

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

**AB-2011-2**

*Report of the Appellate Body*



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Short title	Full case title and citation
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<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609
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<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

## ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
Basic AD Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, <i>Official Journal of the European Union</i> , L Series, No. 343 (22 December 2009) 51, and Corrigendum, <i>Official Journal of the European Union</i> , L Series, No. 7 (12 January 2010) 23 (Panel Exhibit CHN-3)
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, WT/L/432
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1
Definitive Regulation	Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 29 (31 January 2009) 1 (Panel Exhibit CHN-4)
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
General Disclosure Document	European Commission, Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Proposal to impose definitive measures, 3 November 2008) (Panel Exhibit CHN-18)
Information Document	European Commission, Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Non-imposition of provisional anti-dumping measures, 4 August 2008 (Panel Exhibit CHN-17)
IT	Individual treatment
IT suppliers	Non-market economy suppliers that qualify for individual treatment
<i>Kennedy Round Anti-Dumping Code</i>	<i>Kennedy Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade</i> , BISD 15S/24, entered into force 1 July 1968
MET	Market economy treatment
MFN	Most favoured nation
NME	Non-market economy
Panel Report	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R
PCN	Product Control Number

<b>Abbreviation</b>	<b>Description</b>
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**European Communities<sup>1</sup> – Definitive  
Anti-Dumping Measures on Certain Iron or  
Steel Fasteners from China**

European Union, *Appellant/Appellee*  
China, *Appellee/Other Appellant*

Brazil, *Third Participant*  
Canada, *Third Participant*  
Chile, *Third Participant*  
Colombia, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Norway, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu, *Third Participant*  
Thailand, *Third Participant*  
Turkey, *Third Participant*  
United States, *Third Participant*

AB-2011-2

Present:

Oshima, Presiding Member  
Hillman, Member  
Unterhalter, Member

**I. Introduction**

1. The European Union and China each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (the "Panel Report").<sup>2</sup> The Panel was established on 23 October 2009 to consider a complaint by China concerning the consistency "as such" of Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995, as amended, on protection

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<sup>1</sup>This dispute began before the entry into force of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) on 1 December 2009. On 29 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party. We understand the reference in the Verbal Notes to the "European Community" to be a reference to the "European Communities". The European Union requested that the Panel replace "European Communities" with "European Union" in the title of the case, but the Panel decided not to make this change because China's request for consultations and for the establishment of a panel both occurred prior to 1 December 2009 and referred to the European Communities, as did the decision of the DSB establishing the Panel. However, all the submissions of the parties before the Panel came after that date and referred to the European Union, and the Panel made its findings with reference to the European Union. (Panel Report, paras. 6.4 and 6.5) In this Report, we too refer to the European Union.

<sup>2</sup>WT/DS397/R, 3 December 2010.

against dumped imports from countries not members of the European Community<sup>3</sup> with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), and the consistency of this measure, "as applied" in the fasteners investigation, with the *Anti-Dumping Agreement*; and the consistency of Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (the "Definitive Regulation")<sup>4</sup> with the *Anti-Dumping Agreement*. Council Regulation (EC) No. 384/96 was subsequently repealed and replaced by Council Regulation (EC) No. 1225/2009 of 30 November 2009, and China's submissions to the Panel addressed Council Regulation (EC) No. 1225/2009 (the "Basic AD Regulation").<sup>5</sup>

2. Before the Panel, China challenged the consistency of Article 9(5) of the Basic AD Regulation, "as such", with Articles 6.10, 9.2, 9.3, 9.4, and 18.4 of the *Anti-Dumping Agreement*, Articles I:1 and X:3(a) of the GATT 1994, and Article XVI:4 of the *WTO Agreement* because it requires exporters from non-market economies to satisfy certain criteria in order to receive individual dumping margins and individual duty rates. China also challenged Article 9(5) of the Basic AD Regulation, "as applied" in the fasteners investigation, under Articles 6.10, 9.2, and 9.4 of the *Anti-Dumping Agreement*. Additionally, China challenged various substantive and procedural aspects of the Definitive Regulation, imposing anti-dumping duties in the fasteners investigation, under Articles 2, 3, 4, 5, 6, and 12 of the *Anti-Dumping Agreement*. These included the Commission's determinations regarding standing, the definition of the domestic industry, the product under consideration, dumping and price undercutting, volume and impact of dumped imports, and causation. Procedurally, China's challenges dealt with the disclosure by the Commission of information relevant to the investigation, the treatment of confidential information, and the procedural aspects of individual treatment claims.

3. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 3 December 2010. For the reasons set out in its Report, the Panel made the following findings.

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<sup>3</sup>*Official Journal of the European Communities*, L Series, No. 56 (6 March 1996) 2 (Panel Exhibit CHN-1).

<sup>4</sup>*Official Journal of the European Union*, L Series, No. 29 (31 January 2009) 1 (Panel Exhibit CHN-4).

<sup>5</sup>*Official Journal of the European Union*, L Series, No. 343 (22 December 2009) 51, and Corrigendum, *Official Journal of the European Union*, L Series, No. 7 (12 January 2010) 23 (Panel Exhibit CHN-3).

The Panel found that the following claims were not within its terms of reference:

- (a) the claim under Article 2.6 of the *Anti-Dumping Agreement* with respect to the definition of like product;
- (b) the claim under Article 6.9 of the *Anti-Dumping Agreement* with respect to the alleged non-disclosure of aspects of the normal value determination; and
- (c) the claim under Article 6.9 of the *Anti-Dumping Agreement* with respect to the procedural aspects of the domestic industry definition.

The Panel found that the European Union acted inconsistently with:

- (a) Articles 6.10, 9.2, and 18.4 of the *Anti-Dumping Agreement*, Article I:1 of the GATT 1994, and Article XVI:4 of the *WTO Agreement* with respect to Article 9(5) of the Basic AD Regulation;
- (b) Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* with respect to the individual treatment determinations in the fasteners investigation;
- (c) Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* with respect to the volume of dumped imports considered in the fasteners investigation;
- (d) Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* with respect to the causation analysis in the fasteners investigation;
- (e) Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* with respect to certain aspects of the normal value determination;
- (f) Article 6.5.1 of the *Anti-Dumping Agreement* with respect to non-confidential versions of questionnaire responses of two European producers and Article 6.5 of the *Anti-Dumping Agreement* with respect to confidential treatment of information in the questionnaire response of the Indian producer;
- (g) Article 6.5 of the *Anti-Dumping Agreement* with respect to the confidential treatment of the Eurostat data on total EU production of fasteners; and
- (h) Article 6.5 of the *Anti-Dumping Agreement* by disclosing confidential information.

The Panel found that China had not established that the European Union had acted inconsistently with:

- (a) Article 5.4 of the *Anti-Dumping Agreement* with respect to the standing determination in the fasteners investigation;
- (b) Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* with respect to the definition of domestic industry in the fasteners investigation;
- (c) Articles 2.1 and 2.6 of the *Anti-Dumping Agreement* with respect to the product under consideration in the fasteners investigation;

- (d) Article 2.4 of the *Anti-Dumping Agreement* with respect to the dumping determination in the fasteners investigation;
- (e) Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* with respect to the price undercutting determination in the fasteners investigation;
- (f) Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* with respect to the consideration of imports from non-sampled/unexamined producers and exporters as dumped in the fasteners investigation;
- (g) Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* with respect to the consideration of the consequent impact of dumped imports on the domestic industry;
- (h) Articles 6.5, 6.4, and 6.2 of the *Anti-Dumping Agreement* in connection with the non-disclosure of the identity of the complainants and the supporters of the complaint;
- (i) Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* with respect to the confidential treatment of the Eurostat data on total EU production of fasteners;
- (j) Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* with respect to the procedural aspects of the domestic industry definition; and
- (k) Article 6.1.1 of the *Anti-Dumping Agreement* with respect to the amount of time provided for responses to requests for information.

The Panel exercised judicial economy with regard to the following claims:

- (a) Articles 9.3 and 9.4 of the *Anti-Dumping Agreement* and Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation;
- (b) Article 9.4 of the *Anti-Dumping Agreement* with respect to the individual treatment determinations in the fasteners investigation;
- (c) Articles 3.4 and 3.5 of the *Anti-Dumping Agreement* with respect to the volume of dumped imports considered in the fasteners investigation;
- (d) Article 6.5.1 of the *Anti-Dumping Agreement* with respect to the questionnaire response of the Indian producer;
- (e) Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* with respect to the non-confidential versions of questionnaire responses of two European producers and the confidential treatment of information in the questionnaire response of the Indian producer; and
- (f) Article 12.2.2 of the *Anti-Dumping Agreement* with respect to the procedural aspects of the individual treatment determinations.

4. On 25 March 2011, the European Union notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of



Appeal<sup>6</sup> and an appellant's submission pursuant to Rules 20 and 21, respectively, of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>7</sup>

5. On 30 March 2011, China notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Other Appeal<sup>8</sup> and an other appellant's submission pursuant to Rule 23(1) and (3), respectively, of the *Working Procedures*. On 12 April 2011, the European Union and China each filed an appellee's submission.<sup>9</sup> On 15 April 2011, Brazil, Colombia, Japan, and the United States each filed a third participant's submission.<sup>10</sup> On the same day, Canada, Chile, India, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to appear at the oral hearing as a third participant.<sup>11</sup> On 18 April 2011, Turkey notified its intention to appear at the oral hearing as a third participant.<sup>12</sup>

6. The oral hearing in this appeal was held on 4-6 May 2011. The participants and six of the third participants (Brazil, Colombia, India, Japan, Norway, and the United States) made oral statements.<sup>13</sup> The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## **II. Arguments of the Participants and the Third Participants**

### **A. Claims of Error by the European Union – Appellant**

#### **1. The Panel's Findings Regarding Article 9(5) of the Basic AD Regulation "As Such"**

7. The European Union argues that the Panel erred in finding that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10, 9.2, and 18.4 of the *Anti-Dumping Agreement*, Article I:1 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*<sup>14</sup>, and asks the Appellate Body to reverse these findings by the Panel.<sup>15</sup>

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<sup>6</sup>WT/DS397/7 (attached as Annex I to this Report).

<sup>7</sup>WT/AB/WP/6, 16 August 2010.

<sup>8</sup>WT/DS397/8 (attached as Annex II to this Report).

<sup>9</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

<sup>10</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>11</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

<sup>12</sup>Pursuant to Rule 24(4) of the *Working Procedures*.

<sup>13</sup>Turkey made concluding remarks at the oral hearing.

<sup>14</sup>European Union's appellant's submission, para. 14.

<sup>15</sup>European Union's appellant's submission, para. 227.

(a) The Scope of Article 9(5) of the Basic AD Regulation

8. The European Union claims that the Panel erred in finding that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping, and that the Panel erred in the application of Article 6.10 of the *Anti-Dumping Agreement* when finding that Article 9(5) of the Basic AD Regulation is, "as such", inconsistent with that provision. The European Union therefore contends that the Panel's finding of inconsistency with Article 6.10 was premised on an incorrect understanding of the scope of Article 9(5), since Article 6.10 addresses the determination of margins of dumping, while Article 9(5) is directed at the imposition of anti-dumping duties.<sup>16</sup> The European Union asks the Appellate Body to reverse these findings of the Panel.<sup>17</sup>

9. The European Union argues that, although the Panel considered that the meaning of Article 9(5) of the Basic AD Regulation was a "factual matter", this error can be reviewed by the Appellate Body because the examination by a panel of the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations is a legal characterization by a panel, which is subject to appellate review under Article 17.6 of the DSU.<sup>18</sup>

10. According to the European Union, an examination of Article 9(5) of the Basic AD Regulation on its face, based on its text and in the context of other articles of the Basic AD Regulation, shows that Article 9(5) deals exclusively with the imposition of anti-dumping duties.<sup>19</sup> The European Union contends that, in view of the "as such" nature of China's claim, any disagreement between the parties on the scope of the measure at issue should have been resolved by examining Article 9(5) on its face. Considering that the text of Article 9(5) makes it clear that, on its face, this provision relates to only the individual or country-wide imposition of anti-dumping duties, in the European Union's view, the Panel should have ended its examination of the scope of Article 9(5) at this stage. The European Union adds that, when Article 9(5) is read in the context of other provisions of the Basic AD Regulation, the same conclusion is reached regarding its meaning and content.<sup>20</sup>

11. The European Union claims that the Panel erred in concluding that nothing in the other articles of the Basic AD Regulation cited by the European Union "pertains to whether or not an individual margin will be calculated for any foreign producer or exporter", and asserts that other

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<sup>16</sup>European Union's appellant's submission, para. 88.

<sup>17</sup>European Union's appellant's submission, para. 110.

<sup>18</sup>European Union's appellant's submission, para. 89 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105; and Appellate Body Reports, *China – Auto Parts*, para. 225).

<sup>19</sup>European Union's appellant's submission, para. 90.

<sup>20</sup>European Union's appellant's submission, para. 95.

provisions of the Basic AD Regulation address directly or indirectly the separate threshold issue of the determination of individual dumping margins. The European Union makes reference to: Article 2(7) of the Basic AD Regulation, which determines whether suppliers should receive market economy treatment ("MET") and whether individual margins of dumping will be calculated for these suppliers; Article 11(4) of the Basic AD Regulation, which requires the calculation of individual margins of dumping in the context of new exporters' reviews; and Article 11(8) of the Basic AD Regulation, which requires that margins of dumping be established on an individual basis in the context of refund proceedings.<sup>21</sup> According to the European Union, the numerous references in the Basic AD Regulation to the determination of individual dumping margins make sense in view of the obligation set out in Article 9(4) to establish the ceiling for the amount of anti-dumping duties by, *inter alia*, reference to the margin of dumping established. It is thus Article 9(4) that indicates that the EU authorities should calculate an individual dumping margin per supplier.<sup>22</sup>

12. The European Union further contends that the operation of Article 9(5) of the Basic AD Regulation in the context of anti-dumping investigations confirms that this provision addresses specifically the imposition of anti-dumping duties. The European Union explains that Article 9(5) serves to identify the relevant supplier in the context of imports from non-market economies ("NMEs") (that is, an independent supplier or the State and its related or controlled export entities) and that other relevant rules determine the proper duty rate for individual treatment ("IT") suppliers and non-IT suppliers. The Panel's finding that Article 9(5) determines whether an individual or country-wide dumping margin will be established for an exporter from an NME ignores the fact that the determination of the dumping margin for a supplier entitled to an individual dumping margin flows from the rule contained in Article 9(4) of the Basic AD Regulation, which China did not specify as the measure at issue in the present dispute.<sup>23</sup> Moreover, according to the European Union, an individual duty is not automatically based on an individual dumping margin, which serves as a ceiling for the amount of the anti-dumping duty.<sup>24</sup>

13. Finally, the European Union contends that, even if the determination of dumping and the imposition of duties are closely related issues, this does not mean that Article 9(5), which specifically addresses the imposition of anti-dumping duties, also incorporates by implication any other related

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<sup>21</sup>European Union's appellant's submission, para. 96.

<sup>22</sup>European Union's appellant's submission, para. 97.

<sup>23</sup>European Union's appellant's submission, para. 104.

<sup>24</sup>European Union's appellant's submission, para. 105.

issues that may derive as a consequence of its operation. The European Union emphasizes that such an approach should be rejected, particularly in the case of "as such" claims.<sup>25</sup>

(b) Article 6.10 of the *Anti-Dumping Agreement*

14. The European Union claims that the Panel erred in its interpretation and application of Article 6.10 of the *Anti-Dumping Agreement* and failed to comply with Article 11 of the DSU in finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the *Anti-Dumping Agreement* because it conditions the calculation of individual dumping margins for producers from NMEs on the fulfilment of the IT test.<sup>26</sup> The European Union requests the Appellate Body to reverse this finding by the Panel.<sup>27</sup>

15. The European Union contends that Article 6.10, first sentence, does not impose an unqualified obligation to determine individual dumping margins. The term "as a rule", which is inserted after the word "shall", indicates that the obligation is only a general principle and not a strict obligation that is to be complied with in any and all circumstances.<sup>28</sup> Article 6.10 should not be read as being structured in the manner of a "rule/only exception"; rather, it expresses a preference for determining individual dumping margins and then refers to one affirmative situation (sampling) where such a preference "may" not be followed.<sup>29</sup> According to the European Union, there is no direct link between the general principle of the first sentence and the possibility of sampling in the second sentence of Article 6.10.

16. The European Union points out that earlier panels have interpreted Article 6.10 in a more flexible manner than this Panel, as not requiring the calculation of individual dumping margins for each known exporter or producer in all cases. The European Union refers to the panel in *Korea – Certain Paper*, which interpreted the term "exporter and producers" in Article 6.10 as permitting the combination of separate entities in a single supplier that is the "actual source of price discrimination".<sup>30</sup> The European Union also refers to the panel in *EC – Salmon (Norway)*, which found that the term "exporter and producers" in Article 6.10 means that an investigating authority may

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<sup>25</sup>European Union's appellant's submission, para. 107.

<sup>26</sup>European Union's appellant's submission, para. 112.

<sup>27</sup>European Union's appellant's submission, para. 157.

<sup>28</sup>European Union's appellant's submission, para. 114.

<sup>29</sup>European Union's appellant's submission, para. 117.

<sup>30</sup>European Union's appellant's submission, para. 120 (referring to Panel Report, *Korea – Certain Paper*, para. 7.161).

calculate dumping margins based on the producer's pricing behaviour, notwithstanding the existence of a known exporter for the product under investigation.<sup>31</sup>

17. According to the European Union, the fact that Article 6.10, first sentence, does not contain a strict rule, as the Panel found, is further supported by the existence of other situations where the preference does not need to be followed. In particular, the European Union refers to the following examples: (1) a non-cooperating exporter or producer for whom the dumping margin is calculated based on facts available, pursuant to Article 6.8 of the *Anti-Dumping Agreement*; (2) an exporter that exports the product of another supplier (mere "trader") and that is assigned the dumping margin of the actual supplier; (3) the situation where the actual producer of the product concerned cannot be identified; (4) the situation where an investigating authority has to calculate a single dumping margin, based on constructed normal value and export price, due to insufficient information; and (5) a known producer, related to an exporter or producer already subject to anti-dumping duties, that did not export the product during the period of investigation and that would not be entitled to an individual dumping margin in the investigation, nor in the context of a review pursuant to Article 9.5 of the *Anti-Dumping Agreement*.

18. The European Union observes that the Panel dismissed these examples on the grounds that they are directly based on other provisions of the *Anti-Dumping Agreement*, and that, "as such", they could not be considered even potentially as exceptions to the obligation to calculate individual dumping margins but rather as specific rights and obligations otherwise provided for in the *Anti-Dumping Agreement*. The European Union contends that, in doing so, the Panel ignored basic principles of treaty interpretation, because, if other provisions of the *Anti-Dumping Agreement* (such as Article 6.8) directly and expressly permit departing from the "mandatory rule" contained in Article 6.10, first sentence, the only conclusion that the treaty interpreter can reach is that Article 6.10 cannot be interpreted in such a rigid manner.<sup>32</sup> The European Union submits that Article 9(5) of the Basic AD Regulation addresses a situation other than sampling where the preference expressed in Article 6.10 does not need to be followed. Therefore, Article 9(5) of the Basic AD Regulation is "as such" consistent with Article 6.10 of the *Anti-Dumping Agreement*.

19. The European Union claims that, even assuming that Article 6.10 is understood to contain a strict rule to requiring the determination of individual dumping margins for each known exporter or producer, the Panel erred in its application of Article 6.10 because it ignored the fact that Article 9(5) of the Basic AD Regulation aims at identifying the supplier that is the actual source of price

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<sup>31</sup>European Union's appellant's submission, para. 121 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.178).

<sup>32</sup>European Union's appellant's submission, para. 122.

discrimination in the context of imports from NMEs. In this respect, the European Union contends that the purpose of the IT test is to determine if the State and those entities that do not act independently from the State should be treated as a single supplier.<sup>33</sup>

20. The European Union relies on the findings of the panel in *Korea – Certain Paper*, which, in the European Union's view, stand for the proposition that, for the purpose of determining individual dumping margins, Article 6.10 permits investigating authorities to determine that two or more exporters and producers are part of the same entity.<sup>34</sup> The European Union adds that "[n]othing in the *Anti-Dumping Agreement* supports the proposition that the panel in *Korea – Certain Paper* explored the complete universe of relationships existing between separate entities to consider them as one single entity". According to the European Union, the *Anti-Dumping Agreement* contains provisions where, directly or indirectly, the relationship between two separate entities is relevant.<sup>35</sup>

21. The European Union argues that a determination of individual dumping margins for each legal entity, regardless of whether they are *de jure* or *de facto* related to each other, would be contrary to the object and purpose of Article 6.10 of the *Anti-Dumping Agreement*. Investigating authorities should be allowed to determine one dumping margin for related companies as a whole or for companies that, because of their close relationship, behave in the market as one single entity.<sup>36</sup>

22. The European Union points out that the purpose of imposing and collecting anti-dumping duties is to target the source of price discrimination and that a proper identification of the single exporter or producer in a case where several related companies exist allows for the imposition of anti-dumping duties on the actual source of price discrimination. In the view of the European Union, the identification of the actual source of price discrimination and the application of a single duty rate in the case of non-IT suppliers would avoid potential circumvention and additional dumping, which could occur if exports could be channelled by related companies through the supplier with the lowest duty rate.<sup>37</sup>

23. The European Union argues that the Article 9(5) criteria not only reflect elements that demonstrate direct or *de jure* control or interference by the State, but also reflect other elements that indirectly and *de facto* limit the capacity of the exporter to act free from State interference. Contrary to what the Panel found, the European Union contends that Article 9(5) does not merely relate to the role of the State in the way business is conducted in a given country, but it aims also at determining

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<sup>33</sup>European Union's appellant's submission, para. 137.

<sup>34</sup>European Union's appellant's submission, para. 139.

<sup>35</sup>European Union's appellant's submission, para. 140.

<sup>36</sup>European Union's appellant's submission, para. 141.

<sup>37</sup>European Union's appellant's submission, para. 142.

whether there is a close relationship between separate legal entities and the State in NMEs. Thus, the reasoning of the panel in *Korea – Certain Paper* is fully applicable to Article 9(5), considering that the objective of the IT criteria is to identify the actual source of price discrimination, that is, the single supplier of the product concerned, due to a close relationship.<sup>38</sup>

24. According to the European Union, whilst in the case of market economies, as established by the panel in *Korea – Certain Paper*, the close relationship between the separate legal entities has to be examined on a case-by-case basis, in NMEs, since the role of the State is different than in market economies, the presumption of State control is the general rule. Therefore, according to the European Union, the reasoning of the panel in *Korea – Certain Paper* fully applies in cases of imports from NMEs, starting with the presumption that all producers and exporters in an NME are, effectively, arms of the State. The criteria of the IT test are then applied to determine whether each individual producer or exporter can demonstrate that it acts independently from the State.<sup>39</sup>

25. The European Union further contends that the Panel acted inconsistently with Article 11 of the DSU, because it disregarded evidence submitted by the European Union concerning the nature of NMEs and China's status as an NME, as well as the fact that the Protocol on the Accession of the People's Republic of China (China's "Accession Protocol")<sup>40</sup> entitles the European Union to treat China as an NME until 2016. According to the European Union, this evidence, which was not contested by China, supports the presumption underlying Article 9(5) of the Basic AD Regulation that all producers and exporters in an NME constitute a single entity together with the State. However, in the European Union's view, the Panel ignored this evidence without providing reasoned and adequate explanations for its conclusion<sup>41</sup>, and merely stated that it was not convinced by this argument and that the European Union had not pointed to any legal basis that would support it.

26. Finally, the European Union claims that the Panel erred in relying on the fact that the European Union applies a test such as the one in *Korea – Certain Paper* "in addition to" the IT test. The European Union remarks that its argument was not that the two tests are identical, but rather that the relationship between non-IT suppliers and the State "is similar to" the relationship that the panel in *Korea – Certain Paper* found between several legally distinct entities producing the product under investigation, for which the Korean authorities had calculated a single margin, treating them as a single producer. In this respect, the European Union argues, the application of both tests is irrelevant

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<sup>38</sup>European Union's appellant's submission, para. 148.

<sup>39</sup>European Union's appellant's submission, para. 150.

<sup>40</sup>WT/L/432, 23 November 2001.

<sup>41</sup>European Union's appellant's submission, para. 154.

to the question of whether Article 9(5) of the Basic AD Regulation is consistent with Article 6.10 of the *Anti-Dumping Agreement*.<sup>42</sup>

(c) Article 9.2 of the *Anti-Dumping Agreement*

27. The European Union claims that the Panel erred in interpreting and applying Article 9.2 of the *Anti-Dumping Agreement* and violated Article 11 of the DSU when concluding that Article 9(5) of the Basic AD Regulation violates Article 9.2 of the *Anti-Dumping Agreement*, and requests the Appellate Body to reverse this finding by the Panel.<sup>43</sup>

28. The European Union claims that, like Article 6.10 of the *Anti-Dumping Agreement*, Article 9.2 does not contain a mandatory rule regarding the imposition of anti-dumping duties, but rather a principle or a preference. The European Union argues that Article 9.2 reflects a product-wide and country-wide approach in that it refers to the imposition of an anti-dumping duty on a "product", not a company.<sup>44</sup> The European Union contends that it is particularly significant that Article 9.2 refers to sources found to be dumped and causing *injury*, since injury is a country-wide, rather than a company-specific, concept.<sup>45</sup>

29. The European Union thus contends that, contrary to the Panel's interpretation, Article 9.2 does not impose an obligation to grant individual treatment to, or to impose individual anti-dumping duties on, exporters or producers. Article 9.2 merely contains an obligation to specify by name exporters or producers where practicable. This, according to the European Union, may serve to distinguish between exporters or producers included in the anti-dumping investigation and new exporters or producers that may request a review pursuant to Article 9.5 of the *Anti-Dumping Agreement*.<sup>46</sup>

30. The European Union contends that the Panel interprets Article 9.2 as providing for the same general rule (individual duties) and the same single exception (sampling) as contained in Article 6.10, which would make Article 9.2 redundant.<sup>47</sup> The European Union argues that the purpose of imposing anti-dumping duties (that is, to offset and to prevent dumping) also supports its interpretation that Article 9.2 does not require the imposition of individual anti-dumping duties on all known exporters and producers. In this respect, the European Union claims that, once dumping has been found to exist for the product concerned with respect to some investigated companies, a further examination of the

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<sup>42</sup>European Union's appellant's submission, para. 155.

<sup>43</sup>European Union's appellant's submission, paras. 158 and 208.

<sup>44</sup>European Union's appellant's submission, para. 161.

<sup>45</sup>European Union's appellant's submission, para. 162.

<sup>46</sup>European Union's appellant's submission, para. 163.

<sup>47</sup>European Union's appellant's submission, para. 163.



pricing behaviour of other entities would not be required in order to impose anti-dumping duties in order to offset and prevent dumping.<sup>48</sup>

31. Assuming that Article 9.2 of the *Anti-Dumping Agreement* contained a strict rule to impose anti-dumping duties on an individual basis, the European Union submits that the Panel erred in finding that Article 9(5) of the Basic AD Regulation does not fall within the exception under Article 9.2, third sentence, which would only be available in cases where the authorities consider that, because of the large number of producers involved, it would be impracticable to name exporters or producers individually. The European Union is of the view that, like Article 6.10, Article 9.2 expressly permits the imposition of duties on a country-wide basis in cases other than the sampling scenario, in particular when it is "impracticable" to do so on an individual basis, consistently with the notion that these provisions should be interpreted in a flexible manner.<sup>49</sup>

32. The European Union points out that Article 9.4 of the *Anti-Dumping Agreement* addresses the specific situation of the imposition of anti-dumping duties when sampling is used, and contends that interpreting "impracticable" in Article 9.2 as referring only to sampling would make Article 9.4 redundant and unnecessary.<sup>50</sup>

33. The European Union argues that the Panel's interpretation of the term "impracticable" in Article 9.2 is both redundant and too rigid and that this term should be interpreted in a flexible manner.<sup>51</sup> According to the European Union, the notion of "impracticable" in Article 9.2 encompasses the notion of "ineffective". This situation is envisaged in Article 9(5) of the Basic AD Regulation, which provides for the imposition of country-wide duties, where anti-dumping duties cannot be imposed on an individual basis for "practical" reasons. The European Union explains that it would not be effective to impose individual anti-dumping duties on suppliers that are all related to the State, because this may lead to circumvention of the higher anti-dumping duties imposed on some individual exporters by channelling exports through those exporters for whom the lowest anti-dumping duties have been calculated.<sup>52</sup>

34. The European Union submits that its interpretation of the exception to the individual treatment of producers or exporters contemplated under Article 9.2 is also confirmed by the analysis of supplementary means of interpretation and, in particular, by the negotiating history and the circumstances at the conclusion of the *Kennedy Round Agreement on Implementation of Article VI of*

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<sup>48</sup>European Union's appellant's submission, para. 164.

<sup>49</sup>European Union's appellant's submission, para. 168.

<sup>50</sup>European Union's appellant's submission, para. 170.

<sup>51</sup>European Union's appellant's submission, para. 174.

<sup>52</sup>European Union's appellant's submission, para. 187.

*the General Agreement on Tariffs and Trade* (the "*Kennedy Round Anti-Dumping Code*").<sup>53</sup> According to the European Union, the negotiating history and the circumstances at the conclusion of Article 8(b) of the *Kennedy Round Anti-Dumping Code* show that negotiators were aware of the problems associated with imposing anti-dumping duties on imports from NMEs. They clarified that anti-dumping duties could be imposed on a country-wide basis in cases where it was "impracticable" to specify duties on an individual basis. The European Union notes that no limits were imposed on the notion of "impracticability", which included not only cases where suppliers could not be examined individually because they were too numerous or because they did not make themselves known or did not trade during the period examined, but also other situations, such as imports from NMEs. The notion of "impracticability" provided the necessary flexibility when imposing anti-dumping duties in order to remedy injurious dumping and, at the same time, preserved the rights of the other signatories through the obligation to provide refunds.<sup>54</sup>

35. The European Union further claims that the Panel erred in considering irrelevant the fact that Article 8 and Article 2(g) were introduced into the *Kennedy Round Anti-Dumping Code* together and for the first time. The European Union observes that Article 2(g), which incorporated the second *Ad Note* to Article VI:1 of the GATT 1994, specifically referred to a situation where "special difficulties ... in determining price comparability" existed and, thus, a situation where it was "impracticable" to use the normal methods for determining the existence of dumping.<sup>55</sup>

36. The European Union claims that the Panel erred in its application of Article 9.2 of the *Anti-Dumping Agreement*, which, in the European Union's view, does not exclude that the State could be considered as the actual source of price discrimination or as a single supplier for the purposes of imposing anti-dumping duties. The European Union argues that the terms "sources" and "supplier" in Article 9.2 may also include the State in cases where the State is an exporter or producer, because the use of these terms implies that anti-dumping measures aim at identifying the supplier that is the actual source of the price discrimination. This could be one exporter, one producer, or a group of related exporters and/or producers.<sup>56</sup>

37. The European Union argues that, in rejecting the notion that in NMEs the State can be presumed to be the source of price discrimination, the Panel acted inconsistently with its duties under Article 11 of the DSU, because it disregarded evidence presented by the European Union regarding NMEs in general and China's status as an NME, and failed to provide reasoned and adequate

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<sup>53</sup>BISD 15S/24, entered into force 1 July 1968.

<sup>54</sup>European Union's appellant's submission, para. 184.

<sup>55</sup>European Union's appellant's submission, para. 182.

<sup>56</sup>European Union's appellant's submission, para. 194.

explanations for its findings. Although the Panel stated that it addressed this issue elsewhere in its findings, the European Union contends that no explanation was provided by the Panel as to why in NMEs the State cannot be presumed to be a producer and the actual source of price discrimination. To the extent that the Panel discussed this issue in its Report, the European Union argues that the Panel failed to provide a reasoned and adequate explanation for its finding and thus failed to make an objective analysis of the matter.<sup>57</sup>

38. The European Union claims that, in NMEs, because of State control over the means of production and State intervention in the economy, including international trade relations, all exports can be considered to emanate from the State, which can be considered as one single supplier whose dumping behaviour can be identified and addressed in accordance with the disciplines of the *Anti-Dumping Agreement*. The European Union further contends that it has shown that China is an NME and that, in accordance with paragraph 15(d) of China's Accession Protocol, the European Union is entitled to treat China as an NME in anti-dumping proceedings with all the consequences that this determination entails.<sup>58</sup>

39. The European Union argues that the Panel erred in finding that Article 9(5) of the Basic AD Regulation does not serve to identify the source of price discrimination, because it took a narrow view of the notion of "source of price discrimination" as being limited exclusively to the determination of export prices. In the view of the European Union, the source of price discrimination is both the determination of export prices and the determination of normal value, even though suppliers from NMEs may not actually control the determination of their normal value. In this respect, the European Union observes that, while anti-dumping disciplines address the phenomenon of international price discrimination, Article 2.1 of the *Anti-Dumping Agreement* does not require a conscious pricing decision with the intention of dumping by the entity concerned. Moreover, the European Union observes that the IT test criteria embodied in Article 9(5) are not limited to the determination of export prices, but aim at identifying whether the applicant company acts independently from the State in its export activities.<sup>59</sup>

40. In sum, the European Union claims that Article 9(5) serves to identify the relevant supplier in the context of imports from NMEs. The supplier will be the individual supplier if it can show that it meets the five criteria in the IT test. However, failure to meet these criteria will mean that the non-IT

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<sup>57</sup>European Union's appellant's submission, para. 195.

<sup>58</sup>European Union's appellant's submission, para. 196.

<sup>59</sup>European Union's appellant's submission, para. 203.

supplier is not the genuine exporter or producer, but an entity that does not act independently from the State and, thus, should be subject to the actual supplier, country-wide duty rate.<sup>60</sup>

(d) Article I:1 of the GATT 1994

41. The European Union claims that the Panel erred in the interpretation and application of Article I:1 of the GATT 1994 and acted inconsistently with Article 11 of the DSU, when it found that Article 9(5) of the Basic AD Regulation is inconsistent with the MFN obligation of Article I:1 of the GATT 1994. The European Union argues that it is entitled to grant formally different treatment to imports from market economies and from NMEs because such imports are different in nature. The European Union adds that the word "unconditionally" in Article I:1 does not preclude an advantage being subjected to conditions as long as this does not result in *de facto* discrimination.<sup>61</sup>

42. Moreover, the European Union claims that the alleged advantage granted to market economies was based on the nature of the suppliers involved, and not on the product itself. The European Union contends this was a "very important point that the Panel failed to acknowledge" since it means that discrimination between like products originating in different countries does not arise in this case.<sup>62</sup> The European Union further contends that, in assessing China's claim under Article I:1 of the GATT 1994, the Panel failed to fulfil its duties under Article 11 of the DSU, because it did not examine the evidence submitted by the European Union regarding China's status as an NME. The European Union asserts that it did demonstrate that market economies and NMEs, by definition, are in a different situation and that this evidence justifies the formally different treatment it conferred to imports from China.<sup>63</sup> This is so, the European Union argues, because China's status as an NME was not unilaterally determined by the European Union, but is based on paragraph 15(d) of China's Accession Protocol. According to the European Union, the Panel's failure to examine this evidence is contrary to its obligations under Article 11 of the DSU.<sup>64</sup>

43. The European Union also argues that the fact that under Article 9(5) of the Basic AD Regulation producers from NMEs may be able to demonstrate that they are independent from the State ensures that discrimination does not arise, because, if a supplier complies with the conditions of the IT test, it will be treated like a supplier of a market economy.<sup>65</sup> The European Union further contends that the fact that the Basic AD Regulation explicitly lists the NMEs whose producers will be

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<sup>60</sup>European Union's appellant's submission, para. 206.

