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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**

2015-7

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS397/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICES OF APPEAL AND OTHER APPEAL

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## ANNEX A-1

## EUROPEAN UNION'S NOTICE OF APPEAL\*

Pursuant to Article 16.4 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, Recourse to Article 21.5 of the DSU by China* (WT/DS397). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- (a) the Panel erred when finding that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference. The Panel erred with respect to the correct legal interpretation and application of Article 21.5 of the DSU and failed to comply with its functions as required by Article 11 of the DSU. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.34, 7.80, 7.114, 7.115, 7.171, 7.291, as well as 8.1(i)-(iii) and (v) of its Report;
- (b) the Panel incorrectly interpreted and applied Article 6.5 of the AD Agreement to the facts of the case, and also failed to comply with its functions as required by Article 11 of the DSU when finding that the European Union violated Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.50, 7.51 and 8.1(i) of its report;
- (c) the Panel erred in the interpretation and application of Article 6.4 of the AD Agreement when finding that the Commission violated this provision by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, which information was not confidential within the meaning of Article 6.5, and which was relevant to the presentation of the Chinese producers' cases and used by the Commission. The European Union further submits that the Panel erred in the interpretation and application of Article 6.2 of the AD Agreement when finding that the Commission violated this provision by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products. In view of those errors, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.92, 7.96 and 8.1(ii) of its Report;
- (d) the Panel erred in the interpretation and application of Article 2.4 of the AD Agreement when finding that the Commission violated this provision by failing to provide the Chinese producers with specific product data regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings of violation in paragraphs 7.148, 7.149 and 8.1(iii) of the Panel Report;
- (e) the Panel erred in the interpretation and application of Article 2.4.2 of the AD Agreement when finding that the Commission violated this provision by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by the Indian analogue country producer Pooja Forge. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.276 and 8.1(iv) of its Report; and

\* This Notice, dated 9 September 2015, was circulated to Members as document WT/DS397/21.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

- (f) the Panel erred in the interpretation and application of Articles 4.1 and 3.1 of the AD Agreement when finding that, by defining the domestic industry on the basis of domestic producers that came forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1 of the AD agreement and consequently with Article 3.1 of the AD Agreement. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.299 and 8.1(v) of its Report.

**ANNEX A-2****CHINA'S NOTICE OF OTHER APPEAL\***

1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review, the People's Republic of China ("China") hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Recourse to Article 21.5 of the DSU by China)* (WT/DS397/RW) ("Panel Report"), and certain legal interpretations developed by the Panel in that Report.

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures for Appellate Review, China simultaneously files this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures for Appellate Review, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice of China's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

4. China requests the Appellate Body to reverse various findings and conclusions of the Panel as a result of the errors of law and of legal interpretation contained in the Panel Report as identified below.

**1 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIMS UNDER ARTICLE 2.4 OF THE AD AGREEMENT CONCERNING THE EUROPEAN UNION'S FAILURE TO MAKE ADJUSTMENTS FOR DIFFERENCES IN TAXATION**

5. China seeks review by the Appellate Body of the Panel's findings and conclusions concerning China's claim that the European Union violated Article 2.4 of the AD Agreement by failing to make a fair comparison between normal value and export price, and in particular by failing to make due allowances for differences in taxation.<sup>1</sup> The Panel erred in its interpretation and application of Article 2.4 of the AD Agreement when it found that the European Union did not violate Article 2.4 of the AD Agreement by rejecting the Chinese producers' request for an adjustment for differences in taxation. In that respect, China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel erred in finding that the Commission was not required to make an adjustment for differences in taxation because the analogue country methodology was used;
- The Panel erred in its application of Article 2.4 in finding that the Chinese producers did not show that the difference in taxation affected price comparability.

6. China requests the Appellate Body to reverse these Panel's findings and conclusions and to find that the European Union acted inconsistently with Article 2.4 of the AD Agreement.

**2 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIMS UNDER ARTICLE 2.4 OF THE AD AGREEMENT CONCERNING THE EUROPEAN UNION'S FAILURE TO MAKE ADJUSTMENTS FOR CERTAIN OTHER DIFFERENCES AFFECTING PRICE COMPARABILITY**

7. China seeks review by the Appellate Body of the Panel's findings and conclusions concerning China's claim that the European Union violated Article 2.4 of the AD Agreement by failing to make a fair comparison between normal value and export price, and in particular by failing to make due allowances for certain other differences affecting price comparability. The Panel erred in its

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\* This document, dated 14 September 2015, was circulated to Members as document WT/DS397/22

<sup>1</sup> Panel Report, paras. 7.209 – 7.223 and 8.2(iii).

interpretation and application of Article 2.4 of the AD Agreement and failed to comply with its functions as required by Article 11 of the DSU when finding that the European Union did not violate Article 2.4 by rejecting the Chinese producers' requests for adjustments for differences with regard to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity" which affected price comparability.<sup>2</sup> In that respect, China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel erred in finding that the Commission was not obliged to make adjustments to reflect differences in costs because the analogue country methodology was used;
- The Panel erred in its application of Article 2.4 in finding that the Chinese producers did not show that the alleged differences in costs affected price comparability;
- The Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU, by failing to address all aspects of China's claim and by failing to consider the evidence presented by China in its totality.

8. China requests the Appellate Body to reverse these Panel's findings and conclusions and to find that the European Union acted inconsistently with Article 2.4 of the AD Agreement.

### **3 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIMS UNDER ARTICLE 2.4 OF THE AD AGREEMENT CONCERNING THE EUROPEAN UNION'S FAILURE TO MAKE ADJUSTMENTS FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS**

9. In case the Appellate Body were to reverse the Panel's findings that the European Union violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values, China requests the Appellate Body to review the Panel's findings under Article 2.4 with respect to the European Union's failure to make adjustments for differences in physical characteristics.<sup>3</sup>

10. In that regard, China requests the Appellate Body to reverse the Panel's findings and to find that the European Union violated Article 2.4 as it failed to make adjustments for differences in physical characteristics both included and not included in the original PCNs.

### **4 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIM UNDER ARTICLE 6.1.2 OF THE AD AGREEMENT CONCERNING THE EUROPEAN UNION'S FAILURE TO ENSURE THAT THE INFORMATION PROVIDED BY POOJA FORGE WAS MADE AVAILABLE PROMPTLY TO THE CHINESE PRODUCERS**

11. China seeks review by the Appellate Body of the Panel's findings and conclusions concerning China's claim that the European Union violated Article 6.1.2 of the AD Agreement by failing to ensure that the information provided by Pooja Forge concerning the list and characteristics of its products was made available promptly to the Chinese producers.<sup>4</sup>

12. The Panel erred in its interpretation of the term "interested parties" as included in Article 6.11 in considering that the status of "interested parties" is dependent on a decision of the investigating authorities which must appear in the investigation record and in stating that such decision is made at the request of the party concerned. The Panel also erred in its interpretation and application of Article 6.1.2 in concluding that the obligation in Article 6.1.2 only applies to those parties which are "interested parties" under Article 6.11.<sup>5</sup> The Panel also erred in its interpretation of the Appellate Body's findings in the original dispute.<sup>6</sup>

<sup>2</sup> Panel Report, paras. 7.240 – 7.250 and 8.2(iii).

<sup>3</sup> Panel Report, paras. 7.225 – 7.230 and paras. 7.234 – 7.236 and 8.2(iii).

<sup>4</sup> Panel Report, paras. 7.116 – 7.123 and para. 8.2(i).

<sup>5</sup> Panel Report, paras. 7.118 – 7.119.

<sup>6</sup> Panel Report, paras. 7.120 – 7.122.

13. China requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 6.1.2 of the AD Agreement by failing to ensure that the information provided by Pooja Forge was made available promptly to the Chinese producers.

**5 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIM UNDER ARTICLE 6.5.1 OF THE AD AGREEMENT**

14. If the Appellate Body reverses the Panel's findings and conclusions that the European Union violated Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products and instead finds that the European Union did not violate Article 6.5 of the AD Agreement, then China requests the Appellate Body to complete the analysis of China's claim under Article 6.5.1 of the AD Agreement for which the Panel did not make findings.<sup>7</sup>

15. More specifically, China requests that the Appellate Body finds and concludes that the European Union violated Article 6.5.1 of the AD Agreement because it failed to ensure that Pooja Forge provides a meaningful non-confidential summary of the list of its products and of the information concerning the characteristics of its products and/or because it failed to ensure that Pooja Forge identifies the existence of exceptional circumstances and provides a statement of reasons why summarization of such information was not possible.

