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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS397/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES OF THE PANEL

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A Party submitting confidential information in any written submission (including in any exhibits) shall mark the cover and/or first page of the document containing any such information with the words "Contains Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Confidential Information" shall be marked at the top of each page containing the confidential information. Before the Panel circulates its final report to the Members, the Panel shall give each party an opportunity to ensure that the report does not contain any information that it has designated as confidential. The removal of any designated confidential information by the Panel will be indicated in the final report through the use of double brackets.

1.3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

1.4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

1.6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, China shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

1.8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

1.9. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

1.10. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

1.11. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. the previous working day.

1.12. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

Third parties

1.13. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.14. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

1.15. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

1.16. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

1.17. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and in its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary submitted by each party of both opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

1.18. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

1.19. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

1.20. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.21. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

1.22. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

1.23. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, six CD-ROMS/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to xxxxxxxxxx@wto.org and xxxxxxxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX B

ARGUMENTS OF CHINA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

1 INTRODUCTION

1. China has initiated the present proceedings to seek resolution of a disagreement with the European Union ("EU") as to the conformity with the covered agreements of the measures taken by the European Union to comply with the recommendations and rulings of the WTO Dispute Settlement Body ("DSB") in this dispute. China considers that the measures taken by the European Union have failed to bring the European Union into compliance with its obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the AD Agreement") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). More specifically, China considers that the measures taken by the European Union to implement the recommendations and rulings of the DSB in relation to the anti-dumping duties on imports of certain iron or steel fasteners originating in China through Council Regulation (EU) No 924/2012 of 4 October 2012 do not fully and correctly implement the recommendations and rulings of the DSB and that they are inconsistent with various provisions of the AD Agreement and of the GATT 1994.

2 LEGAL CLAIMS

2.1 The European Union violated Articles 6.5, 6.5.1, 6.4, 6.2 and 6.1.2 of the AD Agreement in relation to information concerning the products of the Indian producer

2. China claims that the European Union violated Article 6.5 of the AD Agreement because it granted confidential treatment to the information concerning the products of the Indian producer while such information was not confidential and while no "good cause" had been shown.

3. Pursuant to Article 6.5 of the AD Agreement two conditions must be fulfilled before any information submitted by parties to an investigation is to be treated by the investigating authorities as confidential: first, the information must be either confidential by nature or submitted on a confidential basis and, second, good cause must be shown. These conditions are essential to secure the balance between, on the one hand, the interests of the party submitting the information in confidentiality and, on the other hand, the need of the other parties for a level of transparency that is essential to defend their rights throughout the investigation. Neither of these conditions has been met in the present case in relation to the list of products and the information concerning the characteristics of the products of the Indian producer.

4. First, the list of products actually sold by the Indian producer on its domestic market and the information concerning the characteristics of these products, such as information on the strength class, type of coating, chrome, diameter, length, etc., cannot be considered as confidential "by nature" as they are both the type of information that is routinely provided to potential customers interested in purchasing fasteners. Second, nothing in the file suggests that the Indian producer officially requested confidential treatment for all types of information concerning its products thereby providing them "on a confidential basis".

5. In any case, even if the information concerned is to be treated as being submitted on a confidential basis, it is clear that the Indian producer has never provided any reason or justification for the confidential treatment of its information and therefore failed to show "good cause" as required by Article 6.5 of the AD Agreement. As clarified by the Appellate Body in the original dispute, the party submitting the confidential information not only has to provide the reason why the information should be treated as confidential but such reason must be sufficient to justify the withholding of information. The Indian producer, however, did not provide any reason whatsoever why the information concerning the characteristics of its products and the lists of the products should be treated as confidential. The European Union therefore failed to comply with Article 6.5 of the AD Agreement.

6. Furthermore, if the Panel were to find that the European Union did not violate Article 6.5 of the AD Agreement – *quod non* -, China submits that the European Union violated Article 6.5.1 to the extent that it failed to ensure that the Indian producer provide a non-confidential summary of its information in sufficient detail as to permit a reasonable understanding of the substance of the information submitted in confidence. In addition, China notes that the Indian producer did not establish that there were "exceptional circumstances" and did not provide a statement of the reasons why, in such exceptional circumstances, summarization was not possible.

7. Furthermore, by failing to provide timely opportunities to the Chinese exporters to see the lists of products sold by the Indian producer as well as the information concerning the characteristics of these products, the European Union violated Article 6.4 of the AD Agreement. First, the information was relevant to the presentation of the interested parties' cases, as shown by the numerous requests by the Chinese exporters to see this information during the review investigation. Second, the information was not confidential, in particular in the absence of any "good cause" shown by the Indian producer. And third, the information was used by the authorities for the determination of the normal value and the comparison between the normal value and the export price. Therefore, by failing to provide timely opportunities for the Chinese exporters to see such information, the European Union violated Article 6.4 of the AD Agreement.

8. Moreover, to the extent that the European Union violated Article 6.4 of the AD Agreement, it should also be found to have violated Article 6.2 of the AD Agreement. In China's view, the obligation laid down in Article 6.2 is broad and therefore a finding of violation of Article 6.4 necessarily entails a violation of Article 6.2. Since Chinese exporters have been denied the opportunity to see all information that was relevant to the presentation of their cases, they have been denied the opportunity to fully defend their interests, as required by Article 6.2 of the AD Agreement. Furthermore, even if the Panel were to find no violation of Article 6.4 of the AD Agreement, it should conclude that the European Union nonetheless violated Article 6.2 of the AD Agreement. Indeed, in the framework of the review investigation, the European Union failed to provide to the Chinese exporters access to the list of products as well as to the information on the characteristics of the products sold by the Indian producer which were used by the European Union in the normal value and dumping determination. As a consequence, the Chinese exporters were not in a position to make relevant requests for adjustment necessary to ensure that a fair comparison could be made and were therefore deprived of the opportunity to defend their interests, in violation of Article 6.2 of the AD Agreement.

9. With respect to Article 6.1.2 of the AD Agreement, China considers that the European Union failed to ensure that the evidence provided by the Indian producer concerning the characteristics of its products was made available promptly to the Chinese exporters and thereby violated that provision. The Indian producer should be regarded as an "interested party" within the meaning of Article 6.1.2 since it participated in the investigation by providing a substantial amount of information to the European Union. Furthermore, as examined above, the evidence provided by the Indian producer cannot be treated as "confidential information". For the foregoing reasons, the European Union was under the obligation to make the evidence concerning the characteristics of the products of Indian producer promptly available to the Chinese exporters participating in the investigation and by failing to do so, the European Union violated Article 6.1.2 of the AD Agreement.

2.2 The European Union violated Article 2.4 of the AD Agreement by failing to provide relevant information regarding the dumping margin determination

10. China claims that by failing to provide relevant information on the characteristics of the products of the Indian producer which was used for the determination of the normal value, the European Union violated Article 2.4 of the AD Agreement.

11. In the original dispute, the Appellate Body stated that in order to ensure a fair comparison as required by Article 2.4 of the AD Agreement, the investigating authority must, at a minimum, inform the parties of the products or product groups with regard to which it will conduct the price comparison. According to the Appellate Body, this obligation is particularly important in case of anti-dumping investigations of imports from non-market economy countries since without this information, the foreign producers under investigation are not in a position to request the necessary adjustments.

12. Pursuant to the Appellate Body's finding in the original dispute, the European Union, in the review investigation, initially clarified that, for the purposes of the dumping margin determination, it had grouped products according to the distinction between standard and special fasteners and the strength class. The European Union did not, however, provide any further information regarding the products of the Indian producer. Since the comparison had been made on the basis of products groups defined initially by only two criteria, there were potentially many other physical differences affecting price comparability which would justify adjustment necessary to ensure a fair comparison required by Article 2.4 of the AD Agreement. It was therefore essential for the Chinese exporters to know the characteristics of the products of the Indian producer used in the normal value determination.

13. Despite numerous requests by Chinese exporters, the European Union failed to provide any information concerning characteristics that the European Union itself acknowledged as affecting price comparability and which were identified in the original PCNs such as diameter and length, types of fasteners or coating and chrome. By failing to provide this information, the European Union made it impossible for the Chinese exporters to identify the possible differences between the fasteners of the Indian producer and their own products and, if any, to request adjustments related to these differences.

14. Similarly, the European Union failed to provide any information with respect to characteristics affecting price comparability other than those identified in the original PCNs namely traceability, industry standards, unit of defective rate, hardness, bending, strength impact toughness and friction coefficient, as identified by the Chinese exporters. The European Union failed to provide information on whether any of the abovementioned characteristics were present, and if so, to what extent, in the products sold by the Indian producer. Furthermore, the European Union rejected the request for adjustments presented by the Chinese exporters in relation to these characteristics on the basis that they were not sufficiently substantiated. However, China submits that once the Chinese exporters had shown that certain technical characteristics are known in fasteners industry to affect prices, under the last sentence of the Article 2.4 of the AD Agreement, it was the duty of the European Union to indicate to the Chinese exporters what information their requests should contain so that they could further substantiate their requests for adjustments.

15. Therefore, by failing to provide the necessary information on the characteristics of the products sold by the Indian producer affecting price comparability, which were essential for the Chinese exporters in order to make or substantiate their requests for adjustments and thereby ensure a fair comparison, the European Union acted inconsistently with Article 2.4 of the AD Agreement.

2.3 The European Union acted inconsistently with Article 2.4 of the AD Agreement in failing to ensure that the export price of standard fasteners was not compared to the normal value of special fasteners

16. Pursuant to Article 2.4 of the AD Agreement, in conducting a fair comparison between the export price and the normal value, the investigating authorities should make due allowances for differences affecting price comparability. In the present case, the European Union, after having noted that there were differences between standard and special fasteners, decided to make due allowances for these differences by grouping similar fasteners models, namely "standard" fasteners on the one hand and "special" fasteners on the other hand.

17. China takes no issue with the methodology of "grouping" followed by the European Union. It claims, however, that the European Union failed to ensure that a fair comparison was being made for the following reasons.

18. First, the European Union, failed to ensure that fasteners destined for high-end applications but not made according to a customer drawing were considered as "special" fasteners and not as "standard" fasteners. China submits that such high-end fasteners are much more expensive than the standard low-end fasteners produced by the Chinese exporters and therefore should not be included in the same group. However, during the review investigation, the European Union failed to provide clarifications concerning the criteria on the basis of which it made the distinction between standard and special fasteners and when more precise information was provided, such information was contradictory. Furthermore, the limited information finally provided by the

European Union shows that fasteners used in high-end applications but not made according to a customer's drawing would have been considered as standard fasteners.

19. Second, the European Union could not reasonably and objectively conclude that the lists of standard and special fasteners provided by the Indian producer were accurate. As shown by the Review Regulation, the European Union was unable to conduct an on-the-spot verification of the split between standard and special fasteners made by the Indian producer and accepted the accuracy of the split uniquely on the basis of the so-called "walk-through" tests (i.e. in-depth verification of a sample of sales transactions included in the sales listing in order to verify its accuracy) and after checking the split of the sales listing against an average price level of the split. However, in China's view, neither of these methods can be considered as objective as they check the accuracy of the data by reference to the very same data instead of to an external source.

20. In failing to ensure that the export price of standard fasteners produced by the Chinese exporters was not compared to the normal value of special fasteners manufactured by the Indian producer, and in failing to examine objectively and reasonably the lists of standard and special fasteners provided by the Indian producer, the European Union failed to make a fair comparison between export price and normal value. Therefore, the European Union acted inconsistently with Article 2.4 of the AD Agreement.

2.4 The European Union acted inconsistently with Articles 2.4 of the AD Agreement and VI:1 of the GATT 1994 in failing to make a fair comparison between normal value and export price in particular in failing to make allowances for differences affecting price comparability

21. China claims that the European Union violated Articles 2.4 of the AD Agreement and VI:1 of the GATT 1994 since it failed to make a fair comparison between the normal value and the export price and, in particular, since it failed to make allowances for several differences affecting prices comparability, namely differences in taxation, differences in certain physical characteristics and other differences affecting price comparability.

22. First, in relation to differences in taxation, in the review investigation, the Chinese exporters requested an adjustment for the difference in taxation on the ground that the Indian producer used imported raw materials subject to high indirect taxes, while the Chinese exporters used locally sourced wire rode. The European Union, however, rejected this request for the reason that the Chinese producers could not demonstrate that first, they used imported raw materials and second, that they benefited from a duty drawback scheme.

23. The difference in taxation was due to the fact that the analogue producer used imported raw materials subject to high indirect taxes, while the Chinese exporters used locally produced wire rod. China submits that it was the European Union, by choosing an analogue country producer that used as raw materials imported wire rod subject to high import duties and other indirect taxes, that created the imbalance between normal value and export price. The European Union should therefore have corrected this imbalance by making an adjustment for the difference in taxation.

24. China further submits that by requiring the Chinese exporters to demonstrate that their exports to the European Union benefited from the non-collection or refund of import charges on the raw materials incorporated in the finished product, the European Union not only applied the wrong legal test but also imposed an unreasonable burden of proof on the Chinese producers.

25. Second, during the review investigation the Chinese exporters also indicated that several differences in physical characteristics affected price comparability and therefore had to be taken into account when making the price comparison between normal value and export price. Although the European Union acknowledged that the differences originally identified in the PCNs were all differences that had an effect on prices, it failed to take them properly into account. More specifically, the European Union failed to make necessary adjustments related to the differences in the types of fasteners, coating and chrome as well as the diameter and length of fasteners.

26. The European Union also rejected the requests for adjustments related to the physical characteristics other than those identified in the PCNs arguing that the requests had not been substantiated. The Chinese exporters noted that the characteristics such as traceability, industry standards, unit of defective rate, hardness, bending strength, impact toughness and friction

coefficient affect price comparability, even though in the absence of any information as to the products of the Indian producer, it was impossible for them to further substantiate their requests for adjustment. China submits that in requiring that the Chinese exporters provide further evidence on the existence of differences in price, without providing precise indications on how the interested parties were to substantiate their requests and without providing any information whatsoever on the characteristics of the product types used for normal value determination, the European Union imposed an unreasonable burden of proof on the interested parties.

27. Finally, the European Union acted inconsistently with Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement in failing to make necessary adjustments for other differences affecting price comparability, namely differences resulting from the easier access to raw material, differences resulting from an additional production process, i.e. the fact that the analogue producer used self-generated electricity, and differences in efficiency and productivity, more specifically efficiency of consumption of raw material, electricity consumption and productivity per employee. The European Union rejected these requests for adjustments claiming that the Chinese producers failed to provide evidence that those differences affected price comparability. Additionally, the European Union rejected the requests based on the assertion that this was necessary to prevent the prices and costs in a non-market economy from being taken into account when establishing normal value. China strongly disagrees with both of these assertions. As to the first assertion, the Chinese producers provided extensive information on the differences in costs, along with evidence that these differences translated into differences in prices. As to the second assertion, China notes that the requests for adjustment were not based on the Chinese exporters' prices or costs.

