will acknowledge that this matter was not discussed in the course of the consultations. Any finding of the Panel on this matter would exceed the Panel's mandate and would amount to a legal error. On the merits, China's claim is obviously flawed for the reasons expressed in previous submissions. The use of a deadline for purposes of defining the domestic industry is reasonable and acceptable.

9. China's second claim in respect of the domestic industry definition: In previous submissions, the EU has already explained at length why China's claim that 27% of production does not constitute a major proportion of total domestic production in this case is based on a flawed interpretation of Article 4.1, and is premised on the erroneous assumption that there exists a preference for a definition based on 100% of domestic production. Much as China would have liked to see the text worded differently, it is simply not so that the "major proportion" option is available only if there exists a "practical impossibility" to obtain the requested information from all producers of the like product. China erroneously seems to suggest that there existed any obligation on the EU authorities to

demonstrate that 27% was a "major proportion" in the specific circumstances of this case. No such obligation exists. Since the Anti-Dumping Agreement does not require an a priori explanation but merely requires that the substantive obligation is met, China's claim of a violation in this case must fail. Third, the EU has explained before that China's claim that the domestic industry was not defined in relation to the period of investigation is flawed. China's SWS merely repeats the same erroneous arguments and fails to rebut the basic fact that the determination of the major proportion was made based on the last full year of the period of investigation for purposes of the injury determination for which statistics were available. Fourth, in its SWS China has effectively made a new claim that the EU made an injury determination with respect to a sample of producers that was not representative. China realised the fundamental weakness of the claim it had actually made and changed its claim hoping for a better result; but even the limited procedural rules of the WTO dispute settlement process do not allow for this type of claim-shopping at these final stages of the proceedings. In any case, China's claim is flawed, both in respect of the law and in respect of the facts as the sample was representative of the domestic industry including both small and large producers and representing producers of the various types of products produced. Fifth, in respect of China's claim relating to the alleged need to exclude related producers, the EU notes that China has not event attempted to rebut the essence of the EU's argument.

V. SELECTION OF THE PRODUCT CONCERNED

10. The context of Articles 6.10 and 2.4 and Appellate Body jurisprudence confirm the text of Article 2.1: the product concerned may include different types or models. When defining the product concerned as "fasteners" and then distinguishing between different models or types (standard and special) to ensure comparability, the EU authorities compared "apples to apples".

VI. FAIR COMPARISON UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

11. The essence of China's claim has now shifted to the requirement to make "adjustments for differences in physical characteristics affecting price comparability". However, neither in the course of the proceedings, nor in its FWS or in the SWS has China indicated why certain of these PCN factors require such adjustments. The erroneous premise of China's claim is that since certain factors are part of the PCN, adjustments are required for each and every one of these factors. That is simply incorrect as the PCNs are merely a tool for gathering information. Importantly, Chinese interested parties presented arguments on the importance of strength class, even though strength was part of the PCN. China's logic that none of the interested parties argued in favour of adjustments for the PCN factors because they assumed that these factors would in any case be taken care of through the use of PCN models is thus contradicted by the actual behaviour of Chinese interested parties in the investigation. In addition, we recall that the evidence on the record showed that the cost of quality control on the side of the Indian producer was higher and that therefore an adjustment in favour of the Chinese interested parties had to be made.

12. In its SWS, China is introducing a number of new, essentially procedural claims that the EU authorities should have informed the interested parties of the method used for making the comparison. In addition to the fact that no such obligation exists in the Anti-Dumping Agreement and that no such claim was included in China's Panel Request, the EU wishes to note that the EU authorities did of course request all necessary information, and did inform the interested parties that commented on this issue that the comparison was not made on the basis of the PCN method.

VII. PRICE UNDERCUTTING

13. China's claim that the EU authorities violated the obligation to consider whether there existed a significant price undercutting is not properly before the Panel as it was not part of the request for consultations.

14. On the merits, the EU has already explained in previous submissions why China's allegations are baseless. Even absent any clear guidelines concerning the methodology to follow for the price undercutting analysis and the broad discretionary power that this implies, it stands from the record that the comparison that was made by the EU authorities using almost full PCNs was a reasonable and unbiased method for conducting this price comparison.

VIII. VOLUME OF DUMPED IMPORTS

15. China argues that the EU authorities' volume analysis was inconsistent with Articles 3.1 and 3.2 simply because the EU authorities failed to exclude the volume of two marginal exporters that were found not to be dumping. China's SWS does not add anything to the discussion but makes painfully clear the formalistic approach adopted by China that "the simple fact that the examination included non-dumped imports makes the examination necessarily inconsistent with Articles 3.1 and 3.2 of the AD Agreement". Since the increase in the volume of dumped imports is not a condition for the imposition of duties, since the Anti-Dumping Agreement does not even require a finding of whether the volume increased, but merely requires an authority to take this aspect into consideration in the overall assessment of injury which in its totality is to be based on positive evidence and an objective examination, the EU submits that this formalistic approach is simply not warranted in this context.