<sup>61</sup>European Union's appellant's submission, para. 212.

<sup>62</sup>European Union's appellant's submission, para. 213.

<sup>63</sup>European Union's appellant's submission, para. 214.

<sup>64</sup>European Union's appellant's submission, para. 215.

<sup>65</sup>European Union's appellant's submission, para. 217.

subject to the IT test is irrelevant to the question of non-discrimination, because this list is based on evidence that the listed countries are in the same economic situation to be classified as NMEs and, thus, confers the same treatment to all countries in the same category.<sup>66</sup>

44. Finally, the European Union argues that, even if the Appellate Body were to consider that Article 9(5) of the Basic AD Regulation was inconsistent "as such" with Article I:1 of the GATT 1994, the different treatment of imports from NMEs would be permitted by the provisions of the *Anti-Dumping Agreement*. The European Union remarks that the *lex specialis* principle and the *General Interpretative Note to Annex 1A of the WTO Agreement* make it clear that, when a provision of the *Anti-Dumping Agreement* conflicts with a provision of the GATT 1994, the former should prevail. In this respect, the European Union argues that a conflict between a provision of the GATT 1994 and a provision of the *Anti-Dumping Agreement* occurs not only in situations where a rule in the GATT 1994 prohibits what a rule in the *Anti-Dumping Agreement* requires; a conflict also exists when there is "incompatibility of contents". This scenario includes situations where an agreement prohibits what another permits. The European Union further notes that Article 9.2 of the *Anti-Dumping Agreement* already requires the imposition and collection of anti-dumping duties on a non-discriminatory basis.<sup>67</sup>

(e) Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement*

45. As a consequence of the European Union's contention that the Panel wrongly found that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, the European Union also requests the Appellate Body to reverse the Panel's findings that the European Union acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements.

2. The Panel's Findings Regarding Article 9(5) of the Basic AD Regulation "As Applied" in the Fasteners Investigation

46. The European Union appeals the Panel's finding that Article 9(5) of the Basic AD Regulation, "as applied" in the fasteners investigation, is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. The European Union argues that, since the Panel erred in finding that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with the provisions of the

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<sup>66</sup>European Union's appellant's submission, para. 218.

<sup>67</sup>European Union's appellant's submission, para. 222.

*Anti-Dumping Agreement*, the Appellate Body should also reverse the Panel's "as applied" findings with respect to the determinations made in the fasteners investigation.<sup>68</sup>

47. The European Union argues that the Panel applied the "as such/as applied" distinction in a mechanical manner, and noted that there are measures where the result that is found to be WTO inconsistent "as such" may or may not take place in an "as applied" context, depending on the configuration of facts. The European Union contends that, in such cases, it cannot be found that the same measure "as applied" is WTO inconsistent since, in reality, the result does not take place.<sup>69</sup> The European Union points out that, while the Panel found Article 9(5) of the Basic AD Regulation to be "as such" inconsistent with the provisions of the *Anti-Dumping Agreement* and of the GATT 1994, in the fasteners investigation, each of the five cooperating sampled companies and each of the cooperating companies examined individually were granted individual treatment. Thus, according to the European Union, although the Panel found that Article 9(5) "as such" prevents the result that suppliers from NMEs are entitled to obtain from the obligations contained in the *Anti-Dumping Agreement* and the GATT 1994, in a case where all companies requesting individual treatment were granted such treatment, there is no basis for a finding of inconsistency "as applied". According to the European Union, for the Panel to say that there is a possibility that Article 9(5) affected participation by Chinese exporters in the fasteners investigation and/or the quality and quantity of information Chinese exporters provided to the Commission is pure speculation, and not based on evidence.<sup>70</sup>

48. The European Union argues that the Panel found that Article 9(5) of the Basic AD Regulation leads to a particular result in the absence of the required evidence to substantiate such a conclusion. According to the European Union, the Panel erred by concluding that, having found Article 9(5) of the Basic AD Regulation to be inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, "for the same reasons", its application in the fasteners investigation was also inconsistent with these two provisions. Therefore, even if the Appellate Body were to uphold the Panel's finding in respect of Article 9(5) "as such" and "as applied", the European Union requests the Appellate Body to modify the Panel's reasoning on this issue.<sup>71</sup>

3. The Panel's Findings under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*

49. The European Union requests the Appellate Body to reverse the Panel's finding that the European Union acted inconsistently with Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* with

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<sup>68</sup>European Union's appellant's submission, para. 228.

<sup>69</sup>European Union's appellant's submission, para. 230.

<sup>70</sup>European Union's appellant's submission, para. 231.

<sup>71</sup>European Union's appellant's submission, para. 232.

respect to certain aspects of the normal value determination. In the European Union's view, the Panel erred in finding that Articles 6.4 and 6.2 required the Commission to disclose the factual determination of how it grouped product types for purposes of determining normal value. The European Union also maintains that the Panel made a purely consequential finding of violation of Article 6.2 that is incorrect given the flaws in the Panel's finding under Article 6.4. In addition, the European Union submits that the Panel disregarded certain important evidence on the record in its factual findings and thus violated Article 11 of the DSU.

(a) The "Information" Subject to the Obligations under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*

50. The European Union claims that the Panel erred when "it effectively found that Articles 6.4 and 6.2 required the EU investigating authorities to have disclosed the manner in which they decided to group product types for purposes of the normal value determination, prior to the disclosure of essential facts, and as part of their obligation under Article 6.4 to allow access to the file."<sup>72</sup> The European Union submits that such a factual determination by investigating authorities is not the kind of information that is covered by the obligation in Article 6.4 of the *Anti-Dumping Agreement*. Rather, the European Union contends that this is merely an essential factual determination that was disclosed at the end of the fasteners investigation in the final General Disclosure Document<sup>73</sup>, in compliance with Article 6.9 of the *Anti-Dumping Agreement*. The European Union posits that a proper interpretation of the term "information" in Article 6.4, which takes into account the context of Article 6 as a whole, supports the proposition that factual determinations by investigating authorities are not subject to the obligation of Article 6.4.

51. The European Union contends that the term "information", read in the light of the sequence of rights and obligations set out in the various paragraphs of Articles 6.1 to 6.8 of the *Anti-Dumping Agreement*, refers to knowledge of facts as communicated by the interested parties or collected by the investigating authorities. Referring to the panels' findings in *Korea – Certain Paper*, *Korea – Certain Paper (Article 21.5 – Indonesia)*, and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the European Union contends that the term "information", as used in Article 6.4, concerns facts and "raw data", rather than "reasoning", factual determinations, or conclusions by the

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<sup>72</sup>European Union's appellant's submission, para. 248.

<sup>73</sup>The General Disclosure Document (European Commission, Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Proposal to impose definitive measures, 3 November 2008) (Panel Exhibit CHN-18)) was the final disclosure document before the Commission issued the Definitive Regulation.

investigating authorities.<sup>74</sup> The European Union further submits that this view is confirmed by the Appellate Body's findings in *EC – Tube or Pipe Fittings*, which "assimilated" the term "information" in Article 6.4 with facts, evidence, or raw data that had not been disclosed to the interested parties.<sup>75</sup>

52. The European Union maintains that there is a logical sequence of events and corresponding rights and obligations that is reflected in the various paragraphs and subparagraphs of Article 6 of the *Anti-Dumping Agreement*. Specifically, the European Union submits that Articles 6.1 to 6.3 provide parties with the right to submit their own evidence in writing and to make their views known at an oral hearing. Articles 6.6 and 6.7, in turn, impose an obligation on investigating authorities to verify the information submitted by the parties, and Article 6.8 allows the use of "facts available" when any interested party does not provide necessary information. Thus, the European Union asserts, Article 6.4 is limited to addressing "the parties' right to know what *other interested parties have submitted* in terms of evidence and information".<sup>76</sup> Moreover, the European Union recalls that Article 6.9 requires that, before a final determination is made, the authorities inform all interested parties of "the essential facts under consideration which form the basis for the decision whether to apply definitive measures". In the European Union's view, the use of the phrase "essential facts" rather than the word "information" in Article 6.9 indicates that Articles 6.1 to 6.8 concern the information-gathering process, and Article 6.9 marks the end of the process and requires a disclosure of the authority's essential factual conclusions. The European Union further contends that the differences between the obligations under Article 6.4 and Article 6.9 are well established in WTO jurisprudence. For example, in *Guatemala – Cement II*, the panel found that Article 6.4 generally provides an "access to the file" right<sup>77</sup>, whereas Article 6.9 provides for a disclosure of the basic factual findings in respect of the information received.

53. The European Union submits that the Panel failed to recognize the important differences between the various paragraphs of Article 6, and erroneously considered that Article 6.4 also applied in respect of the authorities' factual findings disclosed under Article 6.9 of the *Anti-Dumping Agreement*. This is because the Panel did not find that non-confidential evidence gathered by the Commission was not made available to the interested parties. Rather, the Panel's finding concerns the fact that the Commission in its General Disclosure Document stated that the normal value

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<sup>74</sup>European Union's appellant's submission, paras. 252 (quoting Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82) and 253 (referring to Panel Report, *Korea – Certain Paper*, para. 7.199; and Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.124).

<sup>75</sup>European Union's appellant's submission, para. 254 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 138-141).

<sup>76</sup>European Union's appellant's submission, para. 260. (original emphasis)

<sup>77</sup>European Union's appellant's submission, para. 268 (referring to Panel Report, *Guatemala – Cement II*, para. 8.230).



determination was based on a grouping of products as certain "product types", as opposed to Product Control Numbers ("PCNs")<sup>78</sup>, which were reflected in the request for data in the questionnaires sent to the Chinese producers and exporters, but did not provide any information as to the relevant characteristics of those "product types". However, the European Union argues, the grouping of products is not raw data submitted by the parties or gathered by the Commission, but is "simply the determination by the European Commission of what constituted a proper way of grouping products per model or type, based on the information on product types which was in the public record".<sup>79</sup> The Panel thus erred in finding that the Commission was required by Article 6.4 to provide timely opportunities to the Chinese interested parties to see such "information".

(b) Whether the "Information" Was Made Available to the Interested Parties in a "Timely" Manner within the Meaning of Article 6.4 of the *Anti-Dumping Agreement*

54. The European Union claims that the Panel failed to conduct an objective assessment of the facts when finding that the European Union acted inconsistently with Article 6.4 of the *Anti-Dumping Agreement* by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established. Specifically, the European Union submits that the Panel disregarded certain critical evidence and thus failed to consider the evidence before it in its totality, as required by Article 11 of the DSU.

55. The European Union recalls that the Panel relied on the final General Disclosure Document, issued on 3 November 2008, to conclude that, for the first time during the investigation, the Chinese interested parties were informed that "the Commission based its normal value determination on 'product types', as opposed to PCNs", and that the General Disclosure Document did not "provide any information as to the relevant characteristics of those groups, or how they were determined".<sup>80</sup> However, the European Union argues, the Panel disregarded certain evidence on the record that contradicts this factual finding. Specifically, the Information Document<sup>81</sup>, issued on 4 August 2008, contains the same paragraphs as those in the General Disclosure Document that the Panel referred to, with the exact same references to the use of "product types". The Information Document, signalling the use of "product types", was thus sent to all interested parties for comments three months before the

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<sup>78</sup>PCNs contain the following elements identified by the Commission: type of fasteners (by CN code); strength/hardness; coating; presence of chrome on coating; diameter; and length/thickness. (See Panel Report, para. 7.293)

<sup>79</sup>European Union's appellant's submission, para. 274.

<sup>80</sup>European Union's appellant's submission, para. 283 (quoting Panel Report, para. 7.485).

<sup>81</sup>European Commission, Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Non-imposition of provisional anti-dumping measures, 4 August 2008 (Panel Exhibit CHN-17).

issuance of the General Disclosure Document, yet no request to see the characteristics that formed the basis for the product types was received until 8 November 2008. Moreover, the Panel also ignored the fact that the Commission's decision to group product types according to the strength class and the distinction between standard and special fasteners was based on arguments and information submitted by the Chinese interested parties during the investigation. Indeed, the Chinese interested parties were able to make presentations on exactly those elements that were used by the Commission to group product types. Thus, in the European Union's view, it is clear that the interested parties had a timely opportunity to see information on the product types and to present their views.

56. The European Union further submits that, even assuming that the interested parties were only informed of the use of product types in the General Disclosure Document, the fact that the European Union ultimately disclosed the basis for the product types to the Chinese producers remains unchanged. On the basis of this disclosed information, a Chinese interested party submitted comments in a letter dated 24 November 2008, in which it did not request an extension of time for making further presentations or submit any evidence relating to the need to make adjustments for differences affecting price comparability.<sup>82</sup> In the European Union's view, this letter, which the Panel ignored, demonstrates that a presentation was made on the basis of the "information" provided and therefore that the "information" was made available in a timely manner.

(c) The Panel's Finding under Article 6.2 of the *Anti-Dumping Agreement*

57. The European Union maintains that, because it has demonstrated that the Panel's finding under Article 6.4 was flawed, the Panel's "purely consequential" finding under Article 6.2 was also in error.<sup>83</sup> In addition, the European Union submits that Article 6.2 cannot be read to constitute a mere reiteration of the right under Article 6.4 to see the information.

58. The European Union contends that the Panel made a purely consequential finding of violation of Article 6.2 when it considered that the violation of Article 6.4 on access to information also constituted a violation of the general right of defence allegedly set forth in Article 6.2 of the *Anti-Dumping Agreement*. The European Union contends that the Panel made the error of reading the obligation in Article 6.4 into Article 6.2, thus erroneously collapsing both provisions, even though Article 6.2 sets forth an important but limited and specific obligation of its own. The European Union finds support for this view in the panel's finding in *Korea – Certain Paper* that Article 6.2 does not

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<sup>82</sup>Letter dated 24 November 2008 from Van Bael & Bellis to the European Commission on behalf of Kunshan Chenghe Standard Component Co. Ltd. (Panel Exhibit EU-12).

<sup>83</sup>European Union's appellant's submission, para. 275.

"address interested parties' right to see the information on the record".<sup>84</sup> The European Union further argues that the first sentence of Article 6.2, referring to the "full opportunity for the defence of [interested parties'] interests" cannot "be read as a catch-all due process provision", because doing so "would effectively render redundant *all* of the other provisions of Article 6 which impose specific obligations on investigating authorities".<sup>85</sup>

(d) Conclusion

59. In sum, the European Union asserts that a proper interpretation of the relevant provisions, as well as a proper assessment of the facts and evidence on the record, should have led the Panel to conclude that no violation of Article 6.4, and thus no consequential violation of Article 6.2, had been demonstrated. Therefore, the European Union requests the Appellate Body to reverse the Panel's finding that the European Union acted inconsistently with Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* concerning the product types used for purposes of normal value determination.

4. The Panel's Findings under Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* Regarding Non-Confidential Questionnaire Responses

60. The European Union requests the Appellate Body to reverse the Panel's findings that the European Union acted inconsistently with Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* with respect to confidentiality requests and non-confidential summaries of confidential information received in the fasteners investigation. Specifically, the European Union contends that the Panel erred in finding that the Commission acted inconsistently with Article 6.5.1 because it failed to require that domestic producers furnish appropriate statements of the reasons why information submitted in confidence was not susceptible of summary, and with Article 6.5 because it treated as confidential information received from the analogue country producer, Pooja Forge, without examining whether "good cause" supported this confidential treatment.

(a) Non-Confidential Summaries of Domestic Producers' Questionnaire Responses

61. The European Union claims that the Panel erred in its interpretation and application of the obligations contained in Article 6.5.1 of the *Anti-Dumping Agreement* when it found that the Commission failed to require domestic producers to provide "appropriate" statements of the reasons why summarization of confidential information was not possible. In the European Union's view, Article 6.5.1 imposes only a "best endeavours" obligation on investigating authorities to require

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<sup>84</sup>European Union's appellant's submission, para. 276 (quoting Panel Report, *Korea – Certain Paper*, para. 7.306).

<sup>85</sup>European Union's appellant's submission, para. 277. (original emphasis)

parties to provide non-confidential summaries of information submitted in confidence, or, in the alternative, a statement of the reasons explaining why summarization is not possible.<sup>86</sup> The European Union contends that the Panel erred in finding that Article 6.5.1 further obliges investigating authorities to ensure that such summaries or statements of reasons are "appropriate".<sup>87</sup>

62. Under the interpretation of Article 6.5 of the *Anti-Dumping Agreement* proffered by the European Union, the only obligations imposed on investigating authorities are: (1) not to disclose confidential information without the specific permission of the submitting party; and (2) to require interested parties to provide non-confidential summaries of information submitted in confidence.<sup>88</sup> The European Union argues that Article 6.5 is therefore concerned "first and foremost" with assuring parties that information submitted in confidence will be treated as confidential and will not be disclosed without their permission.<sup>89</sup> Article 6.5.1, then, imposes a "best endeavours" obligation on authorities to require that parties provide a non-confidential summary of information submitted in confidence so that other interested parties have a reasonable understanding of the substance of the confidential information.<sup>90</sup> In the European Union's view, it is also "permissible" for submitting parties not to summarize certain information, as long as they indicate that summarization is not possible, and provide a "statement of the reasons" as to why such summarization is not possible.<sup>91</sup> The European Union claims that, because Article 6.5 does not allow an authority to disregard information properly treated as confidential, regardless of whether or not a non-confidential summary or statement of reasons is provided, Article 6.5.1 cannot be read strictly to require that such summaries or statements be provided.<sup>92</sup> "Absent the necessary stick" that would allow an authority to penalize noncompliance, the European Union insists that Article 6.5.1 can only impose a "best efforts" obligation on authorities to "push interested parties to be as transparent as possible".<sup>93</sup> The European Union does not see that any "risk of abuse" would result from such an interpretation, as the Panel warned, as long as the request for confidential treatment is warranted.<sup>94</sup>

63. The European Union argues that prior WTO panels that interpreted Article 6.5.1 of the *Anti-Dumping Agreement* as imposing a duty on investigating authorities to require parties to submit a statement of reasons described the "outer boundaries of the obligation imposed by Article 6.5.1".<sup>95</sup>

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<sup>86</sup>European Union's appellant's submission, para. 298.

<sup>87</sup>European Union's appellant's submission, para. 310.

<sup>88</sup>European Union's appellant's submission, para. 314.

<sup>89</sup>European Union's appellant's submission, para. 316.

<sup>90</sup>European Union's appellant's submission, para. 317.

<sup>91</sup>European Union's appellant's submission, para. 317.

<sup>92</sup>European Union's appellant's submission, para. 320.

<sup>93</sup>European Union's appellant's submission, para. 321.

<sup>94</sup>European Union's appellant's submission, para. 322.

<sup>95</sup>European Union's appellant's submission, para. 327.

The panel's reasoning in *Mexico – Steel Pipes and Tubes* supports this argument, and stated that Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* do not contain any obligation with regard to how an authority should comply with the requirements thereunder.<sup>96</sup> The European Union further alleges that the Panel misinterpreted the findings of the panel in *Mexico – Olive Oil* when it relied on that case for its conclusion that the *pro forma* "general statements" of the domestic producers were not sufficient to constitute an appropriate statement of reasons as to why summarization of confidential information was not possible.<sup>97</sup>

(b) Confidential Treatment of Information Obtained from Pooja Forge

64. The European Union contends that the Panel erred in making findings under Article 6.5 of the *Anti-Dumping Agreement* with regard to the confidential treatment of Pooja Forge's questionnaire responses, and that, substantively, the Panel also erred in its application of the chapeau of Article 6.5 to Pooja Forge. Specifically, the European Union argues that the claims relating to Pooja Forge's questionnaire response were not contained in China's panel request<sup>98</sup>, and therefore not within the Panel's terms of reference, and that the Panel thus erred in making findings in this respect, contrary to Article 7.1 of the DSU. In the alternative, the European Union alleges that the manner in which China pursued its claim under Article 6.5, and the manner in which the Panel dealt with this claim, deprived the European Union of its due process rights. If the Appellate Body determines that the Panel did not err in considering this claim to be within its terms of reference and making findings on it, the European Union argues that the Panel nevertheless erred in its application of the chapeau of Article 6.5 because the requirement to show "good cause" in support of a request for confidential treatment applies only to "interested parties" and does not apply to analogue country producers.

(i) Terms of reference and due process

65. The European Union claims that the Panel did not have jurisdiction over China's claim under Article 6.5 relating to Pooja Forge's questionnaire responses, because this claim was not included in China's panel request as required under Article 6.2 of the DSU. The relevant portion of China's panel request did not mention the Indian producer, Pooja Forge, and "unambiguously states that China brings a claim only with regard to domestic producers".<sup>99</sup> The European Union acknowledges that it did not formally raise this challenge before the Panel, but states that the Panel had an obligation to examine its jurisdiction on its own motion, and that it failed to do so. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body explained that "panels cannot simply ignore issues which go

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<sup>96</sup>European Union's appellant's submission, para. 328.

<sup>97</sup>European Union's appellant's submission, para. 329.

<sup>98</sup>European Union's appellant's submission, paras. 335-339.

<sup>99</sup>European Union's appellant's submission, para. 335.

to the root of their jurisdiction"<sup>100</sup>, and in *Guatemala – Cement I*, it found that a panel must determine whether a party has "properly identified a relevant antidumping measure in its panel request" before it may find that a dispute is properly before it.<sup>101</sup> In making findings on this claim, then, the European Union argues, the Panel violated Article 7.1 of the DSU.<sup>102</sup>

66. Should the Appellate Body find that China's claims with respect to Pooja Forge's questionnaire response were within the Panel's terms of reference, the European Union argues that, in the alternative, the Panel violated its obligations under Article 11 of the DSU because the manner in which it dealt with this claim deprived the European Union of its rights to due process. Citing *US – Continued Zeroing*, the European Union argues that the Panel used its questions impermissibly to "make the case"<sup>103</sup> for China. Only in response to Panel Question 71 did China begin to formulate its claims with respect to Pooja Forge's questionnaire response<sup>104</sup>; and only in response to Panel Question 103, after the second substantive meeting of the Panel with the parties, did China "finally clarif[y] that it actually made a claim under both Articles 6.5 and 6.5.1 with respect to Pooja Forge's questionnaire response".<sup>105</sup>

67. The European Union points out that the Panel itself admitted that the claim was unclear, and that this lack of clarity led it to pose questions to China in this regard.<sup>106</sup> Despite the Panel's suggestion to the contrary, the European Union claimed throughout this process that it was "not in a position to provide adequate responses due to the confusion" about China's claim.<sup>107</sup> For these reasons, the European Union requests the Appellate Body to reverse the Panel's finding that the European Union acted inconsistently with Article 6.5 of the *Anti-Dumping Agreement* with respect to confidential treatment of information in the questionnaire response of the Indian producer, Pooja Forge.

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<sup>100</sup>European Union's appellant's submission, para. 337 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

<sup>101</sup>European Union's appellant's submission, para. 338 (quoting Appellate Body Report, *Guatemala – Cement I*, para. 88).

<sup>102</sup>European Union's appellant's submission, para. 339.

<sup>103</sup>European Union's appellant's submission, paras. 342 and 343 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 343).

<sup>104</sup>European Union's appellant's submission, para. 343.

<sup>105</sup>European Union's appellant's submission, para. 344.

<sup>106</sup>European Union's appellant's submission, para. 345 (quoting Panel Report, para. 7.522).

<sup>107</sup>European Union's appellant's submission, para. 346.

(ii) *Application of Article 6.5 to analogue country producers*

68. Substantively, the European Union argues that the Panel erred in its interpretation and application of Article 6.5 when it found that the Commission failed to require the Indian producer, Pooja Forge, to demonstrate that "good cause" existed for the confidential treatment of certain product type information in its questionnaire response. According to the European Union, Article 6.5 applies only to "parties to an investigation", which includes "interested parties" as defined in Article 6.11 of the *Anti-Dumping Agreement*.<sup>108</sup> The European Union contends that the Panel implicitly acknowledged this interpretation when it used the term "interested parties" in making its findings on this claim.<sup>109</sup> The definition of "interested parties" does not include producers from analogue third countries, and the European Union points out that it did not designate Pooja Forge an "interested party" in its regulation regarding the fasteners investigation, which it could have done under the last sentence of Article 6.11.<sup>110</sup> Therefore, because Pooja Forge could not be considered as an "interested party" in the fasteners investigation, the requirement in Article 6.5 to show "good cause" did not apply to it.<sup>111</sup>

69. The European Union emphasizes that this argument "is not pure textualism".<sup>112</sup> Rather, it is the interpretation that "makes the most sense in light of the realities of investigations involving [NME] countries".<sup>113</sup> In NME investigations, authorities must rely on the willingness of third country producers to cooperate with the investigation, although they have no obligation to do so. The difficulty inherent in this situation is evidenced by the fact that the Commission found only two producers willing to cooperate in the fasteners investigation, of which only one, Pooja Forge, submitted information sufficiently detailed to serve as the basis for the establishment of normal value. The European Union argues that its investigating authorities have no coercive powers over analogue country producers, and therefore it would not be practicable to apply the requirements of Article 6.5 to these producers. According to the European Union, having reliable and verifiable third-party data is a benefit to the investigation, even if that data is provided on a confidential basis and without an assertion of "good cause".<sup>114</sup>

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<sup>108</sup>European Union's appellant's submission, para. 349.

<sup>109</sup>European Union's appellant's submission, para. 350.

<sup>110</sup>European Union's appellant's submission, paras. 352 and 353 (quoting the Definitive Regulation, *supra*, footnote 4).

<sup>111</sup>European Union's appellant's submission, para. 354.

<sup>112</sup>European Union's appellant's submission, para. 356.

<sup>113</sup>European Union's appellant's submission, para. 356.

<sup>114</sup>European Union appellant's submission, para. 357.

5. The Panel's Findings under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* Regarding the Disclosure of the Identity of the Complainants

70. The European Union requests the Appellate Body to reverse the Panel's determination that China's claim under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* regarding the identity of the complainants was within its terms of reference. Although the Panel found that the Commission had not violated these provisions by failing to disclose the identity of the complainants and the supporters of the complaint, the European Union nevertheless argues that the Panel should never have made findings on these claims because they were not included in China's panel request. In the European Union's view, Articles 6.4 and 6.2 contain multiple obligations, and it is therefore not sufficient simply to mention them without further elaboration.

71. Specifically, the European Union claims that China's panel request does not refer to the identity of the complainants within its claims under Articles 6.2 and 6.4, and the European Union stresses that, in this case, the mere listing of Articles 6.2 and 6.4 was not sufficient to present the problem clearly.<sup>115</sup> According to the European Union, the Panel mischaracterized the European Union's argument as claiming that China failed to provide "a brief summary of the legal basis for a claim under Articles 6.4 and 6.2". In the European Union's view, "[t]he issue was whether the way in which the panel request was made presented the problem clearly".<sup>116</sup> Specifically, the European Union challenges the Panel's interpretation that "the nature of the rights and obligations set forth in Articles 6.4 and 6.2 is such that a reference to these provisions, without further explanation, could suffice to put the responding Member on notice of the nature of the claim that the complainant might bring".<sup>117</sup> It argues that, while the Appellate Body has found that in some instances it may be sufficient to list the provisions of WTO law under which a complaining party may later develop its arguments, the Appellate Body has also stated in *Korea – Dairy* that this would not be appropriate where the provisions listed contain not just one, distinct obligation, but multiple obligations.<sup>118</sup> According to the European Union, the fact that China made a claim under both Article 6.2 and Article 6.4 suggests that at least two obligations are necessarily involved, and that, furthermore, "these multiple obligations apply in multiple situations in the course of an anti-dumping investigation".<sup>119</sup>

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<sup>115</sup>European Union's appellant's submission, paras. 365 and 372.

<sup>116</sup>European Union appellant's submission, paras. 369 and 370.

<sup>117</sup>European Union's appellant's submission, paras. 378 and 379.

<sup>118</sup>European Union's appellant's submission, para. 381.

<sup>119</sup>European Union's appellant's submission, para. 382.



B. *Arguments of China – Appellee*

1. The Panel's Findings Regarding Article 9(5) of the Basic AD Regulation "As Such"

72. China requests the Appellate Body to reject the European Union's appeal and to uphold the Panel's findings that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10, 9.2, and 18.4 of the *Anti-Dumping Agreement*, Article I:1 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.<sup>120</sup>

(a) The Scope of Article 9(5) of the Basic AD Regulation

73. China submits that the "meaning" or "scope" of Article 9(5) of the Basic AD Regulation is an issue of fact that the Appellate Body is not competent to review pursuant to Article 17.6 of the DSU. However, in the event that the Appellate Body were to consider itself competent to review this issue, China submits that the Panel correctly found that Article 9(5) concerns not only the imposition of anti-dumping duties but also the calculation of dumping margins.<sup>121</sup>

74. China submits that the issue of the "meaning" or "scope" of Article 9(5) of the Basic AD Regulation is an issue of fact that can only be reviewed in an appeal made on the basis of a claim under Article 11 of the DSU. Therefore, it rejects the European Union's argument that the scope of Article 9(5) of the Basic AD Regulation is a legal issue and hence subject to appellate review pursuant to Article 17.6 of the DSU. China contends that, since the "meaning" or "scope" of Article 9(5) was not clear on its face, the Panel's examination necessarily involved a factual assessment in relation to the operation of this provision in practice. As the Appellate Body stated in *China – Auto Parts*, "there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements".<sup>122</sup> In that dispute, the Appellate Body also clarified that whenever a panel is required, in order to determine the meaning of a Member's municipal law, to "go beyond the text of an instrument on its face", the Appellate Body will not interfere lightly with the factual findings made by the panel in that respect.<sup>123</sup> China recalls that, in the case at issue, the "meaning" or "scope" of Article 9(5) was determined by the Panel not solely on the face of this provision, but also involved factual assessments regarding its operation in practice. Given that the "meaning" or "scope" of Article 9(5) of the Basic AD Regulation is an issue of fact and that the European Union failed to raise it under Article 11 of the

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<sup>120</sup>China's appellee's submission, para. 364.

<sup>121</sup>China's appellee's submission, para. 67.

<sup>122</sup>China's appellee's submission, para. 73 (quoting Appellate Body Reports, *China – Auto Parts*, para. 225).

<sup>123</sup>See China's appellee's submission, para. 74.

DSU as a failure by the Panel to make an objective assessment of the facts, such a factual issue is not within the scope of the present appeal.

75. China contends that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the determination of dumping margins. The fact that Article 9(5) does not contain the words "margins of dumping" is not sufficient, in China's view, automatically to conclude that Article 9(5) does not deal with dumping margins at all and relates only to the imposition of anti-dumping duties. In this regard, China agrees with the Panel's reasoning that it is necessary to look at the operation of Article 9(5) as a whole in order to clarify the meaning of that provision and, in particular, to determine whether it also concerns the calculation of dumping margins even if it does not expressly say so. The Panel correctly went beyond the mere text of Article 9(5) and also examined its context and operation, in accordance with the principles established by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* and in *US – Carbon Steel*, in order to ascertain the meaning of that provision.<sup>124</sup>

76. China contests the European Union's assertion that the examination of the context provided by other articles of the Basic AD Regulation, such as Articles 2, 9(4), and 9(6), confirms that Article 9(5) relates only to the imposition of anti-dumping duties. However, China notes that none of these other provisions addresses the issue of whether the dumping margin for exporters or producers from NMEs is to be determined on an individual or country-wide basis. China disagrees with the European Union's contention that Article 9(5) of the Basic AD Regulation mirrors Article 9.2 of the *Anti-Dumping Agreement* concerning the imposition of duties and the obligation to determine individual margins of dumping for each known exporter or producer. Even assuming that this were correct, China points out that there is no provision in the Basic AD Regulation that mirrors Article 6.10 of the *Anti-Dumping Agreement* concerning dumping margin determinations. China submits that Article 9(4) of the Basic AD Regulation merely sets out the principle that the duty rate must not exceed the margin of dumping, but does not state how the dumping margin should be determined, or whether that margin has to be determined on an individual basis or on a country-wide basis for exporters from NMEs.<sup>125</sup> China thus contends that Article 9(5) is the provision governing two separate, but very closely related, issues, namely, the determination of dumping margins and the imposition of anti-dumping duties. Therefore, meeting the five requirements for individual treatment listed under Article 9(5) not only determines whether the exporting producer is subject to an

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<sup>124</sup>China's appellee's submission, para. 82 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168; and Appellate Body Report, *US – Carbon Steel*, para. 157).

<sup>125</sup>China's appellee's submission, para. 93.

individual anti-dumping duty but also whether it qualifies for the determination of an individual dumping margin.

77. China notes that the operation of Article 9(5) of the Basic AD Regulation further confirms that this provision deals with both the determination of dumping margins as well as the imposition of duties. Contrary to what the European Union asserts, China contends that whether a Chinese exporter or producer is entitled to a determination of an individual dumping margin does not flow from Article 9(4), which establishes the requirement that the dumping margin be the ceiling of the anti-dumping duty, but rather flows from Article 9(5) of the Basic AD Regulation. Indeed, during the Panel proceedings, the European Union confirmed that the fact that an exporting producer is a "non-IT supplier", and therefore does not fulfil the Article 9(5) conditions, implies not only that it will receive a country-wide anti-dumping duty but also that no individual dumping margin will be determined for this exporting producer.<sup>126</sup> China recalls that, in order to impose an anti-dumping duty, the investigating authorities first have to determine a dumping margin, and thus considers it logical that an individual anti-dumping duty can only be imposed if the underlying dumping margin was also calculated on an individual basis.<sup>127</sup>

78. Thus, China submits that the examination of how Article 9(5) operates in practice clearly confirms the Panel's conclusion reached on the basis of an analysis of Article 9(5) in the context of the other provisions of the Basic AD Regulation, namely, that Article 9(5) deals not only with the imposition of anti-dumping duties but also with the determination of the dumping margins.<sup>128</sup>

(b) Article 6.10 of the *Anti-Dumping Agreement*

79. China submits that the Panel properly concluded that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the *Anti-Dumping Agreement* because it conditions the calculation of individual margins for producers from NMEs on the fulfilment of the IT test. China considers that the Panel did not err in finding that Article 6.10 of the *Anti-Dumping Agreement* contains a strict rule that an individual dumping margin be calculated for each known producer or exporter and that sampling is the only exception to that rule.<sup>129</sup>

80. China submits that the use of the word "shall" in the first sentence of Article 6.10 establishes the mandatory nature of this provision, and contends that if the drafters' intention indeed had been

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<sup>126</sup>China's appellee's submission, para. 98 (referring to European Union's response to Panel Question 6(a)).