28. For all the abovementioned reasons, by failing to make allowances for differences affecting price comparability, the European Union failed to make a fair comparison between the normal value and the export price and therefore, violated Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement.

2.5 The European Union violated Articles 2.4 and 2.4.2 of the AD Agreement in failing to take into account all comparable export transactions

29. China claims that the European Union acted inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement since it did not take into account all export transactions in determining the dumping margin of each of the Chinese exporters concerned.

30. In determining the margin of dumping, the European Union did not take into account "all" export transactions of the Chinese exporters since the comparison between export price and normal value was made on a weighted average basis only for those fasteners types exported by each Chinese producer for which a matching type was produced and sold by the Indian producer.

31. The European Union's failure to take into account "all" export transactions is based on the fact that where there is no fastener type produced by the Indian producer "matching" the fastener types produced by the Chinese exporter, there is a lack of comparability and the export transactions must be left out.

32. This approach, however, is inconsistent with the requirements of Article 2.4.2 of the AD Agreement. As stated by the European Union itself, all export types of the Chinese producers are "like" the normal value product types of the Indian producer. They are therefore "comparable" within the meaning of Article 2.4.2 of the AD Agreement. As a consequence, all of these comparable types should have been taken into account in the dumping margin calculation. This is further required by the fact that dumping and margins of dumping must be established for the product under investigation as a whole.

33. In failing to base its dumping margin determination on a comparison of all comparable export transactions, the European Union has thus acted inconsistently with Article 2.4.2 of the AD Agreement.

34. Furthermore, by failing to take into account the prices of "all" comparable export transactions, the European Union also failed to make a fair comparison between export price and normal value thereby violating Article 2.4 of the AD Agreement.

2.6 The European Union violated Article 4.1 and Article 3.1 of the AD Agreement

35. In the original proceedings, the Appellate Body found that the European Union acted inconsistently with Article 4.1 of the AD Agreement by linking the eligibility to be included in the domestic industry definition to the producer's willingness to be part of the sample.

36. To remedy this situation, in the review investigation, the European Union re-defined its domestic industry on the basis of the producers which had come forward within the deadline imposed by the Notice of Initiation of the original investigation regardless of whether they indicated that they were prepared to be part of the sample.

37. This approach, however, disregards the fact that the Notice itself had mixed the issue of the domestic industry definition and the sampling determination. Therefore, it is clear that producers may have decided not to come forward and provide the requested information because they knew that their unwillingness to be included in the sample would automatically exclude them from the definition of the domestic industry.

38. For these reasons, in order to properly implement the findings of the Appellate Body and, in order to act in compliance with Article 4.1 of the AD Agreement, the European Union was required to start the selection process of the domestic industry anew, instead of limiting itself to use the data received from the EU producers that came within the deadline imposed in the original investigation.

39. Therefore, the European Union's re-determination of its domestic industry is inconsistent with Article 4.1 of the AD Agreement since it remains based on a self-selection process among the domestic producers that introduces a material risk of distortion.

40. As a consequence, the European Union also violated Article 3.1 of the AD Agreement since the analysis of injury is based on information relating to a wrongly defined industry. Such analysis is therefore necessarily distorted and does not involve an objective examination as required by Article 3.1 of the AD Agreement.

3 CONCLUSIONS

41. China respectfully requests the Panel to find that the measures adopted by the European Union to implement the recommendations and rulings of the DSB in relation to the anti-dumping duties on imports of certain iron or steel fasteners originating in China through Council Regulation (EU) No 924/2012 of 4 October 2012 are inconsistent with Articles 6.5, 6.5.1, 6.4, 6.2, 6.1.2, 2.4, 2.4.2, 4.1 and 3.1 of the AD Agreement and with Article VI:1 of the GATT 1994. For this reason, China further requests the Panel to find that the European Union has failed to comply with the recommendations and rulings of the DSB.

42. China also respectfully requests the Panel to recommend that the DSB requests the European Union to bring its measures into conformity with the AD Agreement and the GATT 1994.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

1. INTRODUCTION

1. In the second written submission, China addresses and rebuts the EU's defence and the arguments it advances in its first written submission. In so doing, China addresses the arguments of the EU in the same order as they have been presented.

2. LEGAL CLAIMS

2.1 The EU violated Articles 6.5, 6.5.1, 6.4, 6.2 and 6.1.2 of the AD Agreement in relation to information concerning the products of the Indian producer

2. China claims that the EU violated Article 6.5 of the AD Agreement because it has granted confidential treatment to the information concerning the products of the Indian producer while such information was not confidential and no "good cause" has been shown.

3. First, China submits that, contrary to the EU's assertion, it is not prevented from raising this claim in the context of the compliance proceedings. China notes that while in the original dispute the claim under Article 6.5 concerned the confidential treatment of information on the "product types", it is now challenging the confidential treatment afforded to the list of products and the information concerning the characteristics of the products sold by the Indian producer. Thus, the claim relates to a different, or at least changed, component. Second, China could not have challenged these aspects during the original proceedings since the Chinese exporters only became aware of them during the Review Investigation. Finally, unlike in *EC – Bed Linen*, the confidential treatment of the information concerned is an inseparable aspect of the measure taken to comply in the present dispute.

4. Second, contrary to what the EU is arguing, the information concerned is neither confidential "by nature" nor has it been submitted on a confidential basis and, in any case, no good cause has been shown by Pooja Forge. China submits that the information concerning the list of products and the information concerning the products characteristics is routinely provided to potential customers willing to purchase fasteners on unrestricted basis and the EU failed to prove otherwise. The argument that it is proprietary information that, allegedly, companies do not like sharing with their competitors cannot stand, and even if it is the case, it does not render such information confidential by nature.

5. Furthermore, the EU fails to precisely show that each piece of information concerned has been provided on a confidential basis. Finally, China reiterates that no good cause has been ever shown by Pooja Forge and that the *a posteriori* justification provided by the EU cannot be considered as "good cause" within the meaning of Article 6.5 of the AD Agreement. The EU has also failed to objectively assess the alleged good cause and instead considered that the confidential treatment was justified merely because Pooja Forge cooperated on a voluntary basis.

6. China further submits that if the Panel were to conclude that the EU did not violate Article 6.5 of the AD Agreement – *quod non* – it should conclude that that the EU violated Article 6.5.1 of the AD Agreement to the extent that it failed to ensure that the Indian producer provide a non-confidential summary. China notes that the file does not contain any indication that the Indian producer was not able to furnish a non-confidential summary nor a statement of reasons why summarization was not possible. Moreover, the excerpt from Pooja Forge's Questionnaire Response does not constitute an adequate summary. Finally, China notes that the arguments put forward by the EU only deal with the list of products but not with the information concerning the characteristics of those products.

7. China maintains that by failing to provide the opportunities to the Chinese exporters to see the list of products sold by Pooja Forge as well as the information concerning the characteristics of

those products which were used for the normal value determination, the EU violated Article 6.4 of the AD Agreement. First, China notes that contrary to the EU objection it does not expand the scope of its claim since the Panel Request clearly refers to the information concerning the products sold by the Indian producer, thus including information on the list of such products as well as information on their characteristics. China further submits that the information concerned is relevant to the presentation of the Chinese exporters' case and in particular for identifying the differences affecting price comparability. Moreover, the information is not confidential within the meaning of Article 6.5 and was used by the investigating authorities since the Commission examined such information in order to make the normal value and dumping determinations. Finally, China notes that the EU did not respond to its claim under Article 6.2 and refers to its arguments developed in China's first written submission.

8. China claims that since the evidence provided by Pooja Forge concerning its products has not been made available promptly to the Chinese exporters, the EU violated Article 6.1.2 of the AD Agreement. In that respect, Pooja Forge is to be regarded as an interested party since it participated in the investigation at the request of the EU and provided substantial amount of information that was used as the basis for determining normal value. Furthermore, the information concerned was not confidential and it has never been provided to the Chinese exporters. For these reasons the Panel should conclude that the EU violated Article 6.1.2 of the AD Agreement.

2.2 The EU violated Article 2.4 of the AD Agreement by failing to provide relevant information regarding the dumping margin determination

9. China claims that by failing to provide relevant information regarding the products of Pooja Forge which was used for the determination of the normal value, the EU violated Article 2.4 of the AD Agreement and failed to implement the DSB recommendations and rulings. The EU's arguments presented in its first written submission are based on an erroneous interpretation of the findings of the Appellate Body and fail to take into account the purpose of the role to be played by the authorities and the interested parties in the context of the "dialogue" under Article 2.4 of the AD Agreement.

10. At the outset China clarifies that its claim under Article 2.4 relates to the role an investigating authority must play in the context of the fair comparison obligation, in particular, taking into account the requirement that the authorities shall indicate what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on the interested parties. In any event, however, China submits that contrary to what the EU argues, there has been no "active and engaged" dialogue.

11. Pursuant to the Appellate Body's finding in the original dispute, in anti-dumping investigations involving imports from NMEs, producers must be informed of the specific products with regard to which the normal value is determined and not only of the product types, since without such information the interested parties are not in a position to request necessary adjustments and to substantiate their requests.

12. The EU, however, failed to provide relevant information regarding characteristics affecting price comparability identified in the original PCNs, namely diameter and length, types of fasteners and coating and chrome. China submits that this information was crucial for the Chinese exporters and that the alleged confidential character of the information is not an excuse for not providing this information to the extent that the provision of such information is necessary under Article 2.4 of the AD Agreement.

13. Similarly, the EU failed to provide relevant information regarding characteristics affecting price comparability not identified in the original PCNs. China notes that the EU did not address China's claim and instead argued that the Chinese exporters failed to show how these product characteristics affect price comparability. China submits that the exporters provided evidence that characteristics such as traceability, hardness or unit of defective rate had an impact on price and therefore should be taken into account. However, because the Commission did not provide any information concerning these characteristics in Pooja Forge's products, it was impossible for the Chinese exporters to substantiate further their request for adjustments.

14. Therefore, by failing to indicate to the Chinese exporters the information that their request should contain, the EU violated Article 2.4 of the AD Agreement and failed to comply with the recommendations and rulings of the DSB.

2.3 The EU acted inconsistently with Article 2.4 of the AD Agreement in failing to ensure that the export price of standard fasteners was not compared to the normal value of special fasteners

15. China submits that it is allowed to raise this claim before the Panel. The EU's argument that China is raising the same issues as those it raised before the Panel in the original proceedings and the argument that it could have, but did not raise this claim in the course of the original proceeding, are contradictory. Indeed, China could not be raising issues "again" which it did not raise during the original proceedings.

16. The claims raised in the present proceedings concern the dumping determination and the comparison between the export price of Chinese fasteners and the normal value of Pooja Forge's fasteners. This claim is very different from those raised in the original proceedings, which concerned the analysis of the price effects in the framework of the injury determination and involved a comparison between the prices of fasteners exported to the EU and those produced by the EU industry.

17. The argument that China could have raised this claim during the original Panel proceedings is unconvincing, as the EU did not inform interested parties how it made the distinction between Pooja Forge's special and standard fasteners during the Original Investigation. It is also incorrect to characterize the distinction between special and standard fasteners as an unchanged aspect of the original measures. The claim China is raising is a result of the further information on how the distinction had been made, information that the EU was obliged to provide following the recommendations and rulings of the DSB.

18. The EU's arguments that it entered into a substantive dialogue as required by Article 2.4 of the AD Agreement are equally unconvincing. Through different phases of the dialogue the EU first refused to engage with the interested parties, thereafter provided conflicting information and ultimately showed that it failed to ensure that fasteners not made to a customer drawing but used in high-end applications were not grouped with standard fasteners.

19. Finally, a reasonable and objective investigating authority could not conclude that the lists of standard and special fasteners provided by Pooja Forge were accurate and would allow for a fair comparison within the meaning of Article 2.4 of the AD Agreement. Indeed, during the *in situ* verification, the EU had not even considered the possibility of distinguishing special from standard fasteners. The distinction was introduced at a later stage, based only on the criterion of a customer drawing. The lists did not contain customer names nor did the product codes allow to identify fasteners that were special on the account of their use in high end-applications.

20. Against this background, walk-through tests could not show that the information provided was accurate as they were conducted to verify the split against information that was obtained prior to the distinction between standard and special fasteners. The average price check is equally unsatisfactory, as the establishment of the average itself likely included special fasteners.

2.4 The EU acted inconsistently with Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 in failing to make a fair comparison between normal value and export price in particular in failing to make due allowances for differences affecting price comparability

21. China claims that the EU violated Articles 2.4 of the AD Agreement and VI:1 of the GATT 1994 since it failed to make a fair comparison between the normal value and the export price and, in particular, since it failed to make due allowances for several differences affecting price comparability, namely differences in taxation, differences in certain physical characteristics and other differences affecting price comparability.

22. China further claims that the EU's argument that China re-litigates the issue and disregards the standard of review under Article 17.6 of the AD Agreement must be rejected. China clarifies that it does not ask the Panel to make a *de novo* review, but instead, in line with the standard

established under Article 17.6 of the AD Agreement, requests the Panel to find that the conclusion reached by the EU was not one that an objective and unbiased investigating authority could have reached and therefore the EU violated Article 2.4 of the AD Agreement.

23. First, with respect to differences in taxation, China submits that by ignoring the evidence presented by the Chinese exporters and requiring them to demonstrate that their exports to the EU *actually* benefited from the non-collection or refund of import charges on wire rod, the EU applied the wrong legal test and imposed an unreasonable burden of proof on the Chinese exporters thereby acting inconsistently with the last sentence of Article 2.4 of the AD Agreement.

24. Furthermore, contrary to what the EU argues, the difference in taxation has nothing to do with the alleged "distorted raw material situation of the Chinese fasteners producers." Moreover, any alleged distortions in the raw material prices of the Chinese producers are irrelevant for the export price determination. In that respect China notes that paragraph 15 of China's Accession Protocol allows to treat China differently only with respect to the domestic aspect of the price comparability (namely normal value), but not with respect to the export price determination or the comparison between export price and normal value once these have been established.

25. By determining normal value on the basis of the domestic sales of an analogue country producer that used as raw material imported wire rod subject to high import duties, the EU created imbalance between the normal value and the export price. Therefore, the obligation to ensure a "fair comparison" rested squarely on the EU that should have corrected this imbalance by making appropriate adjustment, in accordance with Article 2.4 of the AD Agreement.

26. Second, China submits that the EU based its allowances for certain differences in physical characteristics as identified in the original PCNs on an improper factual basis. More specifically China submits that an objective investigating authority could not reasonably conclude, on the basis of the elements on the record, that all fasteners of the Indian producer were electroplated and contained only chrome Cr3. Moreover, the EU failed to take fully into account the differences in diameter and length while acknowledging that such differences affected price comparability. Finally, the methodology followed by the EU to distinguish between different types of fasteners and to make allowances accordingly was not satisfactory. The EU, in its first written submission, failed to address the arguments presented by China and therefore failed to rebut that it acted inconsistently with Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994.