IX. INJURY FACTORS UNDER ARTICLE 3.4 OF THE ANTI-DUMPING AGREEMENT

16. First, in its SWS, China merely repeats the erroneous argument that the EU authorities violated their WTO obligations because certain macroeconomic injury factors were examined using data from all producers of the domestic industry and other factors were based on information received from the sampled companies only. Second, China's prolonged debate about the alleged failure to examine the factor profitability in an objective manner is further painful proof of China's erroneous focus. China disagrees with the conclusion reached by the EU authorities, and suggests that the Panel does the same. But that is not the Panel's task. The Panel's task is to examine whether a reasoned and reasonable explanation was provided of how the facts support the determination made. Third, in its SWS China reiterates its earlier argument that "a finding of material injury … cannot solely be based on one negative factor" and that "having found that all factors showed a positive trend over the period concerned, the EU should have concluded that the EU industry had not suffered material injury". The Anti-Dumping Agreement does not preclude a finding of injury on one negative factor alone, depending on how this factor interrelates with the other factors. The EU authorities did not make their finding based solely on one negative factor. It is also not so that the EU authorities "found that all factors showed a positive trend" and this second premise of China's argument is thus also in error. The suggestion that the EU authorities "should have concluded that the EU industry had not suffered material injury" is not the question before you and is thus not pertinent. The relevant question not addressed by China is, first, whether the EU evaluated all injury factors of Article 3.4 – yes it did, and even China does not argue otherwise; and, second, whether the evaluation of the various factors was reasonable and reasoned. Fourth, China SWS reiterates the erroneous allegation that European Union improperly concluded that the injury consisted of the displacement from one market segment to another. As explained in earlier submissions, the EU authorities did not make such a finding of market displacement, but related its injury finding to fasteners as a whole.

X. CAUSATION AND NON-ATTRIBUTION

17. In its SWS, China introduces an entirely new set of claims that is nowhere to be found in its Panel Request or in its FWS – that the EU failed to demonstrate the existence of a causal link since a "mere coincidence does not establish a causal link" and that the EU failed to adduce evidence of why the domestic producers decided to produce more special fasteners. These new claims of China are thus outside the Panel's terms of reference, and any finding on these new claims would be a violation of Article 11 of the DSU.

18. In any case, WTO case law, for example in the safeguards context, has made it clear that coincidence in movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation. In addition, and as explained in the EU's FWS, the EU authorities provided a reasoned and reasonable explanation of the existence of a causal link between the dumped imports and the injury found to exist. In respect of the non-attribution analysis, China's SWS merely repeats China's earlier made assertions that certain factors were not sufficiently separated and distinguished even though these allegations are clearly contradicted by the facts on the record. In respect of the factor export performance, the EU recalls, first, that this factor was not found to be a factor causing injury; after all export performance was good. In addition, the impact of this factor cannot have been significant given the lack of importance of export sales when compared with domestic sales.

XI. CHINA'S PROCEDURAL CLAIMS UNDER ARTICLES 6 AND 12 OF THE ANTI-DUMPING AGREEMENT

19. Interpretation of Article 6.2: China's position rests on an erroneous legal premise and ignores case law that addresses precisely the distinction between Article 6.2 and 6.4. First, as examined by the European Union in its reply to Panel's Question 62, the Appellate Body has considered that Articles 6.1 and 6.2 together set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations. It is not legally correct that these rights would be laid down in the first sentence of Article 6.2 as China asserts. It is also not correct that Article 6.2 would contain two entirely different sets of rights and obligations. China also ignores the panel report in *Korea – Certain Paper* which addressed precisely this question.

20. Interpretation of Articles 6.4 and 6.9: The European Union cannot but express its astonishment about how China attempts to rewrite what formed the premise of its Article 6.4 and 6.9 claims in its FWS.

China's claim that "the EU's failure to disclose the identity of the complainants and supporters violates Article 6.5 of the AD Agreement"

21. First, the European Union is pleased to note that China admits that its claim does not in fact cover the volume and/or value of production. Second, China has itself demonstrated that interested parties were given access to the detailed production figures of the complainants on a company by company basis. If China seriously suggests that interested parties were in the possession of detailed information on the production of all Community producers in order to "check" the information, nothing prevented them from providing that information to the EU authorities in order to question the figures in Exhibit CHN-42. No suggestion that these figures would be incorrect was ever made. The identity of the complainants and supporters is therefore a non-issue from the point of view of the interested parties' rights of defence. Third, China continues to insist on the potential retaliation being "hypothetical" although it now acknowledges that "it is only if confidential treatment is refused that it is possible to know whether retaliation will actually take place or not". This is a crucial admission because China entirely ignores the fact that the mere threat of retaliation in itself has an adverse effect on a person or a company. What is required under Article 6.5 is "good cause" and the threat of

retaliation surely complies with this requirement. Fourth, China continues to insist that the disclosure of the identity of the sampled companies somehow "shows that the companies constituting the Community industry are either complainants or supporters". The European Union fails to see any logic in this argument. The identity of the complainants and the supporters is manifestly an entirely separate question from the identity of the sampled companies.

China's claim that "the EU's failure to disclose the identity of the complainants is inconsistent with Articles 6.4 and 6.2 of the AD Agreement"

22. These claims are consequential to China's claim under Article 6.5. To the extent the Panel would wish to dwell into these claims any further, the European Union trusts the Panel will address relevant questions to the Parties within the parameters of due process as clarified by Appellate Body jurisprudence.

China's claim that "the EU failed to give information concerning the "product types" used for the normal value calculation, thereby violating Articles 6.4 and 6.2 of the AD Agreement"

23. This claim is premised on the relevance of the detailed PCNs during the investigation. The European Union is of the view that the premise of China's claim is incorrect. Furthermore, China's claim ignores the fact that the information from the company in the analogue country was largely confidential. China has not challenged the treatment of the information as confidential and cannot therefore demonstrate that there could have been a breach of Articles 6.4 or 6.2.

China's claim that "the EU failed to provide information concerning the normal value calculation, thereby violating Articles 6.5, 6.2 and 6.4 of the AD Agreement"

24. The European Union does not entirely understand how this claim differs from the previous claim except that the title also cites Article 6.5 of the Anti-Dumping Agreement and that the factual scope appears more general. In any event, the European Union welcomes China's de facto admission that a claim under Article 6.5 has been advanced at most implicitly. It must go without saying that an implicit claim not coupled with proper argumentation and evidence cannot fulfil the most elementary requirements of a prima facie case. Furthermore, even if there were a claim under Article 6.5, it is still not clear whether a claim would be advanced under the chapeau of Article 6.5 or Article 6.5.1.