<sup>127</sup>China's appellee's submission, para. 106.

<sup>128</sup>China's appellee's submission, para. 107.

<sup>129</sup>China's appellee's submission, para. 111.

merely to express a preference, as the European Union contends, they would have used the word "should" instead of "shall". Likewise, they could have expressly mentioned that the derogation from the general rule was permitted in situations other than the one mentioned in the second sentence of Article 6.10. However, the drafters did not use any such words. In China's view, the expression "as a rule" is necessary to the extent that it creates a "link between the obligation contained in Article 6.10 first sentence which constitutes the rule and the exception to that rule included in the second sentence of that provision".<sup>130</sup> China asserts that the structure of Article 6.10 confirms the conclusion that the first sentence contains the main rule ("the authorities shall ... **determine**"), whereas the second sentence lays down the exception to that rule ("In cases where ... such a **determination** [is] impracticable").<sup>131</sup>

81. China points out that, even in cases where sampling is used, Article 6.10.2 requires investigating authorities to determine an individual margin for any exporter or producer not initially selected who submits the necessary information in time, except when this would be unduly burdensome to the authorities due to the large number of exporters or producers requesting individual examination. Therefore, Article 6.10.2 confirms the fundamental importance of the rule that margins of dumping be determined on an individual basis for each exporter or producer.<sup>132</sup> Indeed, reading Article 6.10, first sentence, as merely establishing a "preference", as the European Union submits, would mean that investigating authorities are merely invited to determine individual dumping margins. This conclusion would, in China's view, render the first sentence of Article 6.10 inutile.<sup>133</sup>

82. China recalls that a finding of the panel in *Mexico – Anti-Dumping Measures on Rice* confirmed that sampling is the only exception to the obligation contained in Article 6.10, first sentence. In that dispute, the panel stated that "[t]he exception to this rule is the case in which there are too many foreign producers or exporters so that an individual margin of dumping will only be calculated for a representative sample".<sup>134</sup> The use of the term "the" preceding the word "exception" indicates that the panel did not consider the second sentence of Article 6.10 to be merely an exception among various possible deviations from the rule. China characterizes the panel reports cited by the European Union, namely, *Korea – Certain Paper* and *EC – Salmon (Norway)*, as irrelevant to the point at issue, since neither panel in those disputes attempted to clarify whether the exception provided in Article 6.10, second sentence, is the only exception to the rule set out in the first sentence. China also considers that the European Union's reference to other provisions of the

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<sup>130</sup>China's appellee's submission, para. 114.

<sup>131</sup>China's appellee's submission, para. 121. (original boldface)

<sup>132</sup>China's appellee's submission, para. 125.

<sup>133</sup>China's appellee's submission, para. 118.

<sup>134</sup>China's appellee's submission, para. 126 (quoting Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.137).

*Anti-Dumping Agreement* that would "provide investigating authorities with certain flexibility in the application of the relevant rules"<sup>135</sup> does not support the European Union's position. On the contrary, Articles 2.4, 2.5, 5.8, 9.3.1, and 11.4 of the *Anti-Dumping Agreement*, by including the word "normally", rather support the view that, if the drafters had intended not to establish a strict obligation under the first sentence of Article 6.10, they would have used clearer wording to that effect, just like they did in the Articles referred to by the European Union.

83. China further asserts that none of the examples presented by the European Union convincingly shows that there are other hypothetical situations, apart from sampling, that may justify not calculating an individual margin for each known exporter or producer. Notably, in the case where an exporter or producer that initially agreed to cooperate decides to cease cooperating in the course of the investigation, the fact that the dumping margin for that exporter is based on best information available and, therefore, is *de facto* the same as the one determined for the other non-cooperating exporters does not render such dumping margin non-individual.<sup>136</sup> Similarly, in the case of an exporter who has not produced the product concerned during the period of investigation but merely "traded" this product, the fact that the investigating authorities may not calculate an individual dumping margin for this "trader" does not constitute an exception to Article 6.10, first sentence; rather, it is a possibility flowing directly from the general obligation in Article 6.10, first sentence, to determine an individual margin for "each known exporter **or** producer".<sup>137</sup> Lastly, in cases where a known producer did not export the product concerned during the period of investigation, China notes that no dumping margin—whether individual or collective—can be determined for a non-exporting producer, and once such a producer starts exporting it will receive, pursuant to Article 9.5 of the *Anti-Dumping Agreement*, an individual dumping margin unless that producer is related to existing producers or exporters.<sup>138</sup> China contends that the other two examples presented by the European Union are based on the European Union's unilateral practice and therefore are not relevant to the interpretation of Article 6.10, first sentence.<sup>139</sup>

84. China also rejects the European Union's alternative argument that Article 9(5) of the Basic AD Regulation is consistent with Article 6.10 of the *Anti-Dumping Agreement* because it "aims at identifying the relevant supplier in accordance with Article 6.10, first sentence".<sup>140</sup> Indeed, China

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<sup>135</sup>China's appellee's submission, para. 151 (quoting European Union's appellant's submission, para. 133).

<sup>136</sup>China's appellee's submission, para. 139.

<sup>137</sup>China's appellee's submission, para. 143. (original boldface)

<sup>138</sup>China's appellee's submission, para. 149.

<sup>139</sup>China's appellee's submission, paras. 146 and 147.

<sup>140</sup>China's appellee's submission, para. 165 (quoting European Union's appellant's submission, p. 47, heading (b)).

contests the European Union's claim that "Article 9(5) of the Basic Regulation follows the same logic [as the *Korea – Certain Paper* test] and seeks to identify the relevant supplier in the specific context of imports from non-market economy countries", which is either a Chinese exporter acting independently from the State (IT supplier), or the State together with related export entities (non-IT suppliers) that are not acting independently from the State.<sup>141</sup> According to China, the European Union's anti-dumping practice confirms that the purpose of Article 9(5) is not to identify the "exporter" or "producer" within the meaning of Article 6.10, first sentence. Indeed, China notes that the IT test provided for in Article 9(5) of the Basic AD Regulation is only applied once the exporters or producers have been identified by the Commission. Therefore, the ultimate purpose of the IT test is not, as the European Union asserts, to identify the single supplier of the product under investigation. If the purpose of the IT test was indeed to identify the relevant supplier, such a test would not be carried out after the supplier has been identified by the Commission, but rather in order to identify such a supplier in the first place. China agrees with the Panel's finding that the fact that "the Commission first determine[s] which, if any, groups of companies should be considered as a single producer or exporter, and then applies the IT test to each 'single' producer or exporter it finds on the basis of that test ... clearly shows that the Commission itself distinguishes the test aimed at determining whether separate legal entities should be treated as a single exporter/producer for purposes of dumping determinations, from the IT test under Article 9(5) of the Basic AD Regulation".<sup>142</sup>

85. China further submits that, contrary to the *Korea – Certain Paper* test, Article 9(5) presumes that in NMEs all exporters or producers are related to the State and places the burden of proving the contrary on each exporter or producer, who are requested to provide evidence of complete fulfilment of the IT requirements under Article 9(5) in order to rebut this presumption. By contrast, under the *Korea – Certain Paper* test, it is for the investigating authorities to establish that there is a "sufficiently close structural and commercial relationship between individual producers to justify treating them as a single entity".<sup>143</sup> The Panel, therefore, correctly concluded that the "difference in the starting points of the two tests, and the different evidentiary burdens involved, ... show how different these two tests are".<sup>144</sup> China also notes that the Commission applies a test similar to the one in *Korea – Certain Paper* in all its anti-dumping investigations, irrespective of whether the importing

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<sup>141</sup>China's appellee's submission, para. 173 (referring to European Union's appellant's submission, para. 142).

<sup>142</sup>China's appellee's submission, para. 182 (quoting Panel Report, para. 7.97).

<sup>143</sup>China's appellee's submission, para. 186.

<sup>144</sup>China's appellee's submission, para. 187 (quoting Panel Report, para. 7.95).

country is a market economy or an NME; however, in cases where imports from NMEs are concerned, the Commission additionally applies the IT test.<sup>145</sup>

86. China recalls that the European Union justifies the reversal of the burden of proof under the IT test as compared to the *Korea – Certain Paper* test on the basis of the mere assertion that there is a presumption of State control in NMEs. For China, such a presumption lacks any legal basis. China notes that there are also many State-owned or State-controlled companies in market economy countries, and fails to see why such companies receive an individual dumping margin whereas the same does not apply to the State-owned or State-controlled companies in NMEs. China also notes that the European Union refers to another presumption in order to justify the previous presumption of "State control", namely, that China is an NME and that the European Union is allowed to treat China as an NME by virtue of China's Accession Protocol. In this respect, China submits that China's Accession Protocol merely authorizes certain WTO Members to apply a temporary and limited derogation from certain rules of the *Anti-Dumping Agreement* concerning the determination of normal value, but in no case contains any general acknowledgement that China is an NME.<sup>146</sup> In any event, China points out that whether China is a market economy or an NME is irrelevant for the purposes of this case, because the first sentence of Article 6.10 of the *Anti-Dumping Agreement* does not distinguish between imports from market economies or NMEs in relation to the determination of dumping margins. China further notes that the Panel expressly and fully addressed this point. Accordingly, there is no basis for the European Union's additional claim that the Panel failed to act in accordance with its duty under Article 11 of the DSU to make an objective assessment of the facts.<sup>147</sup>

87. China further asserts that there are important differences between the test in *Korea – Certain Paper* and the Article 9(5) IT test because the nature of the relationship examined in these tests is fundamentally different: whereas the *Korea – Certain Paper* test examines the linkages between companies, the Article 9(5) IT test focuses on the relationship between companies and the State. For China, there is a fundamental difference between the examination of the structural and commercial relationship between different companies and the examination under Article 9(5), which relates to the political influence or interference the State exercises on the way business is conducted by the exporting producers concerned.<sup>148</sup> The panel in *Korea – Certain Paper* reached the conclusion that there was a close structural and commercial relationship among three companies on the basis of several factual findings, namely: (i) that the parent company had considerable controlling power; (ii) that there was commonality with respect to company management; (iii) that the companies

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<sup>145</sup> China's appellee's submission, para. 189.

<sup>146</sup> China's appellee's submission, para. 195.

<sup>147</sup> China's appellee's submission, para. 197.

<sup>148</sup> China's appellee's submission, para. 204.

harmonized their commercial activities to achieve common corporate objectives; and (iv) that the parent company acted practically as the sole channel for domestic sales. China contends that the IT test criteria in Article 9(5) relate to elements that are proper to the exercise of a governmental function in general, rather than to elements relevant to establishing State control, either *de jure* or *de facto*. Indeed, the IT test involves an assessment of whether exporters are free to repatriate capital and profits, whether export prices are freely determined, whether the majority of shares belong to private persons, whether exchange rate conversions are carried out at the market rate, and whether State interference is not such as to permit circumvention of anti-dumping measures when individual exporters are given different rates of duties. Therefore, in essence, the nature of the relationship examined by the IT test is not comparable to the one in *Korea – Certain Paper*. China further submits that, even assuming that the IT test criteria were seeking to identify circumstances of State control, those criteria are so strict that they disqualify Chinese exporters from individual treatment even in cases where there is no close relationship.<sup>149</sup>

88. Lastly, China notes that even assuming that the European Union seeks to identify a single exporter or producer by applying the IT test under Article 9(5), no individual dumping margin is ultimately calculated for the "State". Indeed, the principle that an "individual dumping margin" needs to be determined for each exporter or producer would require that an individual dumping margin be determined for the "State", that is, the group of companies found not to fulfil the IT conditions. According to China, the European Union does not determine such an individual dumping margin for the "State", but rather it determines a country-wide "residual" dumping margin that is, in most cases, based on "facts available" and applicable to all cooperating non-IT exporting producers as well as to all non-cooperating exporting producers.<sup>150</sup>

(c) Article 9.2 of the *Anti-Dumping Agreement*

89. China submits that the Panel correctly concluded that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the *Anti-Dumping Agreement*. Article 9.2 requires that anti-dumping duties be imposed on an individual basis and that a country-wide duty can only be imposed in the circumstances expressly referred to in Article 9.2, third sentence. Article 9.2, third sentence, however, does not authorize the automatic imposition of a country-wide duty in the case of imports from NMEs. Furthermore, the "State" cannot be regarded as a "supplier" or a "source" within the meaning of Article 9.2 of the *Anti-Dumping Agreement*.<sup>151</sup>

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<sup>149</sup>China's appellee's submission, para. 209.

<sup>150</sup>China's appellee's submission, para. 211.

<sup>151</sup>China's appellee's submission, para. 219.



90. China submits that the fact that Article 9.2, first sentence, refers to the imposition of anti-dumping duties with respect to a "product" does not entail an authorization to impose country-wide duties. In China's view, there is no contradiction in acknowledging that the imposition of anti-dumping duties is made with respect to "products" as well as for each "producer" or "exporter" concerned. Indeed, the panel in *EC – Bed Linen* stated that "individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation".<sup>152</sup> China agrees with the Panel's interpretation of the word "sources" as necessarily referring to "producers" and/or "exporters" of the product under investigation. This reading finds support in Article 8 of the *Anti-Dumping Agreement*, which refers to "sources from which price undertakings have been accepted", when read in connection with Article 9.2, first sentence. By definition, only exporters—and not countries—may offer such price undertakings. China also finds support for that conclusion in the language of Article 9.2, itself referring to the "sources found to be dumped". Since dumping is determined on an individual basis, it follows that "sources found to be dumped" need to refer to exporters individually found to be dumping.<sup>153</sup> China characterizes the European Union's reference to the term "injury" in Article 9.2, first sentence, as entirely irrelevant for the purposes of determining whether Article 9.2 contains the obligation that anti-dumping duties must be imposed on an individual basis. Whereas the term "injury" is a country-wide rather than a company-specific concept, the panel in *EC – Salmon (Norway)* pointed out that "[t]he [*Anti-Dumping Agreement*] makes clear that a determination of dumping is individual" even though "a single injury determination is made in each investigation".<sup>154</sup>

91. China rejects the European Union's reading of the term "appropriate" in Article 9.2, first sentence, as referring to the "duty rate appropriate to the country concerned", and submits that the use of the word "appropriate" rather confirms the rule that anti-dumping duties must be imposed on an individual basis. The panel in *EC – Salmon (Norway)* defined the term "appropriate" as "'proper' or 'fitting' in the context of an anti-dumping investigation".<sup>155</sup> In this regard, China notes that the context of an anti-dumping investigation includes the determination of the dumping margin, which must, as a rule, be calculated on an individual basis, in accordance with Articles 2 and 6.10 of the *Anti-Dumping Agreement*. Therefore, an anti-dumping duty must be deemed to be "appropriate" for a particular exporting producer when it does not exceed the individual dumping margin determined for that

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<sup>152</sup>China's appellee's submission, para. 224 (quoting Panel Report, *EC – Bed Linen*, para. 6.118).

<sup>153</sup>China's appellee's submission, para. 226.

<sup>154</sup>China's appellee's submission, para. 227 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.128).

<sup>155</sup>China's appellee's submission, para. 228 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.704).

exporting producer. China also notes that Article 9.2, first sentence, provides that an anti-dumping duty (singular) be collected in appropriate amounts (plural) on imports from all sources.<sup>156</sup>

92. With respect to the interpretation of Article 9.2, second sentence, of the *Anti-Dumping Agreement*, China submits that the Panel properly found that the obligation "to name" each "supplier" necessarily implies the obligation to impose anti-dumping duties on an individual basis. China also agrees with the Panel's interpretation of the term "suppliers", in the second and third sentences of Article 9.2, as referring to the individual foreign "producers" or "exporters" of the product subject to the anti-dumping investigation. In this respect, China rejects the European Union's argument that the second sentence of Article 9.2 merely imposes an obligation "to name", and that this "naming" obligation may serve to distinguish between exporters or producers who are subject to the anti-dumping duties on that product and those new exporters who may request a review under Article 9.5 of the *Anti-Dumping Agreement*. China fails to see what utility an obligation to name each supplier would have if the general obligation set out in Article 9.2 was not to determine and impose the anti-dumping duties on an individual basis.<sup>157</sup>

93. China points out that Articles 6.10 and 9.4 of the *Anti-Dumping Agreement* are relevant context for the purposes of interpreting Article 9.2 and confirming that it contains an obligation to impose individual anti-dumping duties on each supplier. In China's view, the obligation to determine individual dumping margins contained in Article 6.10 would be rendered meaningless if no similar rule was contained in Article 9.2. In a similar vein, if, pursuant to the second sentence of Article 9.4, an individual anti-dumping duty must be imposed on those exporters or producers not included in the sample to the extent they provided the necessary information, it logically follows that an individual anti-dumping duty must necessarily be determined for those exporters/producers that are included in the sample (in case sampling is used), as well as all the exporters/producers that have provided the necessary information (if sampling is not used).<sup>158</sup> When Article 9.2 of the *Anti-Dumping Agreement* is read in its context it becomes clear that the investigating authorities have the general obligation to impose anti-dumping duties on an individual basis, and that the sole exception to that rule is the one identified in the third sentence of Article 9.2.

94. China contests the European Union's submission that the fact "that Article 9.2 does not require an individual imposition of anti-dumping duties on all known exporters or producers is also supported by the purpose of imposing anti-dumping duties", namely, to "offset *or* prevent

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<sup>156</sup>China's appellee's submission, para. 229.

<sup>157</sup>China's appellee's submission, para. 232.

<sup>158</sup>China's appellee's submission, para. 237.

dumping".<sup>159</sup> Article VI:2 of the GATT 1994 certainly provides that a Member may levy an anti-dumping duty on any product found to be dumped and not exceeding the dumping margin in respect of such a product "in order to offset or prevent dumping"; however, in China's view, this does not authorize Members to impose anti-dumping duties on the basis of whatever circumstances and pursuant to any methodology they wish to choose for the calculation of the margin of dumping.<sup>160</sup>

95. China agrees with the Panel's interpretation that the third sentence of Article 9.2 permits the imposition of country-wide duties when two conditions are met. First, there must be "several suppliers from the same country" and, second, it must be "impracticable to name all these suppliers". However, China rejects the European Union's interpretation of the term "impracticable" that leads the European Union to read Article 9.2 as permitting the imposition of anti-dumping duties on a country-wide basis in cases other than the sampling scenario. China considers that a proper interpretation of the word "impracticable" in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*<sup>161</sup> (the "*Vienna Convention*") does not lead to the conclusion, as the European Union submits, that the exception provided for in Article 9.2, third sentence, includes situations where the imposition of individual duties would be rendered "ineffective" (that is, by actually not offsetting or preventing dumping). The ordinary meaning of the word "impracticable" is "impossible in practice", but it does not encompass something that is "ineffective, not feasible or not suited for being used for a particular purpose".<sup>162</sup> China fails to see how something impossible "for practical reasons" would cover situations where the imposition of anti-dumping duties on an individual basis would be "ineffective" for the purpose of offsetting or preventing dumping.

96. China further notes that the word "impracticable" is used in other provisions of the *Anti-Dumping Agreement* and in other covered agreements. Article 6.10 of the *Anti-Dumping Agreement* expressly sets out that it is a "large number of producers or exporters" that makes individual dumping determinations "impracticable". It flows from the language of this provision that "impracticable" is something not feasible "for practical reasons". Similarly, Article 8.3 of the *Anti-Dumping Agreement* expressly establishes that an instance of impracticability is where "the number of actual or potential exporters is too great". China notes that, under the *Anti-Dumping Agreement*, the word "(im)practicable" is also used in Articles 6.1.1, 6.4, 6.13, 12.2.1, and paragraph 7 of Annex II thereto, and that in all these provisions this term refers to something which is (not) possible for practical reasons, and not to something which is (not) effective. Furthermore, the

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<sup>159</sup>China's appellee's submission, para. 239 (quoting European Union's appellant's submission, para. 164 (original emphasis)).

<sup>160</sup>China's appellee's submission, para. 241.

<sup>161</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>162</sup>China's appellee's submission, para. 249 (quoting European Union's appellant's submission, para. 172).

word "practicable" appears in Article 22.3 of the DSU. In this regard, the arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* emphasized the difference between the meaning of "practicable" and "effective" by stating that "the ordinary meaning of 'practicable' is 'available or useful in practice' ... . In contrast, the term 'effective' connotes 'powerful in effect', 'making a strong impression', 'having an effect or result'".<sup>163</sup>

97. China also contests the European Union's argument that, since the purpose of imposing and collecting anti-dumping duties is to offset or prevent dumping, the imposition of duties on an individual basis becomes "impracticable" when such imposition renders the duties ineffective because they do not actually address the "source of price discrimination". China notes that the European Union fails to explain or define the vague concept of "source of price discrimination", and recalls that there is no rule in Article VI of the GATT 1994 or the *Anti-Dumping Agreement* that addresses it. China further submits that, even if the purpose of the *Anti-Dumping Agreement* is to offset or prevent dumping, nothing in the *Anti-Dumping Agreement* authorizes WTO Members to impose anti-dumping duties pursuant to any methodology they choose in clear deviation of the obligation set forth in Article 1 of the *Anti-Dumping Agreement*, which unambiguously provides that an anti-dumping measure shall only be applied under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the *Anti-Dumping Agreement*.<sup>164</sup> China also notes that, even assuming that the word "impracticable" would mean "ineffective", what is "impracticable" under Article 9.2, second sentence, is the action of "naming" the suppliers on an individual basis and not the action of "imposing" the duties on an individual basis.<sup>165</sup> Lastly, although in China's view there is no need to resort to supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*, since the application of customary rules of interpretation enshrined in Article 31 do not leave its meaning ambiguous or obscure and do not lead to a result that is manifestly absurd or unreasonable, the *travaux préparatoires* confirm the understanding that "impracticable" only relates to the existence of "several suppliers from the same country" for the purposes of Article 9.2 of the *Anti-Dumping Agreement*.

98. In particular, China contends that an examination of the negotiating history of Article 8 of the *Kennedy Round Anti-Dumping Code* (now Article 9.2 of the *Anti-Dumping Agreement*) confirms that the drafters' aim was to clarify whether a Member would be authorized to impose anti-dumping duties only with respect to those particular exporters found to be dumped or, additionally, on all imports

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<sup>163</sup>China's appellee's submission, para. 264 (quoting Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 70-72).

<sup>164</sup>China's appellee's submission, para. 269.

<sup>165</sup>China's appellee's submission, para. 270.

from the country of origin of the dumped imports.<sup>166</sup> China notes that no reference whatsoever to the specific issue of imports from NMEs can be found in the negotiating history of this provision. In addition, China submits that the fact that Article 2(g) of the *Kennedy Round Anti-Dumping Code* (which incorporates the second *Ad Note* to Article VI:1 of the GATT 1994) was also discussed, and eventually included in the *Anti-Dumping Code* during the Kennedy Round, does not demonstrate that the second *Ad Note* and Article 8 necessarily address the same issues.<sup>167</sup> On the contrary, in China's view, there is no link between the *Ad Note* and Article 9.2 of the *Anti-Dumping Agreement*.

99. China agrees with the Panel's interpretation of the terms "sources" and "suppliers" as referring to "the individual foreign producers or exporters of the product subject to the anti-dumping investigation".<sup>168</sup> With respect to the European Union's claim that the Chinese State can be deemed the actual "supplier", China submits that, even if the State could be regarded as a "supplier", it would nonetheless be necessary to prove that the State actually "exports" or "produces" the product concerned. In other words, the fact that the State may have some influence on the manner in which exporting producers conduct their business does not suffice to establish that the State itself is an "exporter" or a "producer". Regarding the European Union's assertion that the term "supplier" can also refer to the "actual source of price discrimination", China submits that there is no legal basis, either in the wording of Article 9.2 or in the negotiating history of that provision, to support such a conclusion.<sup>169</sup>

100. China further submits that, even assuming that the words "source" or "supplier" could somehow include the concept of "actual source of price discrimination", the Panel correctly found that the State cannot be presumed to be the source of price discrimination. In China's view, the lack of any legal basis supporting such a presumption is sufficient to reject the European Union's claim and, therefore, the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU. Notably, the argument that the State in NMEs can be presumed to be the "source of price discrimination" flows from another presumption, namely, that China is indeed an NME, which China also contests. Indeed, China recalls that its Accession Protocol does not contain an understanding that China is an NME but merely contains the possibility, limited in time and only for specific WTO Members, to derogate from the general rules governing normal value determination.

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<sup>166</sup>China's appellee's submission, paras. 274-285.

<sup>167</sup>China's appellee's submission, para. 286.

<sup>168</sup>China's appellee's submission, para. 292 (quoting Panel Report, para. 7.104).

<sup>169</sup>China's appellee's submission, para. 300.

In China's view, the fact that many countries have expressly acknowledged that China is a market economy confirms this position.<sup>170</sup>

101. China contends that, even assuming that the terms "suppliers" or "sources" could be read as referring to the "source of price discrimination", the IT test contained in Article 9(5) of the Basic AD Regulation does not aim at identifying the "source of price discrimination". Indeed, if this were the case, there would be no reason for the European Union to apply different treatment to market economies and NMEs. China notes, instead, that, according to the European Union, the influence or interference by the State in NMEs makes the State the "source of price discrimination", whereas the same influence or interference by the State in market economies does not make the State the "source of price discrimination".<sup>171</sup>

(d) Article I:1 of the GATT 1994

102. China submits that the Panel properly found that Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994. China also submits that the Panel did not fail to comply with Article 11 of the DSU and that it did not err in finding that the *Anti-Dumping Agreement* does not allow for the different treatment of imports from NMEs provided for in Article 9(5) of the Basic AD Regulation.

103. China agrees with the Panel's conclusion that Article 9(5) of the Basic AD Regulation is inconsistent with the MFN obligation contained in Article I:1 of the GATT 1994. China contests the European Union's reading of the word "unconditionally" as permitting an advantage to be made available subject to conditions, as long as this does not result in *de facto* discrimination. Notably, in *Canada – Autos*, the panel clearly stated that once an advantage *per se* has been granted to any product of a WTO Member, the obligation to accord it "unconditionally" to the like product of any other WTO Member means that "the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries".<sup>172</sup> In the light of this finding, subjecting the determination of individual dumping margins and imposition of individual duties (the advantage granted to all WTO Members that are considered market economies) to the fulfilment of the Article 9(5) IT test requirements (the condition imposed on China) is *de jure* inconsistent with the obligation set out in Article I:1 of the GATT 1994. Only in the hypothetical situation in which the IT test was meant to apply to all countries—irrespective of their market economy or NME status—would it be necessary to prove that Article 9(5) results in *de facto* discrimination in order to find a

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<sup>170</sup>China's appellee's submission, para. 304.

<sup>171</sup>China's appellee's submission, para. 312.

<sup>172</sup>China's appellee's submission, para. 323 (quoting Panel Report, *Canada – Autos*, para. 10.18).

violation of Article I:1 of the GATT 1994. China rejects the European Union's assertion that no discrimination arises under Article 9(5) of the Basic AD Regulation because imports from market economies are not "like" imports from NMEs. China also contends that whether or not imports from market economies and NMEs are different in nature is irrelevant for the purpose of the present dispute, precisely because the measure at issue is not origin-neutral on its face.<sup>173</sup>

104. China notes that the Panel addressed the European Union's argument that there is a difference in the nature of imports from NMEs, which justifies different treatment. In this respect, the Panel correctly concluded that the European Union merely asserted that imports from market economies and NMEs are different in nature, without providing sufficient factual evidence to support such a presumption. Notably, a panel's examination and weighing of the evidence submitted falls within the scope of the panel's discretion as the trier of the facts<sup>174</sup>, and, in this case, the Panel did examine the evidence before it, but eventually concluded that it was insufficient to support the European Union's argument.

105. China further submits that the second *Ad Note* to Article VI:1 of the GATT 1994 does not reflect a recognition by Members that imports from market economies and NMEs are different in nature. In China's view, the *Ad Note* does not refer to NMEs but only to countries that have a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the State, this not being China's case. Moreover, China recalls that the fact that exporters from NMEs may be able to show that they act independently from the State casts doubts on the alleged fundamental difference in nature between imports from market economies and NMEs. China also points out that nothing in its Accession Protocol can be read as an understanding that China is an NME. China argues that, pursuant to Section 15 of its Accession Protocol, WTO Members are only entitled to "use a methodology that is not based on a strict comparison with domestic prices or costs in China"<sup>175</sup> when determining normal value. By no means does Section 15 of China's Accession Protocol authorize Members to derogate from the principles contained in the *Anti-Dumping Agreement* that dumping margins and anti-dumping duties must be determined and imposed on an individual basis. In any event, China submits that, even assuming that China's Accession Protocol would permit WTO Members to treat China as an NME, this would still fail to demonstrate that imports from NMEs are different in nature and thus that different treatment is justified.<sup>176</sup>

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<sup>173</sup>China's appellee's submission, para. 328.

<sup>174</sup>China's appellee's submission, para. 339 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>175</sup>China's appellee's submission, para. 344.

<sup>176</sup>China's appellee's submission, para. 345.

106. China requests the Appellate Body to uphold the Panel's finding that Article 9(5) of the Basic AD Regulation violates Article I:1 of the GATT 1994, even in the event it reverses the Panel's findings under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. China rejects the European Union's argument that if Article 9(5) is found to be consistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* it must, by definition, also be consistent with Article I:1 of the GATT 1994 by virtue of the *lex specialis* principle contained in the *General Interpretative Note to Annex 1A of the WTO Agreement*. China recalls that the panel in *EC – Bananas III* established that a conflict only exists where obligations in different agreements cannot be complied with simultaneously.<sup>177</sup> Thus, it fails to see, in the present case, an actual conflict between the *Anti-Dumping Agreement* and Article I:1 of the GATT 1994. In China's view, even if the Appellate Body were to find that the *Anti-Dumping Agreement* is silent (hence does not expressly prohibit) on the question of whether investigating authorities may use special criteria when examining whether a country-wide or a company-specific duty must be imposed with respect to imports from NMEs only, it would still need to examine whether Article I:1 of the GATT 1994 prohibits treating WTO Members differently when deciding on the imposition of a country-wide or individual duty.<sup>178</sup>

(e) Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement*

107. China requests the Appellate Body to uphold the Panel's finding that the European Union acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement*. China submits that, for all the reasons above, the Appellate Body should also find that the European Union failed to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", in accordance with Article XVI:4 of the *WTO Agreement*. Likewise, the European Union failed to "take the necessary steps, of a general or particular character, to ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of the [*Anti-Dumping Agreement*]", in accordance with Article 18.4 of the *Anti-Dumping Agreement*.<sup>179</sup>

2. The Panel's Findings Regarding Article 9(5) of the Basic AD Regulation, "As Applied" in the Fasteners Investigation

108. China requests the Appellate Body to uphold the Panel's finding that the EU authorities violated Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* with respect to the IT determinations in

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<sup>177</sup>China's appellee's submission, paras. 356 and 357 (referring to Panel Reports, *EC – Bananas III*, paras. 7.159 and 7.160).

<sup>178</sup>See China's appellee's submission, para. 359.

<sup>179</sup>China's appellee's submission, para. 363.



the fasteners investigation. China submits that a measure that is found to be "as such" inconsistent with WTO obligations will also necessarily be inconsistent "as applied". China notes that the European Union relies on the fact that all cooperating companies who requested individual treatment obtained it to contend that the application of Article 9(5) of the Basic AD Regulation did not actually lead to a denial of the rights contained in the relevant WTO rules, namely, individual treatment. China stresses that Article 9(5) not only prevents the result that suppliers from NMEs are entitled to obtain but also subjects them to an additional burden by requiring such exporters to request and demonstrate that they fulfil the conditions laid down in Article 9(5).<sup>180</sup> Therefore, the Panel correctly concluded that Article 9(5) of the Basic AD Regulation was inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and, for the same reasons, also inconsistent "as applied" in this investigation.<sup>181</sup>

3. The Panel's Findings under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*

109. China requests the Appellate Body to uphold the Panel's finding that the European Union acted inconsistently with Article 6.4 of the *Anti-Dumping Agreement* by not providing timely opportunities for the Chinese interested parties to see information regarding the product types on the basis of which normal value was established. In addition, China requests the Appellate Body to uphold the Panel's finding that the European Union acted inconsistently with Article 6.2 of the *Anti-Dumping Agreement* because the Chinese interested parties were not able to defend their interests. China requests the Appellate Body to dismiss in its entirety the European Union's appeal under these provisions.

(a) The "Information" Subject to the Obligations under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*

110. China submits that the product types used for the determination of normal value were correctly considered by the Panel as "information" within the meaning of Article 6.4 of the *Anti-Dumping Agreement*.

111. With regard to the interpretation of Article 6.4, China maintains that the ordinary meaning of the term "information" indicates that it is a broad term covering any type of knowledge or facts and is not, as the European Union argues, limited to "facts and raw data rather than factual determinations

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<sup>180</sup>China's appellee's submission, para. 369.

<sup>181</sup>China's appellee's submission, para. 370 (referring to Panel Report, para. 7.148).

and conclusions by the investigating authorities".<sup>182</sup> In China's view, this interpretation is confirmed by the other provisions of the *Anti-Dumping Agreement* in which the term is used, including Articles 2.4, 5.2, 8.6, and 11.2. This interpretation is also confirmed by the panel's finding in *Korea – Dairy* that the term "information" in Article 12.2 of the *Agreement on Safeguards* differs from "issues of fact and law" in that it is more general.<sup>183</sup>

112. China argues that none of the prior disputes relied upon by the European Union supports the interpretation that the term "information" is limited to "facts and raw data". The panel's finding in *Korea – Certain Paper (Article 21.5 – Indonesia)* merely confirms that the relevant information must be before the investigating authorities in the relevant anti-dumping proceeding and does not restrict the meaning of "information" to "raw data".<sup>184</sup> Moreover, the European Union's reliance on the panel's findings in *Korea – Certain Paper* is misplaced, because the panel's findings in that dispute actually support the view that the term "information" covers also the facts as processed by the investigating authority.<sup>185</sup> As for the panel's finding in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, it merely indicates that Article 6.4 applies to "information" as opposed to the "reasoning", but does not suggest that the information is limited to raw data and facts.<sup>186</sup> China further argues that, in *EC – Tube or Pipe Fittings*, the Appellate Body did not assimilate the term "information" under Article 6.4 as "raw data", as the European Union argues<sup>187</sup>, but merely noted the panel's factual finding that the authority's reasoning, as well as certain raw data, had not been disclosed to the interested parties.<sup>188</sup> In addition, the information found to be covered by Article 6.4 in that dispute contained data that had been treated, aggregated, and summarized by the investigating authority, as well as the authority's evaluation of these data. China adds that the "information" found to be subject to Article 6.4 in *EC – Tube or Pipe Fittings* is thus similar to the product types in the fasteners investigation, which are categories of products established on the basis of raw data provided by the Indian producer, Pooja Forge.