27. Third, with respect to differences in physical characteristics other than those identified in the PCNs, China submits since the EU did not clearly indicate the basis on which the price comparison was going to be made until very late in the proceedings, the Chinese producers were not able to request the necessary adjustments in the course of the original anti-dumping investigation, and, as a result, during the original dispute. Furthermore, China submits that the EU could not, as it did, merely claim that the requests for adjustments concerning these other characteristics had not been properly substantiated. The Chinese exporters explained that characteristics such as traceability, standards or unit of defective rate have a significant impact on price, even though in the absence of any information as to the products of Pooja Forge, the evidence they were able to submit was necessarily limited.

28. Fourth, in its first written submission, the EU did not address the detailed arguments presented by China in support of its claims that the EU failed to make due allowances for differences resulting from the easier access to raw materials, differences in efficiency and productivity and differences arising from the self-generated electricity of the Indian producer. China notes that in particular the EU did not respond at all to the claim relating to the adjustments for differences in the efficiency of the consumption of wire rod and productivity per employee.

29. China further submits that the EU's arguments for rejecting those requests cannot be accepted by the Panel. First, China notes that the two Chinese producers submitted comprehensive evidence on the differences in costs as well as demonstrated that such differences in costs translated into differences in prices and that their requests were in line with the well-established practice of the EU. Second, China notes that the NME status of China is irrelevant to the fact that a fair comparison must be made between the normal value and the export price in accordance with Article 2.4 of the AD Agreement and that in any event Chinese exporters relied only on data of the Indian producer's prices and prices applicable in India. China further submits that the fact that the production processes were similar and that the Indian market was competitive, even if deemed

right, do not refute the fact that there were several differences in costs which affected price comparability. As explained by the Chinese exporters, differences related to the easier access to raw materials, self-generated electricity and differences in efficiency and productivity all translate into differences in prices and therefore should be treated equally to the differences in quality control, for which adjustment was made in the original proceedings.

2.5 The EU violated Articles 2.4 and 2.4.2 of the AD Agreement in failing to take into account all comparable export transactions

30. China claims that the EU acted inconsistently with Article 2.4.2 of the AD Agreement because it did not take into account all comparable export transactions in determining the dumping margin of the Chinese exporters.

31. China submits that the appropriate legal standard for identifying "comparable export transactions" is the one elaborated by the Appellate Body in *EC – Bed Linen*. Given that all export types of fasteners of the Chinese producers are "like" normal value fasteners types of Pooja Forge, as acknowledged by the EU itself, they are all "comparable" for the purpose of Article 2.4.2 of the AD Agreement. It logically follows that the related export transactions should be treated as "comparable" and thus, should be included in the comparison under Article 2.4.2. This approach is further required by the fact that the dumping and margins of dumping must be established for the product under investigation as a whole.

32. China submits that, when using the multiple averaging methodology, the investigating authority cannot simply ignore some of the product types or models, and contrary to what the EU argues, this is inherently "unfair". Therefore, the fact that the EU decided to group fasteners into different product types for the calculation of the dumping margin does not imply that the export transactions related to those products that did not have a corresponding Indian type could be simply left out.

33. In response to the EU's arguments under Article 6.10 of the AD Agreement, China notes that this provision allows for sampling only as an exception to the obligation to determine individual margins of dumping, however, it does not provide an exception to Article 2.4.2 and the obligation to take into account all comparable export transactions. China also notes that the EU used only certain types of products not because their overall number was too large, as required by Article 6.10, but rather because Pooja Forge did not produce all of the product types produced by the Chinese exporters. Finally, China wishes to stress that the EU has never indicated that it was wishing to use sampling techniques in the present investigation.

34. China disagrees with the EU that the partial comparison of export prices was the most reliable basis for establishing the level of dumping. In that respect China observes that Article 2 of the AD Agreement provides for alternative methodologies to establish margin of dumping when there is no matching normal value. These methodologies, however, were ignored by the EU.

35. With regard to the "matching problem" referred to by the EU, China submits that it was the EU's responsibility to ensure that the products of Pooja Forge, selected as a market economy third country producer, were comparable to those of the Chinese exporters and to conduct a fair comparison of all comparable export transactions.

36. China further notes that, in its first written submission, the EU did not provide any facts or reasoning supporting its conclusion that the dumping margin calculated on the basis of the matching products was representative for the export sales as a whole. To the contrary, China submits that there are both qualitative and quantitative reasons why the export sales that were compared with normal value are not representative.

37. Finally, China considers that by failing to take into account all comparable export transactions, the EU acted inconsistently with the fair comparison obligation under Article 2.4 of the AD Agreement. In particular, since the comparison made by the EU resulted in a presumption of dumping for those export transactions that were not used in the dumping determination, it must necessarily be qualified as "unfair".

2.6 The EU violated Articles 4.1 and 3.1 of the AD Agreement

38. China considers that the EU's re-determination of its domestic industry is inconsistent with Articles 4.1 and 3.1 of the AD Agreement since it remains based on a self-selection process that introduces a material risk of distortion. This is because, contrary to the EU's assertions, the material risk of distortion does not stem exclusively from the actual exclusion of the producers not willing to participate in the sample from the definition of the domestic industry but rather from the approach linking the eligibility to be included in the domestic industry to the willingness to be part of the sample.

39. China submits that the approach of the EU disregards the fact that the Notice of Initiation and the sampling forms sent to the domestic producers in the Original Investigation had confused the issue of sampling and the definition of the domestic industry and therefore, some of the producers who could be included in the domestic industry did not even come forward within the 15-day deadline. Contrary to the EU's assertion, the possibility that producers did not come forward because of the linkage between the unwillingness to be part of the sample and the definition of the domestic industry is not merely speculative.

40. China also submits that contrary to the EU's assertion the participation rate of 36% remains very low and that the fragmented nature of the fasteners industry cannot serve as a justification for not ensuring that the process of defining the domestic industry does not give rise to a material risk of distortion.

41. In light of the above, China considers that in order to fully implement the Appellate Body's findings in the original dispute and in order to comply with its obligations under Article 4.1 of the AD Agreement, the EU was required to start the selection process of the domestic industry anew instead of limiting itself to using the data received in the Original Investigation.

42. Furthermore, the argument advanced by the EU that the violation of Article 4.1 of the AD Agreement would not result in the automatic violation of Article 3.1, because the sample of domestic producers would still be representative only shows the continuing confusion by the EU between the definition of the domestic industry, on the one hand, and the selection of the sample, on the other hand. In fact, the domestic industry must be defined first and it is only on the basis of the domestic industry thus defined that a sample can be selected that is representative of the domestic industry initially defined. Therefore, since the analysis of injury is based on information relating to a wrongly defined industry, the EU violated Article 3.1 of the AD Agreement. Such an analysis is necessarily distorted and does not involve an objective examination.

3. CONCLUSIONS

43. For the reasons set forth in its second written submission, China respectfully requests the Panel to find that the measures adopted by the European Union to implement the recommendations and rulings of the DSB in relation to the anti-dumping duties on imports of certain iron or steel fasteners originating in China through Council Regulation (EU) No 924/2012 of 4 October 2012 are inconsistent with Articles 6.5, 6.5.1, 6.4, 6.2, 6.1.2, 2.4, 2.4.2, 4.1 and 3.1 of the AD Agreement and with Article VI:1 of the GATT 1994. For this reason, China further requests the Panel to find that the EU has failed to comply with the recommendations and rulings of the DSB.

44. China also respectfully requests the Panel to recommend that the DSB requests the EU to bring its measures into conformity with the AD Agreement and the GATT 1994.

ANNEX B-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA

Opening Statement of the People's Republic of China

1. Introduction

1. The present proceedings concern the European Union's failure to comply with the recommendations and rulings of the DSB in relation to the anti-dumping duties imposed by the European Union on imports of fasteners originating in China. Despite the clear and straightforward ruling of the Appellate Body in July 2011, the implementing measures taken by the European Union have failed to bring it into compliance with its obligations under the AD Agreement and the GATT 1994.

2. The European Union violated Articles 6.5, 6.5.1, 6.4, 6.2 and 6.1.2 of the AD Agreement in relation to the information concerning the products of the Indian producer

2. China claims that the European Union violated Article 6.5 of the AD Agreement because it has granted confidential treatment to the information provided by the Indian producer concerning its products, while such information was not confidential by nature, had not been submitted on a confidential basis. Neither has "good cause" been shown. China is not prevented from raising this claim and has demonstrated that the conditions laid down in Article 6.5 were not met and therefore, the European Union erred in providing confidential treatment to the information concerning Pooja Forge's products.

3. If the Panel where to conclude that there is no violation of Article 6.5, it should be found that the European Union violated Article 6.5.1 since it failed to ensure that Pooja Forge provide a non-confidential summary of the information concerned or, alternatively, establish that there were "exceptional circumstances" and provide a statement of the reasons why, in such circumstances, summarization was not possible.

4. Furthermore, the European Union violated Article 6.4 because it failed to provide opportunities to the Chinese exporters to see the list of products and the information concerning the characteristics of Pooja Forge's products, despite the fact that such information was not confidential, was relevant and used by the Commission. As a consequence, the Chinese exporters have also been denied the opportunity to fully defend their interest as required by Article 6.2.

5. Finally, the European Union violated Article 6.1.2 of the AD Agreement because it failed to ensure that the evidence presented by the Indian producer concerning its products was made available promptly to the Chinese exporters participating in the investigation.

3. The European Union violated article 2.4 of the AD Agreement by failing to provide relevant information regarding the dumping margin determination

6. China now turns to the claim that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to provide information on the product characteristics of Pooja Forge's domestic sales that were used in the normal value determination.

7. In the original dispute, the Appellate Body unambiguously stated that informing which particular method the authority will use to categorize the products for purposes of the price comparison was *a minimum* under Article 2.4 of the AD Agreement. In addition to this *minimum*, the Appellate Body referred to the specific situation of anti-dumping investigations of imports from non-market economies. The Appellate Body stated that foreign producers are unlikely to have knowledge of the specific products and pricing practices of the producer in an analogue country, as is indeed the case in this investigation. Based on this consideration, the Appellate Body found that

exporters will not be able to request adjustments, unless they are informed of the specific products with regard to which normal value is determined.

8. However, during the review investigation, instead of informing the exporters of the specific products used for the normal value determination, the European Union limited itself to explaining on which basis it "grouped" transactions for the basis of the dumping determination. In so proceeding, the European Union both failed to bring its measures into conformity with the covered agreements and prevented the Chinese exporters from substantiating their requests for adjustments.

4. The European Union violated Article 2.4 of the AD Agreement since it failed to ensure that the export price of standard fasteners was not compared to the normal value of special fasteners

9. China claims that the European Union acted inconsistently with Article 2.4 in making a distinction between standard and special fasteners that failed to ensure that the export price of standard fasteners was not compared to the normal value of special fasteners. The failure to ensure that a fair comparison be made results from the fact that a distinction between the standard and the special fasteners sold by Pooja Forge was drawn on the sole basis of a customer drawing, which is an inadequate criterion that does not capture all special fasteners. As a result, the European Union failed to ensure that the price of Pooja Forge's domestic sales of special fasteners was not compared with the export price of standard fasteners of the Chinese producers.

10. China suggests that the Panel exercise its fact-seeking powers under Article 13 of the DSU by requesting the European Union to provide it with a copy of the DMSAL listing, as well as the brochure and other information that has been relied upon to first make the distinction between standard and special fasteners and second, to verify the accuracy of the split made by Pooja Forge.

5. The European Union violated Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 since it failed to make a fair comparison between export price and normal value in particular since it failed to make allowances for differences affecting price comparability

11. The European Union failed to make a fair comparison as required by Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 for the three following reasons.

12. First, the European Union acted inconsistently with Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 because it based its allowances for certain differences in physical characteristics identified in the original PCNs on an improper factual basis. The European Union has acknowledged that differences in characteristics such as coating, chrome, diameter, length and type of fasteners are all differences affecting price comparability. Nevertheless, it failed to ensure that these price differences were eliminated, by making appropriate adjustments.

13. Second, with respect to the adjustments for differences in physical characteristics not reflected in the original PCNs, the European Union failed to communicate what kind of information or evidence was required to substantiate the requests for adjustments and imposed unreasonable burden of proof on the interested parties. The Chinese exporters explained that these characteristics have a significant impact on price, however, in the absence of any information as to the products of Pooja Forge, it was simply impossible for them to differentiate between their products and the products of the Indian producer so as to provide additional information to further substantiate their request for adjustments.

14. Third, the European Union failed to make adjustments for differences that had been shown to affect price comparability. In particular, the European Union failed, despite the requests made by the Chinese exporters, to make due allowances for differences in taxation related to the fact that the normal value of the Indian analogue producer included a significant amount of import duties on wire rod, while the export price of fasteners produced by the Chinese manufacturers did not. The European Union also failed to make due allowances for differences related to the easier access to raw materials, efficiency of energy consumption, productivity per employee and self-generated electricity of Pooja Forge. The European Union ignored evidence and arguments presented by the Chinese exporters and failed to make the necessary adjustments.

6. The European Union violated articles 2.4 and 2.4.2 of the AD Agreement since it failed to calculate the dumping margin on the basis of all comparable export transactions

15. The European Union also acted inconsistently with Articles 2.4 and 2.4.2 of the AD Agreement because it did not take into account all comparable export transactions in determining the dumping margins of the Chinese exporters.

16. The fact that the European Union decided to conduct a comparison by grouping product types does not imply that the export transactions related to those products that did not have a corresponding type on the Indian domestic market could simply be left out. As clarified by the Appellate Body in *EC – Bed Linen* "all types or models falling within the scope of a "like" product" must necessarily be "comparable"" and therefore taken into account in the dumping determination. This approach is further required by the fact that dumping and margins of dumping must be established for the product under investigation as a whole.

17. The European Union attempts to raise secondary arguments with a view to show that it is not so that all domestic and export sales of the "like product" are necessarily always "comparable". These arguments, related to sampling under Article 6.10 or the timing of sales, are manifestly inapposite.

18. The European Union fails to rebut China's arguments that the export sales that were compared with the normal value are not representative for both qualitative and quantitative reasons and seeks to mislead the Panel by providing extremely unclear chart and incorrect data. In any event, it should be stressed that Article 2.4.2 of the AD Agreement requires the comparison of "all comparable export transactions" and does not allow for a calculation of the dumping margin only on the basis of "representative" transactions.

19. By failing to take into account the prices of all comparable export transactions the European Union failed to make a fair comparison between export price and normal value and thereby violated Article 2.4 of the AD Agreement.

7. The European Union violated articles 4.1 and 3.1 of the AD Agreement since the re-determination of the domestic industry remains based on a self-selection process that introduces a material risk of distortion

20. The European Union violated Article 4.1 of the AD Agreement because it defined the domestic industry on the basis of the data received in the original investigation pursuant to the notice of initiation and sampling forms which confused the issue of sampling and the definition of the domestic industry.