China's claim that "the EU failed to provide information concerning the fair comparison being made, including the adjustments for differences affecting price comparability, thereby violating Articles 6.2 and 6.4 of the AD Agreement"

25. China has not challenged the European Union under Article 6.5 of the Anti-Dumping Agreement. Since China in reality must accept that the detailed information on the costs of quality control of the company from the analogue country was properly protected as business confidential information and assuming arguendo that other conditions would be fulfilled, there could not be a violation of Article 6.4 or 6.2, since these two provisions explicitly acknowledge the need to protect confidentiality of information.

China's claim that "by failing to provide information concerning the product types, the normal value determination and the comparison including the adjustments that were made, the EU violated Article 6.9 of the AD Agreement"

26. China essentially assimilates the obligations in Articles 6.2, 6.4 and 6.5 with those under Article 6.9. However, Article 6.9 does not deal with the "very same issue" as Article 6.2, 6.4 and 6.5. This is precisely what many panels have considered incorrect and what China itself argues in its reply to Panel's Question 62. Furthermore, China is relying on the disclosure documents as evidence both

under Articles 6.4 and 6.9 and those documents were surely in China's possession at the time of the consultations. If anything, one could perhaps contemplate that an Article 6.4 claim could develop from an Article 6.9 claim but the reverse seems entirely unconvincing. In the view of the European Union, China is trying to rectify an omission, which, however, is now too late. On substance China adds nothing to its "claim" that stays at the level of a pure assertion.

China's claim that "the EU was in breach of Article 6.5 since the non-confidential versions of the Community producers' questionnaire responses and the questionnaire response of the producer in the analogue country were largely deficient"

27. With regard to China's claims in relation to the two Community procedures' non-confidential version of the questionnaire responses, China's arguments have already been anticipated in the reply by the European Union to Panel's Question 72. Should the Panel require any further evidence, the European Union is prepared to dwell into the hundreds of pages of information in the non-confidential file that relate only to these two companies and that China has ignored when presenting its case. However, in the view of the European Union it is first for the complainant to demonstrate that the factual premise of its claims is correct. With regard to the "claim" in relation to the non-confidential version of the questionnaire response of the producer in the analogue country, the Panel has only been presented with two sentences in China SWS and China's Reply to Question 71 from the Panel. In view of paragraph 16 of the Panel's working procedures, the European Union is of the view that it is systemically important that the Panel should not go any further because China had its opportunity to try to make its case but it failed to even try. In any event, the China's submissions are internally inconsistent on this point.

China's claim that "the EU was in breach of Articles 6.2 and 6.4 since the non-confidential versions of the Community producers' questionnaire responses and the questionnaire response of the producer in the analogue country were largely deficient"

28. This claim is purely consequential and dependent on the above claim based on Article 6.5. The premise of China's argumentation is an alleged incorrect treatment of certain information as confidential. Therefore, there is no need to address this claim in any further detail.

China's claims that "by failing to make PRODCOM data available in the non-confidential file and by failing to provide an explanation as to how the estimation of the production in the EU had been made, the EU violated Article 6.5 of the AD Agreement" and that "by failing to make PRODCOM data available in the non-confidential file and by failing to provide an explanation as to how the estimation of the production in the EU had been made, the EU violated Articles 6.2 and 6.4 of the AD Agreement"

29. In its SWS China has reformulated its claims and arguments significantly. Furthermore, the European Union has never argued that limited annex C 1-2 could "not be considered as information", or rather would not contain information. The point the European Union has very explicitly made is that interested parties have been given access to the relevant EUROSTAT information, including the fact that the source of information was EUROSTAT. It is the ability to see information that matters not that it is provided through a given specific document. With regard to the alleged differences between limited annex C 1-2 and unlimited annex C 1-1, it is remarkable to see how China blows this entirely out of proportion. The unlimited annex contained all the relevant information for interested parties to defend their interests.

China's claim that "through its findings on the domestic industry, the EU violated several due process rights, including Articles 6.2, 6.4 and 6.9 of the AD Agreement"

30. The title of this "claim" or "claims" is a prime example of the broad brushed way in which China has acted in this dispute. China does not even bother citing the legal basis of its claims in an exhaustive way. This is simply not serious and the European Union will treat these claims accordingly.

China's claim that "the EU violated Article 12.2.2 of the AD Agreement by failing to indicate all relevant information concerning its IT determinations"

31. Once again for the record, IT was granted because the suppliers met the five criteria listed in Article 9(5) of Council Regulation No 384/96. This was explained in Council Regulation No 91/2009.

China's claim that "the EU violated Article 6.5 of the AD Agreement by disclosing a document entitled 'Assessment of Market Economy Treatment Claims by nine producers in the PRC' "

32. China continues to plead that some of the information in the MET disclosure document would be confidential and that such information would have been explicitly submitted as confidential by the companies addressed in the document. Yet, China provides no evidence at all that this would be true.

China's claim that "the EU violated Article 6.1.1 of the AD Agreement by limiting the time period for the submission of market economy treatment and/or individual treatment questionnaire responses to 15 days as of the date of publication of the Notice of Initiation"

33. China has failed to provide the MET claim form as evidence in accordance with paragraphs 16 of the Panel's working procedures. To the extent the Panel would decide not to enforce paragraph 16 of its working procedures, the European Union notes that China SWS provides nothing more than mere speculation as to how granting more time to submit the MET claim might or might not have affected the conduct of the investigation.