113. China contends that the word "relevant" in Article 6.4 supports the interpretation that "information" under Article 6.4 is not limited to raw data and facts but any types of facts that the

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<sup>182</sup>China's appellee's submission, para. 380 (quoting European Union's appellant's submission, para. 253).

<sup>183</sup>China's appellee's submission, para. 379 (quoting Panel Report, *Korea – Dairy*, para. 7.125).

<sup>184</sup>China's appellee's submission, paras. 391 (quoting Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82) and 392.

<sup>185</sup>See China's appellee's submission, para. 393 (referring to Panel Report, *Korea – Certain Paper*, para. 7.201).

<sup>186</sup>China's appellee's submission, para. 394 (quoting Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.124).

<sup>187</sup>See European Union's appellant's submission, para. 254.

<sup>188</sup>China's appellee's submission, para. 395 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 138-141).

interested parties consider relevant to the presentation of the case. As for the context provided by the other paragraphs of Article 6, China argues that the European Union has erroneously tried to create an artificial division between the scope of the different obligations in Article 6, and appears to argue that there can be no overlap between such obligations. In China's view, there is a certain overlap between the different paragraphs of Article 6 and, in certain cases, one set of facts can give rise to a violation of several due process obligations. Specifically, the European Union's assertion that Articles 6.1 to 6.3 of the *Anti-Dumping Agreement* address only the right to submit a party's own evidence and arguments is incorrect in the light of the text of these provisions. This assertion also ignores the intertwined nature of a party's right to make submissions and its right to be informed of what the other interested parties submit.

114. In addition, China contends that the repeated reference to Article 6.5 in the other paragraphs of Article 6 illustrates the interrelated nature of the rights and obligations under Article 6, and undermines the artificial distinctions that the European Union has tried to draw among different paragraphs of Article 6. Furthermore, recalling its view that the term "information" in Article 6.4 has a broad connotation and may also include data that has been treated or organized by the investigating authority, China submits that the term "information" in Article 6.4 covers an even wider scope than "essential facts under consideration" in Article 6.9. Therefore, China argues, the distinction drawn by the European Union between "information" in Article 6.4 and "essential facts under consideration" in Article 6.9 is baseless. Finally, China submits that it would frustrate the object and purpose of the important obligations contained in Article 6 of the *Anti-Dumping Agreement* if the scope of the term "information" were to be interpreted restrictively, thereby depriving interested parties of their essential due process rights. In China's view, the sole limitations to the right granted in Article 6.4 are expressly laid down in the provision itself.

115. Turning to the facts of the fasteners investigation, China finds it "rather absurd" that the European Union seems to be arguing that the "product types" only need to be "disclosed by the investigating authorities as 'essential facts' under Article 6.9".<sup>189</sup> The European Union's argument would imply that, until the disclosure of the "essential facts" towards the end of the investigation, the interested parties would have no way of knowing the basis on which the products used for the normal value determination have been grouped into "product types". China argues that this would result in the interested parties not only being unable to comment on the appropriateness of the product categories but also, not knowing the physical characteristics of the product types, being unable to request adjustments pursuant to Article 2.4 of the *Anti-Dumping Agreement*. China adds that this would also be inconsistent with the requirement, in paragraph 151 of the Report of the Working Party

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<sup>189</sup>China's appellee's submission, para. 456.

on the Accession of China to the WTO (China's "Accession Working Party Report")<sup>190</sup>, that the process of investigation be transparent and that sufficient opportunity be given to Chinese producers and exporters to make comments.

- (b) Whether the "Information" Was Made Available to the Interested Parties in a "Timely" Manner within the Meaning of Article 6.4 of the *Anti-Dumping Agreement*

116. China maintains that the European Union fails to demonstrate that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the facts in relation to its finding that the European Union failed to make information available on a timely basis. China argues that the evidence referred to by the European Union was not deliberately disregarded by the Panel, and that, in any event, the conclusions the European Union draws from these pieces of evidence are incorrect and irrelevant.

117. China maintains that, during the Panel proceedings, the European Union did not refer to the Information Document in rebuttal of China's claim that the European Union acted inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*. Rather, before the Panel, the European Union argued that the Information Document should not be taken into account because it was "an informal document that simply reflects a work in progress and has no legal status whatsoever in EU law or in the context of the *Anti-Dumping Agreement*."<sup>191</sup> Therefore, there is no basis for the European Union's assertion that the Panel disregarded the Information Document, when the European Union itself did not claim that this document constituted relevant evidence.

118. In any event, China considers that the Information Document should not lead to a conclusion different from that reached by the Panel. The parity of wording between the General Disclosure Document and the Information Document regarding "product types" does not, in China's view, detract from the Panel's conclusion on this issue for two main reasons. First, the relevant wording was a mere statement by the European Union that it had determined the normal value "per product type". However, in China's view, this did not change the impression by the Chinese producers since the mere reference to "product types" was made without clearly stating that these product types were different from the product types constructed on the basis of the full PCNs. Considering the consistent practice of the European Union in previous investigations to make the comparison on a PCN basis, this was not sufficient information to draw the necessary conclusions that there was a difference between the "product types" and the PCNs.

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<sup>190</sup>WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1.

<sup>191</sup>China's appellee's submission, para. 473 (quoting European Union's second written submission to the Panel, para. 120).

119. Second, China maintains that neither the Information Document nor the General Disclosure Document was specific enough to allow a Chinese producer to know on which basis the comparison would be made. The General Disclosure Document did not provide any information as to the relevant characteristics of those product groups, or how they were determined, and the same applies to the Information Document. China argues that the "factual context supports an interpretation that the use of such ambiguous wording by the Commission was intentional"<sup>192</sup>, as further illustrated by the very ambiguous reply of the Commission to the two Chinese exporters who had doubts regarding the comparison and requested clarification. To China, it was only when these exporters made a second request that the Commission clearly stated that the product types had not been constructed on the basis of the full PCNs, but were instead established on the basis of the strength class and the distinction between standard and special fasteners.

120. China further contends that, even assuming that the Chinese producers had been informed of the use of product types by either the Information Document or the General Disclosure Document, this would be irrelevant to the examination of whether the European Union complied with Article 6.4 of the *Anti-Dumping Agreement*. Article 6.4 requires an authority to provide "timely opportunities" to see the information requested by the interested parties. In the fasteners investigation, the Commission did not inform the Chinese interested parties about the basis of its normal value determination until one working day before the deadline to make comments, following two requests by the Chinese interested parties. Thus, the Panel's finding that the investigating authorities provided "timely opportunity" to see the information requested is properly supported by the relevant evidence on the record.

121. China submits that the contention put forward by the European Union regarding the ability of Chinese producers to make presentations on the basis of the "information" provided by the European Union was rightly dismissed by the Panel as irrelevant to its analysis under Article 6.4 of the *Anti-Dumping Agreement*. The comments by certain Chinese exporters referred to by the European Union were, according to China, made in a context that was completely unrelated to the determination of the product types that would be used for the comparison between normal value and export price. China submits that the Panel considered these "presentations" but rightly concluded that they were irrelevant to the assessment of China's claim under Article 6.4.

122. With respect to the letter of 24 November 2008<sup>193</sup>, in which one of the Chinese interested parties who requested information concerning product types commented on this "information", China

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<sup>192</sup>China's appellee's submission, para. 484.

<sup>193</sup>Panel Exhibit EU-12, *supra*, footnote 82.

disagrees with the European Union that this piece of evidence indicated that a "timely opportunity" had been provided. China maintains that the content of the information given to the Chinese interested parties was not sufficient to enable a substantiated claim for additional adjustments. Specifically, the European Union did not provide the list of "product types" and their correlation with the PCNs, even though such information had been requested. Furthermore, no precise information regarding the distinction between special and standard fasteners was provided by the Commission. China submits that the fact that the Chinese producer did not request an extension is irrelevant, because it was for the Commission to provide the information in a timely manner, and not for the interested parties to try to gain additional time. Thus, the Panel rightly decided not to rely on this letter in reaching its finding.

(c) The Panel's Finding under Article 6.2 of the *Anti-Dumping Agreement*

123. China submits that, although the European Union claims that the Panel's consequential finding under Article 6.2 is erroneous, it does not provide any additional arguments other than those it has provided in its arguments under Article 6.4 of the *Anti-Dumping Agreement*. Moreover, contrary to the European Union's assertion, the Panel did not read the obligation of Article 6.4 into Article 6.2, thus collapsing both provisions. Rather, even though there might be provisions more specific than Article 6.2 that govern a certain claim, it may be necessary for a panel to also address the claims under Article 6.2.

124. China further contends that the European Union's characterization of the Panel's finding under Article 6.2 as "purely consequential"<sup>194</sup> is erroneous. Rather, the Panel found a violation of Article 6.2 that was independent from Article 6.4, on the basis of the fact that the Chinese producers were denied a full opportunity for the defence of their interests because the Commission provided information concerning the product types used in the determination of the normal value only at a very late stage of the proceedings. Thus, according to China, the Panel found a twofold violation of Article 6.2: (i) the consequential violation resulting from Article 6.4; and (ii) a separate violation resulting from the Commission's failure adequately to provide information that would have allowed the Chinese producers to defend their interests in the investigation.

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<sup>194</sup>China's appellee's submission, para. 505 (quoting European Union's appellant's submission, paras. 236, 244, 247, and 275).

(d) Conclusion

125. On the basis of the above arguments, China requests the Appellate Body to uphold the Panel's findings that the European Union acted inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* with respect to aspects of the normal value determination, and in particular the information on "product types", their characteristics, and their relationship with the PCNs.

4. The Panel's Findings under Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* Regarding Non-Confidential Questionnaire Responses

126. China requests the Appellate Body to uphold the Panel's findings that the European Union acted inconsistently with Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* with respect to the non-confidential questionnaire responses of domestic producers, and the confidential treatment of Pooja Forge's questionnaire responses. Specifically, China agrees with the Panel that Article 6.5.1 requires investigating authorities to ensure that parties provide "appropriate" non-confidential summaries of information submitted in confidence, or, in exceptional circumstances, "appropriate" statements of reasons explaining why summarization is not possible. China further maintains that the Panel rightly determined that it could make findings on China's claims regarding the questionnaire responses of Pooja Forge. On the substance of this claim, China asserts that Article 6.5 applies to analogue country producers because they can be considered "parties to an investigation", or, in the alternative, because the European Union created a new class of "interested parties" when it employed an alternative method of determining normal value using analogue country producers.

(a) Non-Confidential Summaries of Domestic Producers' Questionnaire Responses

127. China agrees with the Panel that Article 6.5.1 of the *Anti-Dumping Agreement* requires an investigating authority to ensure that, where information provided in confidence is not susceptible to non-confidential summary, an "appropriate" statement of reasons explaining why summarization is not possible is required. According to China, Article 6.5.1 entails a two-part obligation. First, Article 6.5.1 obliges an investigating authority to require non-confidential summaries of confidential information, or, where applicable, statements of the reasons why summarization is not possible. Second, an investigating authority must require that these summaries or statements be "appropriate" to satisfy Article 6.5.1.<sup>195</sup> In China's view, interpreting this provision in a way that would allow less than "appropriate" compliance with its terms would render the obligation useless and would violate a

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<sup>195</sup>China's appellee's submission, para. 523.

corollary to the general rule of interpretation that an interpreter should not adopt a reading that reduces the provisions of treaty "to redundancy or inutility".<sup>196</sup>

128. China reminds the Appellate Body that, as several panel reports have already recognized, the *Anti-Dumping Agreement* is aimed at WTO Members, not private parties<sup>197</sup>, and it is for the investigating authority of a Member, therefore, to determine whether a party has substantiated its claim that summarization of confidential information is not possible.<sup>198</sup> China disagrees with the European Union that authorities are not given a "stick"<sup>199</sup> with which to enforce such an obligation, and suggests that both Article 6.5.2<sup>200</sup> and Article 6.8<sup>201</sup> allow authorities to disregard information that is not submitted in compliance with Article 6.5 as a whole. Furthermore, China contends that the European Union's obligations under Article 6.5.1 are not affected by the fact that Chinese exporters did not affirmatively request improved summaries<sup>202</sup>, or by the fact that exporters were able to make presentations on the issues to which the confidential information related without having received improved summaries.<sup>203</sup>

129. Contrary to the European Union's interpretation, China argues that Article 6.5 is only one aspect of the overall transparency requirement contained in both Articles 6.5 and 6.5.1, and that Article 6.5.1 "narrowly circumscribes" the right to confidential treatment.<sup>204</sup> Therefore, notwithstanding the protection of confidentiality, interested parties must be given access to non-confidential summaries of confidential information in order to allow them the exercise of their basic procedural rights. Only in the exceptional circumstance that summarization is not possible can one derogate from the obligation to provide a non-confidential summary. In China's view, if these conditions are not met, confidential treatment must be denied or the information must be disregarded.<sup>205</sup> Read within the overall framework of Article 6, then, confidential treatment is rather an exception to the main objective to ensure that interested parties have a full opportunity for the defence of their interests.<sup>206</sup>

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<sup>196</sup>China's appellee's submission, paras. 523 and 524.

<sup>197</sup>China's appellee's submission, para. 525.

<sup>198</sup>China's appellee's submission, para. 527.

<sup>199</sup>China's appellee's submission, para. 530 (quoting European Union's appellant's submission, para. 321).

<sup>200</sup>China's appellee's submission, para. 531.

<sup>201</sup>China's appellee's submission, para. 532.

<sup>202</sup>China's appellee's submission, para. 534.

<sup>203</sup>China's appellee's submission, para. 535.

<sup>204</sup>China's appellee's submission, paras. 537 and 538.

<sup>205</sup>China's appellee's submission, para. 538.

<sup>206</sup>China's appellee's submission, paras. 540 and 541.



130. China further submits that the language of Article 6.5.1—that authorities "shall require" non-confidential summaries, and that these summaries "shall be" sufficiently detailed—does not suggest only a "best endeavours" obligation. Rather, Article 6.5.1 contains "an obligation to achieve the required result, irrespective of the nature of the endeavours undertaken by the investigating authorities".<sup>207</sup> But even if Article 6.5.1 did contain a "best endeavours" obligation, China argues that the European Union still failed to comply with it. The panel in *Egypt – Steel Rebar* analyzed what is meant by a party's "best endeavours", and found that the term "connotes efforts going beyond those that would be considered 'reasonable' in the circumstances" and implies a "high level of effort".<sup>208</sup> While the Commission may have requested that domestic producers submit non-confidential summaries, it did not do so with respect to the provision of statements of reasons explaining why summarization was not possible in the case that no summary was provided.<sup>209</sup> China urges the Appellate Body to accept the findings of the panel in *Mexico – Olive Oil*, which held that an investigating authority should examine a party's reasons for not summarizing confidential information to determine whether they constitute exceptional circumstances.<sup>210</sup> It also disputes the European Union's reading of that case as factually distinguishable from the fasteners investigation.<sup>211</sup>

(b) Confidential Treatment of Information Obtained from Pooja Forge

(i) *Terms of reference and due process*

131. In response to the European Union's terms of reference challenge, China requests the Appellate Body to uphold the Panel's findings that China's claims regarding Pooja Forge's questionnaire responses were properly before it. The European Union did not raise this claim before the Panel, and China contends that the European Union therefore waived its right to have this objection heard before the Appellate Body.<sup>212</sup> China cites the Appellate Body Report in *Mexico – Corn Syrup (Article 21.5 – US)* for the proposition that a Member who "fails to raise objections in a timely manner, notwithstanding one or more opportunities to do so", may be deemed to have waived its rights to have a panel consider such objections.<sup>213</sup>

132. Even if the Appellate Body finds that the European Union did not waive its right to raise this objection on appeal, China argues that its claim under Article 6.5 regarding Pooja Forge's

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<sup>207</sup>China's appellee's submission, para. 549.

<sup>208</sup>China's appellee's submission, para. 551 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.244).

<sup>209</sup>China's appellee's submission, para. 552.

<sup>210</sup>China's appellee's submission, para. 557 (quoting Panel Report, *Mexico – Olive Oil*, para. 7.92).

<sup>211</sup>China's appellee's submission, para. 558.

<sup>212</sup>China's appellee's submission, para. 570.

<sup>213</sup>China's appellee's submission, para. 574 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50).

questionnaire responses was within the panel's terms of reference. In China's view, its panel request satisfied the requirements of Article 6.2 of the DSU because the legal basis of the claim was clear. China observes that the Appellate Body has drawn a distinction between "claims" and "arguments"<sup>214</sup>, and maintains that Article 6.2 therefore does not require it to explain "*why* and *how* the measure at issue violates the provisions" listed in the panel request.<sup>215</sup> By including certain of its arguments in its panel request, China asserts that it merely foreshadowed arguments that it would later develop in its submissions before the Panel, and that this cannot be interpreted as narrowing the scope of its claim.<sup>216</sup> Furthermore, China explains, the reference in its panel request to "domestic producers" only related to its claims under Article 6.5.1, and not to its claims under Article 6.5, which the Panel found to have been violated with regard to the questionnaire responses submitted by Pooja Forge on a confidential basis.<sup>217</sup> Finally, China notes that the sufficiency of a panel request under Article 6.2 of the DSU entails a two-stage test, articulated by the panel in *EC – Bed Linen* as follows: "first, examination of the text of the request for establishment itself, in light of the nature of the legal provisions in question; second, an assessment of whether the respondent has been prejudiced by the formulation of claims in the request for establishment, given the actual course of the panel proceedings."<sup>218</sup> China claims that the European Union's failure to even raise this claim before the Panel confirms that its ability to defend its interests was not prejudiced.

133. Regarding the European Union's alternative claim, China points out that the Panel examined the issue of due process and sufficiently addressed the European Union's concerns when it dealt with this claim. Having determined that China had not offered arguments or evidence relating to any category of information besides "product types", the Panel limited China's claims with regard to Pooja Forge to the confidential information relating to this category only.<sup>219</sup> In any event, China submits that the Panel did not make the case for China, and highlights several submissions made by China to the Panel, which it argues were sufficient for the Panel to have reached the finding it ultimately made. These submissions were not limited to responses to the Panel's questions, moreover, but also consisted of the submission of the non-confidential version of Pooja Forge's questionnaire responses itself, as well as arguments China made in its second written submission to the Panel.<sup>220</sup> Finally, in China's view, the European Union was not deprived of an "adequate opportunity" to

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<sup>214</sup>China's appellee's submission, para. 578 (quoting Appellate Body Report, *Korea – Dairy*, para. 139; and Appellate Body Report, *EC – Bananas III*, para. 141).

<sup>215</sup>China's appellee's submission, para. 577.

<sup>216</sup>China's appellee's submission, para. 584.

<sup>217</sup>China's appellee's submission, para. 584.

<sup>218</sup>China's appellee's submission, para. 585 (quoting Panel Report, *EC – Bed Linen*, para. 6.26).

<sup>219</sup>China's appellee's submission, para. 588.

<sup>220</sup>China's appellee's submission, paras. 591 and 592.

respond to China's claims. Rather, the European Union chose not to respond because it felt the claim "should be dismissed without entering into the substance".<sup>221</sup>

(ii) *Application of Article 6.5 to analogue country producers*

134. China disagrees with the European Union's claim that Article 6.5 of the *Anti-Dumping Agreement* did not apply to Pooja Forge because it was not an "interested party". China argues that Article 6.5 applies expressly to "parties to an investigation", which is a broader concept than "interested parties" as defined in Article 6.11, and would include analogue third country producers participating in the investigation. This interpretation is supported by the subsequent use of more general terms, such as "a person supplying the information" and "the supplier of the information".<sup>222</sup> China claims that the consistent use of a term other than "interested parties" leads to the conclusion that a different meaning is intended, and that therefore Pooja Forge did not need to come within the definition of "interested parties" to be considered a "party to the investigation".<sup>223</sup> China observes that Pooja Forge submitted an extensive amount of data, that this data was used by the Commission as the basis for calculating normal value, and that the Commission even visited Pooja Forge in order to verify such data.<sup>224</sup> Therefore, in China's view, Pooja Forge "took part in" the fasteners investigation, and should be considered a "party to the investigation".<sup>225</sup>

135. In response to the European Union's argument that it does not make sense, in the light of the realities of NME anti-dumping investigations, to apply the requirements of Article 6.5 to analogue country producers, China asserts that the opposite is true. In China's view, investigating authorities enjoy a high margin of discretion in determining normal value in the context of investigations involving NME countries, and, therefore, it is even more important that the process be as transparent as possible, and that sufficient opportunity be given to Chinese producers to view and make comments on information relating to normal value.<sup>226</sup>

136. Even if the Appellate Body determines that Article 6.5 applies only to "interested parties", as defined by Article 6.11, China suggests that Pooja Forge should be considered an "interested party" in the fasteners investigation. The Appellate Body in *Japan – DRAMs (Korea)* found that "interested parties" should also include those entities whose participation is relevant "for carrying out an objective investigation and for obtaining information or evidence relevant to the investigation at

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<sup>221</sup>China's appellee's submission, para. 593.

<sup>222</sup>China's appellee's submission, para. 602.

<sup>223</sup>China's appellee's submission, para. 599.

<sup>224</sup>China's appellee's submission, para. 603.

<sup>225</sup>China's appellee's submission, para. 603.

<sup>226</sup>China's appellee's submission, para. 606 (quoting China's Accession Working Party Report, para. 151).

hand"<sup>227</sup>, and China contends that an analogue producer falls directly within the Appellate Body's description. China further argues that the European Union itself designated Pooja Forge as an "interested party", for purposes of Article 6.5, by including in documents intended solely for analogue country producers instructions on submitting confidential information in compliance with Article 6 of the *Anti-Dumping Agreement*.<sup>228</sup>

5. The Panel's Findings under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* Regarding the Disclosure of the Identity of the Complainants

137. China counters the European Union's terms of reference challenge regarding the disclosure of the identity of the complainants under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* by pointing out that the European Union fails to distinguish between "claims" and "arguments", and thereby identifies the wrong standard for determining whether a panel request summarizes the legal basis of the complaint in a way that is "sufficient to present the problem clearly".<sup>229</sup> China urges the Appellate Body to follow the standard developed in previous Appellate Body reports, which, in its view, requires that "the identification of the legal basis of the claim must shed light on the nature of the obligation at issue so that the respondent is able to defend itself".<sup>230</sup>

138. China argues that it "precisely" identified its claim when it stated in its panel request that the measure at issue violated Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* "because the [European Union] failed to ensure throughout the investigation to Chinese producers/exporters the full opportunity for the defense of their interests and failed to provide timely opportunities for them to see all information that is relevant to the presentation of their cases".<sup>231</sup> According to China, this was sufficient to identify its "claims", and China had no obligation to include "arguments" explaining how the European Union had violated its obligations. Moreover, the fact that China did include several arguments in its panel request should not be interpreted as limiting the scope of its claims to those arguments only.<sup>232</sup> Furthermore, China disagrees with the European Union that its panel request was not specific enough to "present the problem clearly", because Articles 6.4 and 6.2 together contain multiple obligations. With regard to Article 6.2, China emphasizes that it included only the first

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<sup>227</sup>China's appellee's submission, para. 608 (quoting Appellate Body Report, *Japan – DRAMs (Korea)*, para. 242).

<sup>228</sup>China's appellee's submission, paras. 609-611.

<sup>229</sup>China's appellee's submission, paras. 626-628.

<sup>230</sup>China's appellee's submission, para. 633 (referring to Appellate Body Report, *EC – Bananas III*, para. 141; Appellate Body Report, *US – Carbon Steel*, para. 130; and Appellate Body Report, *Korea – Dairy*, paras. 124 and 127)..

<sup>231</sup>China's appellee's submission, para. 634.

<sup>232</sup>China's appellee's submission, paras. 635-638 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 153).

sentence of this provision in its claim, and did not intend to invoke the entire Article.<sup>233</sup> China contends that, while there may be multiple ways in which these provisions can be violated, the same is true for all provisions of the *Anti-Dumping Agreement*, and does not imply that each contains multiple obligations.<sup>234</sup>

139. Finally, China contends that the Appellate Body's examination of the sufficiency of a panel request must take into account whether or not a respondent's ability to defend itself "was prejudiced, given the actual course of the proceedings".<sup>235</sup> In China's view, "irrespective" of whether China's panel request complied with Article 6.2 of the DSU, the European Union cannot succeed in a terms of reference challenge unless it successfully demonstrates such prejudice.<sup>236</sup> Given the unambiguous statement of China's claims in its first written submission to the Panel, and in its subsequent clarifications in response to the Panel's questions, China insists that the European Union cannot show that its ability to defend itself was prejudiced in this case.<sup>237</sup>

C. *Claims of Error by China – Other Appellant*

1. The Panel's Findings under Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*

140. China requests the Appellate Body to reverse the Panel's finding that the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* with respect to the definition of the domestic industry in the fasteners investigation. First, China alleges that the Panel erred in finding that the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* by excluding from the definition of the domestic industry producers who did not support the complaint against injurious dumping and producers that made themselves known more than 15 days after the publication of the Notice of Initiation of the investigation. In addition, China asserts that the Panel erred in rejecting China's claim that the domestic industry in the fasteners investigation, comprising producers accounting for 27 per cent of total estimated EU production of fasteners, did not include producers whose collective output "constitutes a major proportion of the total domestic production" within the meaning of Article 4.1 of the *Anti-Dumping Agreement*. Finally, China claims that the Panel erred in finding that the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* by making an injury

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<sup>233</sup>China's appellee's submission, para. 645.

<sup>234</sup>China's appellee's submission, para. 648.

<sup>235</sup>China's appellee's submission, para. 632 (quoting Appellate Body Report, *Korea – Dairy*, para. 127).

<sup>236</sup>China's appellee's submission, para. 653.

<sup>237</sup>China's appellee's submission, paras. 654-658.

determination on the basis of a sample of producers that was not representative of the domestic industry.

(a) Exclusion of Certain Producers

141. China claims that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*, in finding that the European Union did not exclude producers that did not support the complaint from the definition of domestic industry. China further argues that the Panel erred in its interpretation of Article 4.1 of the *Anti-Dumping Agreement*, and acted inconsistently with Article 11 of the DSU, in finding that the European Union did not violate Article 4.1 of the *Anti-Dumping Agreement* by excluding from the definition of domestic industry the producers that did not come forward within 15 days of the initiation of the anti-dumping investigation. China also submits that the Panel erred in its interpretation of Article 3.1 of the *Anti-Dumping Agreement* by rejecting China's claim under that provision simply because it had rejected China's claim under Article 4.1 of that Agreement.

(i) *Exclusion of producers who did not support the complaint*

142. China recalls the Appellate Body's finding in respect of Article 11 of the DSU that "the question whether a panel has made an 'objective assessment' of the facts is a *legal* one, that may be the subject of an appeal."<sup>238</sup> Moreover, the Appellate Body has found that, in carrying out its mandate under Article 11 of the DSU, "a panel has the duty to examine and consider **all** the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative [force] of each piece thereof."<sup>239</sup> The Appellate Body has also emphasized that panels cannot make affirmative findings that lack a basis in the evidence contained in the panel record.<sup>240</sup>

143. Turning to the facts of this case, China submits that it claimed before the Panel that the European Union erroneously excluded from the definition of the domestic industry all producers who did not support the complaint regarding the alleged injurious dumping caused by imports of fasteners from China. The Panel, however, failed to conduct an objective assessment of the facts, and erroneously found that the Commission did not exclude producers unsupportive of the complaint from the definition of the domestic industry. China alleges that, in reaching its finding, the Panel relied solely on the European Union's factual assertion that at least one producer who did not affirmatively

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<sup>238</sup>China's other appellant's submission, para. 46 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151 (original emphasis); and referring to Appellate Body Report, *EC – Hormones*, para. 132).

<sup>239</sup>China's other appellant's submission, para. 50 (quoting Appellate Body Report, *Korea – Dairy*, para. 137). (boldface added by China)

<sup>240</sup>China's other appellant's submission, para. 50 (referring to Appellate Body Report, *US – Carbon Steel*, para. 142, in turn referring to Appellate Body Report, *US – Wheat Gluten*, paras. 161 and 162).

state support for the complaint at the pre-initiation stage was included in the definition of the domestic industry. According to China, this assertion of the European Union was not substantiated by evidence, even though evidence in this regard "was clearly accessible to the [European Union] as investigating authorities".<sup>241</sup> For example, the European Union could have provided the list of the complainants and supporters who had come forward before the initiation. Yet, in response to the concern raised by China concerning the reliability of this statement, the Panel stated that it "ha[d] no reason to doubt the European Union's assertion of fact in this regard".<sup>242</sup> Therefore, China submits, "by treating as an established fact a mere assertion made by the [European Union] without supporting evidence, the Panel committed an egregious error and therefore failed to make an objective assessment of the facts as required by Article 11 of the DSU".<sup>243</sup>

144. China further maintains that the Panel "disregarded the explanation put forward by China"<sup>244</sup>, as well as other relevant evidence, which showed that the Commission knew whether the producer who had allegedly remained silent before initiation of the investigation in fact supported the complaint. China submits that, as indicated by the European Union's response to a question posed by the Panel, the Commission enquired into the position of all known producers regarding the complaint and, consequently, must have been aware of the position of the producer who had allegedly remained silent prior to initiation but was included in the domestic industry definition subsequent to initiation.<sup>245</sup> Moreover, the Information Document, which was issued by the Commission several months before concluding the investigation, made it clear that the Commission enquired into, and knew, the position of all known producers regarding the complaint. In "ignoring"<sup>246</sup> such evidence, the Panel failed to make an objective assessment, as required by Article 11 of the DSU, when it found that the fact asserted by the European Union, that a producer who had remained silent in the pre-initiation stage was included in the definition of the domestic industry, necessarily demonstrated that the Commission did not exclude producers unsupportive of the complaint.

145. China asserts, furthermore, that the Panel acted inconsistently with Article 11 of the DSU because it "ignored" the following three pieces of evidence submitted by China demonstrating that the European Union excluded from the domestic industry definition all producers unsupportive of the complaint.<sup>247</sup> Specifically, recital 114 of the Definitive Regulation defines the domestic industry

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<sup>241</sup>China's other appellant's submission, para. 65.

<sup>242</sup>China's other appellant's submission, para. 63 (quoting Panel Report, footnote 473 to para. 7.214).

<sup>243</sup>China's other appellant's submission, para. 66.

<sup>244</sup>China's other appellant's submission, para. 69.

<sup>245</sup>China's other appellant's submission, para. 82 (referring to European Union's responses to Panel Questions 88 and 89).

<sup>246</sup>China's other appellant's submission, para. 82.

<sup>247</sup>China's other appellant's submission, para. 85.

as 45 EC producers who "supported the complaint and fully cooperated in the investigation". The Panel acknowledged that the wording of the Definitive Regulation meant that "only producers expressing support for the complaint were included in the domestic industry".<sup>248</sup> However, the Panel "disregarded the unambiguous wording" of the Definitive Regulation in its assessment of facts<sup>249</sup>, and failed to explain why it did not consider this evidence relevant to its finding.

146. In addition, China maintains that, before the Panel, it referred to the Information Document issued by the Commission half a year before the publication of the Definitive Regulation, in which the Commission explained its preliminary determinations in the fasteners investigation. China argues that the Information Document shows that the domestic industry was initially defined as comprising only the 86 producers who supported the complaint and fully cooperated in the investigation. However, the Panel decided not to rely on the Information Document, finding that it was "a working document reflecting progress in the investigation to that point, with no legal status in EU law", and thus did not constitute "part of the measure" at issue before the Panel.<sup>250</sup> According to China, the Panel erroneously disregarded this evidence, because the Information Document is part of the record of the investigation and a relevant piece of evidence. Finally, China contends that it submitted to the Panel a letter sent by the Commission in response to two Chinese producers' requests for clarification regarding certain aspects of the General Disclosure Document.<sup>251</sup> In the letter, the Commission stated that the volume of production of the Community industry indicated in the General Disclosure Document corresponded to "the Community producers that supported the complaint and fully cooperated in the investigation".<sup>252</sup> In China's view, this evidence demonstrates that only producers supporting the complaint were included in the domestic industry definition. The Panel, however, did not refer to this letter and thus "totally ignored" the evidence in its analysis.<sup>253</sup>

147. On this basis, China requests the Appellate Body to reverse the Panel's finding that the European Union did not exclude producers who did not support the complaint from the definition of the domestic industry. China further requests the Appellate Body to complete the analysis and find that the European Union excluded from the definition of the domestic industry the producers who did not support the complaint and that, in so doing, the European Union acted inconsistently with

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<sup>248</sup>China's other appellant's submission, para. 89 (quoting Panel Report, para. 7.214).

<sup>249</sup>China's other appellant's submission, para. 89.

<sup>250</sup>China's other appellant's submission, para. 92 (quoting Panel Report, para. 7.214).

<sup>251</sup>Letter from the European Commission dated 18 November 2008 to Van Bael & Bellis in response to letter from Van Bael & Bellis dated 12 November 2008, submitted to the Panel as Panel Exhibit CHN-39. The General Disclosure Document, *supra*, footnote 73, was the final disclosure document before the Commission issued the Definitive Regulation.

<sup>252</sup>China's other appellant's submission, para. 97 (quoting Panel Exhibit CHN-39, *supra*, footnote 251, p. 1). (underlining by China omitted)

<sup>253</sup>China's other appellant's submission, para. 99.



Article 4.1 of the *Anti-Dumping Agreement*. China argues that, apart from the two exceptions provided in Article 4.1, no other categories of producers may be excluded by the investigating authorities from the definition of the domestic industry. China finds support for its position in the text of Article 4.1, as well as in the finding of the panel in *EC – Salmon (Norway)* that, under Article 4.1, it is not permissible to exclude from the domestic industry definition certain categories of producers of the like product other than those set out in paragraphs (i) and (ii) of that provision.<sup>254</sup>

(ii) *Exclusion of producers who did not come forward within 15 days of the initiation of the investigation*

148. China claims that the Panel erred in the legal interpretation, and acted inconsistently with Article 11 of the DSU, in finding that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement* by excluding from the domestic industry definition all producers who did not come forward within 15 days of the initiation of the investigation.