21. China considers that the European Union's re-determination of its domestic industry remains based on a self-selection process that introduces a material risk of distortion. It is the link between the producer's willingness to be included in the sample and the definition of the domestic industry which creates the self-selection process and introduces the material risk of distortion. This is confirmed by the Appellate Body's finding that the selection of the sample and the determination of the domestic industry constitute two different steps.

22. The European Union also violated Article 3.1 of the AD Agreement since the analysis of injury is based on information relating to a wrongly-defined domestic industry.

Closing Statement of the People's Republic of China

23. As has become clear, and as the European Union itself confirmed today, the European Commission tried to do "its best" on the basis of the information provided to it by Pooja Forge. However, the issue before this Panel is not whether the European Commission "did its best", but whether it substantively complied with the obligations incumbent on it pursuant to the Anti-Dumping Agreement and Article VI of the GATT.

24. As demonstrated by China in its written submissions and during this meeting, the European Union failed to comply with its obligations, in stark contradiction with the DSB rulings and recommendations in the original dispute.

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ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

1 INTRODUCTION

1. The European Union considers that it has fully complied in good faith with the DSB recommendations and rulings in the original dispute. The present submission addressed China's claims in the order followed by China in its first written submission.

1.1 Claims under Articles 6.5 and 6.5.1 of the AD Agreement: information relating to the Indian producer (Pooja Forge)

2. Article 6.5.1 of the AD Agreement imposes an obligation on the investigating authorities to ensure that sufficiently detailed non-confidential summaries are submitted to permit a reasonable understanding of the substance of the confidential information; and, in exceptional circumstances, to ensure that parties provide a statement appropriately explaining the reasons why particular pieces of confidential information are not susceptible of summary.

3. The European Union has complied with this legal standard in the current investigation. Information about internal company codes for its transactions and products (including the product description text string used by the company in question) is proprietary information. It is the typical sensitive information that companies do not like sharing with their competitors. The European Union considers that the information concerning the list of products sold as well as information provided by Pooja Forge concerning the characteristics of the products sold in the Indian market was "by nature" confidential and, in any event, the information in question was provided "on a confidential basis". The European Union considers that in examining the good cause alleged by Pooja Forge objectively in this case, there were reasons to grant such information confidential treatment. Thus, China's claim under Article 6.5 of the AD Agreement should be rejected. The same should be concluded with respect to China's claim under Article 6.5.1 of the AD Agreement.

1.2 Claims under Articles 6.4 and 6.2 of the AD Agreement: the alleged lack of opportunities to see all relevant non-confidential information

4. China claims that the European Union violated Articles 6.2 and 6.4 of the AD Agreement by failing to provide to the Chinese interested parties a full opportunity for the defence of their interests and by failing to provide timely opportunities for them to see all information that was not confidential.

5. Article 6.2 of the AD Agreement provides that throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, this provision foresees the possibility to have hearings by interested parties where 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.

6. Article 6.4 of the AD Agreement imposes the obligation upon investigating authorities to provide timely opportunities for all interested parties to see all information (i) that is relevant to their presentation of their cases, (ii) that is not confidential as defined in Article 6.5 of the AD Agreement, and (iii) that is used by the authorities in an anti-dumping investigation.

7. The European Union notes that China appears to have expanded the scope of its dispute in its first written submission when compared with its Panel Request. Indeed, China's Panel Request defined the scope of the claims under Articles 6.2 and 6.4 of the AD Agreement "with regard to, *inter alia*, the products sold by the Indian producer". In contrast, in its first written submission, China takes issue with internal company's item codes and product description text strings which, unless the internal reference to match the codes is obtained from Pooja Forge, do not say much

about the products sold by Pooja Forge. The Panel should thus refrain from examining this aspect of China's claim.

8. Regardless, the European Union considers that the conditions set out in Article 6.4 of the AD Agreement are not met in this particular case. The Chinese exporters could see the information relating to the characteristics of the products sold by Pooja Forge and which was used in determining the normal value. As a result, the European Union considers that China's claim under Article 6.4 of the AD Agreement should be rejected. On the same basis, the European Union requests the Panel to reject China's claim under Article 6.2 of the AD Agreement.

1.3 Claim under Article 6.1.2 of the AD Agreement: prompt availability of the evidence presented by the Indian producer concerning its products to interested parties

9. China argues that, because the evidence concerning the characteristics of the products of Pooja Forge was not confidential and was not made available during the investigation – and thus *a fortiori* not been made available "promptly" – to the Chinese exporters, the European Union violated Article 6.1.2 of the AD Agreement.

10. Article 6.1.2 of the AD Agreement provides that, subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation. The European Union considers that China's claim under Article 6.1.2 of the AD Agreement is without merit. The European Union disagrees with China that Pooja Forge falls under the definition of an "interested party" within the scope of Article 6.1.2 of the AD Agreement. The European Commission did not designate Pooja Forge as an interested party in the implementation proceeding.

11. In any event, China's claim under Article 6.1.2 of the AD Agreement is baseless on substance. First, the information provided by Pooja Forge about its products sold in the Indian market during the relevant investigation period was confidential under Article 6.5 of the AD Agreement. Second, the information about the characteristics of Pooja Forge's products sold in India and which was used for the normal value determination was provided promptly to the Chinese exporters. Consequently, the European Union requests the Panel to reject China's claim under Article 6.1.2 of the AD Agreement.

1.4 Claim under Article 2.4 of the AD Agreement: failure to indicate information that was necessary to ensure a fair comparison

12. China argues that the European Union violated Article 2.4 of the AD Agreement by failing to provide relevant information on the product characteristics of the Indian producer which was used for the determination of the normal value. The European Union considers that the European Commission disclosed all of the necessary information on the product groupings that were used in the normal value determination to the Chinese exporters and engaged in an active dialogue with the Chinese interested parties, as required by Article 2.4 of the AD Agreement. In so doing, the European Commission fully implemented the recommendations and rulings of the DSB and complied with its obligations under Article 2.4 of the AD Agreement. China's arguments must therefore be rejected.

13. Article 2.4 of the AD Agreement places an obligation on the investigating authority to make a fair comparison between normal value and export price. In particular, it requires the authority to make due allowances, in each case, on its merits, for differences which "are demonstrated to affect" price comparability. Article 2.4 of the AD Agreement does not impose specific obligations in terms of providing information submitted by interested parties to other interested parties requesting adjustments.

14. The Appellate Body explained that it was of the view that the last sentence of Article 2.4 adds "a procedural requirement" and requires a "dialogue" between the investigating authority and the interested parties. In the implementing investigation the European Commission more than complied with the Appellate Body's holding by engaging in an extensive dialogue with the interested parties that led to the development of detailed product categories that took into consideration many of the suggestions made by Chinese interested parties to ensure a fair comparison. Furthermore, information on the characteristics of the product categories used in the

dumping margin determination as well as information on the sales of these product categories by the Indian producer that were used in the normal value determination was made available to the Chinese interested parties. The European Union therefore complied with its obligations under Article 2.4 of the AD Agreement.

15. The Commission fully engaged in the required "dialogue" by constructively addressing the comments received and providing at every step of the proceeding reasoned and reasonable explanations of the decisions that led to the adoption of product categories. The European Union therefore fully implemented the rulings and recommendations of the DSB and complied with the obligation to enter into "dialogue" under Article 2.4 of the AD Agreement. The European Commission also complied with the substantive obligation that the Appellate Body read into Article 2.4 of the AD Agreement requiring the investigating authority to provide information on the product groups that would be used for purposes of the normal value determination. China's argument that the European Union violated Article 2.4 of the AD Agreement by failing to provide relevant information regarding the dumping margin determination is therefore without merit.

1.5 Claim under Article 2.4 of the AD Agreement: fair comparison - failure to ensure that an export price of standard fasteners was not compared to the normal value of special fasteners

16. In the context of the original investigation, the Chinese exporters raised the need to distinguish between "special" and "standard" fasteners. Even though this distinction was raised relatively late in the proceeding and had not been part of the original PCN, the European Commission considered that it was useful to include it in the product types as this distinction was considered to affect price comparability. The original final determination reflects the fact that "customer drawing" is the basic difference between special and standard fasteners. Special fasteners are fasteners "on demand" while standard fasteners are simply fasteners that meet certain general industry standards.

17. China argues that in the implementation proceeding the European Union failed to ensure that a fair comparison was made between export price and normal value as it failed to ensure that the export price of the Chinese standard fasteners was not compared to the normal value of special fasteners produced by the Indian analogue producer. China's claim is without merit. The distinction between standard and special fasteners on the basis of customer drawings was clear from the definitive determination. China's claims of violation of Article 2.4 of the AD Agreement relating to the distinction between standard and special fasteners must therefore be rejected. Investigating authorities are given discretion to determine the comparison methodology. If the selected methodology makes a "fair comparison", in which "due allowance" is made for differences demonstrated to affect price comparability, then the methodology is consistent with Article 2.4 of the AD Agreement.

18. The question before the Panel is whether in the light of the circumstances of the case, the European Commission's treatment of the distinction between standard and special fasteners was reasoned and adequate and whether the European Commission acted as an objective and unbiased investigating authority when using the information provided by the Indian producer. In this respect, it is recalled that the Indian producer provided information enabling the European Commission to distinguish special and standard fasteners and the European Commission verified and cross-checked the information that was provided to ensure accuracy. The main risk was to avoid including special fasteners within the standard list as this would have affected the ultimate dumping calculation, i.e. it would have increased the normal value and thus the possible margin of dumping. By taking all reasonable steps to ensure that this did not happen, the European Commission did what was reasonable and adequate.

19. The European Commission acted as an active, objective and reasonable investigating authority in obtaining confirmation of the accuracy and reliability of the distinction between standard and special fasteners as made by the Indian producer thus complying with its obligations under Article 2.4 of the AD Agreement. Therefore, even though it may have been done differently, such as through an on-spot verification, under the Panel's standard of review, and in light of the obligations imposed under the Agreement, China's claims under Article 2.4 of the AD Agreement relating to the split between special and standard fasteners are to be rejected.

1.6 Claim under Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994: fair comparison - failure to make adjustments for differences affecting price comparability

20. China argues that the European Union failed to fulfil its obligations pursuant to Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 by "refusing to make adjustments for differences in taxation, differences in physical characteristics and certain other differences affecting price comparability". According to China, all of the adjustments that were requested by the Chinese exporters were fully supported by the evidence before the European Commission. China also argues that alleged "imbalances" that are created by choosing an analogue country producer should be corrected by making an adjustment.

21. The European Union considers that Article 2.4 of the AD Agreement requires only that adjustments be made when it concerns differences that have been demonstrated to affect price comparability. The Chinese exporters did not provide the information necessary to substantiate their request for adjustments. China disagrees with the decisions taken by the European Commission in the proceeding but fails to demonstrate that the European Commission's detailed and substantiated explanation of why it did not consider that adjustments were required to address these alleged differences was not reasoned and reasonable. The European Commission acted as an objective and unbiased investigating authority in addressing the claimed adjustments and requesting additional information to be provided in order to substantiate the request. China's claim under Article 2.4 and Article VI of the GATT 1994 must therefore be rejected.

22. Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 concern the comparison by the investigating authority of the export price and the normal value. Pursuant to these provisions, an investigating authority is under an obligation to ensure "a fair comparison" between the export price and the normal value and to make "due allowance" for certain factors affecting price comparability including differences in conditions and terms of sale, and in taxation. Neither Article 2.4 of the AD Agreement nor Article VI:1 of the GATT 1994 mandates a methodology that the investigating authority must use in ensuring "a fair comparison". Under the fair comparison obligation, the authority "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited". Thus, if an adjustment is requested but to a difference which is not shown to affect price comparability, or if the investigating authority determines that an adjustment is not merited, no adjustment to the export price and/or normal value needs to be made. It is through examining the requests for adjustment and by communicating with the interested parties the kind of information and evidence that may be required to substantiate their requests that the investigating authority complies with the fair comparison obligation under Article 2.4 of the AD Agreement.

23. In light of this obligation and given the applicable standard of review under Article 17.6 of the AD Agreement, it is to be examined whether the investigation authority acted in an objective, reasonable and reasoned manner such that its approach to the request for adjustments can be said to have been that of an unbiased and objective investigating authority. A decision with respect to adjustments does not lead to an unfair comparison simply because a different approach could have been adopted.

24. China essentially disagrees with the manner in which the European Commission addressed the request for adjustments and re-litigates the issue that was before the European Commission, disregarding the standard of review under Article 17.6 of the AD Agreement. The European Union therefore requests the Panel to reject China's claim of violation of Article 2.4 of the AD Agreement, similar to what the Panel did in the original dispute when it rejected China's unfounded challenge of the European Commission's decision not to make adjustments for alleged quality differences other than quality control.

1.6.1.1 China's claims relating to allowances for differences in taxation are unfounded

25. China argues that an adjustment should have been made for the import duties paid by the analogue producer to acquire wire rod –an important raw material for the production of fasteners– because the Chinese exporters do not import wire rod. The European Commission examined the arguments of the Chinese interested parties that adjustments had to be made under Article 2(10)(b) of the EU's Basic Regulation for the indirect taxes incurred on the import of wire rod into India. It explained that such an adjustment is claimable if the import charges borne by the

like product when intended for consumption on the domestic market would not be collected or would be refunded when the like product is exported to the European Union. The European Union complied with Article 2.4 of the AD Agreement and acted in a reasonable and reasoned manner when rejecting the request for adjustment for alleged differences in taxation.

26. It appears as if China is complaining that the use of an analogue country is "unfair" or "unreasonable". That debate, however, is not related to Article 2.4 of the AD Agreement but has been settled at the time of China's accession to the WTO and was never in doubt during the original dispute. Absent evidence relating to a difference in taxation affecting price comparability between the Indian producer's domestic sales and Chinese export sales, the European Commission acted as a reasonable and objective investigating authority when taking the decision to reject the requested adjustment.

1.6.1.2 China's claims relating to adjustments for alleged differences in physical characteristics are unfounded

27. China argues that the European Commission failed to take the differences in physical characteristics into account, both physical characteristics included in the product categories and those that were not included. It alleges that the European Commission thus failed to make a fair comparison as required by Article 2.4 of the AD Agreement. However, China fails to demonstrate that the decision by the European Commission not to make the requested adjustment for physical characteristics was unreasonable or biased or that the European Commission did not engage in an active and substantive dialogue with the interested parties on these matters.

28. China's main arguments actually relate to the alleged "limited evidence" and the fact that certain evidence was "not verified", on the one hand, and the additional detailed PCNs that could have been developed by the European Commission, on the other hand. However, as explained above, Article 2.4 of the AD Agreement does not impose any particular evidentiary burden on the investigating authority. An investigating authority must be entitled to rely on information provided by the relevant interested parties and draw conclusions on the basis of this information. The European Commission satisfied itself of the accuracy of the information provided and was thus permitted to rely on such evidence. In any case, China did not include any claims of violation of, for example, Article 6.6 or 6.7 of the AD Agreement that concerns verification of the accuracy of the information provided. The European Commission may thus be assumed to have acted in accordance with the requirements to have satisfied itself of the accuracy of the information provided. The Implementing Regulation explains how that was done for each of the issues raised by China and China fails to demonstrate that this method of proceeding was not objective or was biased.