ANNEX F-3

CLOSING STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel,

China would like to thank you and the Secretariat again for your patience and close attention in hearing our arguments during the last two days and your hard work in this case.

Mr. Chairman, distinguished Members of the Panel, China's decision to resort to the WTO dispute settlement mechanism to challenge EU anti-dumping measures was not taken lightly. China, however, felt obliged to do so because of the manifestly illegal character of the measures at issue and the significant economic impact they have on China.

The first measure at issue, namely Article 9(5) of the Basic AD Regulation, is clearly inconsistent with several provisions of the AD Agreement and has no legal basis whatsoever in China's Protocol of Accession. The EU, which is among the WTO members which have initiated the largest number of anti-dumping investigations against China, applies this WTO-inconsistent measure in all its anti-dumping investigations against China. Article 9(5) is plainly discriminatory against China and constitutes a nullification and impairment of China's benefits under the WTO Agreements. In addition, Article 9(5) has a very significant practical impact since it has led to the illegal imposition of high anti-dumping duties on a large number of Chinese exporting producers.

As regards the second measure at issue, Council Regulation (EC) No. 91/2009, China has proven that numerous determinations made by the EU are incompatible with the EU's WTO obligations. The substantive claims relating to the determination of IT, standing, domestic industry, like product, fair comparison, price undercutting, volume of dumped imports, injury and causation are all crucial to the way the EU handles anti-dumping investigations against China. The same holds true for the due process claims showing that the EU investigating authorities violated several provisions of Articles 6 and 12 throughout the anti-dumping investigation that led to the measure at issue.

Over the past few months, the parties have had ample opportunities to submit their evidence, develop their arguments and discuss in detail the numerous issues raised in this dispute in their written submissions, their replies to the Panel's questions and during the substantive meetings with the Panel. China believes that this process has allowed the parties to develop and clarify the numerous factual and legal aspects of this dispute. China is convinced that in case certain issues remain unclear, the panel will not hesitate to request further information and clarifications from the parties by means of the written questions. Needless to say, China stands ready to respond to any such requests at the best of its ability.

Thank you.

ANNEX F-4

CLOSING STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

Mr Chairman, distinguished Members of the Panel,

1. First of all, the European Union would like to thank you and the Secretariat again for the work already done. Now is decision and drafting time for you. We acknowledge that the task in front of you is not an easy one. Indeed, as we have highlighted, China's claims as originally stated it its Consultations and Panel Requests have considerably changed in the course of these proceedings and we are no longer sure as to whether China seriously (more than *pro forma*) maintains all of its claims at this stage. Moreover, China's disregard of the essential rules of procedure, as stated in the DSU and the Panel's Working Procedures and even the Chairman's precise instructions when filing new exhibits show very little concern for essential principles of due process. We also once more warn the Panel about China's misquotation of our arguments as well as the numerous cross-references to China's own submissions in a futile attempt to show that the relevant facts or arguments have been shown or explained therein (which often is not the case).[1] We of course trust that the Panel will read our and China's submissions accordingly and thoroughly, and will duly comply with the objective assessment standard of review as required by Article 11 of the DSU. In this respect, we can only offer our willingness to assist the Panel in further clarifying any fact or argument we have made.

2. This being said, we would just like to make some brief comments on China's opening oral statement of yesterday.

3. On China's as such claims against Article 9(5) of Council Regulation No 384/96, we would like to mention the following points. First, Article 6.2 DSU requires the complaining Member to plainly connect the specific measure at issue with the specific claim, explaining how and why the measure at issue violates the WTO Agreements.[2] Absent that connection, the Member concerned (and in this case the EU) is left wondering how the measure as described by the complaining Member in its Panel Request can be the source of the alleged nullification or impairment. When a Member only has three weeks to prepare its FWS, and tries to respond to all the issues raised by the complaining Member, the efforts made by the respondent party to engage in good faith to resolve the dispute[3] by attempting to provide a full response to all the issues raised by the complaining Member's FWS should not be penalised.

4. Second, we observe that China does not contest the fact that a proposal to repeal Council Regulation No 384/96 (i.e., the measure at issue as described by China's Panel Request) was published in April 2009, well before China requested consultations and the establishment of the Panel.[4] Again, we consider that the Panel should only examine the specific measure at issue, rather than other measures (such as Council Regulation No 1225/2009) or issues which are outside the Panel's terms of reference.

[1] E.g., China's Opening Oral Statement, Second Meeting with the Panel, para. 45 (footnote 46) and para. 96 (footnote 102).
[2] EU SWS, para. 11.
[3] DSU, Article 3.10.
[4] EU SWS, para. 28.

5. Third, we note that China does not contest that the Panel should examine the scope of Article 9(5) on its face.[5] The meaning and content of Article 9(5) shows that it addresses a threshold issue which relates to the imposition of anti-dumping duties. It serves identifying the actual source of the alleged price discrimination, either the MET/IT supplier or the State (China Inc.) as the relevant supplier. Once that determination has been made, other relevant rules are applied. Indeed, pursuant to Articles 2(7) and 18 of Council Regulation No 384/96, a dumping margin is calculated for MET/IT suppliers by comparing their export prices with their own or an analogue country normal values, to the extent that the information is available, whereas the dumping margin for the State as the relevant producer in a NME is calculated on the same basis. Following Article 9(4), such dumping margins serve as a maximum ceiling for the proper duty rate. In case of sampling, the provisions of Articles 9(6) and 17 apply. China's description of the content of Article 9(5), as including other issues such as the individual determination of dumping margins or the level of AD duties is thus wrong and dangerous.[6] We trust that the Panel will make an appropriate assessment of the scope of the measure at issue and will not examine any consequence, result or subsequent separate determination which may or may not be connected to the specific meaning and content of the measure specified by China in its Panel Request.