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<sup>7</sup> Panel Report, paras. 7.50 and 8.3.



**ANNEX B**

**ARGUMENTS OF THE PARTICIPANTS**

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**ANNEX B-1****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION****1.1 The Panel erred by finding that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference**

1. The European Union submits that the Panel erred in the interpretation and application of Article 21.5 of the DSU and also failed to comply with its functions as required by Article 11 of the DSU when finding that China's claims under Article 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.34, 7.80, 7.114, 7.115, 7.171, 7.291, as well as 8.1(i)-(iii) and (v) of its Report.
2. The European Union considers that Article 21.5 of the DSU instructs a panel in the context of compliance proceedings to evaluate the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. In this respect, the DSB's recommendations and rulings are crucial to determine whether a measure taken to comply exists, what aspects of such measure (including omissions) fall within the scope of the compliance review (e.g. because they are new aspects), and also in evaluating whether such a measure is consistent with the covered agreements. Thus, the recommendations and rulings of the DSB will always provide the starting point for a panel's analysis under Article 21.5. The steps taken by the responding Member to comply with those DSB's recommendations and rulings are also relevant to determine whether certain aspects in the measure taken to comply are "new" (i.e. where modified pursuant to the measure taken to comply), or remain unchanged and incorporated into the measure taken to comply. Panels in Article 21.5 proceeding are precluded from considering several types of issues relating to those unchanged aspects. In particular, the DSU does not allow complaining Members to use compliance proceedings to re-raise claims and arguments that were rejected during the original proceedings. In addition, Members generally may not make claims in compliance proceedings that they could have pursued during the original proceedings, but did not. In order to determine whether a particular claim against an unchanged aspect of the original measure incorporated into the measure taken to comply falls within the scope of those compliance proceedings, the compliance panel will have to assess whether such aspect forms an integral part of the measure taken to comply (e.g. like in *US-OCTG Sunset Reviews (Article 21.5)*) or is separate from the measure taken to comply (e.g. like in *EC – Bed Linen (Article 21.5 – India)*) in particular by examining the original DSB's recommendations and rulings, the steps taken by the responding Member to comply with them though the declared measure taken to comply, and the close relationship between those unchanged aspects and the ones that the responding Member was called to modify.

**1.1.1.1 The Panel made an error when finding that China's claim under Article 6.5 of the AD Agreement was within its terms of reference**

3. The Panel wrongly concluded that the claims made in the original and compliance proceedings took issue "with different types of information". With a different label applied to the same information, in the compliance proceedings China sought to challenge the fact that the European Commission had treated as confidential the same information (i.e. Pooja Forge's product categories reflecting its characteristics) also in the context of the review investigation. Nothing changed when compared with the facts as challenged by China in the original proceedings. China complained that the European Commission had treated as confidential the information provided by Pooja Forge regarding its product categories reflecting product characteristics in the original proceedings, and failed. Now, in compliance proceedings, China also raised the same claim against the same underlying facts in the context of the review investigation.
4. Had the Panel examined what the European Union was required to do following the adopted DSB reports, the Panel would have concluded that, since China failed to make its *prima facie* case with respect to all the information submitted by Pooja Forge in its Questionnaire

Response, including the categories of products sold (i.e. Pooja Forge's product characteristics), China was prevented from raising the same claim against the same facts which remained unchanged in the review investigation (i.e. the treatment as confidential of certain information submitted by Pooja Forge regarding the products sold in India). This issue did not bear any close relationship with the original DSB's recommendations and rulings. Simply, there were no recommendations or rulings on this matter, since China failed to prove its case. Allowing China to raise the same matter again in the context of these compliance proceedings precisely would confer a "second chance" to re-open the same issue which was discussed in the original proceedings, i.e. the treatment as confidential of the information provided by Pooja Forge, including its product types.

**1.1.1.2 The Panel made an error when finding that China's claim under Article 6.2 and 6.4 of the AD Agreement was within its terms of reference**

5. The information provided by Pooja Forge with respect to its products sold in India was not "new". In the review investigation, the European Commission based itself on the data which Pooja Forge had provided in the context of the original investigation. Further, in the original investigation, the Chinese exporting producers repeatedly requested to see the categorisations or product types on the basis of which Pooja Forge had provided information. This aspect, therefore, was not "new". The Panel failed when considering that this information was "new" and hence a new aspect in the measure taken to comply. In addition, the European Union considers that, had the Panel followed the guidance set out by the Appellate Body in *US – Zeroing (Article 21.5 – EC)*, the Panel should have concluded that this aspect of the review investigation did not change when compared to the original investigation (since it was based on the same information) and that such aspect was separable from the measure taken to comply, in light of the relevant DSB's recommendations and rulings.

**1.1.1.3 The Panel made an error when finding that China's claim under Article 6.1.2 of the AD Agreement was within its terms of reference**

6. The Panel erred in the interpretation and application of Article 21.5 of the DSU when examining the European Union's objection against China's claim under Article 6.1.2 of the AD Agreement. The reasons mentioned by the European Union in Section 3.2.4 also apply here *mutatis mutandi*. The European Union further takes issue specifically with the following factual finding made by the Panel in paragraph 7.114: "[w]e also recall that Pooja Forge provided information on coating during the review investigation [referring to Exhibit EU-6]". The European Union considers that the Panel erred under Article 11 of the DSU when drawing this conclusion from the record and which vitally supported its ultimate findings.

**1.1.1.4 The Panel made an error when finding that certain aspects of China's claims under Article 2.4 of the AD Agreement were within its terms of reference**

7. The Panel erred when finding that China's claims under Article 2.4 of the AD Agreement with respect to the use of the special/standard distinction in the dumping determination as well as the failure to make adjustments relating to features that were not included in the revised product categories (like traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient) were within its terms of reference.
8. With respect to the special versus standard distinction, like in the original proceedings, China sought to argue in the compliance proceedings that there was a "third" category of fasteners (yet another "standard-plus fasteners") which, in reality, did not exist either in the original or compliance proceedings. The methodology applied with respect to the special/standard distinction used by the European Commission in the original and review investigations did not change. In this respect, the European Union considers that, regardless of whether China raised the special/standard distinction in different contexts in the original and compliance proceedings, the essence of the claim was identical in both proceedings and, in fact, was rejected in several occasions in the original proceedings.
9. Moreover, China could have contested in the original proceedings how the European Commission applied its special/standard distinction also in the dumping context but did not

do so. Had the Panel examined the DSB's recommendations and rulings, it would have concluded that the use of the special/standard distinction in the dumping context was an unchanged aspect which was separable from the measure taken to comply by the European Union in this case. Indeed, since in essence the panel and the Appellate Body in the original proceedings confirmed the European Commission's approach and therefore rejected the existence of a third category of fasteners (irrespective of whether it was called "standard-plus fastener" or "high-end fastener"), the European Union was entitled to continue with its original special/standard distinction also in the review investigation.

10. With respect to the adjustments regarding differences in physical characteristics that were not included in the original PCNs, the Panel wrongly focussed its analysis on whether the alleged differences (such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient) were "discussed" in the original investigation. The relevant issue was, instead, whether China could have raised a claim in the original proceedings that the European Union also failed to comply with its obligations under Article 2.4 of the AD Agreement because it failed to take into account those differences in the product characteristics which were not reflected in the original PCNs. And indeed China could have brought such a claim.

#### **1.1.1.5 The Panel made an error when finding that China's claim under Articles 4.1 and 3.1 of the AD Agreement was within its terms of reference**

11. An examination of the original DSB's recommendations and rulings would have led the Panel to conclude that what the European Union was required to do was to amend its domestic industry definition so that it did not exclude those domestic producers that came forward but decided not to cooperate in the investigation.
12. In any event, whilst the Panel itself acknowledged that this aspect remained unchanged in the measure taken to comply, the Panel also erred when considering this unchanged aspect as an integral part of the measure taken to comply. The European Union was not required to re-open this issue in view of the original DSB's recommendations and rulings, which found the violation in the exclusion from the domestic industry definition of the producers coming forward within the deadline. The European Union was not called upon to modify the underlying data (i.e. the information collected as a result of the original Notice of Initiation, in particular the number of domestic producers who came forward within the deadline); rather, the European Union was required to change its methodology of selecting from the underlying data the universe of producers which would amount to the domestic industry in that investigation (and indeed it did so by taking into account all domestic producers as opposed to only those who expressed their intention to cooperate).