29. Turning to the specific arguments of China on the need for additional adjustments for physical characteristics reflected in the product categories, the European Union considers that China's arguments are self-defeating and fail to demonstrate that the European Commission did not act as a reasonable and objective investigating authority when examining and ultimately rejecting these requests.

1.6.1.2.1 Coating and Chrome

30. China takes issue with the European Commission's conclusion that no adjustment for coating was required because all domestic sales were electroplated. China asserts that the Commission's conclusion was based on "confidential evidence" and on "declarations of representatives and production brochures which have not been verified". China argues that the evidence should have "been verified" and that the evidence relied on was limited. However, there is no verification in the sense of "on-spot" verification required and China did not challenge the European Commission's verification under Article 6.6 of the AD Agreement.

31. With respect to the European Commission's conclusion that all fasteners of the Indian producer used only Chrome CR3 and not the more expensive Chrome VI, China argues that the European Commission "should have gathered and verify [sic] detailed and precise information regarding the type of chrome used on the fasteners in relation to which normal value was established". China argues that "by failing to do so, the European Union acted inconsistently with Article 2.4 of the AD Agreement". This is clearly incorrect. The European Commission examined the information available. The fact that the information was confidential does not make it less

reliable of course. The European Commission acted as a reasonable and objective investigating authority in addressing chrome and coating in accordance with Article 2.4 of the AD Agreement.

1.6.1.2.2 Diameter and length

32. China argues that actual figures for diameter and length should have been used rather than ranges as there are still price differences within the ranges used. However, the fact that prices may still differ within a range of diameter and length does not mean that it is "unreasonable" of the investigating authority to use ranges to distinguish between product categories for purposes of making a fair comparison. In fact, the interested parties themselves indicated some ranges that could be used.

1.6.1.2.3 Types of fastener

33. China takes issue with the way in which the types of fasteners were identified and included in the product categories, but fails to demonstrate that the methodology followed for distinguishing between different types of fasteners (hexagon screws, wood screws, bolts, etc.) as per the request of Chinese interested parties was unreasonable. The European Commission developed an alternative methodology looking at the main types of fasteners sold on the EU market. The information provided by the Indian producer enabled the European Commission to make these distinctions.

34. China does not appear to disagree with the fact that the different types of fasteners identified in the product categories reflect main types of fasteners; it simply suggests that the European Commission did not develop "evidence" to confirm that this was the case. China again seems to place an undue burden on the authority, which, in the absence of evidence to the contrary, was entitled to rely on the information provided. China therefore failed to demonstrate that there was anything improper or "unreasonable" in the way the Commission made its fair comparison.

1.6.1.2.4 Other features not part of the PCN

35. Finally, with respect to certain other possible features of fasteners that were not included in the revised product categories, China asserts that it was not sufficient for the European Commission to request that the Chinese interested parties substantiate their arguments about the need for adjustments. According to China, the European Commission "failed to provide information concerning the characteristics of the fasteners sold by the Indian producer" thereby allegedly making it impossible for the Chinese interested parties to provide the requested substantiation.

The European Union notes that these non-PCN features were either not substantively raised in the context of the original investigation or to the extent that some were raised, they were adequately dealt with by the European Commission in the original proceeding. In any case, China is in respect of these characteristics again complaining about an alleged lack of information relating to the products sold by the Indian producer. It is not enough for an interested party to simply raise a feature of a product that may have some effect on price to suggest that the burden is then on the investigating authority to develop the evidence to substantiate the need for an adjustment. What needs to be demonstrated is that there are reasons to believe that the presence or absence of these features in the models sold by the Chinese interested parties may have affected price comparability. The Chinese interested parties never did so. The European Commission's rejection of the requested adjustments for lack of substantiation was therefore entirely reasonable and China failed to demonstrate that the European Commission did not act as an objective and unbiased investigating authority.

1.6.1.3 China's claims relating to adjustments for other differences with the Indian analogue country producer are unfounded

36. China argues that the European Union acted inconsistently with Article 2.4 of the GATT 1994 and Article 2.4 of the AD Agreement in failing to make adjustments for alleged differences between the analogue country producer and Chinese exporters resulting from easier access to raw materials, differences in energy consumption affecting productivity, and differences arising from self-generated electricity.

37. The European Union resorted to the use of an analogue country producer to determine normal value because of the cost related market distortions in China for fasteners. The Indian producer's electricity self-generation is a minor difference.

38. None of China's arguments demonstrate that the European Commission's determination was unfair or incorrect. China has failed to demonstrate that the European Union acted inconstantly with Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994. The European Commission examined the requests as a reasonable and objective investigating authority and enquired about the information available to substantiate the requests before rejecting the request based on the record of the investigation.

1.7 Claim under Articles 2.4 and 2.4.2 of the AD Agreement: failure to calculate the dumping margin on the basis of all comparable export transactions and the imposition of anti-dumping duties on this basis

39. China argues that the European Union acted inconsistently with Article 2.4.2 of the AD Agreement by failing to take into account all export transactions in its dumping calculations.

40. The European Union observes that the approach of "multiple averaging" based on examining product types and determining margins of dumping for different models that are then consolidated in a weighted average to weighted average comparison is clearly WTO consistent. In addition, Article 6.10 of the AD Agreement allows for sampling. It provides that, when the number of "types of products involved is so large to make such a determination impracticable", the authorities may limit their examination to only a certain number of products or the largest volume of exports that can reasonably be investigated. Article 6.10.1 of the AD Agreement expressly refers to a limitation based on the "types of products". Given that such sampling techniques are permissible and as long as all comparable export transactions are taken into consideration, it is not inconsistent with Article 2.4.2 of the AD Agreement not to include in the dumping margin determination export transactions for which no comparable domestic sales transaction exists. The obligation is to compare *only comparable* transactions but to make sure to compare and use *all of such comparable transactions*. That is exactly what the European Commission did.

41. The European Commission included only the comparable export transactions in its dumping calculation in order to ensure the accuracy of the calculations. Given that China failed to demonstrate that any comparable export transactions were excluded from the dumping margin determination, China's claim under Article 2.4 and 2.4.2 of the AD Agreement must be rejected.

1.8 Claim under Articles 4.1 and 3.1 of the AD Agreement: definition of domestic industry

42. With respect to the original determination, the Appellate Body found that the exclusion from the definition of the domestic industry of domestic producers that indicated that they would not be willing to be part of the sample and be verified constituted a violation of the EU's obligations under Article 4.1 and 3.1 of the AD Agreement. In the Implementing Regulation, the European Commission therefore re-examined the file and included all previously excluded domestic producers into the definition of the domestic industry. Following a re-examination, it found that in the context of a fragmented industry these domestic producers represented a major proportion of the domestic industry and that the sample originally examined remained sufficiently representative of the domestic industry, also under the new definition of the domestic industry.

43. China, however, considers that despite allowing the previously excluded producers to be part of the domestic industry in the implementation proceeding, as required by the Appellate Body, the European Union still failed to comply with its obligations under Article 4.1 and 3.1 of the AD Agreement. According to China, as a result of the European Commission's approach, certain producers "may have" decided not to come forward and this approach "may have" discouraged producers from coming forward because they allegedly knew they would be rejected from the definition of domestic industry if they were not willing to be part of the sample. China's speculative argument is unfounded and over-states the obligations that result from the limited findings of the Appellate Body. China's argument that the European Union violated Articles 4.1 and 3.1 of the AD Agreement must therefore be rejected.

44. The task of the European Union was to bring its measure into conformity with the recommendations and rulings of the Appellate Body, also in respect of the definition of the domestic industry. The European Commission did not simply reject the request to start the process anew because this was clearly not required by the Appellate Body, as it could have done. The European Commission included the information from all responsive domestic producers in the fragmented fastener industry. The inclusion of this additional information increased the percentage of total production included in the injury analysis. Given that all producers that came forward within the deadline and that provided the relevant information were included in the definition of the domestic industry, the previously highlighted material risk of distortion in the European Commission's injury analysis as a result of the deliberate exclusion of domestic producers for the sole reason that they were not willing to be part of the sample was adequately addressed.

45. The European Commission's revised domestic industry definition and consequent injury determination is based on all producers that came forward within the deadline and provided the relevant information, in line with the EU's obligation under Article 4.1 and 3.1 of the AD Agreement. In view of the fragmented nature of the fasteners industry, these producers represented a major proportion of the domestic industry's production. The previously identified material risk of distortion that resulted from the exclusion of domestic producers that had come forward within the deadline and that had provided the relevant information was thus taken care of. China's claims of violation of Articles 4.1 and 3.1 of the AD Agreement must therefore be rejected.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. Claims under Articles 6.5 and 6.5.1 of the AD Agreement: information relating to the Indian producer (Pooja Forge)

1. The European Union considers that China's claims under Articles 6.5 and 6.5.1 of the AD Agreement must be rejected. Pooja Forge agreed to cooperate in the investigation provided that all its company details remained confidential and, thus, not disclosed to any interested parties. It also provided specific reasons as to why such a disclosure should not take place, i.e., since otherwise that would provide an advantage to its competitors. The European Commission objectively assessed those reasons and concluded that there was "good cause" to treat such information as "confidential". The European Commission also provided information regarding the characteristics of the products sold by Pooja Forge to interested parties to its best ability within the margins of not disclosing such confidential information, and yet striking a balance with the right of those other parties to know the necessary information to protect their interests accordingly.

1.1.1. China is prevented from raising the same claim in these compliance proceedings

2. The European Union recalls that Article 21.5 reports by the Appellate Body and panels have consistently found that a compliance panel must not re-examine the WTO-consistency of an unchanged aspect that was not found to be WTO-inconsistent in that dispute. Similarly, when a WTO Member has failed to make a *prima facie* case against the measure at issue, the same WTO Member cannot have a "second chance" and re-litigate the same issue. The Appellate Body and panels have stressed the importance of the principles of fundamental fairness and due process, as well as the purpose of Article 21.5 which is to provide an "expeditious" resolution of the dispute.

3. China argues that in the original proceeding, it only challenged "the confidential treatment of the information on 'product types' provided by Pooja Forge". China considers that in these compliance proceedings it "disputes the confidential treatment afforded to the list of products as well as of the information concerning the characteristics of the products sold by the Indian producer". China thus tries to draw a distinction, based on the fundamental premise that in the original panel proceedings, it did not take issue with the treatment of all the information submitted by Pooja Forge regarding its products, and in particular the information provided in the context of Pooja Forge's Questionnaire Response. If this premise falls, then China's argument falls.

4. China's fundamental premise is contradicted by the Original Panel's record. The Original Panel explicitly found that "China takes issue with the treatment of all the information in Pooja Forge's questionnaire response". The Panel stated explicitly that China's claim was not limited to "product types". The Panel quotes, for example, China's second written submission, para. 1110, where China claimed that the 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". In the original panel proceeding China raised a broad claim with regard to the treatment of all the relevant information provided by Pooja Forge, not limited to "one" category of information, such as "product types".

5. After having taken "issue with the treatment of all the information in Pooja Forge's questionnaire response" already in the original panel proceedings, China wants to adduce additional evidence and arguments in the 21.5 proceedings, after having failed to do so in the original panel proceedings. This is precisely that sort of attempt at getting a "second chance" which neglects the importance of the principles of fundamental fairness and due process, as well as the purpose of Article 21.5 which is to provide an "expeditious" resolution of the dispute.

1.1.2. China's claim under Article 6.5 of the AD Agreement also fails on substance

1.1.2.1. The information provided by Pooja Forge is confidential by nature

1.1.2.1.1. "*List of products*"

6. With respect to the "list of products", the European Union had argued that "information about internal company codes for its transactions and products (including the product description text string used by the company in question) is the typical sensitive information that companies do not like sharing with their competitors. Knowing how a company arranges its internal administration could provide an advantage to a competitor (e.g. by learning a more efficient manner to organise its internal records) and may have an adverse effect upon a person supplying the information (e.g. if such information is provided to a competitor, such as the Chinese exporters in this case)".

7. China argues that these explanations are "ex post reasons" and selectively quotes one single instance in the Review Regulation. China forgets to cite any of the other passages where reasons were given to maintain the information as confidential. China also forgets to refer to the specific request by the Indian producer that it "would not like to disclose our company details to interested parties" and thus to maintain all "details" (and thus any particulars or information) concerning its company confidential. Thus, there were clear references on record that Pooja Forge requested the European Commission to maintain all information regarding its company confidential as the basis for its cooperation.

8. China further alleges that the information in question (i.e. the item codes and product description text strings per transaction) "is routinely provided to potential customers willing to purchase fasteners on an unrestricted basis". However, the European Union submits that Pooja Forge did not routinely provide the information in question (i.e. the item codes and product description text strings per transaction) on an unrestricted basis. In its business dealings at the time Pooja Forge would not disclose this information on an unrestricted basis. This is the reason why it insisted upon confidential treatment. This is the type of information that is of no concern to customers. Also Chinese exporters did not want this kind of information to be disclosed. China remains silent in this respect.

9. The European Union has not argued that "proprietary information" always amounts to "inherently confidential" information. In the current case this proprietary information in question is such that it is at the same time inherently confidential information.

10. China pretends that it is difficult to understand why the European Union requested Pooja Forge whether its list of products and the company brochure provided during the Original Investigation could be disclosed to interested parties. To the European Union, it seems good administrative practice to ask first and only then to make assessments. Just as in panel proceedings, parties are not supposed to draw conclusions from the fact that a panel may ask question.

1.1.2.1.2 *Information regarding the characteristics of the products sold by Pooja Forge*

11. China claims that the European Union did not provide "any argument as to why the information in question, that is the evidence provided by Pooja Forge with respect to the characteristics such as the type of coating, chrome, and other characteristics of the products, was confidential by nature".

12. The European Union respectfully disagrees. In this respect, the European Union refers China *inter alia* to para. 46 of the EU's first written submission. What China is asking for is disclosure of commercially valuable market information which is proprietary to Pooja Forge. Knowing in detail the whole set of products sold by Pooja Forge on the market provides competitors with valuable market information. This kind of detailed information may indicate to competitors which kind of products a competitor could offer in that market. At the same time, it may allow a competitor to identify which products are not sold so that the competitor can identify potential weaknesses of Pooja Forge and an unsatisfied demand on the market. The disclosure of this detailed information would therefore be of significant competitive advantage to a competitor and could have a

significantly adverse effect upon a person supplying the information, pursuant to Article 6.5 of the AD Agreement.

13. China's claim concerning the information provided by Pooja Forge is very broad. China mostly fails to identify the specific documents where the information provided by Pooja Forge was kept as confidential. China's claim amounts to arguing that an investigating authority has to ensure that any information regarding the characteristics of the product sold by all producers in an investigation must be disclosed to all parties. This seems unreasonable and also inconsistent with the position adopted by the Chinese exporters in this investigation.