149. According to China, the Panel erred in the interpretation of Article 4.1 when finding that "nothing in Article 4.1 ... would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry".<sup>255</sup> In China's view, Article 4.1 prohibits the exclusion of any categories of producers, except for those provided under paragraphs (i) and (ii), and the prohibition applies to producers defined as a category on the basis of the time period within which they must come forward. China submits that the imposition of a deadline for domestic producers to come forward may be permissible by reasons of the necessity for the investigating authorities to conclude the investigations within the time-limit prescribed in Article 5.10 of the *Anti-Dumping Agreement*. The deadline, however, must be balanced with the fundamental due process rights enjoyed by interested parties. Therefore, any deadline granted by the investigating authorities to domestic producers to come forward must be "reasonable" and "sufficient".<sup>256</sup> China further submits that a deadline would not be permissible if the investigating authorities continue to consider the inclusion of producers who come forward after the deadline, but ultimately decide not to include such producers, because this would constitute a deliberate exclusion process inconsistent with Article 4.1 of the *Anti-Dumping Agreement*.

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<sup>254</sup>Under Article 4.1(i), domestic producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product may be excluded. Article 4.1(ii) further provides that domestic industry may be limited to include only those producers within a particular geographic region, if certain criteria are met.

<sup>255</sup>China's other appellant's submission, para. 123 (quoting Panel Report, para. 7.219).

<sup>256</sup>China's other appellant's submission, para. 125.

150. China maintains that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU, when finding that the European Union "did not act to exclude" producers who did not make themselves known within 15 days of the initiation of the investigation.<sup>257</sup> China submits that both the Definitive Regulation and the Information Document indicate that the domestic industry consists of EC producers who expressed a wish to be included in the sample within the 15-day deadline. Moreover, as the Panel also noted, there seemed to have been "a process of considering additional producers for inclusion in the domestic industry", although none of the producers so considered were, in the end, included in the domestic industry.<sup>258</sup> In China's view, this shows that the Commission envisaged including producers other than those who had come forward within the 15-day period but decided not to do so. In the light of the above evidence, China argues, the Panel should have concluded that the Commission acted to exclude producers who had not come forward within the 15-day deadline.

151. Furthermore, China asserts that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU, in finding that China had not established that the 15-day period granted by the Commission was insufficient or unreasonable. China contends that it substantiated, before the Panel, the insufficiency and unreasonableness of the 15-day deadline with the following arguments and evidence. First, the 15-day deadline is "very short and makes it much more likely that complainants and companies supporting the investigation", rather than producers opposing the investigation, will come forward within the prescribed period.<sup>259</sup> China submits that this argument is supported by the evidence, which shows that the 46 producers that made up the domestic industry all supported the complaint and all came forward within the 15-day deadline. In addition, as shown by the Information Document, "a large number of" producers who opposed the complaint or did not express an opinion were not included in the domestic industry definition.<sup>260</sup> Furthermore, by requiring producers to come forward within 15 days and express a willingness to be included in the sample within that deadline, the European Union adopted an approach that was "fundamentally non-objective", because producers opposing the investigation were less likely to be willing to be part of the sample.<sup>261</sup> Finally, China asserts that the 15-day deadline to respond to the sampling form is not the same as the period in which an interested party was requested to make itself known under the Notice of Initiation, which was a 40-day period. China contends, therefore, that it properly substantiated its argument before the Panel that the 15-day deadline was unreasonable and therefore inconsistent with Article 4.1 of the *Anti-Dumping Agreement*.

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<sup>257</sup>China's other appellant's submission, para. 117 (quoting Panel Report, para. 7.215).

<sup>258</sup>China's other appellant's submission, para. 120 (quoting Panel Report, para. 7.215).

<sup>259</sup>China's other appellant's submission, para. 135.

<sup>260</sup>China's other appellant's submission, para. 136.

<sup>261</sup>China's other appellant's submission, para. 137.

152. On this basis, China requests the Appellate Body to reverse the Panel's finding that the Commission "did not act to exclude"<sup>262</sup> producers who did not make themselves known within 15 days of the initiation of the investigation, and that "the mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers ... who did not come forward within the 15-day period, does not demonstrate that the European Union acted inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining the domestic industry."<sup>263</sup> China further requests the Appellate Body to conclude that the 15-day period granted to domestic producers to come forward was not reasonable or sufficient and that the European Union acted inconsistently with Article 4.1 by setting such a deadline.

(iii) *Inconsistency with Article 3.1 of the Anti-Dumping Agreement*

153. China alleges that the Panel erred in its interpretation of Article 3.1 of the *Anti-Dumping Agreement* in dismissing China's claim under that provision because it found that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement* with respect to the definition of the domestic industry. According to China, the separate claims made by China on two different legal bases under Article 4.1 and Article 3.1 required the Panel to examine whether the exclusion from the domestic industry of the producers who did not support the complaint and the producers who did not come forward within the 15-day deadline was inconsistent with the requirements under each of those provisions.

154. China contends that Article 3.1 of the *Anti-Dumping Agreement* requires the injury determination to be based on "positive evidence" and to involve an "objective examination" of, *inter alia*, the impact of dumped imports on domestic producers. Thus, by excluding the producers who did not support the complaint from the definition of the domestic industry, the European Union's action was "fundamentally biased and non-objective", because it "favour[ed] the interests of a group of interested parties, namely the complainants".<sup>264</sup> Moreover, the exclusion of the producers who did not make themselves known within the 15-day deadline was also "bias[ed]" and "non-objective"<sup>265</sup>, because the European Union included only those producers who came forward within that deadline and expressed a willingness to be part of the sample. In China's view, the domestic industry must first be defined from which a sample may be selected. By including in the domestic industry definition only those producers willing to be part of the sample, the European Union's approach confused two different steps in the process of selecting a sample. Because producers not willing to be included in

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<sup>262</sup>Panel Report, para. 7.215. See also China's other appellant's submission, para. 141.

<sup>263</sup>Panel Report, para. 7.219. See also China's other appellant's submission, para. 141.

<sup>264</sup>China's other appellant's submission, para. 155.

<sup>265</sup>China's other appellant's submission, para. 156.

the sample "probably [did] not support the investigation"<sup>266</sup>, this approach made it more likely that only those companies supporting the complaint would be included in the domestic industry definition and, hence, made it more likely to find injury. Therefore, China asserts, by including in the domestic industry only those producers who came forward within the 15-day deadline and expressed their willingness to be part of the sample, the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* by failing to make an objective examination of the impact of the dumped imports on the domestic industry.

155. On this basis, China requests the Appellate Body to reverse the Panel's finding that "China [made] no other allegations in support of its claim of violation of Article 3.1"<sup>267</sup> of the *Anti-Dumping Agreement* and its claim must therefore be rejected, and to conclude that the European Union acted inconsistently with that provision with respect to the definition of the domestic industry.

(b) "A Major Proportion" of the Total Domestic Production

156. China submits that the Panel erred in rejecting China's claim that the domestic industry as defined by the European Union did not include domestic producers whose collective output of the like product constitutes a "major proportion" of the total domestic production. According to China, the Panel erroneously concluded that the fact that the Commission relied on a presumption that 25 per cent of total domestic production constituted "a major proportion" within the meaning of Article 4.1 of the *Anti-Dumping Agreement* was, in itself, insufficient to demonstrate that the definition of the domestic industry in this dispute is inconsistent with Article 4.1. Moreover, the Panel erroneously concluded that the non-quantitative factors raised by China were not relevant to the examination of whether the domestic industry defined by the Commission met the requirement of "a major proportion" under Article 4.1.

(i) *The interpretation of the term "a major proportion"*

157. China submits that the interpretation of the term "a major proportion" on the basis of its ordinary meaning and in the light of the context leads to only one permissible interpretation, which is different from the one followed by the Panel. Quoting the relevant dictionary definitions, China argues that "a major proportion" means a "share" of the whole that is "unusually important, serious or significant".<sup>268</sup> Therefore, the domestic producers whose production makes up a major proportion

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<sup>266</sup>China's other appellant's submission, para. 162.

<sup>267</sup>Panel Report, para. 7.221. See also China's other appellant's submission, para. 171.

<sup>268</sup>China's other appellant's submission, paras. 185 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2381) and 188 (quoting *ibid.*, Vol. 1, p. 1670).

must be representative of the whole. As support, China recalls the Appellate Body's finding in *US – Lamb* that the words "as a whole" and "a major proportion" in Article 4.1(c) of the *Agreement on Safeguards* address "the representative nature of producers making up the domestic industry"<sup>269</sup>, as well as the panel's finding in that dispute that the words relate to the "representativeness of the data pertaining to the condition of the domestic industry".<sup>270</sup> China submits that, although the Panel found that the word "major" means "important, serious, or significant", the Panel failed to take into account the "representative" requirement under the phrase "a major proportion".<sup>271</sup>

158. According to China, the reference to "the domestic producers as a whole", which constitutes the immediate context of the phrase "a major proportion", indicates that "[t]he reason for permitting the domestic industry to be defined as those producers constituting only a 'major proportion' is to address the practical impossibility for investigating authorities in some cases to obtain the requested information from all the producers of the like product."<sup>272</sup> China recalls that paragraphs (i) and (ii) of Article 4.1 expressly authorize the exclusion from the definition of the domestic industry of two categories of producers. In China's view, it would be superfluous to set out precise conditions for the application of the two exclusions if investigating authorities could in any event exclude from the definition of the domestic industry any other producers they wish as long as the remaining producers still constitute a major proportion. Moreover, given the requirement under Article 3.1 that an injury determination "be based on positive evidence and involve an objective examination", China argues that "a major proportion" must be sufficiently representative of the domestic production "as a whole" to ensure that the examination carried out with respect to the industry, as defined, is "objective" within the meaning of Article 3.1 of the *Anti-Dumping Agreement*.

159. Therefore, China submits, whether the requirement of "a major proportion" is met must be assessed in the light of the specific circumstances of a case, including "the practical feasibility for the investigating authorities to include more producers than those actually included, the number of producers and the exclusion of certain categories of producers from the scope of the domestic industry".<sup>273</sup>

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<sup>269</sup>China's other appellant's submission, para. 185 (quoting Appellate Body Report, *US – Lamb*, para. 91).

<sup>270</sup>China's other appellant's submission, para. 186 (quoting Panel Report, *US – Lamb*, para. 7.73). (underlining by China omitted)

<sup>271</sup>China's other appellant's submission, para. 190.

<sup>272</sup>China's other appellant's submission, para. 195.

<sup>273</sup>China's other appellant's submission, para. 201.

(ii) *Whether the domestic industry defined in the fasteners investigation meets the requirement on "a major proportion"*

160. China maintains that, as indicated in the Definitive Regulation in the fasteners investigation, the EU producers whose output represented 27 per cent of the total domestic production constituted "the Community industry within the meaning of Articles 4(1) and 5(4) of the [Basic AD Regulation]."<sup>274</sup> Articles 4(1) and 5(4) of the Basic AD Regulation are largely similar to Articles 4.1 and 5.4 of the *Anti-Dumping Agreement*, except that Article 4(1) of the Basic AD Regulation defines "a major proportion" as being equal to 25 per cent of the total domestic production, namely, the minimum benchmark for meeting the standing requirement contained in Article 5(4). Thus, it is "not disputed" that the Commission concluded in the fasteners investigation "that the domestic producers making up the domestic industry constituted a 'major proportion' solely because they represented more than 25% of the total domestic production".<sup>275</sup>

161. China contends that Article 5.4 of the *Anti-Dumping Agreement* merely lays down a standard for determining whether the standing requirement is met and an investigation may be initiated. Article 4.1, in contrast, defines the "domestic industry" and is therefore a very different exercise than that of measuring the degree of support for a complaint within the meaning of Article 5.4. Therefore, in China's view, it is "legally incorrect" to establish an automatic link between the requirement on "a major proportion" and the 25 per cent minimum benchmark for meeting the standing requirement.<sup>276</sup> Moreover, China submits that whether the requirement on "a major proportion" is met may not be determined in the abstract, on the basis of a quantitative benchmark, but depends on the facts of the case. In China's view, by relying on this rule when defining the domestic industry, without assessing the specific circumstances in this case, the Commission acted inconsistently with Article 4.1 of the *Anti-Dumping Agreement*.<sup>277</sup> Thus, the Panel "made a fundamental legal error in finding that 'the assertion that the Commission relied on a presumption is not alone sufficient to demonstrate, *prima facie*, that the definition of domestic industry in this case is inconsistent with Article 4.1 of the [Anti-Dumping Agreement].'"<sup>278</sup>

162. China further maintains that the Panel erred in failing to consider certain non-quantitative factors that China argued were relevant to the examination of whether the requirement of "a major proportion" was met in the fasteners investigation. Specifically, China argues that, by excluding from

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<sup>274</sup>China's other appellant's submission, para. 211 (quoting Definitive Regulation, *supra*, footnote 4, recital 114).

<sup>275</sup>China's other appellant's submission, para. 216.

<sup>276</sup>China's other appellant's submission, para. 237.

<sup>277</sup>See China's other appellant's submission, paras. 223-228 and 240.

<sup>278</sup>China's other appellant's submission, para. 227 (quoting Panel Report, para. 7.225).

the domestic industry definition the producers who opposed the complaint or remained silent, the "domestic industry" as defined by the Commission was not representative of the whole industry and, thus, not "a major proportion" of the production of that industry.<sup>279</sup> Furthermore, the Panel erred in finding that the possibility or feasibility for the investigating authority to include more producers in the domestic industry definition, and the reasons why it did not do so, was irrelevant to an examination of whether the requirement on "a major proportion" was met. As shown by the relevant evidence, the Commission had identified at the outset of the investigation "at least 114 producers representing 45% of the total domestic production".<sup>280</sup> However, the Commission ultimately excluded more than half of these producers from the domestic industry definition, even though it would have been possible for it to include more producers. Finally, China asserts that the number of producers constituting the domestic industry is relevant to a determination of whether a certain percentage in terms of the volume of production constitutes a major proportion. Yet, the Panel failed to take into account the fact that, although there were more than 300 producers of fasteners in the European Union, the domestic industry definition only included 45 producers. In China's view, "[t]his is a very limited proportion which cannot be considered a 'major proportion'".<sup>281</sup>

163. On this basis, China requests the Appellate Body to reverse the Panel's finding that, "[e]ven assuming non-quantitative factors are relevant to the definition of a domestic industry under Article 4.1, we do not consider that the factors China raises in this regard are relevant in this case, or in general."<sup>282</sup> China further requests the Appellate Body to conclude that, in the light of these non-quantitative factors, the domestic producers constituting the domestic industry in the fasteners investigation did not represent a "major proportion" of the domestic industry.

(c) The Representativeness of the Sample of Domestic Producers in the Injury Determination

164. China submits that the Panel erred in rejecting China's claim that the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* in the selection of a sample of the domestic producers for purposes of the injury determination. China alleges that the Panel made the following two specific errors.

165. First, China asserts that the Panel wrongly rejected China's contention that, because "only a statistically valid sample will be sufficiently representative for purposes of an injury

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<sup>279</sup>See China's other appellant's submission, paras. 245-249.

<sup>280</sup>China's other appellant's submission, para. 254.

<sup>281</sup>China's other appellant's submission, para. 258.

<sup>282</sup>Panel Report, para. 7.230. See also China's other appellant's submission, para. 259.

determination"<sup>283</sup>, the sample of producers selected by the Commission on the basis of the largest volume of production that could reasonably be investigated was not representative of the domestic industry. According to China, despite the absence of a specific provision in the *Anti-Dumping Agreement* addressing the issue of sampling of the domestic industry for purposes of assessing injury, "the investigating authorities are bound by the obligation laid down in Article 3.1 of the [*Anti-Dumping Agreement*] that the injury determination involve[s] an objective examination and be based on positive evidence."<sup>284</sup> China asserts that, in the context of the dumping determination, pursuant to Article 6.10 of the *Anti-Dumping Agreement*, limiting a sample to the largest percentage of the volume of the exports that can reasonably be investigated may be justified in the light of the "possibility for subsequent refunds if an individual producer is not actual[ly] dumping".<sup>285</sup> Because "there is no similar system which would take into account the absence of injury with respect to certain domestic producers", it is "fundamental" that a sample in the injury context be sufficiently representative of the domestic industry as a whole.<sup>286</sup> Therefore, in China's view, a sample cannot merely be based on the largest volume that can reasonably be investigated, but should take into account other criteria, such as, the use of a statistically valid sample.

166. Second, China alleges that the Panel erred in concluding that China had not demonstrated "that the EU investigating authority could have carried out the entire injury examination for the domestic industry it had defined, or at least included more producers in the sample".<sup>287</sup> China submits that, as it demonstrated before the Panel, the Commission examined certain injury factors with respect to the entire domestic industry as defined, that is, the 45 domestic producers. Thus, contrary to the Panel's finding, the Commission could have also analyzed the other injury factors for the entire domestic industry as defined, rather than with respect to only the sampled producers.

167. On this basis, China requests the Appellate Body to reverse the Panel's finding that the European Union did not act inconsistently with Article 3.1 of the *Anti-Dumping Agreement* in the selection of a sample of the domestic industry, and to conclude that the European Union, by selecting the sample for the injury determination solely on the basis of the volume of production, and by including in the sample only six producers representing 17.5 per cent of total domestic production, acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement*.<sup>288</sup>

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<sup>283</sup>China's other appellant's submission, para. 265 (quoting Panel Report, para. 7.239).

<sup>284</sup>China's other appellant's submission, para. 270.

<sup>285</sup>China's other appellant's submission, para. 272 (quoting Panel Report, *EC – Salmon (Norway)*, footnote 309 to para. 7.132).

<sup>286</sup>China's other appellant's submission, para. 272.

<sup>287</sup>China's other appellant's submission, para. 276 (quoting Panel Report, para. 7.240).

<sup>288</sup>See China's other appellant's submission, paras. 275 and 278; and Panel Report, para. 7.241.



2. The Panel's Findings under Article 2.4 of the *Anti-Dumping Agreement*

168. China requests the Appellate Body to reverse the Panel's finding that the European Union did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* with respect to the comparison of the export price and normal value in the dumping determination. China claims that the Panel also acted inconsistently with Article 11 of the DSU by not addressing China's argument that the Commission failed to indicate to the interested parties what information was necessary to ensure a fair comparison. China further submits that the Panel erred in its interpretation and application of Article 2.4, and acted inconsistently with Article 11 of the DSU, in rejecting China's claim that the Commission failed to make adjustments for the differences in physical characteristics identified in the PCNs. Finally, China maintains that the Panel erred in the interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in rejecting China's claim that the Commission failed to make adjustments for quality differences.

(a) The Panel's Treatment of China's Argument

169. China recalls that, at the outset of the fasteners investigation, the Chinese producers were requested to provide product information on the basis of the PCNs identified by the Commission, and "it was clear"<sup>289</sup> that the PCNs would be used for the purposes of ensuring a fair comparison between the export price and the normal value. Although the Commission later decided not to use the PCNs for purposes of price comparison, and instead relied on certain "product types", it did not inform the Chinese producers of this change until one working day before the deadline for submitting comments on the General Disclosure Document. Before the Panel, China claimed that, under the last sentence of Article 2.4 of the *Anti-Dumping Agreement*, the Commission was required to inform the Chinese producers of the fact that the comparison was not made on the basis of the PCNs and to provide them with a sufficient opportunity to comment. However, the Panel did not address this argument, noting that this was "the main argument China raise[d] in connection with its claim under Articles 6.2, 6.4, 6.5 and 6.9 of the [*Anti-Dumping Agreement*]"<sup>290</sup>, and did not explain why it was not necessary to examine the argument in the context of China's claim under Article 2.4 of the *Anti-Dumping Agreement*. China maintains that the Panel thus failed to address a substantial argument by China that was central in the assessment of whether the European Union acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement*. The Panel's failure to address this argument "deprive[d] China of a

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<sup>289</sup>China's other appellant's submission, para. 297.

<sup>290</sup>China's other appellant's submission, para. 314 (quoting Panel Report, para. 6.98).

complete resolution of the matter at issue" and "would ... constitute a false exercise of judicial economy".<sup>291</sup>

170. China therefore requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to address China's argument under the last sentence of Article 2.4 of the *Anti-Dumping Agreement*. In the event the Appellate Body considers that the Panel "implicitly rejected China's argument"<sup>292</sup>, China requests the Appellate Body to find that the Panel erred in its interpretation and application<sup>293</sup> of Article 2.4 of the *Anti-Dumping Agreement*.

171. China further requests the Appellate Body to complete the analysis and find that the Commission's failure to inform the interested parties of the change in the basis for price comparison constitutes a violation of Article 2.4 of the *Anti-Dumping Agreement*. China submits that the relevant factual findings of the Panel in its examination of China's claim under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* provide the factual basis for completing the analysis. Specifically, the Panel found that the "Chinese producers were informed very late in the proceedings of the product types that formed the basis of the comparisons underlying the Commission's dumping determinations" and that, despite their request, the Chinese producers "were not given a timely opportunity to see the relevant information by the Commission".<sup>294</sup> Moreover, the Panel correctly found that, without the information concerning the basis on which the comparison will actually be made, "it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."<sup>295</sup> China therefore submits that the Commission was under an obligation to inform the interested parties of the basis on which the comparison between the export price and the normal value was made, and to provide sufficient time for the interested parties to comment or request adjustments. Because the Commission failed to do so, China requests the Appellate Body to find that the European Union failed to "indicate to the parties in question what information is necessary to ensure a fair comparison" and imposed "an unreasonable burden of proof on those parties"<sup>296</sup>, and thus acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement*.

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<sup>291</sup>China's other appellant's submission, para. 312.

<sup>292</sup>China's other appellant's submission, para. 315.

<sup>293</sup>Although China's other appellant's submission alleges that the Panel erred in its interpretation (see para. 296), China clarified at the oral hearing that its claim also covers the Panel's application of Article 2.4 to the facts of the case.

<sup>294</sup>China's other appellant's submission, para. 325 (quoting Panel Report, para. 7.492).

<sup>295</sup>China's other appellant's submission, para. 326 (quoting Panel Report, para. 7.491).

<sup>296</sup>China's other appellant's submission, para. 332.

(b) Physical Differences

(i) *The Panel's interpretation and application of Article 2.4*

172. China submits that the Panel erred in its interpretation and application<sup>297</sup> of Article 2.4 of the *Anti-Dumping Agreement* in rejecting China's argument that the European Union acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by failing to evaluate, and make adjustments for, physical characteristics identified in the PCNs.

173. China submits that, under Article 2.4 of the *Anti-Dumping Agreement*, the requirement to make due allowance for physical differences means that the investigating authority must at least evaluate identified differences with a view to determining whether or not an adjustment is required. China alleges that this is confirmed by relevant findings of the panels in *Argentina – Ceramic Tiles* and *EC – Tube or Pipe Fittings*.<sup>298</sup> In the light of the fact that the Commission initially identified the physical characteristics reflected in the PCNs as "necessary to make a 'fair comparison'" but later decided to base the comparison on product types instead<sup>299</sup>, China contends that Article 2.4 imposes a "twofold obligation"<sup>300</sup> on the Commission. Specifically, the Commission was required to: (i) first evaluate all differences in physical characteristics that had been identified in the PCNs to determine whether they affected price comparability; and (ii) conclude, on the basis of such an evaluation, that adjustments were indeed required so as to ensure a fair comparison.<sup>301</sup> Yet, the Commission failed to do either.

174. China maintains that, in rejecting China's argument that the Commission acted inconsistently with Article 2.4, the Panel erroneously found that there was no evidence on the record demonstrating that the PCN elements necessarily affected price comparability. In China's view, the Panel failed to distinguish between the two-step analysis that the Commission was required to conduct, because its finding only concerned the second step described above. Indeed, the relevant findings of the Panel make it clear that the physical characteristics in the PCNs constitute differences that had been identified by the investigating authorities. Specifically, the Panel found that the fact that the Commission sought information on the basis of PCNs "suggest[ed] ... that these elements might

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<sup>297</sup>Although China's other appellant's submission alleges that the Panel erred in its interpretation (see paras. 296, 344, and 367), China clarified at the oral hearing that its claim also covers the Panel's application of Article 2.4 to the facts of the case.

<sup>298</sup>See China's other appellant's submission, paras. 353 and 354 (quoting Panel Report, *Argentina – Ceramic Tiles*, para. 6.113; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157).

<sup>299</sup>China's other appellant's submission, para. 337.

<sup>300</sup>China's other appellant's submission, para. 346.

<sup>301</sup>See China's other appellant's submission, para. 346.

affect price comparability".<sup>302</sup> China further contends that, because the interested parties were under the impression that the price comparison was being made on the basis of the PCNs, they made no requests for adjustments during the investigation concerning the physical characteristics reflected in the PCNs. Nonetheless, as China submitted before the Panel, the interested parties stressed throughout the investigation the importance of using the PCNs for purposes of ensuring a fair comparison. However, the Panel failed to "come to the logical conclusion" that, because the physical characteristics "*might* affect price comparability", they had been identified as differences that the Commission was required to evaluate.<sup>303</sup>

175. China also takes issue with the Panel's finding that, although information organized on the basis of the PCNs may well facilitate the comparison process, "the obligation to make a fair comparison under Article 2.4 does not vary depending on the form in which information is requested or received."<sup>304</sup> In China's view, because the Commission had identified certain physical characteristics as possibly affecting price comparability, it was required to evaluate those characteristics to determine whether adjustments were necessary to ensure a fair comparison.

176. On this basis, China requests the Appellate Body to reverse the Panel's finding that "the argument that the Commission should have considered whether the elements excluded from the comparison nonetheless required adjustments does not amount to a *prima facie* case of violation of Article 2.4"<sup>305</sup>, and find that the European Union's failure to evaluate the differences identified through the PCNs constitutes a violation of Article 2.4 of the *Anti-Dumping Agreement*.

(ii) *The Panel's failure to make an objective assessment of the facts*

177. China submits that the Panel failed to make an objective assessment of the facts in finding that China pointed to no evidence that was before the investigating authority in support of its claim that the PCN characteristics indicated differences affecting price comparability. As a preliminary matter, China recalls that the Commission, by failing to inform the interested parties of the basis for the price comparison, made it impossible for the Chinese producers to request adjustments and provide the necessary evidence.

178. Moreover, China contends that it demonstrated to the Panel that there was evidence before the Commission showing that the PCN characteristics were differences affecting price comparability and

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<sup>302</sup>China's other appellant's submission, para. 359 (quoting Panel Report, para. 7.301). (underlining by China omitted)

<sup>303</sup>China's other appellant's submission, para. 361. (original emphasis)

<sup>304</sup>China's other appellant's submission, para. 365 (quoting Panel Report, para. 7.303).

<sup>305</sup>China's other appellant's submission, para. 368 (quoting Panel Report, para. 7.306).

warranting adjustments. Specifically, the fact that certain physical characteristics were reflected in the PCNs shows that such characteristics affect price comparability, because reliance on PCNs had been identified by the investigating authorities at the beginning of the investigation as being necessary to ensure a fair comparison. In addition, several of the PCN characteristics were used by the Commission for purposes of the price undercutting analysis between the Chinese and European fasteners producers in the injury determination, including the type of coating applied and the use of expensive chrome on coating. China also alleges that it referred the Panel to the following three pieces of additional evidence to demonstrate that the PCN characteristics necessarily affected price comparability: (i) a statement by the EU producers, in the context of a discussion on the comparability between EU and Chinese fasteners, regarding the fact that raw materials represent 40 to 55 per cent of the costs and may be lower for products with a little diameter; (ii) a statement by the Chinese Chamber of Commerce, in the same context, that it was necessary to add to the differences reflected in the PCNs a distinction between standard and special fasteners; and (iii) a presentation on behalf of a Chinese interested party that the PCN characteristics are not sufficiently detailed to differentiate interims of the quality of fasteners. China therefore asserts that, by ignoring the above evidence, the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU.

179. China further maintains that Article 17.6(i) of the *Anti-Dumping Agreement* requires the Panel to determine whether the Commission's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. Because the Commission "ignored the evidence before it that demonstrated that the PCN characteristics could affect price comparability", "it is clear" that the Commission's establishment of the facts was not proper and its evaluation of those facts was not unbiased and objective.<sup>306</sup> Thus, the Panel, by finding that it would be inappropriate for it to consider whether the PCN characteristics reflect differences affecting price comparability, "ignored the duty imposed upon it by Article 17.6 (i)" of the *Anti-Dumping Agreement*.<sup>307</sup>

180. On this basis, China requests the Appellate Body to reverse the above Panel findings. China further requests the Appellate Body to complete the analysis and find that the European Union acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by not making the necessary adjustments for the differences in physical characteristics identified in the PCNs. This is because an objective and unbiased investigating authority should have concluded, on the basis of all the elements before the Commission, that the PCN characteristics described in this case indicate differences

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<sup>306</sup>China's other appellant's submission, para. 387.

<sup>307</sup>China's other appellant's submission, para. 386.

affecting price comparability and that, accordingly, these had to be accounted for by means of adjustments.

(c) Quality Differences

181. China asserts that the Panel erred in the interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in rejecting China's claim that the European Union acted inconsistently with that provision by not making the necessary adjustments for quality differences affecting price comparability.

182. China recalls that, under Article 2.4, investigating authorities must at least evaluate identified differences in physical characteristics with a view to determining whether or not an adjustment is necessary to ensure a fair comparison of the export price and the normal value. In this case, "[i]t is not disputed that at least one of the Chinese exporters" sent a letter requesting adjustments for differences in quality between Indian and Chinese fasteners.<sup>308</sup> Moreover, the Commission "acknowledge[d] the existence of quality differences" in the Definitive Regulation by stating that "[a]ny perceived differences in quality, which may subsist from a user's point of view, can be dealt with through an adjustment for physical differences".<sup>309</sup> The Commission also stated in a letter to some Chinese exporters that adjustments were made for the cost of quality control that "reflects the general difference in quality level".<sup>310</sup> This, in China's view, also shows that quality differences had been identified and that the Commission should have evaluated such differences. China therefore contends that the Panel erred in not concluding that the Commission acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by not evaluating the identified quality differences.

183. China further submits that, in finding that the Commission did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement*, the Panel "ignore[d] the fact" that the Commission acknowledged the existence of quality differences. According to China, there is a duty on the investigating authority to request the necessary information if it feels that a claimed adjustment is not sufficiently substantiated. Therefore, "at the very least, the Commission should have sought additional information on this issue."<sup>311</sup> China thus maintains that the Panel erred in law by failing to conclude that the failure of the Commission to indicate further information that would be necessary to

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<sup>308</sup>China's other appellant's submission, para. 410.

<sup>309</sup>China's other appellant's submission, para. 411 (quoting Definitive Regulation, *supra*, footnote 4, recital 52).

<sup>310</sup>China's other appellant's submission, para. 413 (quoting Letter dated 21 November 2008 from the European Commission to Van Bael & Bellis replying to Van Bael & Bellis' letter dated 17 November 2008 (Panel Exhibit CHN-31), point 5).

<sup>311</sup>China's other appellant's submission, para. 420.

ensure a fair comparison and the failure to make appropriate adjustments was inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

3. The Panel's Findings under Articles 6.5, 6.2, and 6.4 of the *Anti-Dumping Agreement* Regarding the Disclosure of the Identity of the Complainants

184. China requests the Appellate Body to reverse the Panel's findings that the European Union did not act inconsistently with Articles 6.5, 6.4, and 6.2 of the *Anti-Dumping Agreement* when it failed to disclose to Chinese producers the identity of the complainants and the supporters of the complaint. China argues that the complainants' allegation of "potential commercial retaliation" was not sufficient to satisfy the requirement to show "good cause" under Article 6.5, and that the Panel violated Article 11 of the DSU in its evaluation of this claim. Assuming the Appellate Body finds that the identity of the complainants and the supporters of the complaint were not properly treated as confidential information, China requests the Appellate Body to complete the analysis to find that the European Union therefore also violated Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* when it failed to disclose this information to Chinese exporters upon request.

(a) The Complainants' "Good Cause" Showing

185. China claims that the Panel erred in finding that the Commission had established that "good cause" existed for the confidential treatment of the identity of the complainants and the supporters of the complaint under Article 6.5 of the *Anti-Dumping Agreement*. China observes that the requirement to show "good cause" is, in the words of the panel in *Mexico – Steel Pipes and Tubes*, of "critical importance" to preventing parties from abusing the privileges of confidential treatment, and in "preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation".<sup>312</sup> In China's view, while every request for confidentiality requires an evidentiary showing of "good cause", in the case of information that is not "by nature" confidential, such as the identity of the complainants, "a higher threshold needs to be met".<sup>313</sup>

186. China argues that the Panel erred in its interpretation of the "good cause" requirement, because, in its view, Article 6.5 does not apply to commercial retaliation that is merely hypothetical in nature. China contends that, in the complaint, domestic producers requested confidential treatment of their identity because of a "potential retaliation" that "could" happen, but did not allege or show that any "significantly adverse effect" "would" happen if confidential treatment [was] not granted". In

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<sup>312</sup>China's other appellant's submission, para. 447 (quoting Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380).

<sup>313</sup>China's other appellant's submission, para. 449.

China's view, Article 6.5 refers to situations that "*would have* a significantly adverse effect" upon the parties supplying the information, and that the complainants' use of the word "could" suggests that "the likelihood of the detrimental effect to occur is rather remote".<sup>314</sup>

187. According to China, the complainants failed to provide any evidence to support the assertion in the complaint that a threat of potential commercial retaliation existed. The Panel itself acknowledged that the "*only evidence* before the Commission was the complaint" and that "[t]he Commission relied on this statement, although there is no indication that the complainants submitted evidence to support their concern in this regard."<sup>315</sup> In China's view, the reasoning included in the complaint, that retaliation could come from the complainants' customers who also bought the subject products from China, was a "mere statement" and clearly does not amount to an evidentiary showing. China contends that an interpretation of Article 6.5 that does not require an evidentiary showing to support "good cause" "is contrary to both the text and *ratio legis* of Article 6.5" and "seriously undermines the delicate balance sought in that provision to protect the interests of all interested parties".<sup>316</sup>

188. China further argues that the evidentiary burden of proof under Article 6.5 rests with the party requesting confidential treatment, and that the Panel violated Article 11 of the DSU when it impermissibly shifted this burden on China. The Panel found that China did not "contest the factual assertion" contained in the complaint, and had not "proffered any evidence, or even argued, that this assertion was unfounded, unreasonable, or untrue".<sup>317</sup> It similarly found that evidence of "potential commercial retaliation" is not likely to be obtainable, and that therefore, the allegation of the complainants would be sufficient "unless there is some reason to believe that the fear of retaliation is unreasonable, unfounded, or untrue – and China has proffered none".<sup>318</sup> In China's view, it was up to the complainants in the investigation to present "compelling evidence" to support their allegation, and it was not China's responsibility to present evidence before a WTO panel that no "good cause" existed.<sup>319</sup> Moreover, even if China had an obligation to offer evidence against the complainants' allegation of potential commercial retaliation, it was prevented from doing so because it was never given access to those complainants' identity.<sup>320</sup>

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<sup>314</sup>China's other appellant's submission, paras. 450-453.