#### **1.2 The Panel made an error when finding that the European Union violated Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products**

13. The European Union submits that the Panel incorrectly interpreted and applied Article 6.5 of the AD Agreement to the facts of the case and also failed to comply with its functions as required by Article 11 of the DSU when finding that the European Union violated Article 6.5 by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products.
14. First, the Panel erred when failing to examine the reasons provided by Pooja Forge to request confidential treatment in their proper context. The Panel wrongly narrowed its analysis down to the fact that an e-mail where Pooja Forge provided reasons to justify the confidential treatment of its products was placed in the confidential file of the review investigation. The Panel was wrong to exclude this information from its consideration. Further, the Panel's ultimate concerns for disregarding this e-mail were also misguided. The Panel considered that the Chinese producers could not know the reason adduced by Pooja Forge, which, however, was known to the Chinese producers. In paragraph 7.44 of its Report, the Panel omits any discussion or reference to the Hearing Officer's Report dated 18 July 2012. The Panel further erred when finding that Pooja Forge's request was merely a "bald assertion". The Panel ignored the considerations submitted by the EU.

15. The European Union further submits that the Panel erred when finding that the European Commission "never" performed an objective assessment. This is in contradiction with the record. For example, the European Union explained that Pooja Forge's request for confidential treatment regarding the list and its product characteristics was made in the context of the verification visit that took place in April 2008 (Exhibit EU-5). The e-mail of 2 July 2012 confirmed that Pooja Forge stated the same concerns back in 2008. They were also mentioned in the Hearing Officer's Report dated 18 July 2012.
16. Moreover, the Panel did not attribute proper weight to the fact that the confidentiality of Pooja Forge's product range was a non-issue in the original investigation.
17. Neither did the Panel attribute proper weight to the circumstance that the facts and events to which the European Union needed to refer in this case date back to 2008.
18. The European Union also showed that the relevant assessment conducted in the review investigation was a "good proxy" of how the European Commission assessed the same matter back in 2008.
19. The European Union maintains that the Panel wrongly relied on an alleged logical inconsistency in the European Union's arguments that, on the one hand, the European Commission treated as confidential the information provided by Pooja Forge about its products for the purpose of the claim under Article 6.5, but that, on the other hand, the European Commission provided the Chinese exporting producers with certain information on the characteristics of Pooja Forge's products in the context of the claims under Articles 6.2 and 6.4, to conclude that this undermined the European Union's contention that the information at issue was confidential and that good cause was shown to keep it confidential.
20. This balancing which the European Union applied is laid down in the AD Agreement itself. The European Commission struck a balance between protecting the information deemed confidential and the information that was needed by the Chinese exporting producers to defend their interests.
21. It is not logically inconsistent to argue that the entirety of certain information as a whole is confidential whereas specific bits of information are not equally confidential.
22. Further, the Panel erred when finding, without a proper analysis, that the information relating to Pooja Forge's products was not confidential. In paragraph 7.51 of its Report, the Panel specified that its finding only indicated that the European Commission failed to observe the obligations set forth in Article 6.5. The Panel explicitly did not make a finding on the nature of such information as confidential or not. There is no reasoning apparent in the Panel Report which would reconcile these two sentences: "... we do not necessarily say that such information was not of a confidential nature" (para. 7.51) versus "... we treat that information as not confidential ..." (para. 7.88). The second sentence does not logically flow from the first one, contrary to what the Panel seems to assume.
23. In light of the foregoing, the European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.50, 7.51 and 8.1(i) of its Report.

**1.3 The Panel erred when finding that the Commission violated Articles 6.2 and 6.4 of the AD Agreement by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products, and by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, which information was not confidential within the meaning of Article 6.5, and which was relevant to the presentation of the Chinese producers' cases and used by the Commission**

24. The European Union submits that the Panel erred in the interpretation and application of Article 6.4 of the AD Agreement when finding that the Commission violated this provision by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, which information was not confidential within the meaning of Article 6.5, and which was relevant to the presentation of the Chinese

producers' cases and used by the Commission. The European Union further submits that the Panel erred in the interpretation and application of Article 6.2 of the AD Agreement when finding that the Commission violated this provision by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products.

25. Article 6.4 of the AD Agreement applies to information that meets three conditions: (i) the information has to be relevant to the presentation of the interested parties' cases; (ii) it should not be confidential as defined in Article 6.5; and (iii) it must have been used by the investigating authority.
26. With respect to condition (i): first, the fact that an interested party requests certain information cannot be equated with the determination that such information is "relevant". Second, the information about the list and characteristics of Pooja Forge's products the Chinese producers were asking for did not concern directly the dumping calculations. That part of the information which indeed did concern the dumping calculations was provided to the Chinese producers. In addition, the Chinese exporting producers could have made requests on the basis of the company specific disclosures.
27. With respect to condition (ii): the Panel erred when automatically concluding that an alleged error made by the European Union in assessing such information meant that the information itself was not confidential in the meaning of the second condition under Article 6.4.
28. With respect to condition (iii): the mere fact that information "relates" to a particular issue that is before the investigating authority does not establish that the information was "used" by the authority in making its determination. That information as a whole (as opposed to more specific parts of it) was not used by the Commission.
29. The Panel wrongly considered that providing this information at the time of the company specific disclosures was too late. The Chinese exporters, however, were given three weeks to make comments on the disclosure, including the possibility of asking for adjustments - preceded by three months of an active dialogue.
30. The Panel also found that the Commission violated Article 6.2 by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products. The European Union submits that this finding is in error for similar reasons as those mentioned before in the context of Article 6.4.
31. In light of the foregoing, the European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.92, 7.96 and 8.1(ii) of its Report.

**1.4 The Panel erred when finding that the Commission violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue**

32. The European Union submits that the Panel erred when finding that the Commission violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with specific product data regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue.
33. In particular, the Panel committed a legal error by turning the "fair comparison" requirement of Article 2.4 of the AD Agreement into a procedural provision that would require the investigating authority to disclose raw data and evidence to interested parties. Article 2.4 requires the authority to indicate to the parties what information is necessary to ensure a fair comparison, and provides that the authority shall not impose an unreasonable burden of proof on those parties in this respect. Rather than examining whether the Commission failed to indicate the information that was required and to examine if the Commission imposed an unreasonable burden of proof on the Chinese producers, the Panel simply re-interpreted one sentence in the original Appellate Body Report and, on that basis, read Article 2.4 to require that in an investigation involving NME countries, all of the raw product data from the

analogue country producer needs to be disclosed to the interested parties. There is no basis for this requirement in the text of Article 2.4 of the AD Agreement or in the original Appellate Body Report.

34. Article 2.4 of the AD Agreement requires that the interested parties be informed of the approach adopted by the investigating authority for ensuring a fair comparison and of the characteristics of the product groupings that will be used for purposes of the dumping determination. A dialogue needs to exist between the investigating authorities and the interested parties on the product groupings and on the request for adjustments. That is what the Appellate Body found in the original dispute. The investigating authority is to communicate clearly with the interested parties on the method it will use and the product types it has developed to make the fair comparison. It is then for the interested parties to request that additional characteristics be added to the product types or that particular adjustments are required given the type of products they are exporting.
35. Article 2.4 does not require a disclosure of the raw data provided by an interested party or of the verified evidence with respect to each product sold by an interested party, and certainly not when it concerns confidential information. The relevant obligation relating to the disclosure of information used in the determination is to be found in Articles 6.2 and 6.4 of the AD Agreement. As noted above, these provisions concern only information that is used by the investigating authority in the anti-dumping investigation and do not allow for the disclosure of confidential information.
36. In particular, the European Union argues that the Panel Report contains five errors of law.
37. *First*, the Panel expressly acknowledges that "the Chinese producers knew the basis on which the Commission grouped the products on the normal value and the export price side in comparing prices". In other words, the Panel confirms that the European Union complied with the requirement identified by the Appellate Body. The finding of the Panel that the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4 is thus clearly in error. Based on the Panel's own findings, the European Union did not fail to implement the Appellate Body's ruling and complied with the "procedural requirement" of Article 2.4 of the AD Agreement.
38. *Second*, the European Union considers that the Panel's conclusion in paragraph 7.144 that without seeing such "product types", and understanding their characteristics, "the Chinese producers could not, in our view, have had a meaningful opportunity to request adjustments" is wrong. These findings reveal a number of fundamental errors of law. Importantly, the facts of the case reveal that the Commission disclosed the "product types" on the basis of six relevant product characteristics. The Panel ignores the fact that the Chinese producers could thus have claimed an adjustment on the basis of other relevant characteristics e.g. if their mixed bag of transactions reflected such different characteristics likely to affect price comparability. However, China failed to provide any relevant evidence in respect of the alleged differences relating to the characteristics that were part of the PCNs. The Panel did not find otherwise. The Panel erred by accepting China's approach that a fair comparison can only be made if the producers can verify and confirm themselves if an adjustment is required based on all of the information available to the investigating authority. That is not what Article 2.4 provides.
39. *Third*, insofar as the Panel considers that the final disclosure documents were not a timely way of informing interested parties, the Panel erred as well. The Panel's finding to this effect in paragraph 7.144 is based on a reading which takes the Appellate Body's findings relating to the required dialogue out of context. The situation in the context of the review investigation in which the dialogue started well before the General Disclosure and which led to the Commission fully informing the interested parties of the product types it was using at the time it provided the company-specific disclosures, thus leaving sufficient time for comments (three weeks) is entirely different. The Panel erred in failing to appreciate that difference and in finding that providing full disclosure of the product types that were used in the final disclosure documents only violated Article 2.4.