14. China's second written submission refers to the fact that one domestic producer enclosed a product catalogue as an annex to its questionnaire response. The European Union fails to see the relevance. The information that is in question here is Pooja Forge's company brochure, and it is uncontested that at the time of the investigation Pooja Forge did not typically disclose it in an unrestricted way in the normal course of business. The fact that one producer decides to disclose all its prices to its competitors does not mean that Pooja Forge's price information cannot be considered as "confidential" by nature.

15. Finally, China's reference to recent European Union guidelines is inapposite. These are (1) very recent "guidelines" (and thus subject to change in view of the specific circumstances of each party) which were not used in respect of Pooja Forge; (2) at the time of the Fasteners investigation the European Commission made no such statement; (3) administrative guidelines by one WTO Member do not constitute an authoritative interpretation of the WTO Antidumping Agreement and are thus not dispositive of the question which China has raised before this Panel.

1.1.2.2. Pooja Forge provided the information at issue on a confidential basis

16. The European Union observes that the information in question was provided "on a confidential basis". China takes issue with this and argues that the European Union "fails to demonstrate that confidential treatment has been requested precisely with respect to sub-section B.2 'Specifications of the product concerned'".

17. Pooja Forge agreed to cooperate in the original investigation as an analogue country producer, provided that no company details would be disclosed to interested parties. This request was reiterated a number of times both orally and in writing, see for example Exhibit CHN-25, a communication from Pooja Forge to the European Commission dated 2 July 2012. As is apparent from this communication, the case handlers had asked which information could be treated as non-confidential, and Pooja Forge had replied that "it would not like to disclose our company details to interested parties as requested by you". Thus, it is clear that all the information provided by Pooja Forge in this case was provided on a confidential basis.

18. With respect to sub-section B.2 referred to by China, China ignores the fact that Pooja Forge did not fill in this part of its Questionnaire Response. The non-confidential version of the "blanked" response showed precisely the same result.

1.1.2.3 The "good cause" requirement is met in this case

19. Regarding the list of products, the European Union has explained that "disclosing such information could provide an advantage to Pooja Forge's competitors and may cause an adverse effect on Pooja Forge".

20. China further considers that the "good cause" test is not met because, in China's view, "good cause" must be shown by the party seeking confidential treatment for information, not by the European Union. However, as the Appellate Body found, it is up to the *investigating authority* to determine objectively "good cause". A party can never itself determine the existence of "good cause" in the sense of Article 6.5 AD Agreement. The purpose of the "good cause" requirement is, in the words of the Appellate Body, that the "investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests". If this balance is done properly, then it seems mere formalism whether it is the investigating authority – in the exercise of its balancing duty under Article 6.5 of the AD Agreement – that has correctly

interpreted the interests of the submitting party in order to establish a clearer balancing of the interests, in the interest of the strength and accuracy of the balancing exercise.

21. The point by China must therefore be rejected, even if one were not to share Japan's consideration that "the authorities may not be prevented from treating relevant information as confidential on its own initiative, provided that 'good cause [is] shown' by themselves".

22. China argues that the Panel must disregard Pooja Forge's e-mail dated 3 July 2012 because it was not in the administrative file. However, the question of how to deal with such a situation has already been clarified by the panel in *EC – Salmon*.

23. The arguments that China raises in its second written submission with regard to information about the characteristics of the products sold by Pooja Forge are to be rejected for the same reasons as those arguments relating to the list of products.

1.1.3. China's claim under Article 6.5.1 of the AD Agreement also fails

24. At the time of the verification visit in April 2008, Pooja Forge insisted on the confidentiality of its information in order to continue its cooperation and expressed its views about the impossibility of summarising the information about its list of products and product characteristics without revealing too much to its competitors. The facts and events to which the European Union needs to refer in this case refer to back 2008. At that time, the European Commission did not have the means to archive all the documents and communications provided by interested parties. Furthermore, many of the observations made by Pooja Forge regarding the information about its products and the impossibility to provide any meaningful summary (other than "fasteners") were made orally to the European Commission's case-handlers that visited the facilities of the Indian producer, so no written record was left other than the case-handlers' verification notes.

25. Pooja Forge provided the summary "fasteners" as a general statement contained in its response to the questionnaire about its product range. Upon request of the European Commission, Pooja Forge expressed its views about the impossibility of summarising the information about its list of products and product characteristics in a way other than by means of this general statement. The European Union considered that, other than the general statement "fasteners", Pooja Forge could not provide another, more meaningful confidential summary of a list of 80,000 item codes relating to specific transactions as well as their product description text strings without either revealing internal company details or other sensitive market information to competitors. Yet throughout the whole investigation, the European Commission provided information regarding the characteristics of the products sold by Pooja Forge to interested parties to its best ability within the margins of not disclosing such confidential information.

2. Claims under Articles 6.4 and 6.2 of the AD Agreement: the alleged lack of opportunities to see all relevant non-confidential information

26. China continues to ignore the fact that the information about the characteristics of the products sold by Pooja Forge and that was used for the normal value determination (i.e. the specific claim made by China) was provided to the interested parties through the company specific disclosures.

2.1.1. China's claim with respect to the "list of products" is not within the Panels' terms of reference

27. The scope of China's claims under Articles 6.2 and 6.4 of China's Panel Request is limited to "information … with regard to, *inter alia*, the products sold by the Indian producer", that is, information *specifically* with respect to the products sold by Pooja Forge. It does not cover the item codes and product description text strings. The item codes are a combination of letters and numbers (e.g. Z1234), whereas the product description text string is also a combination of letters and numbers indicating some product characteristics, such as diameter and length. These codes and text strings are therefore part of the internal administrative set-up; in themselves they do not say much about the products sold by Pooja Forge. While sometimes the product description text string could indicate some of the features of the products sold, further information is required to understand the characteristics Pooja Forge considered as relevant to be included in such a product

description. The Panel should limit its examination to China's claim regarding the information submitted by Pooja Forge on the characteristics of the products sold in the Indian market.

2.1.2. China's claim under Article 6.4 of the AD is unwarranted

28. China argues that the item code, product description text strings as well as the characteristics of the products sold by the Indian producer were all "used" by the investigating authorities. First the European Union would like to remind China of the scope of its claim. China stated its claim as follows: "it is clear that the list of products as well as the information concerning the characteristics of the products sold by the Indian producer used for the determination of normal value constitutes information that was relevant to the presentation of the exporters' cases, that was not confidential and that was used by the investigating authorities in the anti-dumping investigation. By failing to provide timely opportunities for the Chinese exporters to see such information despite the numerous requests made by the Chinese exporters during the review investigation, the European Union violated Article 6.4 of the AD Agreement". Pursuant to its claim under Articles 6.4 and 6.2, China does not take issue with the "raw data" concerning the products sold by Pooja Forge, but rather it takes issue with information relating to the products sold by the India producer which was used by the European Commission when making the normal value determinations. Such information was actually disclosed to the Chinese exporters in their specific disclosures.

29. China creates confusion between the standards under Articles 6.4 and 6.9 of the AD Agreement. However, while through those specific disclosures the European Commission informed interested parties of the essential facts underlying its determination, it also provided information about the characteristics of the products sold by Pooja Forge and that were used in the normal value determinations. Any other information that was provided by the Indian producer was, thus, not "used" by the European Commission.

2.1.3. China's consequential claim under Article 6.2 of the AD Agreement must also fail

30. The European Union has requested the Panel to reject China's claim under Article 6.2 of the AD Agreement on the same basis as argued with regard to Article 6.4 of the AD Agreement, since China's claim is entirely consequential.

3. Claim under Article 6.1.2 of the AD Agreement: prompt availability of the evidence presented by the Indian producer concerning its products to interested parties

31. The text of Article 6.1.2 only refers to evidence presented by an "interested party" which Pooja Forge clearly is not. Further, the information provided by Pooja Forge was confidential under Article 6.5 of the AD Agreement. Finally, the type of information against which China takes issue was provided promptly to the Chinese exporters through the specific disclosures.

4. Claim under Article 2.4 of the AD Agreement: failure to indicate information that was necessary to ensure a fair comparison

32. The European Commission disclosed all of the necessary information on the product groupings (including the detailed product characteristics) that were used in the normal value determination to each of the Chinese exporters and engaged in an active dialogue with the Chinese interested parties, as required by Article 2.4 of the AD Agreement. In so doing, the European Commission fully implemented the recommendations and rulings of the DSB and complied with its obligations under Article 2.4 of the AD Agreement.

33. China acknowledges that the European Commission provided information about the "product groups" in the Implementation Review as required by the Appellate Body. However, China now asserts that the next step required by the Appellate Body in the context of investigations involving NME countries was to provide information "also of the 'specific products' with regard to which the normal value was determined". This is not correct. China's presentation of the "procedural requirement" of the last sentence of Article 2.4 of the AD Agreement as requiring a full disclosure of the "full information" or "raw data" of the analogue country producer, even if this information is provided on a confidential basis is in error. There is no basis in the Appellate Body report in the original dispute or in any other dispute that would support such a requirement, and China cannot point to one. In the second written submission, China concedes that the European Commission

disclosed the basis for the price comparison by providing the calculation sheets. Therefore, China acknowledges that the European Commission complied with the obligation identified by the Appellate Body and provided the required information on the product types that were used from the Indian analogue country producer.

34. China fails to provide any relevant evidence in respect of the alleged differences relating to the characteristics that were part of the PCNs. China therefore does not provide evidence to support its allegation that the use of the PCNs led to an "unfair" comparison. And the same is true for the additional characteristics not originally included in the PCNs. China makes a lot of noise about additional aspects of fastener products that may affect prices but fails to show how those alleged differences affected price comparability for example because Chinese interested parties would have sold only one specific type. That is the evidence and information the Commission was asking for and never received. That is not an "undue burden" on interested parties. Finally, in light of the fact that the sales information was provided on a confidential basis, the product type information that was provided to China shows the kind of products sold by the Indian analogue country producer and that were used for the normal value determination without disclosing any confidential information.

35. China's argument that the European Union violated Article 2.4 of the AD Agreement by failing to provide relevant information regarding the dumping margin determination is therefore without merit and must be rejected.

5. Claim under Article 2.4 of the AD Agreement: fair comparison - failure to ensure that an export price of standard fasteners was not compared to the normal value of special fasteners

36. The original final determination reflects the fact that "customer drawing" is the basic difference between special and standard fasteners. Special fasteners are fasteners "on demand" while standard fasteners are simply fasteners that meet certain general industry standards. In its second written submission, China continues to argue that the European Commission failed to ensure that the export price of the Chinese standard fasteners was not compared to the normal value of special fasteners produced by the Indian analogue producer. China fails to explain why this matter is different from the one already decided upon by the Original Panel in the context of the injury examination and cannot explain why it did not raise this same matter also with respect to the dumping determination in the original dispute. It thus fails to rebut any of the procedural and substantive arguments developed in the EU's first written submission.

37. In fact, China's arguments in the second written submission have confirmed that the distinction between special and standard fasteners was actually "clear": orders made on the basis of customer's drawings is what makes a fastener a "special" fastener. China's allegation in the second written submission that the criteria used for distinguishing special and standard fasteners failed to ensure that the export price of standard fasteners was not compared to the normal value of special fasteners is based on an erroneous interpretation of what is a "special" fastener and is contradicted by the facts on the record. The use that is ultimately made of a fastener that is ordinary and not otherwise made "on demand" ("special") has no effect on its price, and is thus irrelevant.

38. The European Commission undertook to test the sales information from the analogue producer and conducted additional reasonable analysis to confirm that special fasteners were not included in the sales listing for standard fasteners used for the normal value determination. It thus acted as a reasonable and objective investigating authority in response to demands of the Chinese interested parties that a distinction be made between special and standard fasteners in addition to the use of PCNs. The European Union therefore complied with its obligations under Article 2.4 of the AD Agreement when making the distinction between special and standard fasteners.

6. Claim under Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994: fair comparison - failure to make adjustments for differences affecting price comparability

39. In its second written submission, China continues to disagree with the decisions taken by the European Commission in the review proceeding but fails to demonstrate that the European Commission's detailed and substantiated explanation of why it did not consider that

adjustments were required to address these alleged differences was not reasoned and reasonable. China's claim under Article 2.4 and Article VI of the GATT 1994 must therefore be rejected.

40. The European Commission examined the requests for adjustments and took steps to achieve clarity by requesting that evidence be provided of the effect of these alleged differences on price comparability. It found that China failed to meet the evidentiary requirements to support the claimed adjustment or failed to demonstrate how these alleged differences affected price comparability and therefore rejected the requests for adjustments. In so doing, and as explained in our first written submission, the European Commission acted as an objective and unbiased investigating authority and provided a reasoned and adequate explanation of its decision not to accept the requested adjustments.

41. On the alleged need for adjustments relating to alleged taxation differences, Article 2(10) (b) of the EU Basic Regulation does not allow, as a matter of EU law, taking into account hypothetical import duties that were not actually incurred by Chinese exporters. Furthermore, the European Union maintains its position that China is actually challenging the use of an analogue country producer as the basis for making a dumping determination, in disregard of China's Accession Protocol. The Indian producer operates in a competitive market environment and prices its products accordingly. The price used as the basis of the dumping comparison is thus the price of the fasteners sold by the Indian producer on its competitive home market, irrespective of whether it had to import part of the wire rod used in the production of the fasteners or not. Absent evidence relating to a difference in taxation affecting price comparability between the Indian producer's domestic sales and Chinese export sales, China failed to rebut the EU's argument that the European Commission acted as a reasonable and objective investigating authority when taking the decision to reject the requested adjustment.

42. China also fails to demonstrate that the decision by the European Commission not to make the requested adjustment for alleged differences in physical characteristics was unreasonable or biased. China essentially doubts the accuracy of the information provided and considered that the European Union should have done more to verify the information on the record. However, an investigating authority must be entitled to rely on information provided by the relevant interested parties and to draw conclusions on the basis of this information. China does not provide any evidence that would be able to suggest that the European Commission's conclusions are not correct or are contradicted by other evidence on the record.

43. China also repeats its arguments relating to the lack of adjustments for alleged differences affecting price comparability that were not part of the PCNs, but fails to rebut the European Union's procedural and substantive arguments. First, throughout the original proceedings, interested parties could have raised non-PCN features and could have requested non-PCN adjustments, as they did for the distinction between special and standard fasteners for example or for quality control. They did not do so for these other non-PCN features and neither did China in the original dispute. On substance, Article 2.4 of the AD Agreement concerns price comparability and not just difference in prices for products based on certain features. What needs to be demonstrated is that there are reasons to believe that the presence or absence of these features in the models sold by the Chinese interested parties may have affected price comparability because these features were or were not present in the products used for purposes of the normal value determination. The Chinese interested parties never did so. They could have pointed to unique features of the products exported by the Chinese interested parties that required a further distinction or an adjustment. No such evidence was provided.