6. Fourth, as regards China's claims, we believe we have shown that Article 6.10 ADA contains a preference for the individual determination of dumping margins and that sampling is not the only scenario where an IA can choose not to follow that preference or general rule.[7] Contrary to what China asserts[8], the negotiating history of Articles 6.10 and 9.4 that we provided you[9] indicates this. The examples taken from the EU experience and other hypothetical examples show that there are other situations where the general rule or preference does not need to be followed, and there can be more where the supplier or company concerned would be subject to the residual duty. We also believe that *Korea – Certain Paper* and *EC – Salmon* are relevant in the present dispute since both cases show that the close relationship between companies with a group entitles the IA to determine one single dumping margin for the whole group. In that respect, the situation in NMEs can be considered analogous, since the State as the actual producer is the source of the alleged price discrimination. That is the reason why in our view the manner in which the EU calculates dumping margins for a group and its related companies in MEs and the manner in which the dumping margin is calculated for the State and its related export branches in NMEs is the same. China attempts to confuse this matter by making mere assertions, unsupported by any evidence on the record about our practice (such as "more than 80% of all exports" or "in most cases").[10]

7. Finally, we have shown that Article 9(5) is consistent with Article 9.2 ADA. China seems to take issue with the fact that the terms "actual source of the price discrimination" are not treaty terms.[11] However, even China cites the AB Report which states that the notion of dumping relates to the supplier's pricing behaviour, and ignores that the State in NMEs can be considered as a "producer" and thus as the source of the price discrimination. In this respect, the imposition of AD duties on a country-wide basis seek to address that source accordingly, an any amount subsequently collected will be proper, keeping also in mind the possibility for requesting refunds.

8. As regards Council Regulation No 91/2009, we believe we have shown that China's claims should be disregarded in full. In a nutshell, the EU authorities properly determined the standing before the initiation of the investigation; correctly defined the domestic industry by reference to those

[5] EU SWS, para. 15.
[6] EU SWS, paras 20 – 22.
[7] EU SWS, paras 36 – 44.
[8] China's Opening Oral Statement, Second Meeting with the Panel, para. 29.
[9] Exhibit EU-3.
[10] China's Opening Oral Statement, Second Meeting with the Panel, paras 50 and 51.
[11] China's Opening Oral Statement, Second Meeting with the Panel, para. 53.

amounting to a major proportion and willing to cooperate with the IAs; compare "apples to apples" in the dumping and price undercutting analysis; properly examined the injury and causation; and fully respect the rights of interested parties when having access to file, disclosing the essential facts, etc.

Mr Chairman, members of the Panel, we thank you again for your attention and remain at your disposal for answering any further questions you may have.

ANNEX G

REQUEST FOR CONSULTATIONS AND REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

ANNEX G-1

REQUEST FOR CONSULTATIONS BY CHINA

WORLD TRADE ORGANIZATION

WT/DS397/1
G/L/891
G/ADP/D79/1
4 August 2009
(09-3790)

Original: English

EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

Request for Consultations by China

The following communication, dated 31 July 2009, from the delegation of China to the delegation of the European Communities 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 Communities (the "EC") pursuant to Articles 1 and 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 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") with respect to, but not necessarily limited to, the following EC measures:

(a) Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995[1], as amended, on protection against dumped imports from countries not members of the European Community (the "*Basic AD Regulation*");

(b) Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China[2];

These measures appear to be inconsistent with the EC's obligations under the provisions of the GATT 1994, the AD Agreement and the Protocol of Accession of the People's Republic of China

[1] OJ L 56, 6.3.1996, pp. 1-20.
[2] OJ L 29, 31.1.2009, p. 1.

("China") which is an integral part of the *Marrakech Agreement Establishing the World Trade Organization*.

1. Article 9(5) of the *Basic AD Regulation* 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. China considers that Article 9(5) of the *Basic AD Regulation* is inconsistent, as such, with the EC'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) 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 EC's measure is also discriminatory and thus contrary to Article I:1 of the GATT 1994.

2. China considers that the EC's imposition of anti-dumping duties on imports of certain iron or steel fasteners originating in the People's Republic of China is inconsistent with the EC's obligations under Articles VI and X:3(a) of the GATT 1994; Articles 1, 2.1, 2.2. 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the AD Agreement as well as Part I, paragraph 15 of China's Protocol of Accession.

(i) The EC imposed a countrywide duty on the sole basis that China is a non-market economy country and exempted from this duty only those few Chinese exporters that were able to meet the so-called "Individual Treatment" criteria, thereby acting inconsistently with Articles 2, 6.10, 9.2, 9.3, 9.4 and 12.2.2 of the AD Agreement;

(ii) The EC granted only 15 days to Chinese exporters to submit their written reply to the Market Economy Treatment and Individual Treatment questionnaires contrary to the obligation provided for in Article 6.1.1 of the AD Agreement and Part I, paragraph 15 of China's Accession Protocol;

(iii) The EC initiated the AD investigation with the support of producers accounting for only 27 per cent of the total domestic production, rendering the said investigation inconsistent with Article 5.4 of the AD Agreement;

(iv) The EC wrongly included, in the scope of the product under consideration, both standard and special fasteners as "like" products, despite their readily apparent differences and uses, thereby acting inconsistently with the provision of Article 2.1, as interpreted by Article 2.6, of the AD Agreement;

(v) The EC did not take into consideration all appropriate adjustments affecting price comparability, in particular, by failing to make a product comparison on the basis of the full product control number, thereby acting inconsistently with Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994;

(vi) The EC based its injury determination on data from EC producers accounting for only 27 per cent of the estimated total EC production of the product concerned in 2006, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement;

(vii) The EC failed to determine which proportion of the total domestic production was represented by the EC producers in relation to which the injury determination was

made throughout the investigation period, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement;