40. *Fourth*, the European Union also considers that the Panel erred in law in suggesting that the obligation in Article 2.4 differs based on whether one or another permissible normal value methodology is used. There is no basis in the text of the AD Agreement or China's accession protocol for the Panel's finding that in investigations involving NME countries, Article 2.4 imposes a different and more far reaching disclosure obligation. What the Appellate Body required under the procedural requirement of Article 2.4 was that the Commission would enter into an active dialogue with Chinese producers. That is what the Commission did. The Appellate Body made this finding in the context of this NME investigation. The Appellate Body did not find that in an NME investigation Article 2.4 imposes additional obligations on investigating authorities.
41. *Fifth*, the Panel also erred when it found that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the product information. 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
42. The European Union therefore requests the Appellate Body to reverse the Panel's findings of violation in paragraphs 7.148, 7.149 and 8.1(iii) of its Report.

**1.5 The Panel erred when finding that the Commission violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge**

43. The European Union submits that the Panel erred when finding that the Commission violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by the Indian analogue country producer Pooja Forge. The Panel ignored the term "comparable" in Article 2.4.2 and failed to interpret the requirement of Article 2.4.2 in the context of the overarching "fair comparison" obligation of Article 2.4 which distinguishes this situation from the one addressed in the zeroing disputes. The Commission applied a neutral methodology that included all comparable export transactions for which there was a comparable domestic sale. The European Union therefore requests that the Panel's findings in paragraphs 7.276 and 8.1(iv) be reversed.
44. The obligation in Article 2.4.2 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. The European Commission included only the comparable export transactions in its dumping calculation in order to ensure the accuracy of the calculations. In so doing, the European Commission included all comparable export transactions in the dumping margin determination and 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 did not find otherwise. The evidence presented by the European Union showed that both qualitatively and quantitatively the amount of matching sales was such as to ensure a fair comparison between comparable sales. The European Commission excluded some export transactions from its dumping calculation, because including them would have resulted in inaccurate findings based on non-comparable transactions. This situation cannot be compared with the zeroing situation that the Panel based its analysis on.
45. In sum, by including "all comparable export transactions" – and including both quantitatively and qualitatively a significant amount of matching sales – the European Commission ensured a "fair comparison" between the export price and normal value in accordance with Articles 2.4 and 2.4.2 of the AD Agreement. The European Union respectfully request the Appellate Body to reverse the Panel's conclusion to the contrary. The Panel's finding that the Commission violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge was based on a legal error in the interpretation and



application of Article 2.4.2 of the AD Agreement and the Panel's findings in paragraphs 7.276 and 8.1(iv) should thus be reversed.

**1.6 The Panel erred when finding that by defining the domestic industry on the basis of domestic producers that came forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1 of the AD Agreement and consequently with Article 3.1 of the AD Agreement**

46. The European Union submits that the Panel erred when finding that by defining the domestic industry on the basis of domestic producers that came forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1 of the AD agreement and consequently with Article 3.1 of the AD Agreement. In fact, the Panel recognised that the Commission implemented the finding of the Appellate Body by including all producers that came forward within the deadline. However, its ultimate contrary conclusion in paragraphs 7.299 and 8.1(v) is based on an erroneous reading of the Appellate Body Report and is not supported by the text of Article 4.1, and should therefore be reversed.
47. 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 to be verified constituted a violation of the European Union's obligations under Article 4.1 and 3.1 of the AD Agreement.
48. 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 review of the Appellate Body's findings the Panel expressly found, as argued by the European Union, that the finding of the Appellate Body related only to the exclusion of the domestic producers that came forward within the deadline. The Panel also found that as a matter of fact in the review investigation "[n]one of those [previously excluded] producers was excluded from the new definition of domestic industry". However, rather than drawing the logical conclusion that the inclusion of such previously excluded producers thus brought the European Union into conformity with the Appellate Body's ruling, as it should have, the Panel considered that the legal reasoning of the Appellate Body required something additional of the European Union. This is in error as the problematic approach identified by the Appellate Body was the exclusion of producers that provided relevant information, and not the mere fact of having requested producers to indicate whether they would be willing to participate in the sample and cooperate in the investigation.
49. In fact, as a practical matter, every domestic industry determination is based on self-selection as producers are informed of the initiation of an investigation and are invited to make themselves known. There is no obligation to come forward. And any producer that comes forward knows that if it does not accept verification of the information and is thus uncooperative, its information may be disregarded anyway. Thus, it is not realistic to suggest that the mere question of willingness to participate in the sample would cause a material risk of distortion when it simply raises an issue that any producer is all too well aware of. Finally, no evidence of such a distortion was provided by China and the conclusion of the panel is thus based purely on speculation. That as well constitutes legal error.
50. Given that the European Union demonstrated that the Implementing Regulation's definition of the domestic industry was consistent with its obligations under Article 4.1 of the AD Agreement, the Panel's entirely consequential finding of violation of Article 3.1 of the AD Agreement is also flawed
51. In sum, the Panel committed legal error when finding that the European Union's domestic industry definition was inconsistent with Articles 4.1 and 3.1 of the AD Agreement because of a line in the Notice of Initiation that requested producers to inform the authorities of their willingness to be included in the sample. The European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.299 and 8.1(v) that the European Union's

definition of domestic industry was inconsistent with Article 4.1 of the AD Agreement and that the resulting injury determination was inconsistent with Article 3.1 of the AD Agreement.

**ANNEX B-2****EXECUTIVE SUMMARY OF CHINA'S OTHER APPELLANT'S SUBMISSION****1 INTRODUCTION**

1. The Report issued by the compliance Panel in the case *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 by China* contains a number of legal errors and errors of legal interpretation of the provisions of the AD Agreement and of the DSU. These errors have led to Panel to erroneous findings and conclusions with respect to China's claims under Articles 2.4, 6.1.2 and 6.5.1 of the AD Agreement. China requests the Appellate Body to reverse the Panel's findings and conclusions and to complete the analysis, with respect to these legal errors and errors of legal interpretation committed by the Panel.

**2 THE PANEL ERRED IN FINDING THAT THE EUROPEAN UNION DID NOT VIOLATE ARTICLE 2.4 OF THE AD AGREEMENT BY REJECTING THE CHINESE PRODUCERS' REQUESTS FOR AN ADJUSTMENT FOR DIFFERENCES IN TAXATION**

2. China submits that the Panel erred in its interpretation and application of Article 2.4 of the AD Agreement when it found that the European Union did not violate Article 2.4 by rejecting the Chinese producers' requests for an adjustment for differences in taxation.

3. First, the Panel erred in finding that the Commission was not required to make an adjustment for differences in the taxation of wire rod in India because of the use of the analogue country methodology. This finding is contrary to Article 2.4 and is not supported by the special rules included in China's Accession Protocol. Indeed, Article 2.4 imposes on the investigating authorities the obligation to ensure a fair comparison between the normal value and the export price, which applies equally in all anti-dumping investigations, including those involving imports from China in which the analogue country methodology is used.

4. By finding that the Commission was under no obligation to make an adjustment for differences in taxation when the analogue country methodology was used, the Panel has confused the issue of the determination of the normal value and the issue of the comparison of the normal value and the export price.

5. The Panel misunderstood the nature of the adjustment claimed by the Chinese producers by considering that it related to a difference in input costs resulting from the difference in the taxation of inputs between India and China while actually China's claim relates to the difference in tax treatment between domestic and export sales incorporating the same inputs, namely wire rod. Thus, the claim was unrelated to the choice of the analogue country but dealt with the comparability of the domestic and export prices.