44. Furthermore, all three aspects of China's claim relating to access to raw materials and costs of energy (electricity) have been rebutted by the European Union in its first written submission on the same basis: raw materials and energy distortions are among the typical features of a non-market economy and, if no evidence is adduced that the alleged differences in costs affect price comparability, no adjustments will be made. The fact that in the European Union's practice involving NME countries cost-related differences between analogue country producers and NME exporters have sometimes and under specific circumstances led to adjustments being made is not relevant from a WTO perspective and that is why the European Union did not engage with China on its arguments relating to this EU practice. In any case, in all of the cases where such adjustments were made, it concerned differences in costs that were reflected in the prices of the analogue country producer. The situation is entirely different here. China tries to use adjustments to partly undo the recourse to the analogue country method which is to replace the entire data set

of the exporter in the non-market economy country by the data set of a producer in an analogue market economy country, and not to merely replace the costs of the production factors, as used by the non-market economy producer, by market costs. China has therefore failed to demonstrate that the European Union acted in a manner that is inconsistent with its obligations under Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994.

7. Claim under Articles 2.4 and 2.4.2 of the AD Agreement: failure to calculate the dumping margin on the basis of all comparable export transactions and the imposition of anti-dumping duties on this basis

45. The European Union recalls that the European Commission included all export transactions of product types for which it could identify a comparable product type sold domestically by the Indian analogue country producer. For the export sales of product types for which no match was found on the normal value side, no comparison was made for lack of a comparable domestic transaction. No export transactions for which a comparable domestic sale existed were excluded. China acknowledges the important difference between the zeroing situation and the issue at stake in the current dispute but fails to otherwise respond to the European Union's arguments in this respect. China also fails to respond to the European Union's reference in paragraph 211 of its first written submission to the clear finding by the Appellate Body in *US – Softwood Lumber V* that only "comparable" export transactions need to be taken into consideration. The European Commission did not exclude any comparable transactions or otherwise sought to skew the averaging that followed the model-to-model comparison as had been the issue in the zeroing disputes. There is therefore nothing "inherently unfair" about this approach. The panel in *US – Stainless Steel (Korea)* also emphasised the need to compare only those transactions that are comparable and found that the timing of sales could lead to problems of comparability. Thus, it is not so, as China seems to argue that all domestic and export sales of the "like product" are necessarily always "comparable". Finally, the European Union demonstrates that both qualitatively and quantitatively, the amount of matching sales was such as to ensure a fair comparison between comparable sales. The non-matching is made up of a variety of product types that were sold in very small quantities, whereas the matching is made up of a number of main product types that were sold in very large quantities. Thus, the matched and included export transactions are both qualitatively and quantitatively representative of the product as a whole. China's claims under Articles 2.4 and 2.4.2 of the AD Agreement must be rejected.

8. Claim under Articles 4.1 and 3.1 of the AD Agreement: definition of domestic industry

46. In the Implementation Review, the European Union complied with the Appellate Body's findings relating to the definition of the domestic industry by including all producers that presented themselves within the deadline to be part of the domestic industry. Contrary to what China argues, the material risk of distortion to which the Appellate Body referred in the original dispute does not stem from the mere presence of a question on participation in the sample in the sampling form. China does not present any evidence of such risk of distortion either to support its speculative argument that certain producers may have decided not to come forward because of a question in the sampling form. The 25 producers that came forward within the deadline but indicated that they would not be willing to be part of the sample clearly had a sufficient incentive to provide information. Contrary to China's speculative assertion, these producers were willing to provide the information, notwithstanding the question on sampling. In this respect, the European Union considers relevant the Appellate Body's findings in its report on *US – Offset Act (Byrd Amendment)* warning against an attempt to examine the motives of domestic producers. All that matters is that the domestic producers that come forward and that are included in the domestic industry represent a significant proportion of total domestic production.

47. China fails to rebut the European Union's argument that the European Commission's revised domestic industry definition and consequent injury determination is based on all producers that came forward within the deadline and that provided the relevant information, in line with the European Union's obligation under Article 4.1 and 3.1 of the AD Agreement. In view of the fragmented nature of the fasteners industry, these producers represented a major proportion of the domestic industry's production. The previously identified material risk of distortion that resulted from the exclusion of domestic producers that had come forward within the deadline and that had provided the relevant information was thus taken care of. China's claims of violation of Articles 4.1 and 3.1 of the AD Agreement must therefore be rejected.

9. Conclusions

48. For the reasons stated in this submission, the European Union respectfully requests the compliance Panel to reject China's claims and therefore declares that the European Union has fully implemented the original DSB recommendations and rulings.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT
BY THE EUROPEAN UNION

Mr. Chairman, distinguished Members of the Panel,

1. Introduction

1. Following the structure of China's submissions, today we will recall first our position with respect to China's claims regarding the lack of transparency in this case, in particular with respect to China's claims under some of the obligations under Article 6 of the AD Agreement. Then, we will address China's concerns with respect to the fair comparison requirement under Article 2.4 as well as the definition of domestic industry in Article 4.1 of the AD Agreement.

2. Claims under Articles 6.5 and 6.5.1 of the AD Agreement: Information relating to the Indian producer (Pooja Forge)

2. First, China claims that the European Union should not have granted confidential treatment to the information concerning the products of the Indian producer.

3. The European Union considers that China is prevented from raising this Article 6.5 claim as the Panel found explicitly that China raised a broad claim with regard to all relevant information but only managed to substantiate, with evidence and arguments, part of the claim, i.e. those bits that relate to the "product types".

4. In any event, the European Union is of the view that such an Article 6.5 claim also fails on substance since (i) the information provided by Pooja Forge China takes issue with indeed is confidential "by nature"; (ii) the record of the investigation clearly shows that Pooja Forge provided the information at issue on a confidential basis; and (iii) it is up to the investigating authority and not China to determine the existence of "good cause" in the sense of Article 6.5.

5. To sum up: the European Union considers that China is barred from re-litigating its Article 6.5 claim in these compliance proceedings, and even if it were not barred from raising it again, its claim should not be upheld on substance.

6. China further argues that the European Union also violated Article 6.5.1 by failing to ensure that the Indian producer provided a non-confidential summary. However, throughout the whole investigation, the European Union provided information regarding the characteristics of the products sold by Pooja Forge to interested parties within the limits of this balancing exercise. China's claim under Article 6.5.1 should thus equally be rejected.

3. Claims under Articles 6.4 and 6.2 of the AD Agreement: The alleged Lack of Opportunities to see all relevant non-confidential information

7. China alleges that the European Union failed to provide opportunities to the Chinese exporters to see the "list of products" sold by Pooja Forge as well as the information concerning the characteristics of the products of Pooja Forge, and which were used for the normal value determination. In that regard, the European Union recalls that China's Panel Request is limited to "information … with regard to, inter alia, the products sold by the Indian producer", and does not stretch to encompass Pooja Forge's internal administrative set-up.

8. Moreover, China's claim fails also on substance as (i) the so-called "list of products" is not relevant to the presentation of the cases of the interested parties; (ii) both the list of products as well as the characteristics of the products sold by Pooja Forge are confidential under Article 6.5 of the AD Agreement; and (iii) what the European Union actually did use in its determination of the Chinese exporters' normal values was disclosed to the Chinese exporters.

9. Consequently, China's claim under Article 6.4 of the AD Agreement must be rejected.

10. On similar grounds as argued with respect to Article 6.4 of the AD Agreement, the European Union requests the Panel to reject China's claim under Article 6.2 of the AD Agreement.

4. Claim under Articles 6.1.2 of the AD Agreement: Prompt availability of the evidence presented by the Indian producer concerning its products to interested parties

11. China argues that the European Union violated this provision by not making available "promptly" to the Chinese exporters the evidence provided by Pooja Forge.

12. The European Union reminds that it has never designated Pooja Forge as an "interested party" in the implementing procedure. Pooja Forge is therefore not an "interested party" within the meaning of Article 6.1.2.

13. China's claim under Article 6.1.2 is also baseless on substance since (i) the information provided by Pooja Forge about its products sold in the Indian market was confidential under Article 6.5 of the AD Agreement; and (ii) the information about the characteristics of Pooja Forge's products sold in India was provided promptly to the Chinese exporters, i.e. at the time of the company specific disclosure.

14. Consequently, the European Union requests the Panel to reject China's claim under Article 6.1.2 of the AD Agreement.

5. Claim under Article 2.4 of the AD Agreement: failure to indicate information that was necessary to ensure a fair comparison

15. Concerning Article 2.4 of the AD Agreement, China firstly argues that the lack of information provided by the European Commission to Chinese interested parties amounts to a violation of Article 2.4 of the AD Agreement. However, providing such information in a case where the one cooperating analogue country producer undisputedly provided the data on a confidential basis would not be consistent with Article 6.5 of the AD Agreement.

16. Moreover, the European Commission fulfilled its obligation under Article 2.4 of the AD Agreement to engage in an active dialogue to ensure a fair comparison between normal value and export price. Furthermore, the European Commission also entered into a dialogue with Chinese interested parties on the alleged differences other than those included in the revised PCNs and provided the required information on the product types that were used from the Indian analogue country producer.

17. Consequently, the European Union respected its obligation under Article 2.4 of the AD Agreement.

6. Claim under Article 2.4 of the AD Agreement: fair comparison - failure to ensure that an export price of standard fasteners was not compared to the normal value of special fasteners

18. A second claim of China under Article 2.4 of the AD Agreement re-starts the "old" debate about the distinction between special and standard fasteners.

19. It is submitted that China fails in its argument that the European Commission did not ensure that special fasteners sold by the Indian producer were not compared with standard fasteners exported by China. The European Commission acted as a reasonable and objective investigating authority in response to demands of the Chinese interested parties that a distinction be made between special and standard fasteners in addition to the use of PCNs. Consequently, the European Union acted in accordance with its obligations under Article 2.4 of the AD Agreement.

7. Claim under Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994: fair comparison - failure to make adjustments for differences affecting price comparability

20. In its third claim China also fails to demonstrate that the European Commission's detailed and substantiated explanation of why it did not consider that adjustments were required to address the alleged differences that China pointed to was not reasoned and reasonable. This follows from the following reasons.

21. First, China refers to alleged differences in taxation on input products between the analogue country producer and Chinese producers. But that is not the relevant issue in the context of a non-market economy where the authority will take the price of the product in the analogue country as the ordinary, "normal" market price, and is not required to adjust for differences that are related to the market economy environment of the analogue country.

22. Second, China's claim that adjustments were required to take into account alleged differences in physical characteristics is focused on an alleged lack of verification of the record by the authority. However, China does not provide any evidence that would suggest that the European Commission's conclusions are not correct or are contradicted by other evidence on the record.

23. Third, China fails to demonstrate that there are reasons to believe that the presence or absence of PCNs in the models sold by the Chinese interested parties may have affected price comparability.

24. Fourth, China makes a cluster of claims relating to differences in access to raw materials and costs of energy (electricity) between the Indian producer and Chinese producers. China tries to use adjustments partly to undo the recourse to the analogue country method, which is a method that replaces the entire data set of the exporter in the non-market economy country with the data set of a producer in an analogue market economy country. Accordingly, China's attempt should be rejected.

25. Consequently, also with respect to its third claim under Article 2.4 of the AD Agreement, China failed to demonstrate that the European Union acted in a manner that is inconsistent with its obligations under Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994.

8. Claim under Articles 2.4 and 2.4.2 of the AD Agreement: failure to calculate the dumping margin on the basis of all comparable export transactions and the imposition of anti-dumping duties on this basis

26. A fourth and final claim of China under Article 2.4 concerns the European Commission's decision to compare all export transactions of product types for which it could identify a comparable product type sold domestically by the Indian analogue producer.

27. In that regard, The Appellate Body has in the past made it clear that only "comparable" export transactions need to be taken into consideration. Since the European Union ensured that the matched and included export transactions are both qualitatively and quantitatively representative of the product as a whole, China's fourth and final claim under Article 2.4 must also be rejected.

9. Claim under Articles 4.1 and 3.1 of the AD Agreement: definition of domestic industry

28. The Appellate Body considered that the European Commission should not have excluded those domestic producers that provided information within the deadline simply because they had indicated that they did not want to be part of the sample. As a result of this, in the implementing review, the European Commission went back to the file, included all producers that presented themselves within the deadline and examined their information as part of the information provided by the domestic industry.

29. China argues now that the real problem was that the questionnaires sent to the domestic producers included a question about whether they would be willing to be part of a sample and cooperate with the investigators if selected. That question caused a "material risk of distortion", according to China. However, (i) this argument is contradicted by the facts on the record as a major proportion of producers did provide information despite this question; (ii) this argument is not supported by the text of Article 4.1 of the AD Agreement, which imposes a requirement that the definition of the domestic industry includes a major proportion of domestic production; and (iii) this argument is not supported by the Appellate Body's findings in this or other relevant disputes.

30. China's claims of violation of Articles 4.1 and 3.1 of the AD Agreement must therefore be rejected.

10. Conclusions

31. For the reasons stated in our submissions, as summarised and further clarified here today, the European Union respectfully requests the compliance Panel to reject China's claims. We look forward to answering any questions that you may have.

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ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. Since we have already provided our views in our written Third Party Submission, we will not repeat all of those comments today. Rather, Japan would like to use this oral statement to provide some reactions to the parties' arguments addressing Japan's Third Party Submission regarding the issues of (1) how to treat confidential information, and (2) the scope of the domestic industry.

2. We begin with the treatment of confidential information. In Japan's view, the relevant Appellate Body precedent makes clear that the investigating authorities have the burden of ensuring that "good cause" for confidential treatment has been shown.[1] The party submitting the information may provide relevant information that helps to establish the factual basis for the authority to find "good cause". But the legal conclusion finding "good cause" must be made by the authorities themselves, based on any facts submitted by the party claiming confidential treatment and any other facts properly before the authorities. This is clear from the text of Article 6.5 that provides "Any information ... shall ... be treated as such by the authorities." Thus, in Japan's view, China's argument that only the party seeking confidential treatment can make the "good cause" showing, confuses the distinction between the factual basis for the authority to find "good cause" and the legal conclusion of the existence of "good cause" itself. In order for the requirement of Article 6.5 with regards to "good cause" to be satisfied, the authorities must conclude that a sufficient factual basis on the record demonstrates the existence of "good cause." The text of Article 6.5 itself refers only to "upon good cause shown", without specifying who must show what. Moreover, Article 6.5.2 states "if the authorities find that a request for confidentiality is not warranted" and footnote 18 provides "Members agree that requests for confidentiality should not be arbitrarily rejected". These contexts for Article 6.5 make clear that request for confidential treatment may be rejected; even if confidential treatment is requested by the party submitting the information, the request is up to the authorities to "find" whether such treatment is "warranted". This language suggests that "good cause" must be found or determined by the authority. Nothing in the text of Article 6.5 would require an authority to ignore facts otherwise properly on the record when making its determination of "good cause", even if those facts came from someone other than the party claiming confidential treatment for information.