(viii) The EC conducted the injury determination on the basis of a sample of EC producers accounting for only 17.5 per cent of the total EC production of the product at issue in 2006, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement;

(ix) The EC failed to exclude from the scope of the domestic industry EC producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product, thereby acting inconsistently with Articles 3 and 4.1 of the AD Agreement;

(x) The EC failed to exclude from the volume of imports, for injury determination purposes, non-dumped imports, thereby acting inconsistently with Article 3.1 and 3.2 of the AD Agreement and Article VI:1 of the GATT 1994;

(xi) The injury determination failed to be based on positive evidence and to involve an objective examination since, in analyzing the economic factors and indices, the EC disregarded the multiple positive trends and figures shown by most factors and focused its decision on the sole factor that showed a negative trend, *i.e.* market share, thereby acting inconsistently with Article 3.1 and 3.4 of the AD Agreement and Article VI:1 of the GATT 1994;

(xii) The EC failed to weigh, properly and reasonably, factors other than the alleged dumped imports in its examination of injury and causation, in particular, imports from third countries, increasing costs of raw materials, and export performance of the EC community, thereby acting contrary to Article 3.5 of the AD Agreement;

(xiii) The EC disclosed the "Assessment of Market Economy Treatment Claims by nine producers in the PRC"(DG TRADE/H3/D(2008)), containing relevant confidential information which pertains to different Chinese producers, thereby acting inconsistently with Article 6.5 of the AD Agreement;

(xiv) The EC failed to provide the opportunity to the interested parties to see all relevant information including, but not limited to, the identity of the applicants, non-confidential summaries of the questionnaire responses of EC producers, data concerning the normal value in the analogue country and information on the adjustments for differences affecting price comparability, thereby acting inconsistently with Article 6.2, 6.4 and 6.5 of the AD Agreement and Part I, paragraph 15 of China's Protocol of Accession.

3. The EC's measures also appear to nullify or impair the benefits accruing to China directly or indirectly under the cited agreements.

4. China reserves its right to raise additional factual matters and legal claims during the course of the consultations.

5. China looks forward to receiving your reply to the present request and to fixing a mutually convenient date and venue for consultations.

ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

WORLD TRADE ORGANIZATION

WT/DS397/3
13 October 2009

(09-5005)

Original: English

EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

Request for the Establishment of a Panel by China

The following communication, dated 12 October 2009, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 31 July 2009, The People's Republic of China ("China") requested consultations with the European Communities (the "EC") pursuant to Articles 1 and 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 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") with respect to, but not necessarily limited to, Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995[1] on Protection against Dumped Imports from Countries not Members of the European Community, as amended, and Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.[2]

The request for consultations was circulated in document WT/DS397/1 – G/L/891 – G/ADP/D79/1 dated 4 August 2009. The consultations were held on 14 September 2009 in Geneva, with a view to reaching a mutually satisfactory solution. Unfortunately, those consultations failed to lead to a satisfactory resolution of the matter.

Therefore, China hereby requests, pursuant to Articles 4 and 6 of the *DSU*, Article XXIII:2 of the *GATT 1994* and Article 17.4 of the *AD Agreement*, that the Dispute Settlement Body ("DSB") establish a Panel with regard to the following measures:

(c) Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995[1] on protection against dumped imports from countries not members of the EC, as amended.

(d) Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China[2].

China requests that the Panel have standard terms of reference as set out in Article 7.1 of the DSU. China asks that this request be placed on the agenda for the next meeting of the Dispute Settlement Body that will take place on 23 October 2009.

I. ARTICLE 9(5) OF COUNCIL REGULATION (EC) NO. 384/96 OF 22 DECEMBER 1995 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EC, AS AMENDED

Article 9(5) of the Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the EC, as amended, (the "*Basic AD Regulation*") 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 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 obligations under the following provisions of the *AD Agreement*, the *GATT 1994* and the *Marrakesh Agreement Establishing the World Trade Organisation*:

(a) Articles 6.10 of the AD Agreement since, in order to benefit from an individual dumping margin, an exporter from China must fulfil specific conditions that are not provided for in the AD Agreement;

(b) Article 9.2 of the AD Agreement since, in order to benefit from an individual anti-dumping duty, an exporter from China must fulfil specific conditions that are not provided for in the AD Agreement;

(c) Article 9.3 of the AD Agreement since for those producers/exporters who do not fulfil the conditions for individual treatment, 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 AD Agreement;

(d) Article 9.4 of the AD 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;

(e) 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 EC fails to accord to China advantages granted to market economies;

[1] OJ L 56, 6.3.1996, pp. 1-20.
[2] OJ L 29, 31.1.2009, p.1.

(f) Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organisation and Article 18.4 of the AD Agreement since the EC has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and the AD Agreement.

(g) 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.

II. COUNCIL REGULATION (EC) NO. 91/2009 OF 26 JANUARY 2009 IMPOSING A DEFINITIVE ANTI-DUMPING DUTY ON IMPORTS OF CERTAIN IRON OR STEEL FASTENERS ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA (THE "DEFINITIVE REGULATION")

Through the Definitive Regulation, the EC established for Chinese producers/exporters of certain iron or steel fasteners dumping margins ranging from 0% to 115,4% and imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China ranging from 0% to 85%.