<sup>315</sup>China's other appellant's submission, para. 458 (quoting Panel Report, para. 7.453).

<sup>316</sup>China's other appellant's submission, para. 463.

<sup>317</sup>China's other appellant's submission, para. 464 (quoting Panel Report, para. 7.452).

<sup>318</sup>China's other appellant's submission, para. 464 (quoting Panel Report, para. 7.453).

<sup>319</sup>China's other appellant's submission, paras. 464 and 467.

<sup>320</sup>China's other appellant's submission, para. 468.



189. Before the Panel, China claimed that the Commission's disclosure of the sampled producers' identity in the context of the injury determination demonstrated that good cause could not have existed for the Commission's earlier confidential treatment of those producers' identity as complainants and supporters of the complaint. By disclosing the names of the sampled producers, China submits, the Commission thereby also revealed the names of several complainants and/or supporters of the complaint. The fact that the domestic producers did not request that their identity be kept confidential in this context as well, demonstrates, in China's view, that no "good cause" existed to treat their identity as confidential earlier in the proceedings.<sup>321</sup> On appeal, China claims that the Panel erred in rejecting this argument because the Panel record contains clear evidence showing that the entire domestic industry as defined by the Commission, and therefore also the domestic producers sampled for purposes of the injury determination, consisted only of complainants and supporters of the complaint.<sup>322</sup>

190. China also claims that the Panel erred in finding that the identification of companies as sampled producers would not cause the same concerns for those companies as their identification as complainants and supporters, and that in the fasteners investigation it was not the case that the sampled producers were necessarily complainants or supporters of the complaint. China argues that the former argument is "unfounded" because the Panel did not explain why sampled producers would not have the same concerns as complainants and supporters. As to the latter, China submits that this conclusion was erroneous, because it was based on the European Union's "mere assertion" that "at least one company included in the sample was not, in fact, either a complainant or supporter of the complaint".<sup>323</sup>

(b) Disclosure under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*

191. Assuming that the Appellate Body reverses the Panel's finding that the European Union properly treated the identity of the complainants as confidential information under Article 6.5 of the *Anti-Dumping Agreement*, China requests that the Appellate Body also reverse the Panel's consequential findings under Articles 6.4 and 6.2 of the *Agreement*, and find instead that the Commission's failure to disclose the identity of the complainants was inconsistent with both provisions.<sup>324</sup> To this end, China argues that the identity of the complainants and the supporters of the complaint should have been disclosed in compliance with Article 6.4 because this information was "used" by the Commission in their standing determination, and was therefore "relevant" to the

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<sup>321</sup> China's other appellant's submission, para. 471.

<sup>322</sup> China's other appellant's submission, paras. 473 and 474.

<sup>323</sup> China's other appellant's submission, para. 477 (quoting Panel Report, footnote 940 to para. 7.454).

<sup>324</sup> China's other appellant's submission, para. 482.

presentation of [the Chinese producers'] cases" in this regard.<sup>325</sup> China also argues that the identity of the complainants should have been disclosed under Article 6.2 of the *Anti-Dumping Agreement* in order to provide the producers with a "full opportunity for the defence of their interests".<sup>326</sup> According to China, Article 6.2 is "so broad" that a violation of Article 6.4 "necessarily entails a violation of Article 6.2".<sup>327</sup> Even independently of a violation of Article 6.4, however, China submits that the Commission violated Article 6.2 because, as a result of the Commission's failure to disclose the names of these companies, the Chinese producers were not given an opportunity properly to examine and present arguments regarding the Commission's standing determination.<sup>328</sup>

4. The Panel's Findings that the MET/IT Claim Form Was Not a "Questionnaire" for Purposes of Article 6.1.1 of the *Anti-Dumping Agreement*

192. China requests the Appellant Body to reverse the Panel's finding that the Commission did not act inconsistently with its obligations under Article 6.1.1 of the *Anti-Dumping Agreement* when it allowed Chinese producers only 15 days from the publication of the Notice of Initiation of the investigation to submit a claim form requesting market economy and/or individual treatment ("the MET/IT Claim Form"). Specifically, China argues that the Panel erred in finding that the 30-day time-limit required for the submission of "questionnaires" in Article 6.1.1 applies only to "the initial comprehensive questionnaire" issued in an investigation.<sup>329</sup> In the alternative, China contends that the Panel erred in finding that the MET/IT Claim Form was not the initial, comprehensive questionnaire sent to foreign exporters in an NME investigation.

193. China submits that the Panel erred in interpreting the term "questionnaires" as referring only to "the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which questionnaire seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation)".<sup>330</sup> Instead, China urges the Appellate Body to find that the term "questionnaires" includes all information requests made through a series of questions that are substantial enough to warrant verification, as long as extending a full 30-day deadline would not prevent the investigating authorities from complying with the overall timeframe set out in Article 5.10 of the *Anti-Dumping Agreement* for the completion of an investigation.<sup>331</sup>

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<sup>325</sup>China's other appellant's submission, paras. 483 and 484.

<sup>326</sup>China's other appellant's submission, para. 487.

<sup>327</sup>China's other appellant's submission, para. 487.

<sup>328</sup>China's other appellant's submission, para. 488.

<sup>329</sup>China's other appellant's submission, para. 501 (quoting Panel Report, para. 7.574).

<sup>330</sup>China's other appellant's submission, para. 501 (quoting Panel Report, para. 7.574).

<sup>331</sup>China's other appellant's submission, para. 538.

194. China observes that the ordinary meaning of the term "questionnaire" is quite broad and would on its face cover every document used by an investigating authority to seek information in the form of "a formulated series of questions".<sup>332</sup> China also emphasizes the fact that Article 6.1.1 uses the plural form of this term, which suggests that the provision would not only apply to multiple questionnaires, but that each foreign producer may receive more than one questionnaire requiring a 30-day deadline throughout the course of the investigation.<sup>333</sup> China argues that Articles 6.1 and 6.2 of the *Anti-Dumping Agreement* provide the appropriate context for the interpretation of Article 6.1.1, and notes that the Appellate Body has found that these provisions "set out the fundamental due process rights" in anti-dumping investigations and provide for "liberal opportunities for respondents to defend their interests".<sup>334</sup> China claims that the reference to a "questionnaire" in paragraphs 6 and 7 of Annex I to the *Anti-Dumping Agreement* (Procedures for On-the-Spot Investigations pursuant to Paragraph 7 of Article 6) shows that the term refers to information requests that are "so substantial" that they require verification by the investigating authority—a characterization that would cover the MET/IT Claim Form.<sup>335</sup> Finally, China argues that the purpose of the time-limit set out in Article 6.1.1, that investigating authorities retain the ability to "control and expedite the investigating process", does not imply that the term "questionnaires" can refer to only one document.<sup>336</sup> China claims that the Commission's ability to complete the fasteners investigation in a timely manner would not have been frustrated by allowing the Chinese producers a full 30 days to submit the MET/IT Claim Form.<sup>337</sup>

195. Even if the Appellate Body determines that the Panel was correct in its interpretation of the term "questionnaires" in Article 6.1.1, China argues that the Panel violated Article 11 of the DSU and Article 17.6(i) of the *Anti-Dumping Agreement* when it failed to find that, for the foreign exporters of an NME country, the MET/IT Claim Form is the initial, comprehensive questionnaire. China submits that the MET/IT Claim Form includes many of the same issues covered in other initial questionnaires, and that the Panel's own admission that not all initial questionnaires will cover the same material, suggests that the MET/IT Claim Form need not have covered all the issues involved in the investigation to be considered the "initial questionnaire".

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<sup>332</sup>China's other appellant's submission, para. 509.

<sup>333</sup>China's other appellant's submission, para. 510.

<sup>334</sup>China's other appellant's submission, para. 513 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241).

<sup>335</sup>China's other appellant's submission, para. 526.

<sup>336</sup>China's other appellant's submission, para. 533.

<sup>337</sup>China's other appellant's submission, para. 536.

D. *Arguments of the European Union – Appellee*

1. The Panel's Findings under Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*

196. The European Union requests the Appellate Body to reject China's appeal against the Panel's finding that the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* with respect to the definition of the domestic industry in the fasteners investigation. The European Union maintains that, as the Panel properly found, the European Union did not exclude from the definition of the domestic industry those producers who did not support the complaint. Nor did the European Union act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* by not including in the domestic industry definition those producers who made themselves known more than 15 days after the publication of the Notice of Initiation of the investigation. The European Union further submits that the Panel correctly rejected China's assertion that the domestic industry defined by the Commission, consisting of those producers whose output accounted for 27 per cent of total domestic production, did not meet the requirement of "a major proportion" under Article 4.1 of the *Anti-Dumping Agreement*. Finally, with respect to China's claim regarding the representativeness of the sample for purposes of the injury determination, the European Union contends that the claim was not properly before the Panel and therefore outside the scope of appellate review. In any event, the European Union asserts that China's arguments in support of this claim are without merit.

(a) Exclusion of Certain Producers

197. The European Union submits that China fails to demonstrate that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6(i) of the *Anti-Dumping Agreement* in finding that the European Union did not exclude producers who did not support the complaint from the definition of domestic industry. Moreover, China has not demonstrated that the Panel erred in its interpretation of Article 4.1 of the *Anti-Dumping Agreement*, or acted inconsistently with Article 11 of the DSU, in rejecting China's allegation that the exclusion of the producers who did not come forward within the 15-day deadline was inconsistent with Article 4.1 of the *Anti-Dumping Agreement*. In addition, China fails to demonstrate that the Panel erred in law when it rejected China's "consequential"<sup>338</sup> claim under Article 3.1 of the *Anti-Dumping Agreement*.

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<sup>338</sup>European Union's appellee's submission, para. 107.

(i) *Exclusion of producers who did not support the complaint*

198. The European Union maintains that "[i]t is well established" that a panel, as the trier of facts, enjoys a substantial margin of discretion. The discretion is not boundless, and there could be a failure to make an objective assessment of the facts in the event of "deliberate disregard" and refusal to consider the evidence, or in case of the "wilful distortion" or "misrepresentation" of the evidence.<sup>339</sup> In the European Union's view, the relevant jurisprudence under Article 11 of the DSU suggests that a violation of that provision is not "simply an error of judgment in the appreciation of evidence but rather 'an egregious error that calls into question the good faith of a panel'".<sup>340</sup>

199. Turning to the facts of the case, the European Union submits that the Panel properly took into consideration, as part of the totality of evidence before it, the "information provided by the [European Union] that at least one producer that had remained silent prior to initiation and thus had not 'supported the complaint' was included in the definition of the domestic industry".<sup>341</sup> The Panel "was right to assume good faith on the part of the [European Union]"<sup>342</sup>, and there was no reason to doubt the veracity of the information in the light of the relevant evidence on the record. Specifically, the European Union provided the name of the producer in question, rather than giving "a vague reference to an unidentified mysterious producer that could not be verified".<sup>343</sup> Moreover, contrary to China's assertion that the European Union should have provided the list of complainants and supporters in order to prove the information it provided, the European Union indicated to the Panel its willingness to provide the list, but also highlighted the fact that the list had been treated as confidential. The Panel did not request to see the list, and it is not within the Appellate Body's mandate to examine now evidence in respect of which factual findings have been made by the Panel.

200. Moreover, the European Union contends, the information it provided to the Panel concerning the producer who had not supported the complaint was "mainly to *confirm* the [other] information already provided by the [European Union] that no producer was excluded for reason of the fact that it did not support the complaint".<sup>344</sup> Specifically, the European Union maintains that it submitted evidence in the form of the sampling forms sent upon the initiation of the investigation to all known producers for purposes of defining the domestic industry, which did not include a question concerning support for the complaint. Moreover, recitals 23 to 25 of the Definitive Regulation also confirm that

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<sup>339</sup>European Union's appellee's submission, para. 50 (quoting Appellate Body Report, *EC – Hormones*, para. 133). (underlining by the European Union omitted)

<sup>340</sup>European Union's appellee's submission, para. 50 (quoting Appellate Body Report, *EC – Hormones*, para. 133). (underlining by the European Union omitted)

<sup>341</sup>European Union's appellee's submission, para. 53.

<sup>342</sup>European Union's appellee's submission, para. 61.

<sup>343</sup>European Union's appellee's submission, para. 57.

<sup>344</sup>European Union's appellee's submission, para. 58. (original emphasis)

all those producers who responded to the sampling forms within the 15-day deadline and indicated their willingness to cooperate were included in the domestic industry definition, regardless of whether they supported the complaint. Thus, the European Union contends, China erroneously suggests that the European Union made a "mere assertion"<sup>345</sup> when it provided the name of the producer who had not supported the complaint. On the contrary, this evidence was supported and confirmed by other evidence on the record. The Panel therefore did not act inconsistently with Article 11 of the DSU because it took into account all of the above evidence in its assessment of the facts.

201. The European Union further submits that there is no basis for China's allegation that the Commission knew whether the sampled producer who had not supported the complaint at the time of initiation actually supported the investigation when it came forward after initiation. In the European Union's view, China "speculates" about what the Commission could have known regarding the producer's position in respect of the complaint, "when it has been established as a matter of fact that this was a producer that (i) was silent before initiation and (ii) subsequently ... return[ed] a sampling form in which no question was asked about support for the complaint".<sup>346</sup> Therefore, the Panel properly found that, "[w]hile China continues to assert that the Commission inquired as to the position of EU producers with respect to the complaint, the only evidence before the Panel, the sampling forms, does not support that assertion."<sup>347</sup> The European Union asserts that the "evidence" provided by China in this regard was based on "certain unfortunate statements in the Information Document and in [the Definitive Regulation]".<sup>348</sup> Such statements, according to the European Union, were due to certain "confusion"<sup>349</sup> between the issue of the standing requirement and the definition of the domestic industry, which was caused by the Commission's inquiry, after the initiation of the investigation, concerning the Chinese interested parties' allegation that the standing requirement had not been met. Although China disagrees with the weight given by the Panel to the alleged "evidence", a panel's examination and weighing of the evidence submitted falls within the scope of the panel's discretion as the trier of the facts.

202. Finally, the European Union maintains that, in alleging that the Panel "disregarded"<sup>350</sup> three pieces of evidence and thus acted inconsistently with Article 11 of the DSU, China's claim merely concerns the Panel's appreciation of the evidence within the boundary of its discretion as the trier of

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<sup>345</sup>European Union's appellee's submission, para. 59 (quoting China's other appellant's submission, para. 66).

<sup>346</sup>European Union's appellee's submission, para. 63.

<sup>347</sup>European Union's appellee's submission, para. 64 (quoting Panel Report, para. 6.75).

<sup>348</sup>European Union's appellee's submission, footnote 47 to para. 65.

<sup>349</sup>European Union's appellee's submission, footnote 47 to para. 65.

<sup>350</sup>European Union's appellee's submission, para. 68 (quoting China's other appellant's submission, para. 85).

facts. Specifically, the Panel rightly relied on recitals 23 to 25 of the Definitive Regulation, which show that support for the complaint was not a condition for being included in the domestic industry definition, despite the reference to "producers supporting the complaint" in the definition of the domestic industry under the Definitive Regulation. "Similarly", the European Union argues, "the Panel put the confused statements in the informal Information Document in context by pointing to the fact that this was a mere working document with no legal status in the [European Union]."<sup>351</sup> Finally, the European Union asserts that the Panel did not err in not expressly addressing the letter referred to by China, because a panel "is not required to discuss, in its report, each and every piece of evidence".<sup>352</sup> In any event, China misinterprets the letter it sought to rely on, which does not state that support for the complaint was a condition for inclusion in the domestic industry definition.

203. On this basis, the European Union submits that China's allegation that the Panel committed egregious error in not giving the same weight to the evidence as did China, and acted inconsistently with Article 11 of the DSU, must fail.

(ii) *Exclusion of producers who did not come forward within 15 days of the initiation of the investigation*

204. The European Union asserts that China fails to establish that the Panel erred in the legal interpretation, and acted inconsistently with Article 11 of the DSU, in finding that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement* by excluding from the domestic industry definition all producers who did not come forward within 15 days following the initiation of the investigation.

205. The European Union contends that China accepts that it is "permissible"<sup>353</sup> to impose a deadline for domestic producers to come forward, which undermines its assertion that Article 4.1 prohibits the exclusion of any categories of producers except for those provided under paragraphs (i) and (ii). Moreover, there is no basis for China's argument that the imposition of a deadline for producers to come forward is "inadmissible if the investigating authorities ... consider the inclusion of producers that did not come forward within the deadline and finally decide not to include them".<sup>354</sup> Indeed, China does not explain why it accepts that deadlines may be used, but then objects to the fact that such deadlines are actually applied by the authorities. The European Union submits that

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<sup>351</sup>European Union's appellee's submission, para. 72.

<sup>352</sup>European Union's appellee's submission, para. 73 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202).

<sup>353</sup>European Union's appellee's submission, para. 78 (quoting China's other appellant's submission, para. 125).

<sup>354</sup>European Union's appellee's submission, para. 81 (quoting China's other appellant's submission, para. 126).

investigating authorities are entitled, under Article 6.14 of the *Anti-Dumping Agreement*, to maintain control over the investigations and to impose deadlines in order to be able to proceed expeditiously with the investigation. Moreover, the authorities are required to impose such deadlines in order to comply with their obligation under Article 5.10 of the *Anti-Dumping Agreement* to conclude the investigation within 12 to 18 months. The European Union further submits that, in the fasteners investigation, the 15-day deadline excluded producers irrespective of their support for the complaint and was a reasonable and objective way of defining the domestic industry.

206. The European Union maintains that there is no basis for China's allegation that the Panel acted inconsistently with Article 11 of the DSU in finding that the European Union did not deliberately exclude producers that came forward after the 15-day deadline. The Information Document, to which China refers in support of its claim, merely reflects, "in a somewhat confused manner"<sup>355</sup>, the fact that the Commission accommodated the Chinese interested parties' allegation, that the standing requirement had not been met, by contacting additional domestic producers concerning their production volume and their position regarding the complaint. Moreover, the Panel examined the relevant evidence and found that "the fact that the Commission considered including [the additional producers in] the domestic industry supports our view that it did not simply exclude producers who did not come forward within the 15-day period."<sup>356</sup> In the European Union's view, China's allegation that the Panel acted inconsistently with Article 11 of the DSU in reaching this finding is "based on a wilful misreading of the Panel Report", because the Panel simply "reached the factual conclusion that the authorities applied the deadline they had set for domestic producers but that in so doing the authorities had not been deaf to requests from exporters to contact more producers".<sup>357</sup>

207. The European Union argues that China's assertion that the Panel acted inconsistently with Article 11 of the DSU in finding that China had not demonstrated the unreasonableness of the 15-day deadline is also without merit. As the Panel correctly found, China submitted no evidence regarding the alleged unreasonable or insufficient nature of the 15-day deadline. China's mere "speculation" that a deadline as short as 15 days makes it more likely that only complainants and supporters would come forward does not amount to such evidence.<sup>358</sup> Moreover, contrary to China's argument, linking the possibility of being included in the domestic industry to a producer's willingness to be included in the sample is unrelated to the question of whether the 15-day deadline is reasonable. This is because the information requested in the sampling form, concerning the products produced and the volume of

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<sup>355</sup>European Union's appellee's submission, para. 89.

<sup>356</sup>European Union's appellee's submission, para. 90 (quoting Panel Report, para. 7.215).

<sup>357</sup>European Union's appellee's submission, para. 91.

<sup>358</sup>European Union's appellee's submission, para. 96.



production, was easy to provide, and the indication of willingness to be included in the sample only required the ticking of the appropriate box on the form. Finally, the European Union contends that China's assertion that the 15-day deadline to respond to the sampling form is not the same as the period in which an interested party was requested to make itself known under the Notice of Initiation is "simply incorrect". This is so because the Notice of Initiation clearly provides for a 15-day period for being included in the domestic industry, and a 40-day period for interested parties to make themselves known "unless otherwise specified".<sup>359</sup>

208. On this basis, the European Union requests the Appellate Body to reject China's above claims and arguments, as well as China's request for completion of the analysis.

(iii) *Inconsistency with Article 3.1 of the Anti-Dumping Agreement*

209. The European Union maintains that the Panel correctly determined that China failed to make a *prima facie* case under Article 3.1 of the *Anti-Dumping Agreement* because its arguments under that provision were dependent on its arguments under Article 4.1 of the *Anti-Dumping Agreement*. In support of its appeal under Article 3.1, China simply repeats its arguments concerning the alleged exclusion of the producers who did not support the complaint, and the alleged unreasonableness of the 15-day deadline. These are the same arguments China had raised under Article 4.1 of the *Anti-Dumping Agreement*, which the Panel properly rejected. Thus, given the Panel's findings under Article 4.1, and given the fact that China's arguments under Article 3.1 were identical to those under Article 4.1, the Panel did not err in rejecting China's claim under Article 3.1. The European Union adds that China's appeal does not identify any error of law in the Panel's finding under Article 3.1, but merely describes the alleged errors committed by the Commission in its definition of the domestic industry. Thus, the European Union contends that, because China "never developed an independent argument under Article 3.1 of the *Anti-Dumping Agreement*"<sup>360</sup>, the Appellate Body must also reject China's appeal under that provision.

210. The European Union further submits that China's argument that the manner in which the Commission defined the domestic industry was biased must also be rejected. China's assertion that "[c]ompanies opposing the investigation are much less likely to be willing to be part of the sample than companies supporting the investigation"<sup>361</sup> is "purely speculative".<sup>362</sup> Even if it were true, this

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<sup>359</sup>European Union's appellee's submission, para. 101. (boldface by the European Union omitted)

<sup>360</sup>European Union's appellee's submission, para. 108.

<sup>361</sup>European Union's appellee's submission, para. 113 (quoting China's second written submission to the Panel, para. 548).

<sup>362</sup>European Union's appellee's submission, para. 113.

does not mean that an authority cannot use cooperation as a criterion for defining the domestic industry. In the absence of subpoena powers, the Commission was entitled to continue its investigation on the basis of facts made available by the cooperating producers, as long as their output represented a major proportion of the total domestic production. Finally, the European Union submits that Article 3.1 of the *Anti-Dumping Agreement* only requires that the authorities conduct an objective examination of positive evidence in respect of the domestic industry as defined under Article 4.1. Article 3.1 thus concerns only the manner in which data from those producers included in the domestic industry definition is examined, an issue not raised in China's appeal under that provision.

211. On this basis, the European Union requests the Appellate Body to reject China's appeal under Article 3.1 of the *Anti-Dumping Agreement*.

(b) "A Major Proportion" of the Total Domestic Production

212. As a preliminary matter, the European Union submits that it wishes to express its concern about what it views as a change in China's position with regard to the interpretation of the term "a major proportion" under Article 4.1 of the *Anti-Dumping Agreement*. Before the Panel, China agreed with the interpretation of the panel in *Argentina – Poultry Anti-Dumping Duties* that "major" means "important, serious or significant", with which the European Union also agreed. Although China's original position had been that "a major proportion" must be as close as possible to 100 per cent, it "clearly abandoned its original position" by acknowledging that "major" in abstract terms could even be a percentage lower than 25 per cent.<sup>363</sup> Thus, noting the agreement between the parties on the interpretation of the term "a major proportion", the Panel focused its examination on whether China met its burden of proving that, in this dispute, 27 per cent of the total domestic production was not a major proportion. Thus, in the European Union's view, because the Panel "relied on" the agreement between the parties regarding the legal interpretation in developing its reasoning, it is "simply not credible, nor appropriate" for China to assert on appeal that the interpretation put forward by the Panel is not permissible.<sup>364</sup>

213. The European Union further submits that, as the Panel correctly found, despite the alleged presumption relied on by the Commission in defining the domestic industry, China failed to establish that the output of the domestic industry as defined by the Commission, representing 27 per cent of total domestic production, did not constitute "a major proportion" within the meaning of Article 4.1 of the *Anti-Dumping Agreement*. Finally, China's allegation that the Panel erred in rejecting certain non-quantitative factors is also unfounded. These non-quantitative factors include the alleged

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<sup>363</sup>European Union's appellee's submission, para. 138.

<sup>364</sup>European Union's appellee's submission, para. 141.

exclusion of certain producers, the practical possibility to obtain information from all producers, and the number of producers.

(i) *The interpretation of the term "a major proportion"*

214. The European Union submits that, because the text of Article 4.1 of the *Anti-Dumping Agreement* refers to "a major proportion" and does not use terms such as "the majority", this provision does not require that the domestic industry consist of producers representing more than 50 per cent of the domestic production. This interpretation is supported by the panel's finding in *Argentina – Poultry Anti-Dumping Duties*<sup>365</sup>, and China does not argue otherwise. The European Union further maintains that, on the basis of its ordinary meaning, the term "a major proportion" means an "important, serious or significant" proportion of total domestic output. Although the dictionary definition relied on by China defines the word "major" as "*unusually* important, serious or significant"<sup>366</sup>, the European Union submits that the qualifying term "unusually" is not particularly meaningful.

215. The European Union agrees with China's argument that, in order to represent a "proportion", the production of domestic producers concerned must constitute a "part" or "share" of the whole. However, the European Union asserts that China "makes an unsubstantiated leap of logic when it states that '[i]n other words, they must be representative of the whole'".<sup>367</sup> There is nothing inherently "representative" in the term "proportion", because the term simply refers to a ratio. Moreover, because Article 4.1 refers to the "collective output", the term "a major proportion" is to be examined in relation to the quantity of production. The European Union further contends that the Appellate Body's finding in *US – Lamb*, to which China refers in support of its position, addresses the meaning of "producers as a whole", and not "a major proportion", and therefore does not lend support to China's position.<sup>368</sup>

216. The European Union submits that, without any basis, China asserts that "[t]he reason for permitting the domestic industry to be defined as those producers constituting only a 'major proportion' is to address the practical impossibility for investigating authorities in some cases to

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<sup>365</sup>European Union's appellee's submission, para. 147 (referring to Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.341 and 7.342).

<sup>366</sup>European Union's appellee's submission, para. 142 (referring to China's other appellant's submission, paras. 10, 188 and 189). (emphasis added by the European Union)

<sup>367</sup>European Union's appellee's submission, para. 151 (referring to China's other appellant's submission, para. 185). (emphasis added by the European Union)

<sup>368</sup>European Union's appellee's submission, para. 153 (quoting Appellate Body Report, *US – Lamb*, para. 91).

obtain the requested information from all the producers of the like product."<sup>369</sup> The European Union maintains that Article 4.1 merely refers to two alternative options for defining the domestic industry, and the word "or" indicates that there is no hierarchy or preference between these two options. Moreover, contrary to China's assertions, paragraphs (i) and (ii) of Article 4.1 do not limit the discretion of the investigating authority, but merely allow the investigating authority to limit the total number of eligible producers. The European Union emphasizes that its interpretation would not, as China suggests, lead to arbitrary exclusion of categories of producers. Rather, if the authority acts in an objective and unbiased manner in defining the domestic industry by, for example, including only those producers willing to cooperate, the definition of the domestic industry will be consistent with Article 4.1, even if it consists of producers whose output represents less than 100 per cent of the total domestic production. Finally, the European Union disagrees with China's argument that Article 3.1 of the *Anti-Dumping Agreement* provides contextual support for the proposition that the term "a major proportion" requires that the domestic industry so defined must be representative of the domestic producers as a whole. Rather, Article 3.1 imposes obligations in respect of injury determination, and does not impose any obligations in respect of the definition of the domestic industry.

(ii) *Whether the domestic industry defined in the fasteners investigation meets the requirement on "a major proportion"*

217. The European Union submits that it is for China, as the complaining party, to make a *prima facie* case that the European Union failed properly to define the domestic industry in the fasteners investigation because the collective output representing 27 per cent of total domestic production did not constitute "a major proportion" within the meaning of Article 4.1 of the *Anti-Dumping Agreement*. Before the Panel, although China argued that the Commission wrongly relied on a presumption that producers accounting for 25 per cent of total domestic production constituted a major proportion of domestic production, China also accepted that, depending on the circumstances, even a percentage of less than 25 per cent could be sufficient. Thus, the Panel correctly required China to provide evidence demonstrating that, in this dispute, 27 per cent was not an important, serious, or significant part of total domestic production.

218. In the European Union's view, China effectively alleges that authorities are under an independent obligation to explain the basis for their conclusion that a certain percentage of production is "major" in the circumstances of the case. However, Article 4.1 does not impose such an obligation. This is confirmed by the panel's finding in *Argentina – Poultry Anti-Dumping Duties* that authorities are not under an obligation to elucidate how they found that a percentage lower than 50 per cent could

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<sup>369</sup>European Union's appellee's submission, para. 155 (quoting China's other appellant's submission, para. 195).

be considered "a major proportion".<sup>370</sup> The European Union maintains that, before the Panel, China did not deny that the domestic industry as defined included large and small companies, as well as producers of different types of fasteners. Moreover, during the fasteners investigation, the Chinese exporters did not question the representativeness of the domestic industry definition, and the Commission was therefore under no obligation to address such concerns. In this regard, China's argument on appeal that the Commission relies on a rule that automatically equates "a major proportion" with 25 per cent of total domestic production "is in error and entirely irrelevant".<sup>371</sup> This is because China did not challenge the relevant provision of the European Union's Basic AD Regulation concerning such a "rule". Thus, these provisions are not before the Appellate Body and, in any event, there is no evidence on the record demonstrating that the Basic AD Regulation sets forth a mandatory rule preventing the Commission from concluding, in the specific circumstances of a case, that 25 per cent does not amount to a major proportion.

219. The European Union nonetheless maintains that the Basic AD Regulation reflects its position that Article 5.4 of the *Anti-Dumping Agreement* provides important contextual guidance concerning the meaning of the term "a major proportion" in Article 4.1 of that Agreement. Specifically, Article 5.4 provides that a request for initiation of an anti-dumping investigation must be made "by or on behalf of the domestic industry", and that this will be the case when it is established that domestic producers supporting the application represent at least 25 per cent of total domestic production. Therefore, it is "permissible to consider that producers that represent 25 [per cent] or more of domestic production can *legitimately* represent a major proportion of total production and that, as explained before, this was the case in the fasteners investigation."<sup>372</sup>

220. With regard to China's claim that the Panel failed to consider certain non-quantitative factors, the European Union asserts that China merely repeats the arguments in support of its view that the term "a major proportion" requires the domestic industry so defined be representative of the domestic producers as a whole. The European Union agrees that authorities cannot deliberately exclude a category of producers. However, if the exclusion only results from the application of a reasonable deadline, or the consequence of the fact that the industry is fragmented, it is not inconsistent with Article 4.1 of the *Anti-Dumping Agreement*. Furthermore, contrary to China's assertion, the number of producers is not a relevant element in the definition of the domestic industry, because Article 4.1 concerns the volume of production.

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<sup>370</sup>European Union's appellee's submission, para. 178 (referring to Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.343).

<sup>371</sup>European Union's appellee's submission, para. 186.

<sup>372</sup>European Union's appellee's submission, para. 187. (original emphasis)

221. On this basis, the European Union submits that the Panel properly found that China failed to demonstrate, *prima facie*, that the definition of domestic industry in this case is inconsistent with Article 4.1 of the *Anti-Dumping Agreement*, and requests the Appellate Body to reject China's appeal.

(c) The Representativeness of the Sample of Domestic Producers in the Injury Determination

222. The European Union alleges, as a preliminary matter, that China's appeal concerns the Panel's rejection of a claim that was not within the Panel's terms of reference. In its request for the establishment of a panel<sup>373</sup>, China alleged that the European Union acted inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* because the Commission conducted the injury determination on the basis of a sample of producers accounting for only 17.5 per cent of the total European Union production of the like product in 2006. However, in its second written submission before the Panel, China raised the "entirely new claim" that the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* by using a sample on the basis of the largest volume that can be reasonably investigated, thereby failing to use a sampling technique that guaranteed that the sample was sufficiently representative of the domestic industry.<sup>374</sup> The European Union argues that this new claim is in no way related to China's claim under Article 3.1 of the *Anti-Dumping Agreement* listed in its panel request, and is therefore not properly before the Appellate Body.

223. The European Union submits that China's claim under Article 3.1 of the *Anti-Dumping Agreement* is in any event without merit. Article 3.1 does not prescribe any methodology for sampling in the injury determination. Although Article 6.10 of the *Anti-Dumping Agreement*, concerning sampling in the dumping determination, is not directly applicable in the context of injury determinations, the fact that the Commission followed one of the two sampling methodologies provided in that provision indicates that its method was not unreasonable or biased. Moreover, as the Panel correctly found, China failed to present any factors other than volume that should have been taken into account. The European Union further maintains that there is no basis for China's claim that the Commission could have included more domestic producers in the sample. The Panel properly found that the mere fact that certain macro-economic factors were examined on the basis of data from all 45 producers making up the domestic industry does not demonstrate that the Commission could have examined all micro-economic factors on the same basis. This finding falls within the Panel's discretion as the trier of facts, and China makes no claim under Article 11 of the DSU in this regard.

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<sup>373</sup>WT/DS397/3, 13 October 2009.

<sup>374</sup>European Union' appellee's submission, para. 214.

224. On this basis, the European Union requests the Appellate Body to reject China's appeal of the Panel's finding that the sample selected by the Commission was not inconsistent with Article 3.1 of the *Anti-Dumping Agreement*.

2. The Panel's Findings under Article 2.4 of the *Anti-Dumping Agreement*

225. The European Union requests the Appellate Body to reject China's appeal of the Panel's finding that the European Union did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in respect of the comparison of the export price and normal value in the dumping determination. According to the European Union, each of China's three claims on appeal is without merit and should be rejected.

(a) The Panel's Treatment of China's Argument

226. The European Union submits that China's allegation of a violation of Article 11 of the DSU by the Panel for its alleged failure to address China's argument on the EU authorities' lack of communication on the information required to ensure a fair comparison is baseless.