3. At the same time, this discretion to consider the factual information only extends to those facts <u>properly</u> before the authority.[2] Japan is of the view that "before" should mean not merely that the factual information is in the hand of the authority at the time of determination, but also that the authority took into consideration the information at that time. The factual information not included in the record should be presumed not to have been "before" the authority, or otherwise the interested party would have no opportunity to object to the treatment of confidential information. Thus, the factual basis for the authority to find "good cause" should be included in the investigation record.

4. Let us now turn to the issue of the proper scope of the domestic industry. Japan would like to stress the Appellate Body's explanation that the phrase "major proportion" in Article 4.1 "... should be understood as a proportion defined by reference to the total production of domestic producers as a whole." The benchmark is "the total production of domestic producers as a whole", and not some subset thereof. The Appellate Body went on to note that "the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole."[3] Again the focus remains on "the total production of the domestic producers as a whole." Japan believes an investigating authority must ensure that the proportion used in the definition of a domestic industry substantially reflects the total production of the producers as a whole so as to remove any material risk of distortion.

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[1] *EC – Fasteners*, Appellate Body Report, para. 537.
[2] *EC – Salmon*, Panel Report, paras.7.837-7.839
[3] *EC – Fasteners*, Appellate Body Report, para. 412.

5. In Japan's view, the EU authorities were not sufficiently concerned with crafting a methodology that substantially reflects "the total production of the producers as a whole". In particular, a methodology that allows self-selection – with companies deciding themselves to provide information or not – poses a serious risk of distortion. If the resulting proportion of the total domestic production is high enough, the materiality of any distortion fades. If the proportion remains low, however, then the risk of material distortion becomes very real. When an industry is fragmented, that fact just underscores the importance of using neutral methods to gather the necessary information, not methods that emphasize administrative convenience over the need to avoid self-selection bias.

6. Moreover, the Appellate Body's discussion of the role of motive in another context[4] does not change this analysis, because the motive of domestic firms deciding to come forward or not cannot objectively determine the scope of the domestic industry. Rather, the issue under Article 4.1 is whether the method adopted by the authority is neutral on its face, or has a material risk of bias. One source of bias is self-selection. The potential problems from self-selection are made even worse if the request to participate is phrased in such a way as to make companies with a certain perspective more willing or less willing to participate in order to be included in the scope of the domestic industry. The method that allows self-selection to skew the information being gathered can create a material risk of distortion, and can be inconsistent with Article 4.1, particularly when the resulting percentage of the industry as a whole remains small.

[4] *US – Offset Act*, Appellate Body Report, para. 291.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. China's Claims Under Article 6 of the AD Agreement

A. Article 6.5

1. The United States disagrees with China's assertion that that "information routinely provided to potential customers…*cannot* be by nature confidential," as a categorical matter, for purposes of Article 6.5 (emphasis added). China's position is not supported by the text of Article 6.5. The article is clear in stating that information is "by nature confidential" where, *inter alia*, "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…" The text of the provision contains no carve out, as China proposes, for confidential information provided to potential customers. Indeed, the United States can envision commercial scenarios where proprietary information is routinely provided to potential customers, perhaps with the proviso that the information not be further disclosed by the recipient.

B. Article 6.5.1

2. The first sentence of Article 6.5.1 makes clear that the requirement to "furnish non-confidential summaries" applies *only* to information submitted by "interested parties." China, however, has not established that Pooja Forge is an "interested party" for purposes of the AD Agreement.

3. The phrase "interested parties" is expressly defined in Article 6.11 of the AD Agreement. The definition set forth in Article 6.11 applies to the AD Agreement *as a whole*, including therefore to Article 6.5.1. Pooja Forge does not fall under any of the "interested party" categories listed in Article 6.11. That is, Pooja Forge is (i) not an exporter or foreign producer of the product subject to investigation, (ii) not the government of the exporting Member (*i.e.*, China), and (iii) does not reside in the territory of the importing Member (*i.e.*, in the EU). Moreover, in its submission China made no attempt to establish that Pooja Forge met the definition of "interested party" as defined in Article 6.11.

4. Therefore, because Pooja Forge does not appear to be an "interested party" for purposes of the AD Agreement, the United States disagrees with China's assertion that the European Union was obligated, by virtue of Article 6.5.1, to require that Pooja Forge furnish non-confidential summaries of information submitted to the EU Commission.

C. Articles 6.2 and 6.4

5. 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 thus agrees with the Appellate Body's decision in *EC – Pipe Fittings*, where the Appellate Body recognized that the relevancy of information covered by Article 6.4 is to be determined from the perspective of the interested parties, not the investigating authority.

6. Accordingly, Article 6.4 generally requires that an investigating authority give interested parties access to *all* non-confidential information submitted during an investigation that an interested party could view as relevant to the presentation of their positions or the outcome of the investigation. Failure to provide such access is not only inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, interested parties are necessarily denied "a full opportunity for the defense of their interests."

7. The United States takes no position on whether the information at issue was properly accorded confidential treatment under Article 6.5. To the extent that confidential treatment was not properly accorded, the United States is of the view that the EU Commission was obligated,

under Article 6.4, to make such information available to Chinese exporters during the review investigation, and in a timely fashion. On the other hand, if the information from the Indian producer was properly accorded confidential treatment under Article 6.5, Article 6.4 would not require disclosure of such information.

8. Nonetheless, even if the information provided by the Indian producer could not be disclosed in full, this does not mean that the EU Commission could conduct an investigation in a manner that completely denied the respondents any opportunity to participate meaningfully in the investigation or to defend their interests as contemplated in Article 6.2 of the AD Agreement. The United States recalls that it was the choice of the EU Commission to rely on confidential information from a party that was not an "interested party" under Article 6.11. If the EU decided to rely on such information, and if access to such information was necessary for the respondents to participate meaningfully or defend their interests in the investigation, the United States understands Article 6.2 to require that an authority adopt some sort of mechanism that would allow the respondents an opportunity to do so. For example, perhaps the Commission could have provided its own summary of the information obtained from the Indian producer, or could have disclosed the information under a narrowly-drawn protective order (*see* AD Agreement, note 17).

D. Article 6.1.2

9. The United States believes that transparency is a key principle reflected in the provisions of the AD Agreement, including Article 6.1.2. Accordingly, the United States is of the view that transparency is best ensured by requiring all non-confidential information presented to, or obtained by an investigating authority to be on the record of antidumping proceedings, and should be made available to all interested parties.

10. The United States, however, disagrees with China's further suggestion that where a party presents evidence to an investigating authority that party is, *ipso facto*, an "interested party" for purposes of Article 6.1.2. Specifically, China argues that Pooja Forge "should be regarded as an 'interested party' for purposes of Article 6.1.2" *because* Pooja Forge submitted evidence used by the EU Commission during the antidumping investigation.

11. As discussed above, however, the phrase "interested parties", is expressly defined in Article 6.11 of the AD Agreement. Simply put, a "party that provides information to investigating authorities" is *not* among the list of "interested parties" listed in Article 6.11. Thus, the fact that a party provides information to an investigating authority does not *ipso facto* render said party an "interested party" for purposes of the AD Agreement.

II. China's Claims under Article 2 of the AD Agreement

A. Claim that European Union failed to provide relevant information regarding the products of the Indian analogue producer

12. The United States understands Article 2.4 as generally obligating an investigating authority to solicit information regarding what differences in physical characteristics affect price comparability. The investigating authority can fulfill this obligation by asking interested parties to: (1) identify and explain the differences in physical characteristics; and (2) identify which of those differences in physical characteristics may affect price comparability. Taking into consideration the responses the parties provide and the investigating authority's own analysis of the record evidence, the investigating authority may then develop appropriate product comparison criteria for the dumping margin calculation.

13. An investigating authority must exercise transparency with respect to the products used in the determination of normal value, the considered physical differences between those products, and how those differences informed the investigating authority's determination of price comparability and ultimately normal value. This transparency obligation is found in the provisions of Article 6 of the AD Agreement, and is reinforced by the last sentence of Article 2.4. The United States understands that transparency within the confines of Article 2.4 requires an investigating authority to provide the necessary information regarding the products and transactions at issue so that the parties can provide relevant information and argument in response. Failure to ensure transparency in this context could prevent an interested party from being able to meaningfully defend its interest.

14. The United States therefore agrees with the statement of the Panel and Appellate Body in this dispute that "without knowing what constituted product types, it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."

15. To the extent that the EU Commission, as alleged, has not provided Chinese exporters with information on the full range of product characteristics considered in the Commission's assessment of price comparability, the United States finds it difficult to see how the Commission could have met its obligation to conduct a fair comparison with respect to physical differences.

B. Claim that the European Union improperly grouped standard and special fasteners in its determination of normal value

16. The United States understands that a mere statement by an investigating authority that a certain product grouping is defined the same in both markets, without providing further information, is likely to be inconsistent with the requirements of Article 2.4. In addition, without knowing the details of the comparison product, the party may have no way of knowing whether a standard product (or special product) in the export market is defined under the same parameters as a standard product (or special product) in the comparison market.

C. Claim that the European Union failed to make warranted adjustments for differences that affected price comparability

17. The Appellate Body has stated that, "under Article 2.4, the obligation to ensure a 'fair comparison' lies on the investigating authorities, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports." It is important to understand, however, that although the investigating authority has a burden to ensure a fair comparison, the interested parties also have the burden to support any requested adjustments for differences that affect price comparability.

18. Thus, when requesting adjustments to reflect the "due allowance" within the meaning of Article 2.4, an interested party is responsible for explaining to the investigating authority why such adjustment is warranted. Moreover, while the investigating authority is required to make "due allowance" for differences that affect price, Article 2.4 does not require the authority to accept, without evaluation, an interested party's argument that a certain difference affects price comparability and that adjustment is thereby warranted.

EXECUTIVE SUMMARY OF U.S. THIRD-PARTY STATEMENT

I. Exclusion of one or more export transactions

19. The United States does not agree with China that an administering authority breaches Article 2.4.2 unless each and every export transaction is included in a weighted average to weighted average comparison methodology. This view is too extreme, and does not reflect the text of the agreement or the realities of the administration of anti-dumping measures. On the other hand, the other extreme – such as basing a dumping margin on just one export transaction out of a thousand total export transactions – would also not be appropriate. As the United States will describe, the text of the agreement does provide guidance on instances where certain export transactions might be excluded from a margin calculation.

20. Turning first to Article 2.4.2, the text provides that "margins of dumping…shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions…." Notably, the text limits the comparison to "comparable" export transactions, which clearly indicates that this requirement does not extend to "all" export transactions. Indeed, if WTO Members had intended for the requirement to extend to "all transactions", they would have not limited Article 2.4.2 by including the modifier "comparable" before the term "export transactions."

21. The Appellate Body has also interpreted the text of Article 2.4.2 in this manner. In particular, the Appellate Body has recognized that this provision allows investigating authorities to use "multiple averaging" under the weighted average-to-weighted average comparison

methodology. Under this approach, an investigating authority can divide transactions into groups according to model or product type.

22. The basic definition of dumping is set out in Article 2.1 of the AD Agreement, and Article 2.2 sets out the basic rules covering the situation where a "proper comparison" cannot be made between export price and the price of the like product in the domestic market. Further, Article 6.10 provides important context, and indicates a number of factors which may be relevant when certain export transactions are excluded. To recall, Article 6.10 provides "where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable" the investigating authority "may limit [its] examination … to a reasonable number of … 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 which can reasonably be investigated." From this language, at least the following factors may be relevant in examining a situation where certain export transactions are excluded.

23. First, the number of different types of products is relevant; a large number of different types may support a limitation of the examination. Second, the difficulties involved in conducting an investigation of each and every product type are a relevant factor. The text notes that one consideration is whether an examination of each export sale is "impracticable." And at the end of this second sentence of Article 6.10, the language repeats this theme, noting that the limitation of an examination may be tied to what "can reasonably be investigated." Third, where the examination is so limited, the authority must still examine a "reasonable" number. Fourth, the text indicates that what is a "reasonable" number may depend on whether the examined transactions represent a statistically valid sample. Fifth, the text also indicates that the percentage of the total volume of exports investigated is relevant, and is tied to what can "reasonably" be investigated. Sixth, Article 6.10.1 states that it is "preferable" for any selection of product types to be made "in consultation with, and the consent of," the exporters, producers or importers concerned.

24. The United States suggests that the Panel apply these types of factors in examining China's claim with respect to the EU's exclusion of certain export sales. Because this involves a close examination of the facts and circumstances of the dispute, the United States takes no position on the ultimate question of whether China has made out its claim with respect to the exclusion of certain sales. Nonetheless, the United States does note its agreement with the EU that in the circumstances of this case, one particularly important factual circumstance is that China is a nonmarket economy. As a result, the EU was not able to rely on prices charged in China's domestic market, and was required to employ information from an analogue country. The use of this type of methodology appears to have made it more difficult for the EU to examine all product types.

II. Alleged differences in production costs

25. China claims that the EU acted inconsistently with Article 2.4 of the AD Agreement in failing to make adjustments for alleged differences relating to the production of fasteners in China and the production of fasteners in India, which was the analogue country used by the EU.

26. As an initial matter, the United States notes that the issue raised by China is not governed by Article 2.4. By its plain terms, Article 2.4 sets forth the obligation of an investigating authority to make a "fair comparison" between the export price and the normal value. In the investigation at issue, the export price of course is the price to the EU, and the basis of normal value – under the EU's analogue country methodology – were domestic sales in India by an Indian producer. Here, China's complaint is not with respect to physical differences, or differences in terms of sale, between the sales to the EU and the domestic sales in India. Rather, China raises a completely different issue, regarding – in essence – whether the domestic sales in the analogue country were an appropriate basis of normal value.

27. Furthermore, Article 2.4 provides that "[d]ue 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." But here, China is alleging difference in production costs between China and the analogue country (India); such alleged cost differences do not themselves affect "price comparability" between sales of two sets of products.

Rather, these alleged differences go to the issue of whether or not the Indian domestic sales are an appropriate surrogate for normal value.

28. Turning to the merits of China's factual assertions, we agree with the EU that an investigating authority may determine that normal value cannot be based on sales in a nonmarket economy because of, *inter alia*, a distorted market for raw materials, and that making adjustments to the dumping calculation based on such distortions would be inappropriate. Accordingly, China's argument is fundamentally circular.

29. China argues that India is not an appropriate analogue country because of alleged differences – as compared to China – in costs of raw materials and electricity. However, China fails to acknowledge that the very reason the EU has resorted to India as an analogue country is that the costs in China are distorted because China is a nonmarket economy. Accordingly, any calculation of the "true" costs in China – that is, the costs that would have been incurred if China were a market economy – are not knowable. Thus, in the facts of this dispute, it appears that China cannot establish that costs in China would be lower – or for that matter higher – than the costs incurred by the Indian producer.

30. In short, China's argument, if accepted, would defeat the underlying purpose of not relying on cost and sales data from a nonmarket economy.

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