China submits that this measure is inconsistent, at least, with the following provisions of the *AD Agreement* and of the *GATT 1994*:

(a) Article 6.1.1 of the AD Agreement and Part I, paragraph 15 of the Protocol on the Accession of the People's Republic of China ("China's Protocol of Accession") and paragraph 151 (d) and (e) of the Working Party Report on the Accession of China because the EC granted to Chinese exporters/producers only 15 days as of the date of publication of the Notice of Initiation in the Official Journal of the European Union to submit their completed questionnaires for Market Economy Treatment and Individual Treatment;

(b) Articles 6.10 of the AD Agreement because the EC required Chinese exporters to demonstrate, on the basis of substantiated claims, that they fulfil all the "individual treatment" criteria listed in Article 9(5) of the Basic AD Regulation as a pre-requisite to benefit from an individual dumping margin;

(c) Article 9.2 of the AD Agreement because the EC required Chinese exporters to demonstrate, on the basis of substantiated claims, that they fulfil all the "individual treatment" criteria listed in Article 9(5) of the Basic AD Regulation as a pre-requisite to benefit from an individual anti-dumping duty;

(d) Article I of the GATT 1994 because the EC does not impose the individual treatment conditions listed in Article 9(5) of the Basic AD Regulation to exporters/producers from market-economy countries;

(e) Article 12.2.2 of the AD Agreement and paragraph 151 (f) of the Working Party Report on the Accession of China because the EC failed to substantiate the reasons for accepting and/or rejecting the request of individual exporters/producers to benefit from individual treatment;

(f) Article 5.4 of the AD Agreement because the EC initiated the anti-dumping proceeding on the basis of a complaint by the Community producers allegedly representing 27% of the total domestic production in the EC while (i) the EC failed to examine properly before the initiation whether the application has been made by or

on behalf of the domestic industry and (ii) the EC improperly concluded that the application had been made by or on behalf of the domestic industry;

(g) Articles 2.1 and 2.6 of the AD Agreement by including in the scope of the product under consideration both standard and special fasteners as "like" products despite their readily apparent differences and uses;

(h) Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 by failing to make a fair comparison between the export price and the normal value; in particular, by failing to make a product comparison on the full product control number and without making the necessary adjustments for differences physical or otherwise, affecting price comparability;

(i) Article 2.4.2 of the AD Agreement and Article VI:1 of the GATT 1994 by excluding certain export sales from the dumping margin calculation;

(j) Articles 3.1 and 3.2 of the AD Agreement because the EC failed to make a product comparison on the full product control number and did not make the appropriate adjustments for the differences affecting price comparability when determining the price undercutting margin;

(k) Articles 4.1, 3.1, 3.4 and 3.5 of the AD Agreement because the EC failed to make an injury determination with respect to the relevant domestic industry as defined in Article 4.1 of the AD Agreement and/or is not based on positive evidence or does not include an objective examination in accordance with Article 3.1 of the AD Agreement:

(i) The EC improperly excluded from the "domestic industry" all producers that did not make themselves known within 15 days from the date of initiation of the investigation or that did not support the complaint**;**

(ii) The EC failed to include in "the domestic industry" domestic producers accounting for a major proportion of the total EC production;

(iii) The EC failed to determine which proportion of the total domestic production was represented by the EC producers constituting the domestic industry throughout the investigation period;

(iv) The EC conducted the injury determination on the basis of a sample of producers accounting for only 17.5 per cent of the total EC production of the like product in 2006;

(v) The EC failed to exclude from the definition of the domestic industry producers that are related to producers/exporters or importers or are themselves importers of the allegedly dumped product.

(l) Article 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* because the EC failed to exclude from the volume of dumped imports, imports from Chinese producers that were found not to be dumping and by including in the volume of dumped imports all imports from non-sampled producers;

(m) Articles 3.1, 3.2 and 3.4 of the *AD Agreement* because the EC failed to make an objective examination of the impact of the alleged dumped imports on the domestic

industry (including all relevant economic factors and indices having a bearing on the state of the industry) that is based on positive evidence;

(n) Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* by failing to weigh properly and reasonably factors other than the alleged dumped imports in its examination of injury and causation, including imports from third countries, increasing costs of raw materials, competition by EC producers not supporting the complaint, and export performance of the EC producers;

(o) Articles 6.2 and 6.4 of the *AD Agreement* and paragraph 151 (c)(e) of the *Working Party Report on the Accession of China* because the EC failed to ensure throughout the investigation to Chinese producers/exporters the full opportunity for the defence of their interests and failed to provide timely opportunities for them to see all information that is relevant to the presentation of their cases, including, but not limited to the composition of the domestic industry, data concerning normal value determination, information on the adjustments for differences affecting price comparability, Eurostat data on the basis of which are based the total EC production and EC consumption figures;

(p) Articles 6.2 and 6.9 of the *AD Agreement* because the EC failed to inform the interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures, including, but not limited to the following elements: data concerning the normal value determination and information on how the price comparison was carried out, including data on the adjustments for differences affecting price comparability;

(q) Articles 6.2, 6.4, 6.5 and 6.5.1 of the *AD Agreement* because the EC failed to ensure that domestic producers provided non-confidential summaries of confidential information they submitted or because the EC wrongly treated information as being confidential, thereby preventing Chinese producers to have the full opportunity for the defence of their interests;

(r) Article 6.5 of the *AD Agreement* because the EC disclosed the document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC" (DG TRADE/H3/D(2008) that contains confidential information which pertains to different Chinese producers that claimed MET.

The EC's measures therefore nullify and impair benefits accruing to China under the *AD Agreement*, the *GATT 1994*, *the Marrakech Agreement Establishing the World Trade Organisation* and *China's Protocol of Accession*.

China requests that the panel be established with the standard terms of reference, in accordance with Article 7 of the DSU.

China asks that this request for the establishment of a panel be placed in the agenda for the next meeting of the Dispute Settlement Body, which is scheduled to take place on 23 October 2009.