6. Furthermore, the Panel erred in concluding that making adjustments for differences in taxation on inputs would undermine the Commission's right to have recourse to the analogue country methodology. The difference in taxation of wire rod results from the non-recognition by the European Union of the drawback systems applicable in both China and India and has nothing to do with the cost of wire rod itself which is allegedly affected by non-market economy conditions in China. Furthermore, making an adjustment for differences in the taxation of inputs, such as wire rod, does not prevent the use of data from the analogue country producer, and thus, in no way undermines the use of the analogue country methodology.

7. Second, the Panel erred in its application of Article 2.4 of the AD Agreement in finding that the Chinese producers did not show that the difference in taxation affected price comparability. By showing that no import duties on raw materials are included in the export price of Chinese fasteners, while the domestic price of Pooja Forge's fasteners used for the establishment of the normal value included such import duties, the Chinese producers demonstrated the existence of a difference in taxation that affects price comparability.

8. In light of the above, China requests the Appellate Body to reverse the Panel's findings and conclusions with respect to China's claim under Article 2.4 of the AD Agreement concerning the adjustments for differences in taxation; and to find that by rejecting the Chinese producers' request the European Union failed to make a fair comparison and thus violated Article 2.4 of the AD Agreement.

**3 THE PANEL ERRED IN FINDING THAT THE EUROPEAN UNION DID NOT VIOLATE ARTICLE 2.4 OF THE AD AGREEMENT BY REJECTING THE CHINESE PRODUCERS' REQUESTS FOR ADJUSTMENTS FOR DIFFERENCES WITH REGARD TO "EASIER ACCESS TO RAW MATERIALS", "USE OF SELF-GENERATED ELECTRICITY", AND "EFFICIENCY AND PRODUCTIVITY" WHICH AFFECT PRICE COMPARABILITY**

9. China submits that the Panel erred in its interpretation and application of Article 2.4 of the AD Agreement when it found that the European Union did not violate Article 2.4 by rejecting the Chinese producers' requests for adjustments for differences with regard to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity" which affected price comparability.

10. First, the Panel erred in finding that the investigating authority is not obliged to make adjustments to reflect differences in costs in an investigation where the analogue country methodology is used. Such a finding is contrary to Article 2.4 which imposes the obligation to ensure a fair comparison also in investigations in which the analogue country methodology is used. By reaching this conclusion the Panel confused two distinct steps (i.e. the use of the analogue country methodology for determining normal value and the making of due allowances for differences affecting price comparability between such normal value and export price) and effectively established two different standards under Article 2.4. In any event, the differences raised by China were completely unrelated to its non-market economy status and the requested adjustments would only have used analogue country cost data and not the data from China.

11. Second, the Panel erred in its application of Article 2.4 when it found that the Chinese producers did not show that the alleged differences in costs affected price comparability. In fact, in light of the particular circumstances of the investigation at issue, which involved the use of information from an analogue country producer, the Panel should have found that the Chinese requests were properly substantiated and thus, required adjustments under Article 2.4. Furthermore, the Panel misunderstood the requirement of differences "affecting price comparability" under Article 2.4. Having acknowledged that the differences in costs factors likely will have an impact on prices, the Panel thereafter erroneously concluded that these differences could not justify any adjustment merely because the normal values of the Chinese companies have been based on the data of an analogue country producer.

12. Third, the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, by failing to address all aspects of China's claim and by failing to consider the evidence presented by China in its totality. Indeed, the Panel focused exclusively on the differences in terms of electricity consumption and examined different pieces of evidence presented by China in isolation from one another.

13. In light of the above, China requests the Appellate Body to reverse the Panel's findings and conclusions and to find that by rejecting the Chinese producers' requests for adjustments for the differences with regard to easier access to raw materials, use of self-generated electricity, and efficiency and productivity the European Union failed to make a fair comparison and thus violated Article 2.4 of the AD Agreement.

**4 REVIEW OF THE PANEL'S FINDINGS THAT THE EUROPEAN UNION DID NOT VIOLATE ARTICLE 2.4 OF THE AD AGREEMENT BY REJECTING THE CHINESE PRODUCERS' REQUESTS FOR ADJUSTMENTS FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS**

14. China submits that if the Appellate Body were to reverse the Panel's findings under Article 2.4 of the AD Agreement that the European Union failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values, the Appellate Body should reverse the Panel's findings that the

European Union did not violate Article 2.4 by rejecting the Chinese producers' requests for adjustment for differences in physical characteristics both included and not included in the original PCNs and find that, in doing so, the European Union failed to make a fair comparison and violated Article 2.4.

15. First, the Panel erred in assessing China's claim with respect to differences in physical characteristics included in the original PCNs (coating and chrome, diameter and length and types of fasteners) and, more specifically, failed to examine whether the Commission acted in an unbiased and even-handed manner because it based its decision to reject China's requests on an improper factual basis.

16. Second, the Panel erred in assessing China's claim with respect to differences in physical characteristics not included in the original PCNs. By using all the information available to them, the Chinese producers made constructive requests for adjustments which were rejected by the European Union without any further analysis. The European Union thereby failed to comply with its requirements under Article 2.4.

## **5 THE PANEL ERRED IN FINDING THAT THE EUROPEAN UNION DID NOT VIOLATE ARTICLE 6.1.2 OF THE AD AGREEMENT BY NOT MAKING THE INFORMATION ON THE LIST AND CHARACTERISTICS OF POOJA FORGE'S PRODUCTS AVAILABLE PROMPTLY TO THE CHINESE PRODUCERS**

17. China submits that the Panel erred in its interpretation and application of Article 6.1.2 of the AD Agreement when it found that the European Union did not violate Article 6.1.2 by not making the information on the list and characteristics of Pooja Forge's products available promptly to the Chinese producers.

18. First, the Panel erred in its interpretation of the term "interested parties" in Article 6.11 in considering that the status of "interested parties" is dependent on a decision of the investigating authorities which must appear in the investigation record and in stating that such decision is made at the request of the party concerned. In the present case, the fact that the Commission chose Pooja Forge as the analogue country producer and used its information to establish the normal values of the Chinese producers shows that the Commission decided to treat Pooja Forge as an interested party.

19. Second, the Panel erred in its interpretation and application of Article 6.1.2 and, in particular, of its scope, in concluding that the obligation in Article 6.1.2 only applies to those parties which are "interested parties" under Article 6.11. The Panel should have examined whether Pooja Forge should not be assimilated to "interested parties" presenting evidence for the purposes of Article 6.1.2. Given the key role of Pooja Forge in the investigation at issue and the purpose of Article 6.1.2, Pooja Forge should be assimilated to an "interested party" presenting evidence under Article 6.1.2 and thus, the information provided by this company should come within the scope of Article 6.1.2.

20. Third, the Panel erred in its interpretation of the Appellate Body's findings in the original dispute. Indeed, the Panel's interpretation fails to reconcile the finding that Article 6.5.1 applies to Pooja Forge with the fact that this provision expressly refers to the confidential information provided by an "interested party". China submits that the Appellate Body's finding that Article 6.5.1 applies to Pooja Forge despite the fact that Article 6.5.1 uses the term "interested parties" supports the conclusion that Pooja Forge should also be covered by Article 6.1.2.

21. In light of the above, China requests the Appellate Body to reverse the Panel's findings and to find that the European Union violated Article 6.1.2 of the AD Agreement by failing to make the information on the list and characteristics of Pooja Forge's products available promptly to the Chinese producers.

## **6 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIM UNDER ARTICLE 6.5.1 OF THE AD AGREEMENT**

22. China submits that if the Appellate Body were to reverse the Panel's findings that the European Union acted inconsistently with Article 6.5 of the AD Agreement by treating as

confidential information submitted by Pooja Forge regarding the list and characteristics of its products, China requests the Appellate Body to complete the analysis of China's claim under Article 6.5.1 for which the Panel did not make findings.

23. China requests the Appellate Body to find that the European Union violated Article 6.5.1 of the AD Agreement because it failed to ensure that Pooja Forge provides a non-confidential summary of the information regarding its products and/or failed to ensure that Pooja Forge establishes the existence of exceptional circumstances and provides a statement of reasons why, in such exceptional circumstances, summarization was not possible.