227. The European Union maintains that the "factual premise for China's claim is in error"<sup>375</sup>, because China did not make a claim, nor a substantial argument, before the Panel concerning the Commission's alleged failure to inform interested parties of the fact that PCNs were not used in price comparison. Rather, China raised this issue before the Panel in its second written submission merely in rebuttal of the European Union's argument that no interested parties had requested adjustments, and in support of its claim that adjustments should have been made. The Panel therefore did not "ignore[] a substantial argument put forward by China"<sup>376</sup>, because the Panel was not requested to opine on such an argument. The European Union further submits that China's references to the Appellate Body's findings on "false exercise of judicial economy" are "completely besides the point", given that those findings deal with the decision of a panel not to address certain "claims" before it, not "arguments".<sup>377</sup> Moreover, because panels have the discretion to address only those arguments they deem necessary to resolve a particular claim, "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it'

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<sup>375</sup>European Union's appellee's submission, para. 249.

<sup>376</sup>European Union's appellee's submission, para. 252 (quoting China's other appellant's submission, para. 306).

<sup>377</sup>European Union's appellee's submission, para. 255.

required by Article 11 of the *DSU*".<sup>378</sup> Thus, the European Union submits that China fails to demonstrate that the Panel acted inconsistently with Article 11 of the *DSU* by not addressing China's argument.

228. The European Union further contends that China fails to substantiate its alternative claim that, should the Appellate Body consider that the Panel implicitly rejected China's argument, the Appellate Body should find that the Panel erred in its interpretation of Article 2.4 of the *Anti-Dumping Agreement*. In the European Union's view, given that the Panel did not make a finding in this respect, and did not exceed the boundaries of its discretionary authority in not addressing China's argument, there is no basis for the Appellate Body to review this alleged error in law in respect of a non-existent finding.

(b) Physical Differences

(i) *The Panel's interpretation and application of Article 2.4*

229. The European Union maintains that China's allegation of the Panel's error in the interpretation and application of Article 2.4 of the *Anti-Dumping Agreement*, concerning the Commission's obligation to evaluate all PCN characteristics and to make necessary adjustments, is equally without merit. According to the European Union, the Panel's legal interpretation of Article 2.4 of the *Anti-Dumping Agreement* "is in line with the interpretation" advocated by China that an authority must evaluate identified differences potentially affecting price comparability.<sup>379</sup> This is confirmed by the Panel's finding that, under Article 2.4, the authorities "must take steps to achieve clarity as to the adjustment claimed and then determine **whether and to what extent that adjustment is merited**".<sup>380</sup>

230. The European Union submits that China's appeal does not concern an issue of law, but rather concerns China's disagreement with the Panel's factual finding regarding the role and relevance of the PCN characteristics, and fails to "convincingly" challenge this finding under Article 11 of the *DSU*.<sup>381</sup> The European Union recalls China's argument before the Panel that, because the PCN characteristics had been identified by the authorities themselves as affecting price comparability, the Commission had an obligation at least to evaluate whether these differences indeed affected price comparability or not, and should subsequently have concluded that adjustments were indeed required. Thus, China's argument is premised on the assumption that the Commission had identified PCN characteristics as

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<sup>378</sup>European Union's appellee's submission, para. 255 (quoting Appellate Body Report, *EC – Poultry*, para. 135).

<sup>379</sup>European Union's appellee's submission, para. 272.

<sup>380</sup>European Union's appellee's submission, para. 271 (quoting Panel Report, para. 7.298, in turn quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158 (boldface added by the Panel)).

<sup>381</sup>European Union's appellee's submission, para. 263.



affecting price comparability. The Panel, however, disagreed with the "factual premise" of China's assertion<sup>382</sup>, finding, instead, that the fact that the Commission used the PCNs as a tool for information gathering did not imply that the Commission identified each of the PCN characteristics as necessarily affecting price comparability. The Panel further found that China pointed to no evidence that was before the investigating authority in support of its assertion that the Commission considered all PCN characteristics as necessarily affecting price comparability. In the European Union's view, these are factual findings unrelated to whether or not there exists a distinction, as alleged by China, between the evaluation of identified differences and the making of adjustments for differences affecting price comparability.

231. The European Union further maintains that, in any event, pursuant to a proper interpretation of Article 2.4 of the *Anti-Dumping Agreement*, the European Union complied with its obligations under that provision. First, Article 2.4 requires an investigating authority to request information that may be necessary for ensuring a fair comparison and to determine whether any adjustments are warranted. The European Union requested all interested parties to organize product information on the basis of the PCNs "merely [as] a tool"<sup>383</sup> to help matching export sales to domestic sales in the analogue country. Second, under Article 2.4, it is the obligation of the producers from the country under investigation to substantiate their claim for adjustment. The European Union recalls that the interested parties emphasized, throughout the fasteners investigation, the importance of the distinction between standard and special fasteners, and the Commission took into account this distinction in the product types used for purposes of price comparison. Third, under Article 2.4, an investigating authority is only required to adjust for differences that are demonstrated to affect price comparability, and not for any other differences. Consistent with this obligation, the Commission determined that only one of the PCN characteristics, that is, strength, was demonstrated to affect price comparability. In this respect, the European Union argues that China makes an inaccurate factual statement that "interested parties have stressed throughout the investigation that it was of fundamental importance that the comparison be made on the PCN basis".<sup>384</sup> Therefore, the Commission complied with all of the obligations under Article 2.4 of the *Anti-Dumping Agreement* and conducted a fair comparison between normal value and export price by making a comparison between fasteners on the basis of their strength class and whether they were special or standard fasteners.

232. On this basis, the European Union requests the Appellate Body to reject China's appeal against the Panel's finding that the Commission did not act inconsistently with Article 2.4 of the

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<sup>382</sup>European Union's appellee's submission, para. 267.

<sup>383</sup>European Union's appellee's submission, para. 277.

<sup>384</sup>European Union's appellee's submission, para. 287 (quoting China's other appellant's submission, para. 360).

*Anti-Dumping Agreement* in not making adjustments for alleged differences indicated through the PCN characteristics.

(ii) *The Panel's failure to make an objective assessment of the facts*

233. The European Union submits that, before addressing China's specific claims, it may be useful to recall the role of the PCNs in the fasteners investigation. According to the European Union, the PCNs are an information-gathering tool, consisting of "a very preliminary listing" of potentially relevant product features that may or may not affect price comparability.<sup>385</sup> Whether the PCNs will ultimately be used depends on numerous factors, including the arguments of the parties, and the practical limitations of the information available. In the fasteners investigation, the European Union argues, the failure of the Indian producer to provide the information in the detailed manner required by the PCNs implied that a different approach based on product types became preferable. Furthermore, the evidence on the record indicates that strength class and the distinction between standard and special fasteners, on the basis of which the Commission determined the product types, were two main characteristics referred to by the interested parties in the course of the investigation, including the Chinese interested parties. The European Union further submits that the Chinese interested parties did not raise any other characteristics affecting price comparability during the investigation, even after they were informed that the price comparison was done on the basis of product types rather than PCNs. China's argument, that the interested parties did not request adjustments because they assumed that any differences affecting price comparability would be taken into account by the PCN characteristics, is contradicted by the fact that the Chinese interested parties presented arguments during the investigation regarding the importance of strength class even though strength class was one of the PCN characteristics.

234. Turning to China's allegation that the Panel acted inconsistently with Article 11 of the DSU, the European Union maintains that China has not pointed to any evidence that was disregarded by the Panel. First, China repeats its erroneous assertion that the fact that certain physical characteristics were reflected in the PCNs provides evidence that such characteristics affect price comparability. Yet, as the Panel correctly found, the use of the PCNs as an information-gathering tool did not mean that the characteristics indicated therein necessarily affect price comparability. Second, although China submitted to the Panel that the Commission should have made adjustments for PCN characteristics such as the type of coating and the use of chrome, it did not make such claims before the Commission. The European Union emphasizes that the Panel's duty was to review whether

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<sup>385</sup>European Union's appellee's submission, para. 292.

the Commission's determination was reasonable in the light of the evidence before the Commission, rather than assertions made during the Panel proceedings. Third, with regard to the three pieces of evidence that China alleges it submitted to the Panel, the first two were statements by the EU industry made in the context of discussions concerning the comparability between EU and Chinese fasteners, and thus did not concern the issue of price comparability between Indian and Chinese fasteners. As for the third piece of evidence, it concerns a presentation on behalf of a Chinese interested party stressing the need to differentiate fasteners based on standard market and niche products, which also does not address the alleged importance of the PCN characteristics. Thus, China fails to demonstrate that the Panel wilfully disregarded, distorted, or refused to consider the evidence submitted by China. Rather, the Panel examined all evidence in its totality, including China's acknowledgement that no interested parties raised any factors affecting price comparability other than those taken into account by the Commission, and reached its conclusion on that basis. The Panel did not violate Article 11 of the DSU simply because it did not discuss every piece of evidence or every argument made by China.

235. The European Union contends that China neither substantiates, nor provides any evidence for, its allegation that the Panel acted inconsistently with Article 17.6(i) of the *Anti-Dumping Agreement*. As the Panel found, China had pointed to no evidence that was before the investigating authorities in support of its assertion that all PCN characteristics constituted differences affecting price comparability. Because the task of the Panel was to review the reasonableness of the Commission's determination, the Panel rightly considered that it should not engage in a review of such evidence to determine whether it would have reached a different conclusion. Therefore, China's appeal in this respect, as well as its request for completion of the analysis, must be rejected.

(c) Quality Differences

236. The European Union maintains that, although China alleges that the Panel erred in its legal interpretation, China's appeal does not point to any legal errors by the Panel in the interpretation of Article 2.4 of the *Anti-Dumping Agreement*. Rather, the interpretation advanced by China is in line with the Panel's finding that an authority must examine whether and to what extent adjustments must be made. The European Union further submits that it agrees that characteristics that have been acknowledged to affect price comparability, or for which the requisite evidence has been provided, must be evaluated in order to determine whether and to what extent adjustments may need to be made.

237. In this dispute, however, there was no evidence of any difference in quality that affected price comparability between Chinese and Indian fasteners. Specifically, with respect to the letter from one Chinese producer requesting adjustments for quality differences, the Panel correctly found that the letter was not supported by any evidence. Moreover, China's assertion that the Commission failed to

evaluate, and make adjustments for, quality differences is based on a misreading of the Definitive Regulation. As the Panel rightly found, the recital in the Definitive Regulation to which China referred concerns fasteners produced in China and in the European Union, and does not even mention fasteners produced in India. Moreover, the letter from the Commission to some Chinese exporters does not refer to any quality differences, but indicates that the only difference for which an adjustment was made consisted of the fact that the Indian producer regularly checked the quality before shipping, whereas the Chinese producers generally did not do so.

238. Therefore, the European Union argues, China's claim under Article 2.4 of the *Anti-Dumping Agreement* is based on the erroneous factual premise that the Commission acknowledged that certain quality differences existed. Given that the Panel correctly found that there was no evidence showing that the Commission made such an acknowledgement, the European Union requests the Appellate Body to reject China's appeal that the Panel erred in finding that the Commission did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by not evaluating, and making adjustments for, quality differences.

3. The Panel's Findings under Article 6.5, 6.2, and 6.4 of the *Anti-Dumping Agreement* Regarding the Disclosure of the Identity of the Complainants

239. The European Union requests the Appellate Body to uphold the Panel's findings under Article 6.5 of the *Anti-Dumping Agreement* with respect to the disclosure of the identity of the complainants and the supporters of the complaint. As a preliminary matter, the European Union raises two jurisdictional concerns. First, the European Union points out that the claim under Article 11 of the DSU brought by China in its other appellant's submission was not included in its Notice of Other Appeal, and is therefore not properly before the Appellate Body.<sup>386</sup> Second, in the European Union's view, China's argument regarding the disclosure of the identity of the sampled producers seems to challenge the Panel's weighing of the evidence, and should more properly have been raised under Article 11 of the DSU. As Article 11 was not mentioned in China's Notice of Other Appeal in this context, this claim too should be dismissed by the Appellate Body as outside the scope of appellate review.<sup>387</sup> Substantively, the European Union argues that the Panel correctly found that the European Union acted consistently with Article 6.5 when it treated the complainants' identity as confidential in order to prevent commercial retaliation by some of their customers. As a consequence of upholding the Panel's finding in this regard, the European Union also requests the Appellate Body to uphold the Panel's consequential finding that the European Union acted consistently with Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*.

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<sup>386</sup>European Union's appellee's submission, para. 362.

<sup>387</sup>European Union's appellee's submission, para. 363.

(a) The Complainants' "Good Cause" Showing

240. The European Union observes, at the outset, that China does not challenge the Panel's findings that the Commission's standing determination was consistent with its obligations under the *Anti-Dumping Agreement*, and China thereby "confirms" that the identity of these companies was a "non-issue from the point of view of the interested parties' rights of defence".<sup>388</sup> In response to China's specific claims, the European Union disagrees with China's suggestion that a higher threshold must be reached in order to show "good cause" in the case of information that is not "by nature" confidential. Rather, the European Union concurs with the Panel's determination that the relevant issue was "whether the justification based on potential commercial retaliation provided by the complainants in the fasteners investigation could amount to 'good cause' in the sense of Article 6.5".<sup>389</sup>

241. Regarding China's claim that the complainants were required to demonstrate the commercial retaliation "would", as opposed to "could", happen, the European Union contends that "China's distinction is artificial".<sup>390</sup> The use of the term "would" in Article 6.5 appears as part of some examples of information that is confidential by nature, and does not imply that in all cases the submitting party must show that harm will unavoidably result. In the European Union's view, China's proposition does not appear to cover a "risk" that some harm might occur, and ignores the purpose of Article 6.5, which is "precisely to make sure that a feared adverse effect ... remains hypothetical and does not actually materialise".<sup>391</sup> In the European Union's view, China's interpretation would alter the balance under Article 6.5, not in favour of parties requesting confidential treatment of their information, but decidedly against them, and would "discourage the initiation of investigations and cooperation overall".<sup>392</sup>

242. The European Union counters China's claim that the Panel relied on a "mere assertion" to justify "good cause" by arguing that the Panel did examine "the evidence in light of the specific justification provided as 'good cause'", and took into consideration the "particular standard of review" the Panel had in reviewing decisions of an investigating authority.<sup>393</sup> The European Union asserts that commercial retaliation can be carried out in sophisticated and subtle ways, and therefore a party's ability to supply proof that such retaliation might occur is very difficult.<sup>394</sup> Given this difficulty, the Panel logically looked next for any evidence to show "that the fear of retaliation was unreasonable,

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<sup>388</sup>European Union's appellee's submission, para. 365.

<sup>389</sup>European Union's appellee's submission, para. 369.

<sup>390</sup>European Union's appellee's submission, para. 371.

<sup>391</sup>European Union's appellee's submission, para. 371.

<sup>392</sup>European Union's appellee's submission, para. 372.

<sup>393</sup>European Union's appellee's submission, para. 375.

<sup>394</sup>European Union's appellee's submission, para. 376.

unfounded or untrue".<sup>395</sup> The Panel did not violate Article 11 of the DSU in expecting that China should provide evidence in this respect because, the European Union argues, the normal rules of dispute settlement proceedings in fact require the complainant—in this case China—to make a *prima facie* case of inconsistency.<sup>396</sup> In any event, the European Union claims that the Panel did not find that "no evidence" existed to support the complainants' assertion that their customers also purchased the subject product from Chinese producers. Rather, this assertion itself was "essential" to the Panel's findings and "served to substantiate" the complainants' concerns about commercial retaliation.<sup>397</sup> Further, the European Union explains that the fact that more evidence of potential commercial retaliation was not disclosed does not imply that such evidence was not before the Commission, particularly with regard to the nature and operation of the fasteners market itself.<sup>398</sup>

243. The European Union considers that China's claim regarding the disclosure of the identity of the sampled domestic producers essentially challenges the Panel's weighing of the evidence and, as an Article 11 claim has not been raised, therefore falls outside of the scope of this appeal.<sup>399</sup> China's claim relies on its own allegation that the evidence before the Panel unequivocally demonstrated that all sampled producers were also supporters of the complaint, and that the disclosure of the sampled producers' identity effectively disclosed the identity of the supporters of the complaint as well. The European Union contends, however, that China's presentation of the evidence is incomplete, and that the same document extensively cited by China also states that the data and figures presented "correspond to *two different sets of companies*", referring to the sets of companies who either supported the complaint or cooperated with the investigation.<sup>400</sup> China's claim that the Panel relied solely on the European Union's assertion that "at least one company included in the sample was not, in fact, either a complainant or supporter of the complaint" is, in the European Union's view, not only "unfounded", but also "blatantly outside the Appellate Body's jurisdiction".<sup>401</sup> Finally, the European Union emphasizes the fact that it is specifically the identification of a company as an initiator of an investigation that would create a hazard "analogous to the risk of a whistleblower".<sup>402</sup>

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<sup>395</sup>European Union's appellee's submission, para. 378 (quoting Panel Report, para. 7.453).

<sup>396</sup>European Union's appellee's submission, para. 378.

<sup>397</sup>European Union's appellee's submission, para. 379.

<sup>398</sup>European Union's appellee's submission, para. 380 and footnote 338 thereto.

<sup>399</sup>European Union's appellee's submission, para. 363.

<sup>400</sup>European Union's appellee's submission, para. 384 (quoting European Union's oral statement at the second Panel meeting, paras. 100 and 101). (boldface added by the European Union on appeal)

<sup>401</sup>European Union's appellee's submission, para. 387.

<sup>402</sup>European Union's appellee's submission, para. 385.

(b) Disclosure under Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*

244. The European Union raises no substantive arguments in response to China's request that the Appellate Body complete the analysis to find that, because the identity of the complainants was not properly treated as confidential, the Commission's failure to disclose the company names was also inconsistent with Article 6.4 and 6.2 of the *Anti-Dumping Agreement*. If the Appellate Body determines that these claims were within the Panel's jurisdiction, the European Union requests that the Panel's findings that the European Union did not act inconsistently with Articles 6.4 and 6.2 be upheld. Because China's claims under Articles 6.4 and 6.2 are "entirely dependent" on its claim under Article 6.5, the European Union maintains that the Panel did not err in finding that the identity of the complainants was confidential information under Article 6.5, and therefore cannot have erred in finding that the European Union did not violate Articles 6.4 and 6.2.

4. The Panel's Findings that the MET/IT Claim Form Was Not a "Questionnaire" for Purposes of Article 6.1.1 of the *Anti-Dumping Agreement*

245. As a preliminary matter, the European Union argues that China can only succeed on its claims under Article 6.1.1 of the *Anti-Dumping Agreement* if the Appellate Body reverses the Panel's interpretation of the term "questionnaires", because China's alternative claim under Article 11 of the DSU was not mentioned in its Notice of Other Appeal and is therefore not properly before the Appellate Body. The European Union requests, however, that the Appellate Body uphold the Panel's findings under Article 6.1.1, because its interpretation of the term "questionnaires" is also supported by two previous panel reports<sup>403</sup>, and because the alternative interpretation suggested by China would render the meaning of the term "questionnaires" "arbitrary and dependent on a case-by-case analysis".<sup>404</sup> In fact, the European Union states that it adopts the panel's reasoning in *US – Anti-Dumping and Countervailing Duties (China)*, which dealt with the parallel provision in the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), as its own.<sup>405</sup>

246. The European Union further argues that the dictionary definition of the word "questionnaire" does not amount to its "ordinary meaning" for purposes of interpretation, because this can only be discerned with reference to its context and in the light of its object and purpose. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, the broad language in the chapeau of Article 6.1 confirms the fact that not every request for information will fall under "the specific 30-day

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<sup>403</sup>European Union's appellee's submission, paras. 410-415 (quoting Panel Report, *Egypt – Steel Rebar*, paras. 7.276 and 7.277; and Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 15.23-15.37).

<sup>404</sup>European Union's appellee's submission, para. 418.

<sup>405</sup>European Union's appellee's submission, para. 416.

'ample opportunity' rule" set out in Article 6.1.1.<sup>406</sup> The European Union contends that this contextual interpretation of the term "questionnaires" as applying only to the initial, comprehensive questionnaire is further supported by the consistent use of the singular form of the term in footnote 15 of Article 6.1.1, and in Annex I to the *Anti-Dumping Agreement*.<sup>407</sup> The European Union further argues that the question of whether or not an information request is "so substantial" that it warrants verification, or whether allowing 30 days for its return will interfere with the authority's timely completion of the investigation, are both issues that will require a case-by-case determination depending on the circumstances in a particular investigation, and should not form part of the definition of the term "questionnaires".<sup>408</sup>

247. Should the Appellate Body find that China's alternative claims are properly raised on appeal, the European Union asserts that the Panel rightly found that the MET/IT Claim Form did not constitute a "questionnaire" under the Panel's interpretation. Although some of the information contained in the MET/IT Claim Form may overlap with information requested in more comprehensive questionnaires, the European Union argues that the MET/IT Claim Form serves an entirely different purpose from such questionnaires, and is much narrower in scope.<sup>409</sup> Were the Appellate Body to agree with China's suggested application of Article 6.1.1, it would have to find that every information request that "plays a role" in the investigation would fall under the term "questionnaire" and require 30 days for completion<sup>410</sup>, a result the European Union urges the Appellate Body to reject.

E. *Arguments of the Third Participants*

1. Brazil

248. Brazil disagrees with the Panel's finding that there is solely one exception to the obligation in Article 6.10 of the *Anti-Dumping Agreement* to determine individual dumping margins to each known exporter or producer of the product under investigation. Brazil contends that there are various plausible interpretations of the second sentence of Article 6.10 of the *Anti-Dumping Agreement*. In cases where multiple interpretations of a treaty provision are "possible", the Appellate Body has clearly stated that customary rules of interpretation require interpreters to avoid assuming that the most burdensome obligation was the one intended by the drafters of the treaty.<sup>411</sup> In Brazil's view, it seems "reasonable" to interpret the second sentence of Article 6.10 as one specific, but not the sole,

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<sup>406</sup>European Union's appellee's submission, para. 420.

<sup>407</sup>European Union's appellee's submission, para. 420.

<sup>408</sup>European Union's appellee's submission, paras. 421-423.

<sup>409</sup>European Union's appellee's submission, para. 429.

<sup>410</sup>European Union's appellee's submission, para. 431.

<sup>411</sup>Brazil's third participant's submission, para. 12 (referring to Appellate Body Report, *EC – Hormones*, para. 165).



exception to the first sentence of Article 6.10. Indeed, the use of "as a rule" in the first sentence of Article 6.10 reveals the general nature of the obligation, merely expressing preference for the use of a specific methodology. This conclusion is further confirmed by the French and the Spanish versions, which begin, respectively, with the expressions "*en règle générale*" and "*por regla general*". In contrast, there are no limiting or restrictive expressions, such as "unless" or "only in cases where", in the second sentence of Article 6.10 of the *Anti-Dumping Agreement*.<sup>412</sup>

249. Brazil contends that one of the situations in which the general rule of individual dumping margin calculation contained in the first sentence of Article 6.10 of the *Anti-Dumping Agreement* is not applicable is where prices and costs are not established according to market economy rules. This conclusion is supported in Article 2.7 of the *Anti-Dumping Agreement*, which refers to the second *Ad Note* to Article VI:1 of the GATT 1994, and, in the particular case of China, reinforced by paragraph 15(a)(ii) of China's Accession Protocol. Pursuant to these provisions, investigating authorities may use, when determining the dumping margin, a different methodology for price comparability than the one resulting from Articles 2 and 6.10 of the *Anti-Dumping Agreement*. Brazil notes that, in *Korea – Certain Paper*, the panel recognized that there may be situations in which treating separate legal entities as a single exporter for determining dumping margins is a proper, WTO-consistent methodology.<sup>413</sup> Although this precedent refers to an investigation concerning companies that operated under market economy conditions, it is Brazil's contention that in the case of NMEs the motives for "single exporter" treatment are all the more justified.<sup>414</sup> The Panel itself recognized that it is possible to consider all companies operating under NME conditions as one single exporter together with the State, but such a statement seems to be in contradiction with the Panel's final conclusion that sampling is the only exception to the obligation to determine individual dumping margins.<sup>415</sup>

250. Regarding the presumption established by Article 9(5) of the Basic AD Regulation with respect to the relationship between investigated companies and the State in NMEs, Brazil considers that the Panel erred in finding that such a presumption has no legal basis. In Brazil's view, investigating authorities are permitted under WTO law to place on Chinese exporters or producers the burden of proving that their industry is subject to market economy conditions in its functioning, which includes showing that they operate independently from the State. The expressions "can/cannot clearly show" in Article 15(a)(i) and (ii) are the key textual element indicating that the treatment accorded to

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<sup>412</sup>Brazil's third participant's submission, para. 9.

<sup>413</sup>Brazil's third participant's submission, para. 26 (referring to Panel Report, *Korea – Certain Paper*, para. 7.161).

<sup>414</sup>Brazil's third participant's submission, para. 28.

<sup>415</sup>Brazil's third participant's submission, para. 30.

Chinese exporters or producers is dependent upon their capacity to show that market economy conditions prevail in their industry. Brazil further contends that, since NME conditions constitute a factor that Members have recognized to affect price comparability, information on price comparability falls into the scope of Article 2.4 of the *Anti-Dumping Agreement*. Therefore, placing the burden of proof regarding the existence of market economy conditions on the Chinese exporters or producers is permitted under Article 2.4 of the *Anti-Dumping Agreement*, as long as this burden is reasonable.<sup>416</sup>

251. With respect to Article 9.2 of the *Anti-Dumping Agreement*, Brazil rejects the Panel's conclusion that, given the similarities between Article 9.2 and Article 6.10 of the *Anti-Dumping Agreement*, the obligation to name the suppliers corresponds to the obligation to calculate individual dumping margins.<sup>417</sup> Brazil submits that the *Anti-Dumping Agreement* addresses, in distinct provisions, the determination of dumping margins and the imposition of anti-dumping duties, and considers that the Panel's parallelism between these core provisions is far-fetched. The textual differences between Article 9.2 and Article 6.10 are a clear indication that Members intended them to have different scopes. In addition, both in *US – Gasoline* and *EC – Hormones*, the Appellate Body affirmed that a treaty interpreter must not ignore the choice of different words in the text of treaty provisions.<sup>418</sup> In referring to the naming of the concerned suppliers, Article 9.2 of the *Anti-Dumping Agreement* does not establish any other obligation than the *naming* itself, thus there is no need for the investigating authorities to impose different duties on each of them. In Brazil's view, the investigating authorities may rightfully impose the same anti-dumping duty to all known exporters or producers as long as it is equal to, or less than, the smallest dumping margin established to these exporters/producers.<sup>419</sup>

## 2. Colombia

252. With respect to the interpretation of Article 6.10 of the *Anti-Dumping Agreement*, Colombia disagrees with the Panel's finding that the rule in this provision does not admit more exceptions than only sampling. Colombia considers that a single dumping margin can also be determined if, after having assessed the evidence available, the investigating authorities conclude that the producers and exporters in an NME are deemed a single entity with the State. Colombia considers, however, that there is no direct legal basis within the WTO legal framework for a general presumption that all producers and exporters in an NME are a single entity with the State for the purposes of the determination of a dumping margin and the imposition of anti-dumping duties. Therefore, the

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<sup>416</sup>Brazil's third participant's submission, para. 40.

<sup>417</sup>Brazil's third participant's submission, para. 45.

<sup>418</sup>Brazil's third participant's submission, paras. 49 and 50 (referring to Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at 16; and Appellate Body Report, *EC – Hormones*, para. 164).

<sup>419</sup>Brazil's third participant's submission, para. 56.

assessment of a link between the producers/exporters and the State is a matter of evidence and should be done on a case-by-case basis. Colombia reads Article 9(5) of the Basic AD Regulation as setting out the evidentiary threshold to establish a link between producers/exporters and the State in NMEs for the purposes of the dumping margin determination. In Colombia's view, as long as this threshold provides the elements to collect the evidence necessary to demonstrate that such a link does not exist, it is consistent with Article 6.10 of the *Anti-Dumping Agreement*. Colombia further submits that the Appellate Body can take into account China's Accession Protocol and the Accession Working Party Report as guidance in relation to the Members' concerns regarding anti-dumping investigations concerning products from China.<sup>420</sup>

253. Colombia disagrees with the Panel's interpretation of Article 9.2 of the *Anti-Dumping Agreement* and rejects the Panel's conclusion that Article 9.2 does not permit the imposition of a single country-wide anti-dumping duty in an investigation involving an NME. In Colombia's view, rejecting the European Union's interpretation of the term "appropriate" in Article 9.2, as referring to the duty rate appropriate to the country concerned, could lead to a situation where, even if the "appropriate" amount of anti-dumping duty to be collected is a country-wide one, such country-wide anti-dumping duty cannot be imposed. This would limit the possibility for Members to collect the appropriate amount of anti-dumping duties in a given case.<sup>421</sup> Colombia reiterates its understanding that, since there is no legal basis for a general evidentiary presumption that producers and exporters act as a single entity under the control of the State in NMEs, an investigating authority needs a factual basis to support a conclusion that a single, country-wide anti-dumping duty must be imposed. Article 9(5) of the Basic AD Regulation sets out the evidentiary threshold that the European Union applies to determine what type of relationship exists between exporters and producers and the State in NMEs, and, as long as such threshold provides evidence of a link, this can be considered as a factual basis for the imposition of a single, country-wide anti-dumping duty.<sup>422</sup>

254. Colombia agrees with the Panel's finding that the determination of how to group products by product type was the kind of "information" covered by the requirements of Article 6.4 of the *Anti-Dumping Agreement*. In *EC – Tube or Pipe Fittings*, the panel defined the kind of information that Article 6.4 requires authorities to disclose as "information that would not initially be in the possession of an interested party and would therefore be unknown or unfamiliar to an interested party if it were not disclosed to that party in the course of an investigation".<sup>423</sup> Taking this definition into

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<sup>420</sup>Colombia's third participant's submission, para. 13.

<sup>421</sup>Colombia's third participant's submission, para. 23.

<sup>422</sup>Colombia's third participant's submission, para. 28.

<sup>423</sup>Colombia's third participant's submission, para. 30 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.208).

consideration, Colombia submits that the qualification of how to group the products in the investigation falls within the scope of information covered by Article 6.4 of the *Anti-Dumping Agreement*, and highlights the fact that product grouping defines how the producers and exporters under investigation will substantiate their defence.<sup>424</sup>

3. Japan

255. Japan agrees with the Panel's finding that the first sentence of Article 6.10 establishes an obligation to determine an individual dumping margin for each individual exporter or producer concerned, with only one exception, namely, the possibility of sampling specified in the second sentence of Article 6.10. In Japan's view, Article 6.10 is purely procedural in nature, in the sense that it imposes a procedural obligation to determine individual margins of dumping for each known exporter or producer, and it is not concerned with substantive issues regarding the determination of individual dumping margins.<sup>425</sup> Therefore, provisions covering substantive issues, such as Articles 2 and 6.8 of the *Anti-Dumping Agreement*, cannot be deemed exceptions to the rule set out in Article 6.10. In addition, the manner in which an investigating authority may define "exporter" or "producer" within the meaning of the first sentence of Article 6.10 has nothing to do with the relationship between the first and the second sentences of the Article 6.10 of the *Anti-Dumping Agreement*.<sup>426</sup>

256. Japan further submits that the Panel's reading of *Korea – Certain Paper* may be too narrow, especially in its application in the context of NMEs. In Japan's view, the principles derived from that precedent—that is, that distinct legal entities may be treated as a single exporter or producer if they "are in a relationship close enough to support that treatment"<sup>427</sup>—equally apply to the relationship between the State and private legal entities. In that sense, Japan has doubts as to whether the operation of Article 9(5) of the Basic AD Regulation is indeed "fundamentally different" from the test in *Korea – Certain Paper* as the Panel concluded. Japan also queries whether the question of who carries the burden of proving whether distinct entities are in a close enough relationship to be considered a single exporter or producer is relevant for the interpretation of Article 6.10 of the *Anti-Dumping Agreement*, insofar as this provision makes no reference to the burden of proof. In any event, Japan considers that Article 15(a) and (d) of China's Accession Protocol, which places the

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<sup>424</sup>Colombia's third participant's submission, para. 32.

<sup>425</sup>Japan's third participant's submission, para. 8.

<sup>426</sup>Japan's third participant's submission, para. 9.

<sup>427</sup>Japan's third participant's submission, para. 14 (quoting Panel Report, *Korea – Certain Paper*, para. 7.161).

burden of proof on the producers under investigation or on China itself, appears to provide relevant context in that respect.<sup>428</sup>

257. Japan supports the Panel's finding that "sources" and, by implication, "suppliers" in Article 9.2 of the *Anti-Dumping Agreement* can be interpreted as referring to the State where it is demonstrated that the State is the actual producer or exporter of the product in question.<sup>429</sup> Likewise, Japan supports the European Union's argument that the State can be the source of price discrimination. However, Japan queries whether the Panel provided a sufficient basis to conclude that Article 9.2 of the *Anti-Dumping Agreement* prohibits Members to presume that the State in an NME is the source of price discrimination. In Japan's view, it is at least questionable whether Members would not, in any event, be allowed to presume that the Chinese State is the source of price discrimination on the basis of Article 15(a) and (d) of China's Accession Protocol, read together with paragraph 151 of China's Accession Working Party Report. Japan maintains, however, that any presumption in that regard must be rebuttable.<sup>430</sup>

258. Japan disagrees with the Panel's finding that the term "impracticable" in Article 9.2 of the *Anti-Dumping Agreement* must be interpreted as in Article 6.10, namely, in reference to a large number of producers or exporters. In Japan's view, the impracticability of naming all the suppliers, as provided for in the third sentence of Article 9.2, relates to the collection of the appropriate amount of anti-dumping duties, as provided for in the first sentence of Article 9.2. A high risk of circumvention may be one reason for it to be impracticable to name each individual producer or exporter for which an anti-dumping margin was calculated.<sup>431</sup> Given the context, the scope of the third sentence of Article 9.2 could well be given a broader interpretation than the situation described in the second sentence of Article 6.10, namely, the sampling exception. Japan notes that there is no reference in the text of either Article 9.2 or Article 6.10 indicating that the exceptions contained respectively in the third and second sentences of each provision must be read together; and it adds that whereas Article 6.10 explicitly qualifies the "impracticability" as referring to only one specific situation ("where the number of exporters, producers, importers or types of products involved is so large"), Article 9.2 provides no such explicit, nor even implicit, limitation.<sup>432</sup>

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<sup>428</sup>Japan's third participant's submission, para. 18.

<sup>429</sup>Japan's third participant's submission, para. 20 (referring to Panel Report, footnote 278 to para. 7.103).

<sup>430</sup>Japan's third participant's submission, para. 24.

<sup>431</sup>Japan's third participant's submission, para. 33.

<sup>432</sup>Japan's third participant's submission, para. 36.