ANNEX H

PANEL'S DECISION CONCERNING EXHIBIT CHN-65

ANNEX H-1

PANEL'S DECISION CONCERNING EXHIBIT CHN-65

1. The European Union, in its first written submission, argued that a number of claims raised by China fell outside the Panel's terms of reference because they were not subject to consultations between the parties. In response, China, during the first substantive meeting of the Panel with the parties, sought to submit a document allegedly sent by China to the European Union prior to the consultations and used during the consultations. The European Union objected to the submission of this document, arguing that it would violate Article 4.6 of the DSU, which provides that consultations are confidential. At the meeting, the Panel declined to receive the document at issue and stated that if China wished to submit this document to the Panel it could make a written request to that effect and the Panel would decide whether to accept it.

2. China subsequently submitted the document at issue as Exhibit CHN-65 to its second written submission on 19 April 2010. On 22 April 2010, the European Union objected, asserting that China had failed to follow the procedures established by the Panel with respect to possible submission of this document, and asking the Panel to indicate whether "Exhibit CHN-65" and references to it in China's second written submission were part of the record, or if not, how this issue should be dealt with. This was followed by further letters from both parties to the Panel on 23 and 26 April 2010. The parties disagree as to the procedures for possible submission of the document in question, and as to the significance of Article 4.6 of the DSU in this context.

3. We recall that the European Union has raised preliminary jurisdictional objections to certain of China's claims on the ground that those claims were not subject to consultations, either because they were not identified in China's request for consultations and/or because no consultations took place between the parties to the dispute with respect to them.[1] Thus, it is clear to us that the European Union asserts, as a matter of fact, that certain of China's claims were not the object of the consultations between the parties. China, on the other hand, seeks to rebut this factual assertion by submitting Exhibit CHN-65, which sets out a "List of Questions for the consultations" which allegedly was sent to the European Union prior to the consultations and formed the basis for the consultations.[2]

4. In these circumstances, we consider it appropriate to accept Exhibit CHN-65. While it is true that China did not make a separate written request to submit the document in question as an exhibit, we do not consider this to preclude its submission as an exhibit in this dispute, as it is clear that the European could, as it did, object to the submission.

5. We see nothing in Article 4.6 of the DSU that would preclude accepting this document as an exhibit in this dispute. Article 4.6 of the DSU provides:

> "Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings."

[1] See, e.g., First Written Submission of the European Union, paras. 244, 248, 488, 491.

[2] See, e.g., Second Written Submission of China, para. 418. The EU has not disputed that this document was provided to it prior to the consultations.

We do not consider that submission of Exhibit CHN-65 to the panel called upon to resolve the same dispute that was the subject of the consultations is inconsistent with the confidentiality requirement of Article 4.6. In this regard, we recall the view expressed by the panel in *Korea – Alcoholic Beverages* that:

> "this confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. ... It would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings."[3]

If information obtained during consultations may be used in the ensuing proceedings, we see no reason to exclude *a priori* an exhibit purporting to set out a list of questions the complaining party considers should be discussed during consultations.

6. The statement of the Appellate Body in *US – Upland Cotton*, relied upon by the European Union, does not apply to this issue. In that case, the Appellate Body expressed agreement with the views of the panel in *Korea – Alcoholic Beverages* that "[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel".[4] We do not read either the panel in *Korea – Alcoholic Beverages* or the Appellate Body in *US – Upland Cotton* to have concluded that in determining the scope of the consultations a panel is precluded from considering evidence submitted by a party as to what it believes to have been subject to those consultations. We recall the Appellate Body's statement in *US – Shrimp (Thailand) / US – Customs Bond Directive* that "whether a complaining party has "expand[ed] the scope of the dispute" or changed the "essence" of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case basis".[5] Evidence of a party's intention to discuss certain questions may well be relevant in making such a case-by-case determination as to the scope of the consultations. This is not, in our view, the same as "[e]xamining what took place in the consultations", which was the focus of the Appellate Body statement relied upon by the European Union.

7. We emphasise that our decision to accept Exhibit CHN-65 in this dispute is without prejudice to our consideration of its relevance to, or the weight we may accord to it in our consideration of the preliminary jurisdictional objections raised by the European Union.

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[3] Panel Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44, para. 10.23. We note that this approach was subsequently also followed by the panel in *Mexico – Corn Syrup*. See, 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. 7.41.

[4] 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. 287.

[5] Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* ("*US – Shrimp (Thailand) / US – Customs Bond Directive*"), WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008, para. 293.

WORLD TRADE ORGANIZATION
ORGANISATION MONDIALE DU COMMERCE
ORGANIZACIÓN MUNDIAL DEL COMERCIO

WT/DS397/R/Corr.1
19 July 2011
(11-3595)

EUROPEAN COMMUNITIES - DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

Report of the Panel

Corrigendum

In paragraph 7.278, "Article 17.6(i) of the AD Agreement" should read "Article 17.6(ii) of the AD Agreement".

COMMUNAUTÉS EUROPÉENNES - MESURES ANTIDUMPING DÉFINITIVES VISANT CERTAINS ÉLÉMENTS DE FIXATION EN FER OU EN ACIER EN PROVENANCE DE CHINE

Rapport du Groupe special

Corrigendum

Au paragraphe 7.278, "l'article 17.6 i) de l'Accord antidumping" doit se lire "l'article 17.6 ii) de l'Accord antidumping".

COMUNIDADES EUROPEAS - MEDIDAS ANTIDUMPING DEFINITIVAS SOBRE DETERMINADOS ELEMENTOS DE FIJACIÓN DE HIERRO O ACERO PROCEDENTES DE CHINA

Informe del Grupo Especial

Corrigendum

En el párrafo 7.278, donde dice "el párrafo 6 i) del artículo 17 del Acuerdo Antidumping" debe decir "el párrafo 6 ii) del artículo 17 del Acuerdo Antidumping".