**ANNEX B-3****EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION****1 INTRODUCTION**

1. In its Appellant Submission, the European Union appeals and requests the Appellate Body to reverse a number of findings and conclusions of the Panel. In the first place, the European Union takes issue with the scope of the Panel's jurisdiction and appeals the Panel's findings that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference in accordance with Article 21.5 of the DSU. Furthermore, the European Union appeals the Panel's findings on the merits under Articles 6.5, 6.2, 6.4, 2.4, 2.4.2, 4.1 and 3.1 of the AD Agreement. China submits that all claims of the European Union are without merit and therefore requests the Appellate Body to reject the European Union's appeal in its entirety.

**2 THE PANEL CORRECTLY FOUND THAT CHINA'S CLAIMS UNDER ARTICLES 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 AND 3.1 OF THE AD AGREEMENT FELL WITHIN ITS TERMS OF REFERENCE**

2. China submits that, contrary to the European Union's arguments, the Panel correctly found that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement were within its terms of reference. These findings are consistent with a correct interpretation and application of Article 21.5 of the DSU in light of the existing case-law of the Appellate Body. Furthermore, in reaching its conclusions the Panel acted in accordance with the requirements set out in Article 11 of the DSU.

**2.1 China's claim under Article 6.5 of the AD Agreement**

3. The Panel correctly found that China's claim under Article 6.5 fell within its terms of reference. All claims of error raised in this regard by the European Union must be rejected.

4. First, while the European Union essentially claims that the Panel erroneously assessed the facts in the original and compliance proceedings regarding the type of information that was the object of the claims, it has not raised Article 11 of the DSU and thus the Appellate Body should simply reject its claim.

5. Second, and in any event, the Panel correctly concluded that the claims raised by China in the original and compliance proceedings took issue "with different types of information" and consequently that the object of the claim under Articles 6.5 and 6.5.1 presented in the original and compliance proceedings was not the same. In that regard, China notes that the European Union distorts the scope of China's claims under Article 6.5 in the original and compliance proceedings and disregards the important fact that the object of China's claim in the original proceedings was limited to Pooja Forge's questionnaire response while the information at issue in the compliance proceedings was not part of that questionnaire response.

6. Third, the Panel did not err when relying on the fact that the issue of the confidentiality and non-disclosure of information regarding the list and characteristics of Pooja Forge's products had been subject to extensive debate.

7. Fourth, the Panel correctly followed the guidance of the Appellate Body's findings in *EC – Bed Linen (Article 21.5 – India)*. Indeed, the Panel correctly started its examination by considering whether the claim raised in the compliance proceedings was the same as the claim raised in the context of the original proceedings. Having found that the claims were not the same, the Panel correctly found that China's claim under Article 6.5 and 6.5.1 fell within its terms of reference.

## 2.2 China's claim under Articles 6.4 and 6.2 of the AD Agreement

8. The Panel correctly found that China's claim under Articles 6.4 and 6.2 fell within its terms of reference.

9. First, contrary to the European Union's arguments, the Panel properly examined and concluded that China's claim under Articles 6.4 and 6.2 could not have been brought in the original proceedings. The European Union's argument that the Panel erred in considering that the information at issue was new is irrelevant since whether the list of products and the information on Pooja Forge's products has been submitted during the original investigation or the review investigation was irrelevant to the Panel's examination as to whether China's claim under Articles 6.4 and 6.2 was a claim that could have been brought by China during the original proceedings. In any case, at least part of the information concerned has been provided by Pooja Forge during the review investigation. Furthermore, the European Union erroneously argues that requests made by the Chinese producers during the original and review investigations related to the same information. Finally, the European Union fails to take into account that this claim relates to the violation of a procedural obligation.

10. Second, the European Union is incorrect in arguing that the Panel failed to follow the guidance set out by the Appellate Body in *US – Zeroing (Article 21.5 – EC)*. In line with the latter dispute, the Panel correctly concluded that China's claim under Articles 6.4 and 6.2 was a claim that it could not have brought in the original proceedings. As a result, the Panel was not required to examine whether the claim challenged an unchanged aspect of the original measure which has become an integral part of the measure taken to comply. However, if the Appellate Body were to consider these issues, China submits that it should conclude that the aspect being challenged by this claim is an aspect which has changed when compared to the original investigation and furthermore that it is an aspect which is not separable from the measure taken to comply.

## 2.3 China's claim under Article 6.1.2 of the AD Agreement

11. The Panel correctly found that China's claim under Article 6.1.2 fell within its terms of reference. Contrary to the European Union's argument, the Panel properly examined and concluded that China's claim under Article 6.1.2 could not have been brought during the original proceedings. The fact that the Chinese producers only became aware of the existence of the information concerning Pooja Forge's products during the review investigation is essential as it proves that China could not have brought a claim under Article 6.1.2 in the original proceedings. Furthermore, this aspect is not only a changed aspect but also an aspect which is not separable from the measure taken to comply. Finally, the European Union's allegation of violation of Article 11 of the DSU is without merit. Indeed, Exhibit EU-6, referred to by the Panel, demonstrates that Pooja Forge provided information on coating during the review investigation.

## 2.4 China's claims under Article 2.4 of the AD Agreement

12. The Panel correctly found that China's claims under Article 2.4 fell within its terms of reference. The European Union takes issue with two aspects of China's claims under Article 2.4. First, since China does not appeal the Panel's findings with regard to its claim under Article 2.4 with respect to the special/standard distinction, China understands that the European Union will withdraw its claim, and thus China does not address this claim in the present submission. Second, with respect to the claim concerning adjustments for differences in physical characteristics not included in the original PCNs, China submits that since any such differences were not discussed in the original investigation China could not have made a claim under Article 2.4 during the original proceedings arguing that the Commission should have made due allowances for such differences. Furthermore, the Chinese producers were precluded from making such requests in the original investigation since the European Union did not clearly indicate the basis on which the price comparison was going to be made until very late in the original investigation.

## 2.5 China's claim under Articles 4.1 and 3.1 of the AD Agreement

13. The Panel correctly found that China's claim under Articles 4.1 and 3.1 fell within its terms of reference. In this regard, China submits that the Panel examined the relationship between China's claim in the compliance proceedings and the original DSB recommendations and rulings and



correctly concluded that China's claim goes to the very heart of a compliance panel's task under Article 21.5 of the DSU. Furthermore, contrary to the European Union's arguments, the Panel correctly concluded that the aspect at issue became an integral part of the measure taken to comply.

14. In light of the foregoing, China requests the Appellate Body to reject the European Union's appeal and to uphold the Panel's finding that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within the Panel's terms of reference.

**3 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLE 6.5 OF THE AD AGREEMENT BY TREATING AS CONFIDENTIAL THE INFORMATION SUBMITTED BY POOJA FORGE REGARDING THE LIST AND CHARACTERISTICS OF ITS PRODUCTS**

15. China submits that the Panel correctly interpreted and applied Article 6.5 of the AD Agreement to the fact of this case.

16. First, contrary to the European Union's allegation, the Panel did not fail to examine the reasons provided by Pooja Forge to request confidential treatment in their proper context. More specifically, the Panel did not narrow its analysis down to the fact that the email of 3 July 2012 was placed in the confidential file of the review investigation. Instead, the Panel examined this email in detail and found that it did not support the argument that Pooja Forge provided good cause to justify confidential treatment of its information. At the same time, the Panel correctly found that placing the email on the confidential file rather than the public one deprived the Chinese producers of the opportunity to know of this argument made by Pooja Forge. The Panel also correctly found that Pooja Forge's request was merely a "bald assertion" which was insufficient to justify confidential treatment of Pooja Forge's information.

17. Second, the Panel correctly found that the European Commission never performed an objective assessment on whether the information provided by Pooja Forge was confidential by nature or whether good cause had been shown to justify its confidential treatment. Contrary to the European Union's argument, the Panel made an objective assessment of the facts as required by Article 11 of the DSU. There is simply no evidence on the record showing that the Commission objectively assessed the request for confidential treatment of Pooja Forge. Furthermore, the circumstances invoked by the European Union are simply irrelevant. The Panel properly discussed and disregarded all such circumstances.

18. Third, the Panel correctly found that the European Union's contention that the information at issue as a whole was confidential was logically inconsistent with the European Union disclosing part of that information. To the extent that specific bits of information can be disclosed under Article 6.4, the treatment of such information as confidential is inconsistent with Article 6.5. Thus, it is correct that the European Union's argument that the European Commission disclosed certain information about the characteristics of Pooja Forge's products undermined the European Union's contention that the information at issue was confidential and that good cause was shown to keep it confidential.

19. Fourth, the Panel did not err in treating the information relating to Pooja Forge's products as not confidential. The Panel focused its analysis under Article 6.5 on whether "good cause" had been shown by Pooja Forge and whether the Commission objectively assessed any confidentiality request by Pooja Forge. The Panel rightly found that no "good cause" had been shown and that, in any case, the Commission did not make any objective assessment. On that basis, the Panel rightly considered that information as not requiring confidential treatment within the meaning of Article 6.5 of the AD Agreement. Indeed, without good cause being shown information cannot be treated as confidential under Article 6.5, regardless of whether such information is by nature confidential or not. In any event, China has explained that contrary to the European Union's arguments the information regarding the list and characteristics of Pooja Forge's products was not confidential by nature.

20. In light of the above, China requests the Appellate Body to reject the European Union's appeal and to uphold the Panel's finding that the European Union violated Article 6.5 of the

AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products.

**4 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLES 6.4 AND 6.2 OF THE AD AGREEMENT BY FAILING TO PROVIDE THE CHINESE PRODUCERS WITH TIMELY OPPORTUNITIES TO SEE THE INFORMATION ON THE LIST AND CHARACTERISTICS OF POOJA FORGE'S PRODUCTS**

21. China submits that the appeal brought by the European Union should be rejected by the Appellate Body because the Panel appropriately interpreted and applied Articles 6.4 and 6.2 of the AD Agreement to the facts of the case.

22. With respect to Article 6.4, and contrary to the European Union's contention, the Panel correctly found that all three conditions set out in this provision were met in the present case. First, the Panel correctly found that the information requested by the Chinese producers was relevant to the presentation of their cases. Indeed, the repeated requests made by the Chinese producers indicated why access to such information was relevant. Furthermore, the Panel correctly examined the type and nature of the information at issue and rightly concluded that such information concerned the determination of the normal values and ultimately the dumping margins for the Chinese producers. Second, the Panel correctly found that the information requested by the Chinese producers was not confidential as defined in Article 6.5. Third, the Panel correctly found that the information at issue was used by the Commission in the review investigation. In addition, contrary to what the European Union argues, providing information through disclosure documents before making final determination does not meet the requirement of "timely opportunities" under Article 6.4. In any case, China notes that the disclosure documents invoked by the European Union did not contain the information at issue.

23. With respect to Article 6.2, China submits that the Panel did not commit any errors and correctly found that the European Union violated this provision. Indeed, by depriving the Chinese producers from having access to see the relevant information, in violation of Article 6.4, the Commission prevented the Chinese producers from having a full opportunity to defend their interests and thus also violated Article 6.2. Furthermore, even if the Appellate Body were to reverse the Panel's findings under Article 6.4, it should nonetheless uphold the Panel's findings under Article 6.2. Indeed, the fact that without the information at issue the Chinese producers were not in a position to make relevant requests for adjustment in order to ensure a fair comparison under Article 2.4 demonstrates that this information was essential for the defense of the Chinese producers' interests.

24. In light of the above, China requests the Appellate Body to reject the European Union's appeal and to uphold the Panel's finding that the European Union violated Article 6.4 and Article 6.2 of the AD Agreement by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products.

**5 THE PANEL CORRECTLY FOUND THAT THE COMMISSION VIOLATED ARTICLE 2.4 OF THE AD AGREEMENT BY FAILING TO PROVIDE THE CHINESE PRODUCERS WITH INFORMATION REGARDING THE CHARACTERISTICS OF POOJA FORGE'S PRODUCTS THAT WERE USED IN DETERMINING NORMAL VALUES IN THE INVESTIGATION AT ISSUE**

25. China submits that, contrary to the European Union's allegation, the Panel correctly found that the European Union violated Article 2.4 of the AD Agreement.

26. First, the Panel correctly concluded that the European Union failed to implement the Appellate Body's ruling and did not comply with the procedural requirement under the last sentence of Article 2.4 of the AD Agreement. Apart from providing the information about the product groups used for the purpose of price comparison – which is the minimum required from the investigating authorities – the European Union was also required to inform the interested parties about the specific products with regard to which the normal value was determined. Since it failed to do so, the Panel was correct to conclude that it did not comply with the last sentence of Article 2.4 of the AD Agreement.

27. Second, contrary to the European Union's arguments, the Panel did not err when interpreting the scope of the procedural requirement under the last sentence of Article 2.4 as requiring the investigating authorities to provide information regarding the characteristics of the products used in determining normal values, since the purpose is to ensure that the interested parties are in a position to make informed decisions on whether to request adjustments under Article 2.4. Furthermore, the Panel did not err in assessing the value of the company specific disclosures, which did not provide any information on the characteristics of the specific products of Pooja Forge, on the basis of which normal value was determined.

28. Third, since the disclosure documents provided by the European Union did not include information on the characteristics of Pooja Forge's products, necessary for the Chinese producers to be in a position to request adjustments, the Panel was correct to consider that they did not satisfy the requirements under Article 2.4 of the AD Agreement.

29. Fourth, the Panel correctly interpreted the obligation under Article 2.4 in the context of an investigation involving the use of an analogue country methodology. Indeed, when the normal value is established on the basis of data of an analogue country producer, not known to the foreign exporter under investigation, the investigating authority is required to provide information concerning the products used in the normal value determination in order to ensure that the exporters are in a position to meaningfully request relevant adjustments.

30. Fifth, China submits that the Panel correctly assessed the relationship between the confidential treatment of certain information and the obligations arising under Article 2.4 of the AD Agreement. In any event, the Appellate Body should uphold the Panel's findings that the European Union violated Article 2.4 because it failed to provide the Chinese producers with the information on the characteristics of Pooja Forge's products that were used in determining the normal value.

31. China also submits that the European Union errs when considering that it entered into an active dialogue as required by Article 2.4 of the AD Agreement. In fact, there can be simply no "dialogue" on the need of adjustments if the foreign producers are not sufficiently informed about the products used for determining their normal values.

32. In light of the above, China requests the Appellate Body to reject the European Union's appeal and uphold the Panel's findings that the European Union violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue.

**6 THE PANEL CORRECTLY FOUND THAT THE COMMISSION VIOLATED ARTICLE 2.4.2 OF THE AD AGREEMENT BY NOT TAKING INTO CONSIDERATION, IN ITS DUMPING DETERMINATIONS, CHINESE PRODUCERS' EXPORTS OF MODELS THAT DID NOT MATCH ANY OF THE MODELS SOLD BY POOJA FORGE**

33. China submits that the European Union's appeal of the Panel's findings under Article 2.4.2 should be rejected.

34. First, contrary to the European Union's allegation, the Panel's interpretation of the term "all comparable export transactions" in Article 2.4.2 is correct and consistent with the previous case-law, the definition of dumping in Article 2.1 of the AD Agreement and the context provided by the "fair comparison" obligation in Article 2.4. Accordingly, all export transactions of different types of fasteners falling within the scope of like product are comparable and should be taken into account in the establishment of the dumping margin.

35. Second, the Panel correctly rejected the European Union's arguments. The Panel did not confuse the situation addressed in previous zeroing cases with the allegedly "neutral" methodology adopted by the European Union. While zeroing deals with different stage of the WA-WA methodology, the findings in zeroing cases are relevant for the present dispute since they provide a comprehensive interpretation of the term "all comparable export transactions" in Article 2.4.2 of the AD Agreement. Furthermore, the use of multiple averaging does not allow for the exclusion of certain exported models that do not have a perfect matching on the normal value

side. Such conclusion is also not supported by the possibility of sampling foreseen by Article 6.10 or the Panel's findings concerning the issue of timing of transactions in *US – Stainless Steel (Korea)*. Finally, the alleged representativeness of the export sales included in the comparison is irrelevant to the legal obligation under Article 2.4.2, i.e. to take into account all comparable export transactions for calculating dumping margin. In any event, the European Union's argument, illustrated by a chart, is factually incorrect.

36. Third, the European Union's characterization of its methodology as "neutral" is misleading. The European Union took into account only those Chinese producers' exports of fasteners for which there was a matching model sold by Pooja Forge. The other export transactions were simply ignored. As a result, the comparison made by the European Union resulted in a presumption of dumping for those export transactions that were not used in the dumping determination. Therefore, it is clear that such methodology cannot be described as "neutral".

37. In light of the above, China requests the Appellate Body to reject the European Union's appeal and to uphold the Panel's finding that the European Union violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge.

**7 THE PANEL CORRECTLY FOUND THAT BY DEFINING THE DOMESTIC INDUSTRY ON THE BASIS OF DOMESTIC PRODUCERS THAT CAME FORWARD IN RESPONSE TO A NOTICE OF INITIATION WHICH STATED THAT ONLY THOSE PRODUCERS WILLING TO BE INCLUDED IN THE INJURY SAMPLE WOULD BE CONSIDERED AS COOPERATING, THE COMMISSION ACTED INCONSISTENTLY WITH ARTICLE 4.1 OF THE AD AGREEMENT AND CONSEQUENTLY WITH ARTICLE 3.1 OF THE AD AGREEMENT**

38. China submits that contrary to the European Union's allegation the Panel correctly interpreted and applied Article 4.1 of the AD Agreement.

39. First, the Panel correctly found that the European Union acted inconsistently with Article 4.1 since it failed to eliminate the material risk of distortion from the way it defined its domestic industry. Second, the Panel correctly read the Appellate Body's findings in the original dispute as taking issue with the link between the producer's willingness to be included in the sample and the definition of the domestic industry and not simply the actual exclusion of certain domestic producers. Third, the Panel's approach was reasonable, supported by the Appellate Body's findings and consistent with the text of Article 4.1 of the AD Agreement, which requires the investigating authority to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion.

40. Furthermore, contrary to what the European Union claims, the Panel correctly concluded that due to a wrongly-defined domestic industry, the European Union's injury determination was inconsistent with Article 3.1 of the AD Agreement.

41. In light of the above, China requests the Appellate Body to reject the European Union's appeal and to uphold the Panel's findings that the European Union's definition of domestic industry was inconsistent with Article 4.1 of the AD Agreement and that the resulting injury determination was inconsistent with Article 3.1 of the AD Agreement.

**ANNEX B-4****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION**

1. In its Other Appellant Submission, China mischaracterises the Panel's findings and effectively tries to re-litigate the factual and evidentiary issues that were adequately addressed by the Panel in its findings.
  2. In addition, and despite its repeated statements to the contrary, it is clear that China is in fact challenging the appropriate use of the analogue country methodology by the European Union. However, the Commission resorted to the prices of the Indian producer Pooja Forge to establish the normal value in line with China's Accession Protocol. China's claims as developed before the Panel and as repeated in its Other Appellant Submission, effectively take issue with the European Union's Non Market Economy (NME) methodology and seeks to change the normal value determination so as to have it reflect the Chinese producers' distorted market conditions. According to China, the prices of the Indian producer may be used as long as they are then changed to reflect conditions in the Chinese market and are adapted to the specifics of the Chinese producers on input costs, taxes, access to raw materials, etc. No matter how many times China states that it is not challenging the analogue country methodology and asserts that the Panel erred when viewing its claims for adjustments as related to the analogue country approach, this is in essence what its entire case under Article 2.4 of the AD Agreement turns on.
  3. This is not to say that Article 2.4 does not apply when a NME methodology is used. That is not the issue. The European Union itself regularly makes adjustments for differences affecting price comparability between product sold by the analogue country producer on the home market and products exported by the Chinese producer. In fact, the Commission did so even in the context of the fasteners investigation for differences relating to quality control. It made this adjustment because the fact that the Indian producer undertakes additional quality control involved an additional step in the production process of the Indian analogue country producer which is not part of the Chinese producers' process for export sales. Clearly, the fact that an NME methodology is used does not mean that Article 2.4 no longer applies. China's attempt at casting this debate as an all-or-nothing, black-and-white debate about the relevance of making adjustments and due allowances for differences affecting price comparability in the context of NME situations is a hoax. The European Union did not argue, and the Panel did not find that as soon as an NME methodology is used, Article 2.4 of the AD Agreement no longer applies and no adjustments must ever be made to reflect differences affecting price comparability.
  4. China's three claims based on the Panel's rejection of China's adjustment claims under Article 2.4 of the AD Agreement are in error and must be rejected. China's claims under Article 11 of the DSU should equally be dismissed.
  5. China's claims of error made by the Panel with respect to the interpretation and application of Article 6.1.2 of the AD Agreement are also without merit. China is seeking to read obligations in a provision by forcing its text and the rationale of the other provisions of the AD Agreement.
  6. Finally, China's attempt to reopen the debate regarding its claim under Article 6.5.1 of the AD Agreement should be rejected, since there are no factual findings or undisputed facts on the record for the Appellate Body to complete the analysis.
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**ANNEX C**

ARGUMENTS OF THE THIRD PARTICIPANTS

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## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION**

#### **A. The proper Treatment of Confidential Information**

1. Under Article 6.5, information is treated as "confidential" only when (1) the information is either "by nature confidential" or it was "provided on a confidential basis"; and (2) "good cause" is shown.

2. Specific facts must support such "good cause", demonstrating that avoidance of the risk of a potential consequence is "important enough" to warrant non-disclosure of the information. The investigating authority thus must make an objective assessment of whether "good cause" for confidential treatment of information has been demonstrated.

3. Factual information showing "good cause" must be contained in the investigation record to permit investigating authorities to perform an objective assessment of "good cause". Although there may be situations where the basis for "good cause" is itself confidential, the submitting party must nonetheless satisfy summarization obligations under Article 6.5.1.

#### **B. Scope of the "Domestic Industry"**

4. The Appellate Body confirmed a positive relationship between the proportion of the total domestic production and possibility of a material risk of distortion.

5. There remains a legitimate concern that the process by which the EU gathered its questionnaires created an incentive for self-selection, leaving a material risk of distortion. Japan believes that the Appellate Body observed two types of excluded parties: parties who excluded themselves at the outset due to self-selection bias, and parties that submitted responses that the EU subsequently excluded. Since the EU made no changes to the process by which questionnaires were gathered, the incentive for self-selection among the parties initially submitting questionnaires remains.

6. Japan considers that no procedure is necessarily permissible. The investigating authority, administering a neutral process, must ensure the proportion of the domestic industry is adequately represented and material risk of distortion is eliminated.

7. The EU's definition of "domestic industry" and the resulting injury determination did not constitute an "objective examination" of this issue pursuant to Article 3.1 in conjunction with Article 4.1.



**ANNEX C-2****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION**

1. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that parties to an investigation must be given a full and fair opportunity to see relevant information and defend their interests. At the same time, protection of confidential information is essential to the appropriate functioning of an antidumping proceeding. Various aspects of those transparency and confidentiality requirements are being challenged before the Appellate Body.
  2. The EU appealed the Panel's interpretation of Article 6.5. The Panel erred in its interpretation of Article 6.5 because that provision does not provide that an objective assessment for good cause requires that the investigating authority specifically explain its conclusions as to why good cause has been demonstrated.
  3. The Panel also reached a conclusion as to Article 6.5.1. Here, the Panel correctly found that obligations of Article 6.5.1 apply only with respect to information submitted by entities explicitly defined as "interested parties" at 6.11 of the AD Agreement.
  4. The EU has also appealed the Panel's interpretation of Articles 6.2 and 6.4. The United States considers that the Panel was correct to generally discount the EU's assessment that certain information sought by China was "irrelevant" to the presentation of the Chinese producers' cases because the issue of relevancy, for purposes of Article 6.4, is to be determined from the perspective of the interested parties, not the investigating authority. The Panel also correctly rejected the EU's argument that information is "used" within the meaning of Article 6.4, only if the information is used in the final methodology selected by the authority for calculating the margin of dumping.
  5. Also at issue is the Panel's interpretation of Article 6.1.2, which provides that evidence submitted by one "interested party" must be made available to other interested parties. The Panel correctly found this obligation applies only with respect to those entities explicitly defined as "interested parties" by Article 6.11 of the AD Agreement.
  6. The Panel also made findings with respect to Article 2.4. While Article 2.4 generally requires that an investigating authority make adjustments for differences that affect price comparability, the United States agrees with the Panel's finding that an investigating authority is not required to make adjustments that reflect distorted production costs and pricing in non-market economies.
  7. The EU appealed the Panel's interpretation of Article 2.4.2. The United States agrees with the Panel's finding that the Commission could not rely on 2.4.2 to justify its decision to simply *ignore* certain Chinese export transactions on grounds that they do not match any of the models sold by in the analogue market selected by the Commission. The United States notes the AD Agreement explicitly provides for situations where there are mismatches in product types on the export and normal value sides. Article 2.4 provides for an investigating authority to take non-matching models into account by making "necessary adjustments to eliminate" the elements "that affect price comparability." Article 2.2 provides that an investigating authority may construct the export price on the basis of costs of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
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