4. United States

259. The United States argues that the Panel erred in its interpretation that Article 6.10 of the *Anti-Dumping Agreement* prohibits investigating authorities from requiring NME exporters or producers to show their independence from the State before providing them with an individual margin of dumping. In the United States' view, the Panel's interpretation of Article 6.10 as prescribing a single rule for how investigating authorities must weigh evidence in all cases does not accord with the recognition elsewhere in the WTO Agreements that NMEs may present additional factual complexities in an anti-dumping investigation.<sup>433</sup> The United States maintains that the interpretative second *Ad Note* to Article VI:1 of the GATT 1994 recognizes that price comparisons with domestic prices may not be possible in an NME where State interference is pervasive, and allows Members to apply an alternative price comparison methodology by basing the normal value on data from an analogue country. Moreover, China's Accession Protocol recognizes the pervasive government interference in the Chinese economy, allowing Members to establish different evidentiary requirements for firms operating in China. Specifically, the Protocol recognizes that, absent a demonstration to the contrary by Chinese producers, government interference will prevent market principles from functioning in the relevant industry producing the product under consideration.<sup>434</sup>

260. The United States further submits that the Panel erred in its interpretation that Article 6.10 of the *Anti-Dumping Agreement* prohibits an investigating authority from using criteria, such as those established in Article 9(5) of the Basic AD Regulation, to determine whether a firm is sufficiently separate from the State to determine an individual margin of dumping for that entity. According to the United States, the *Anti-Dumping Agreement* neither defines "exporter" nor "producer", nor sets out criteria for the investigating authority to examine before concluding that a particular firm or group of firms constitute an "exporter" or "producer".<sup>435</sup> Therefore, the determination of whether a firm constitutes the relevant exporter or producer, including the selection of criteria to employ in making this determination, would appear to fall within the discretion of the investigating authority. The United States contends that, in a NME such as China, State interference could exert influence over firms and prices, thus making the State analogous to a parent company that makes business decisions for the individual firms. Furthermore, there is substantial evidence that such State interference exists in the Chinese economy, such as concerns expressed by Members in this regard during China's accession negotiations.<sup>436</sup> Therefore, contrary to the Panel's finding, it is logical for the

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<sup>433</sup>United States' third participant's submission, p. 12.

<sup>434</sup>United States' third participant's submission, para. 13.

<sup>435</sup>United States' third participant's submission, para. 16.

<sup>436</sup>United States' third participant's submission, para. 19 (referring to China's Accession Working Party Report, paras. 50, 51, and 150).

European Union's investigating authority to confirm that a Chinese company functions as an exporter or producer separate from the State before assigning an individual dumping margin to that company. The United States disagrees with China's argument that requiring companies from NMEs to demonstrate that they qualify for individual dumping margins results in the application of a rigid and burdensome rule to Chinese firms. Rather, such a requirement provides investigating authorities with the necessary flexibility to respond to changes in these NMEs.<sup>437</sup>

261. The United States maintains that the Panel erred in its application of Article I:1 of the GATT 1994 in finding that Article 9(5) of the Basic AD Regulation is inconsistent with that provision. In the United States' view, Chinese products pose "methodological challenges to investigating authorities" in determining costs and prices in connection with those products due to pervasive State interference.<sup>438</sup> Thus, Article 9(5) of the Basic AD Regulation is designed to address a particular condition associated with the nature of China's economy. Moreover, several WTO rules, including the second *Ad Note* to Article VI:1 of the GATT 1994 and China's Accession Protocol, explicitly recognize that, in the context of anti-dumping and countervailing duty proceedings, products from one Member may be treated differently from those of another Member. The United States further contends that the Panel misinterpreted Article 9 of the *Anti-Dumping Agreement* when finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the *Anti-Dumping Agreement* because Article 9.2 requires an authority to "name the supplier or suppliers of the product concerned" when imposing a duty. According to the United States, the imposition of anti-dumping duties is always with respect to products, not individual exporters or producers.<sup>439</sup> Thus, the concept of imposing duties on exporters or producers, on which the Panel relied in reaching its finding, has no basis in the *Anti-Dumping Agreement*. Moreover, the obligation to "name the supplier" under Article 9.2 does not require an authority to calculate individual margins of dumping for each exporter or producer.

262. The United States submits that, although it does not take a position on the particular facts at issue in this dispute, it agrees with China that a definition of the domestic industry that is narrowly limited to those parties who actively support or otherwise wish to participate in the investigation does not permit an "objective examination" of whether the domestic industry is experiencing material injury, within the meaning of Article 3.1 of the *Anti-Dumping Agreement*.<sup>440</sup> This is because those producers most likely to participate are those who supported the complaint who had the "least healthy economic performance". The United States also agrees with China that the Panel's analysis under

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<sup>437</sup>United States' third participant's submission, para. 21.

<sup>438</sup>United States' third participant's submission, para. 23.

<sup>439</sup>United States' third participant's submission, para. 26.

<sup>440</sup>United States' third participant's submission, para. 41.

Article 3.1 was flawed insofar as it did not account for the European Union's failure to make active efforts to collect data on all known EU fastener producers. In this respect, the United States disagrees with the Panel's suggestion that the European Union's exclusion of most known EU fastener producers from its definition of the domestic industry may be justified by the fragmented nature of this industry.

263. The United States disagrees with the Panel's finding that the European Union is allowed to use a process that favours complainants and supporters to be included in the domestic industry definition "so long as the producers that are included account for a sufficient quantity of domestic production to be considered a 'major proportion'".<sup>441</sup> In the United States' view, such an interpretation renders meaningless the two exceptions covered under subparagraphs (i) and (ii), which expressly allow investigating authorities to depart from the inclusive standard defined in Article 4.1. Finally, the United States disagrees with the European Union's argument that the "major proportion" referenced by Article 4.1 should be interpreted to mean producers accounting for at least 25 per cent of total domestic production in the light of the 25 per cent benchmark under Article 5.4 of the *Anti-Dumping Agreement* for determining the sufficiency of standing. In the United States' view, the 25 per cent standing requirement under Article 5.4 should not be read as setting a benchmark for the "major proportion" requirement under Article 4.1 for defining the relevant domestic industry, given that the 25 per cent standing requirement itself must be judged against a broader domestic industry defined under Article 4.1 as "domestic producers as a whole" or "those of them whose collective output ... constitutes a major proportion of the total domestic production".<sup>442</sup>

264. The United States submits that the Panel correctly interpreted Article 6.1.1 of the *Anti-Dumping Agreement* in finding that the 30-day response period prescribed in that provision applies only to the original anti-dumping questionnaire. The United States recalls that, in *Egypt – Steel Rebar*, the panel explained that the term "questionnaire" refers to one particular request for information made by the investigating authority.<sup>443</sup> Moreover, the panel in *US – Anti-Dumping and Countervailing Duties (China)* similarly found that the term "questionnaires" in Article 12.1.1 of the *SCM Agreement* refers to the initial comprehensive questionnaire issued by an investigating authority covering the issues on which the investigating authority will have to make determinations in relation to subsidization of the investigated product, injury, and causation.<sup>444</sup> The United States further submits that paragraphs 6 and 7 of Annex I to the *Anti-Dumping Agreement* refer to "the questionnaire" in the singular. In the United States' view, given the breadth of information requested

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<sup>441</sup>United States' third participant's submission, para. 46 (quoting Panel Report, para. 7.230).

<sup>442</sup>United States' third participant's submission, para. 47.

<sup>443</sup>United States' third participant's submission, para. 32 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.7276).

<sup>444</sup>United States' third participant's submission, para. 33 (referring to Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 15.37).



in the initial anti-dumping questionnaire, it is logical that the *Anti-Dumping Agreement* seeks to provide a minimum time period for respondent firms to collect the necessary data. However, the opportunity to claim MET or IT is merely a precursor to the issuance of the actual anti-dumping questionnaire, and hence not subject to the obligations in Article 6.1.1 of the *Anti-Dumping Agreement*.<sup>445</sup>

### III. Issues Raised in This Appeal

265. The following issues are raised in the appeal by the European Union:

- (a) whether the Panel erred in finding that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and with Article I:1 of the GATT 1994, and in particular:
  - (i) whether the Panel erred in finding that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties, but also the calculation of margins of dumping;
  - (ii) whether the Panel erred in its interpretation of Article 6.10 of the *Anti-Dumping Agreement* and in finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the *Anti-Dumping Agreement*, because it conditions the determination of individual dumping margins for exporters or producers from NMEs on the fulfilment of the IT test;
  - (iii) whether the Panel erred in its interpretation of Article 9.2 of the *Anti-Dumping Agreement* and in finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the *Anti-Dumping Agreement*, because it conditions the imposition of individual duties on exporters or producers from NMEs on the fulfilment of the IT test;
  - (iv) whether the Panel erred in finding that Article 9(5) of the Basic AD Regulation violates the MFN obligation in Article I:1 of the GATT 1994; and
  - (v) whether, in making the findings that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping*

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<sup>445</sup>United States' third participant's submission, para. 35.

*Agreement* and with Article I:1 of the GATT 1994, the Panel acted inconsistently with its obligations under Article 11 of the DSU;

- (b) whether the Panel erred in finding that the European Union acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements;
- (c) whether the Panel erred in finding that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as applied" in the fasteners investigation;
- (d) whether the Panel erred in the interpretation and application of Article 6.4 of the *Anti-Dumping Agreement*, and acted inconsistently with Article 11 of the DSU, in finding that the European Union acted inconsistently with Article 6.4 of the *Anti-Dumping Agreement* by failing to provide a timely opportunity for the Chinese exporters to see the product types used by the Commission for purposes of comparing the export price and the normal value in the dumping determination;
- (e) whether the Panel erred in finding that, by failing to provide a timely opportunity for the Chinese exporters to see the product types, the European Union also acted inconsistently with Article 6.2 of the *Anti-Dumping Agreement* by failing to ensure all interested parties had a full opportunity for the defence of their interests;
- (f) whether the Panel erred in its interpretation and application of Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* with regard to the European Union's treatment of confidential information, and in particular:
  - (i) whether the Panel erred in finding that the European Union failed to ensure that the two domestic producers, Agrati and Fontana Luigi, provided appropriate statements of the reasons why information provided in confidence was not susceptible of summary;
  - (ii) whether the claim that the European Union failed to establish that "good cause" existed to support the confidential treatment of information submitted by the analogue country producer participating in the investigation, Pooja Forge, was within the Panel's terms of reference under Article 6.2 of the DSU; and if so

- (iii) whether Panel erred in finding that the European Union failed to establish that "good cause" existed to support the confidential treatment of information submitted by Pooja Forge;
- (iv) whether, in addressing China's claim that no "good cause" supported the confidential treatment of information submitted by Pooja Forge, the Panel acted inconsistently with its obligations under Article 11 of the DSU, and deprived the European Union of its right to due process; and
- (g) whether the Panel erred in finding that China's claims before the Panel under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* regarding the disclosure of the identity of the complainants and the supporters of the complaint were within the Panel's terms of reference under Article 6.2 of the DSU.

266. The following issues are raised in the other appeal by China:

- (a) whether the Panel erred in rejecting China's claim that the domestic industry in the fasteners investigation did not include producers whose collective output "constitutes a major proportion of the total domestic production" within the meaning of Article 4.1 of the *Anti-Dumping Agreement*, and in particular:
  - (i) whether the Commission erroneously relied on a presumption that 25 per cent of the total domestic production constituted "a major proportion", and therefore failed to define the domestic industry in the fasteners investigation consistently with Article 4.1; and
  - (ii) whether other specific circumstances of the fasteners investigation were relevant to the examination of the domestic industry definition in the fasteners investigation under Article 4.1 of the *Anti-Dumping Agreement*;
- (b) whether the Panel erred in rejecting China's claim that the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* by making an injury determination on the basis of a sample of producers that was not representative of the domestic industry;
- (c) whether the Panel erred in finding that the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* by excluding certain producers from the definition of the domestic industry, and in particular:

- (i) whether the Panel acted inconsistently with its obligations under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* in finding that the European Union did not exclude from the definition of the domestic industry those producers who did not support the complaint;
  - (ii) whether the Panel erred in the interpretation and application of Article 4.1 of the *Anti-Dumping Agreement*, and acted inconsistently with Article 11 of the DSU, in finding that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement* by excluding from the definition of the domestic industry producers who did not make themselves known within 15 days of the publication of the Notice of Initiation; and
  - (iii) whether the Panel erred in the interpretation and application of Article 3.1 of the *Anti-Dumping Agreement* in rejecting China's claim that the European Union acted inconsistently with that provision by excluding certain producers;
- (d) whether the Panel erred in finding that the Commission did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the dumping determination in the fasteners investigation, and in particular:
- (i) whether the Panel acted inconsistently with Article 11 of the DSU, and erred in its interpretation and application of Article 2.4 of the *Anti-Dumping Agreement*, in not addressing China's argument that the Commission failed to inform the interested parties of the "product types" it used to compare the export price and normal value;
  - (ii) whether the Panel erred in the interpretation of Article 2.4 of the *Anti-Dumping Agreement*, and acted inconsistently with Article 11 of the DSU, when finding that the Commission did not have to make adjustments for the physical differences reflected in the Product Control Number (the "PCN"); and
  - (iii) whether the Panel erred in the interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in finding that the European Union did not have to make adjustments for alleged quality differences;

- (e) whether the Panel erred in its interpretation and application of Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* with regard to the European Union's treatment of confidential information, and in particular:
  - (i) whether the Panel erred in finding that the European Union did not act inconsistently with its obligations under Article 6.5 when the Commission granted the request to treat the identity of the complainants and the supporters of the complaint as confidential; and
  - (ii) whether the Panel acted inconsistently with Article 11 of the DSU in its evaluation of the above claim when it impermissibly shifted the burden to China to show that the "good cause" alleged for the confidential treatment of the complainants' identity was unfounded;
- (f) if the Appellate Body finds that the Panel erred in finding that "good cause" existed to support the confidential treatment of the identity of the complainants and supporters of the complaint, whether the European Union also violated Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* when it failed to disclose the identity of the complainants and the supporters of the complaint to the Chinese producers;
- (g) whether the Panel erred in its interpretation and application of Article 6.1.1 of the *Anti-Dumping Agreement*, and in particular of the term "questionnaire", when it found that the European Union did not act inconsistently with this provision by allowing Chinese exporters less than 30 days to submit the Market Economy Treatment and/or Individual Treatment Claim Form; and
- (h) whether the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* when it concluded that the Market Economy Treatment and/or Individual Treatment Claim Form did not fall under the definition of "questionnaires" as interpreted by the Panel.

#### IV. The Panel's Findings Regarding Article 9(5) of the Basic AD Regulation "As Such"

##### A. Introduction

267. Before the Panel, China claimed that Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 (the "Basic AD Regulation")<sup>446</sup> is inconsistent "as such" with Articles 6.10, 9.2, 9.3, and 9.4 of the *Anti-Dumping Agreement* as well as Articles I:1 and X:3(a) of the GATT 1994. China also claimed that, as a consequence of the fact that Article 9(5) of the Basic AD Regulation is inconsistent with the provisions of the *Anti-Dumping Agreement* and of the GATT 1994, this measure is also inconsistent with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement*.

268. The Panel found that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* because it requires that a country-wide dumping margin be determined and a country-wide duty be imposed with respect to producers or exporters from non-market economies ("NMEs") unless such producers or exporters show, on the basis of the criteria set out in that provision, that they are independent of their State.<sup>447</sup> The Panel also found that Article 9(5) of the Basic AD Regulation violates the most favoured nation ("MFN") obligation of Article I:1 of the GATT 1994 because its application will, in certain situations, result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union.<sup>448</sup>

269. As a consequence of its findings that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, the Panel also found that the European Union acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements.<sup>449</sup>

270. The European Union appeals these findings and requests the Appellate Body to: (i) reverse the Panel's finding that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties, but also the calculation of margins of dumping, and find instead that Article 9(5)

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<sup>446</sup>Official Journal of the European Union, L Series, No. 343 (22 December 2009) 51, and Corrigendum, Official Journal of the European Union, L Series, No. 7 (12 January 2010) 23 (Panel Exhibit CHN-3).

<sup>447</sup>Panel Report, paras. 7.98 and 7.112.

<sup>448</sup>Panel Report, para. 7.124.

<sup>449</sup>Panel Report, para. 7.137. Having found that Article 9(5) is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and with Article I:1 of the GATT 1994, the Panel exercised judicial economy in respect of China's claims under Articles 9.3 and 9.4 of the *Anti-Dumping Agreement* and Article X:3(a) of the GATT 1994. (*Ibid.*, paras. 7.116, 7.118, and 7.133)

of the Basic AD Regulation, on its face, deals with only the individual or country-wide imposition of anti-dumping duties in respect of imports from NMEs; (ii) reverse the Panel's finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the *Anti-Dumping Agreement*, since that finding was premised on the Panel's incorrect understanding of the scope of Article 9(5) of the Basic AD Regulation; (iii) reverse the Panel's finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the *Anti-Dumping Agreement* because it conditions the determination of individual dumping margins for producers or exporters from NMEs on the fulfilment of the individual treatment ("IT") test; (iv) reverse the Panel's finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the *Anti-Dumping Agreement* because it conditions the imposition of individual duties on producers or exporters from NMEs on the fulfilment of the IT test; (v) reverse the Panel's finding that Article 9(5) of the Basic AD Regulation violates the MFN obligation under Article I:1 of the GATT 1994; and (vi) reverse the Panel's consequential findings that the European Union acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements.

271. Before turning to the specific issues on appeal, we consider it useful to outline the measure at issue in this dispute, that is, the Basic AD Regulation and, in particular, Article 9(5).

B. *The Measure at Issue*

272. Article 9(5) of the Basic AD Regulation provides that "[a]n anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except for imports from those sources from which undertakings under the terms of this Regulation have been accepted." It further establishes that the regulation imposing the anti-dumping duty shall specify the duty "for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned". Article 2(7)(a) provides that, in the case of imports from NMEs, normal value shall not be determined based on prices paid or payable in the ordinary course of trade by independent customers in the exporting country, but based on an alternative methodology, such as the price or constructed value in a market economy third country.

273. To provide the relevant context for Article 9(5), we note that Article 2 of the Basic AD Regulation addresses the determination of dumping, including the determination of normal value. The rules set out in Article 2(1) to (6) closely mirror the provisions of Article 2.2 of the *Anti-Dumping Agreement*, and concern the determination of normal value in respect of imports from market economies. Article 2(7) of the Basic AD Regulation contains specific rules on the determination of

normal value in anti-dumping investigations involving NMEs. It groups NMEs into two categories—(i) NMEs that are not WTO Members and (ii) NMEs that are WTO Members (and Kazakhstan)—and establishes different rules for determining normal value for these categories.

274. Article 2(7)(a) applies to NMEs that are not Members of the WTO, including Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan, and Uzbekistan.<sup>450</sup> It provides that, for these countries, normal value is determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the European Union, or, where this is not possible, on any other reasonable basis, including the price actually paid or payable in the European Union for the like product duly adjusted if necessary to include a reasonable profit margin. Article 2(7)(b), which applies to "imports from the People's Republic of China, Vietnam and Kazakhstan and any [NME] country which is a member of the WTO at the date of the initiation of the investigation"<sup>451</sup> provides that if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in Article 2(7)(c), that "market economy conditions prevail" for them, normal value is determined for those producers in accordance with the rules in Article 2(1) to (6) applicable to market economies. Article 2(7)(b) further provides that, when this is not the case, normal value will be determined on the basis of Article 2(7)(a), that is, on the basis of the price or constructed value in a market economy third country, or the price actually paid or payable in the European Union for the like product. Article 2(7)(c) sets out the criteria that a foreign producer has to fulfil in order to demonstrate that it operates under market economy conditions, and thus that "market economy conditions prevail". These criteria are generally referred to as the market economy treatment test ("MET test").<sup>452</sup> The

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<sup>450</sup>See corrigendum to Basic AD Regulation, *supra*, footnote 5.

<sup>451</sup>See corrigendum to Basic AD Regulation, *supra*, footnote 5.

<sup>452</sup>Specifically, Article 2(7)(c) sets out the following criteria for the MET test. To demonstrate that they operate under market economy conditions, producers must show that:

- decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values;
- firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;
- the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
- the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and
- exchange rate conversions are carried out at the market rate.



determination of export prices to which the normal value is compared in order to calculate the margin of dumping is dealt with in Article 2(8) and (9). Article 2(8) provides that the export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the European Union. Article 2(9) sets out alternative methods for the determination of export prices under certain specified circumstances that are not relevant in this dispute.

275. Article 9(5) of the Basic AD Regulation sets out the modalities for the imposition of anti-dumping duties. Article 9(5) requires that, in principle, a duty be specified for each "supplier" of a product found to be dumped. It then provides for two exceptions to this principle: (i) where it is "impracticable" to specify the duty for each supplier; and (ii) where Article 2(7)(a) of the Basic AD Regulation applies—that is, where normal value for NME suppliers is determined on the basis of market economy third country prices or one of the other methods set forth in that provision. In these situations, the regulation imposing the duty shall specify a single duty rate for the supplying country concerned, a so-called country-wide duty, which will apply to all suppliers and imports from that country.

276. Article 9(5), however, exempts from the country-wide duty rate those NME suppliers that qualify for individual treatment ("IT suppliers"). An exporter from an NME may qualify for individual treatment and be granted an individual duty if it meets all of the following conditions:

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

277. These criteria are generally referred to as the "IT test". If an exporter demonstrates that it meets these conditions and is thus entitled to individual treatment, the EU authorities will specify an individual duty rate for that exporter. Such an individual rate is determined by comparing the normal value from the market economy third country with the exporters' actual export prices. Exporters that fail to satisfy the IT test will be subject to the country-wide duty rate.

278. Thus, when an exporter from a WTO Member that the European Union treats as an NME is subject to an anti-dumping investigation, the following possibilities with respect to the determination of normal value and the imposition of an anti-dumping duty apply. If the NME exporter or producer satisfies the MET test according to the criteria set out in Article 2(7)(c), then, according to Article 2(7)(b), its normal value will be determined on the same basis as for exporters from market economies, that is, prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. Moreover, according to Article 9(5), an individual duty rate will be specified for that supplier.

279. If the NME exporter fails to meet the MET test, then its normal value will be determined on the basis of an alternative method (usually on the basis of prices in a market economy third country). Whether an individual or a country-wide duty rate will be specified for that supplier will depend on whether the exporter requests and obtains individual treatment, pursuant to Article 9(5). Thus, if the NME exporter that has not fulfilled the MET test makes such a request and demonstrates that it meets the criteria in Article 9(5) of the Basic AD Regulation—that is, the IT test—an individual duty rate will be specified for the NME exporter on the basis of a comparison of the alternative third country normal value with its own export prices.<sup>453</sup>

280. An NME exporter that does not meet the IT test will be subject to a country-wide duty rate. The determination of the export price used to calculate that country-wide duty rate will depend on the level of cooperation on the part of the non-IT exporters altogether. If the level of cooperation is high—that is, if the cooperating non-IT exporters account for almost 100 per cent of all exports—the export price will be based on a weighted average of the actual price of all export transactions effected by these exporters. If, however, the level of cooperation is low—that is, if the cooperating non-IT exporters account for significantly less than 100 per cent of all exports—the Commission will resort to facts available to complete the missing information. Recourse to facts available will depend on the degree of non-cooperation and may include statistical import data.<sup>454</sup>

281. In sum, Article 2(7) of the Basic AD Regulation determines whether a supplier from an NME will receive market economy treatment, that is, whether the normal value for its imports will be determined on the basis of its domestic prices or costs or on the basis of an alternative methodology. Article 9(5) of the Basic AD Regulation determines whether a supplier from an NME will receive an individual or a country-wide anti-dumping duty. According to Article 9(5), NME suppliers that have

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<sup>453</sup>For an NME exporter or producer who meets the MET test, an individual duty will be specified on the basis of a comparison between that exporter's *domestic* normal value and its export price; by contrast, for an NME exporter or producer who meets the IT test, an individual duty will be calculated on the basis of a comparison between that exporter's export price and a *market economy third country* normal value.

<sup>454</sup>Panel Report, para. 7.50.

fulfilled the MET test under Article 2(7) will automatically receive individual duties; NME suppliers that have not fulfilled the MET test under Article 2(7) will receive country-wide duties, but will receive individual duties if they fulfil the IT test set out in Article 9(5).

282. In this dispute, China does not challenge the European Union's alternative methodology to determine normal value for imports from NMEs on the basis of a market economy third country, nor does it challenge the criteria to grant market economy treatment to WTO NME suppliers set forth in Article 2(7). China directs its challenge to the rules regarding the specification of individual and country-wide duties for NME suppliers, including the IT test, which are contained in Article 9(5) of the Basic AD Regulation.

C. *Section 15 of China's Accession Protocol*

283. Before addressing the appeal by the European Union of the Panel's findings under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, we address the claim by the European Union that the Protocol on the Accession of the People's Republic of China (China's "Accession Protocol")<sup>455</sup>, and in particular Section 15, allows the European Union to treat China as an NME for the purpose of applying anti-dumping rules and, in particular, Article 9(5) of the Basic AD Regulation.

284. The European Union argues that China's Accession Protocol contains an understanding that China is not yet a market economy and that, while it does not speak directly to the issue of whether Chinese suppliers must receive individual treatment with respect to the calculation of dumping margins and the imposition of anti-dumping duties, it "does not narrow the universe of situations where the *Anti-Dumping Agreement* permits a flexible application of the rules".<sup>456</sup> The European Union highlights that the reference in paragraph 15(a)(i) and (ii) of China's Accession Protocol to "the manufacture, production and sale of that product" suggests that the term "market economy conditions" also "encompasses the situation where State intervention in the economy including international trade is so substantial that operators cannot act independently from the State in their export activities".<sup>457</sup> China responds that Section 15 of its Accession Protocol does not contain "an official recognition by China" that it is an NME, but only "a temporary and limited derogation from the rules in the [*Anti-Dumping Agreement*]" on the determination of the normal value in anti-dumping investigations initiated with respect to imports from China.<sup>458</sup>

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<sup>455</sup>WT/L/432, 23 November 2001.

<sup>456</sup>European Union's appellant's submission, para. 49.

<sup>457</sup>European Union's appellant's submission, para. 46.

<sup>458</sup>China's appellee's submission, para. 49.

285. We begin by observing that Section 15 of China's Accession Protocol contains a similar acknowledgment of the difficulties in determining price comparability as the one contained in the second *Ad Note* to Article VI:1 of the GATT 1994, in respect of imports from China.<sup>459</sup> The second *Ad Note* to Article VI:1 recognizes that, in the cases of imports from countries where the State has a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the State, importing Members may determine that a comparison with domestic prices in such a country may not be appropriate due to special difficulties in determining price comparability. This provision allows investigating authorities to disregard domestic prices and costs of such an NME in the determination of normal value and to resort to prices and costs in a market economy third country. Article 2.7 of the *Anti-Dumping Agreement* states that Article 2 is without prejudice to the second

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<sup>459</sup>Section 15 of China's Accession Protocol, entitled "Price Comparability in Determining Subsidies and Dumping", reads in relevant part:

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
  - (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
  - (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- ...
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

*Ad Note to Article VI:1 of the GATT 1994*, and thus incorporates the second *Ad Note to Article VI:1* into the *Anti-Dumping Agreement*.<sup>460</sup>

286. According to paragraph 15(a) of China's Accession Protocol, it is incumbent upon Chinese producers to "clearly show" that market economy conditions prevail in the industry producing the like product in order for Chinese prices or costs to be used when determining price comparability. If Chinese producers are not able to "clearly show" that market economy conditions prevail in the industry in question, the importing WTO Member may use an alternative methodology that is not based on a strict comparison with domestic prices or costs in China, such as using surrogate third country or constructed normal value.

287. We note that paragraph 15(a) of China's Accession Protocol places the burden on the Chinese producers clearly to show that market economy conditions prevail in the industry producing the like product with respect to its manufacture, production, and sale. If such a showing is made, the importing Member shall use Chinese prices and costs in determining price comparability. Like the second *Ad Note to Article VI:1 of the GATT 1994*, paragraph 15(a) of China's Accession Protocol permits importing Members to derogate from a strict comparison with domestic prices or costs in China, that is, in respect of the determination of the normal value. This is indicated by the text of paragraph 15(a), which, in respect of the determination of price comparability, refers to "*Chinese*

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<sup>460</sup>The second *Ad Note to Article VI:1 of the GATT 1994* reads as follows:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing Members may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

We observe that the second *Ad Note to Article VI:1* refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second *Ad Note to Article VI:1* would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

Furthermore, the reference in the second *Ad Note to Article VI:1* to a strict "comparison with domestic prices" not always being "appropriate" provides flexibility only in respect of the determination of normal value. The recognition of special difficulties in determining price comparability in the second *Ad Note to Article VI:1* does not mean that importing Members may depart from the provisions regarding the determination of export prices and the calculation of dumping margins and anti-dumping duties set forth in the *Anti-Dumping Agreement* and in the GATT 1994. While the second *Ad Note to Article VI:1* refers to difficulties in determining price comparability in general, the text of this provision clarifies that these difficulties relate exclusively to the normal value side of the comparison. This is indicated by the operative part in the third sentence of this provision, which only allows importing Members to depart from a "strict comparison with *domestic* prices".

The second *Ad Note to Article VI:1* was added to the GATT 1947 following the 1954-1955 Review Session. (L/334, adopted 3 March 1955, p. 2, para. 6, and Annex I, Section I.B, p. 10; BISD 3S/222, at 223, para. 6)

prices or costs" or "a methodology that is not based on a strict comparison with *domestic* prices or costs in China".<sup>461</sup>

288. We do not consider that the references in paragraph 15(a)(i) and (ii) to producers having to show that "market economy conditions prevail ... with regard to the manufacture, production and *sale*"<sup>462</sup> of a product means that paragraph 15(a) permits any derogations also with respect to the determination of export prices. We reach this conclusion because, when producers are not able to show that market economy conditions prevail (including with regard to the *sale* of the product), paragraph 15(a) makes it clear that all an importing WTO Member is allowed to do as a consequence is to "use a methodology that is not based on a strict comparison with *domestic prices or costs in China*".<sup>463</sup>

289. Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member "that it is a market economy" or that "market economy conditions prevail in a particular industry or sector". Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application cannot be wider than that of paragraph 15(a). Both paragraphs concern exclusively the determination of normal value. In other words, paragraph 15(a) contains special rules for the determination of normal value in anti-dumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.

290. In our view, therefore, Section 15 of China's Accession Protocol does not authorize WTO Members to treat China differently from other Members except for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value. We consider that, while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the

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<sup>461</sup>Emphasis added.

<sup>462</sup>Emphasis added.

<sup>463</sup>Emphasis added.

*Anti-Dumping Agreement* and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties.<sup>464</sup>

291. Finally, we note that China's claim before the Panel concerned the determination of individual and country-wide dumping margins and duties, not the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China.

D. *The Scope of Article 9(5) of the Basic AD Regulation*

292. We now turn to the European Union's appeal of the Panel's findings concerning the scope of Article 9(5) of the Basic AD Regulation. The Panel found that "Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping".<sup>465</sup> The Panel reasoned that, as a general matter, "there is a close and necessary link between the calculation of a margin of dumping and the imposition of an anti-dumping duty"<sup>466</sup> and that "normally, an investigating authority would calculate the margin of dumping and impose the consequent anti-dumping duty on the same basis", whether this is producer specific or country-wide.<sup>467</sup> Specifically, the Panel found that, "in operation, the result of the IT test in Article 9(5) of the Basic AD Regulation determines the nature of the margin calculation the EU authorities will undertake, either individual or country-wide".<sup>468</sup>

293. The European Union claims that Article 9(5) of the Basic AD Regulation, examined on its face and based on its text and in the context of other Articles of the Basic AD Regulation, shows that it "deals exclusively with the imposition of anti-dumping duties"<sup>469</sup> and does not address the

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<sup>464</sup>Paragraph 150 of China's Accession Working Party Report states that several WTO Members noted that China was continuing the process of transition towards a full market economy and also refers to possible special difficulties in determining price comparability and to the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate. It states:

Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.

<sup>465</sup>Panel Report, para. 7.77.

<sup>466</sup>Panel Report, para. 7.72.

<sup>467</sup>Panel Report, para. 7.74.

<sup>468</sup>The Panel found that it is undisputed that, where according to Article 9(5) country-wide duties are imposed on NME producers that fail the IT test, the European Commission calculates only a country-wide dumping margin for such producers (and not individual margins), while in respect of producers that pass the IT test, an individual margin is calculated and an individual duty is imposed. (Panel Report, para. 7.77)

<sup>469</sup>European Union's appellant's submission, para. 90.

calculation of dumping margins or whether such dumping margins should be calculated on an individual or a country-wide basis. According to the European Union, the determination of the dumping margin for a supplier entitled to an individual dumping margin flows from the rule contained in Article 9(4) rather than 9(5) of the Basic AD Regulation, which China did not specify as the measure at issue in the present dispute.

294. China contends that the Panel's finding on the "meaning" and "scope" of Article 9(5) of the Basic AD Regulation is an issue of fact that the Appellate Body is not competent to review pursuant to Article 17.6 of the DSU. China submits that the meaning and scope of Article 9(5) is not clear "on its face", and its determination involves the Panel's findings on relevant factual elements with which the Appellate Body will not lightly interfere. China contends that, because the European Union has failed to raise a claim under Article 11 of the DSU in this respect, the Panel's finding regarding the meaning and scope of Article 9(5) of the Basic AD Regulation is not subject to our review in this case. In the alternative, assuming that we were to consider ourselves competent to review this issue, China submits that the Panel correctly found that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of dumping margins.<sup>470</sup>

295. We begin by addressing China's preliminary objection that the Panel's finding concerning the meaning and scope of Article 9(5) of the Basic AD Regulation is a matter of fact that is not subject to appellate review pursuant to Article 17.6 of the DSU. We disagree with China and the Panel.<sup>471</sup> On several occasions, the Appellate Body has clarified that municipal law may serve both as evidence of facts and evidence of a Member's compliance or non-compliance with its international obligations.<sup>472</sup> In particular, in *US – Section 211 Appropriations Act*, the Appellate Body stated that, when a panel examines the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its WTO obligations, that examination is a legal characterization by a panel and is therefore subject to appellate review under Article 17.6 of the DSU.<sup>473</sup>

296. In *China – Auto Parts*, the Appellate Body stated that it could review the panel's findings regarding the meaning of municipal law to the extent that the panel conducted its examination of municipal law for purposes of determining whether the Member had complied with its WTO

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<sup>470</sup>China's appellee's submission, para. 67.

<sup>471</sup>At the outset of its analysis of the scope of Article 9(5) of the Basic AD Regulation, the Panel stated that it fell upon it "to clarify the scope/operation of Article 9(5) of the Basic AD Regulation as a factual matter before engaging in a substantive analysis of China's claims". (Panel Report, para. 7.68)

<sup>472</sup>Appellate Body Report, *India – Patents (US)*, paras. 65 and 66; Appellate Body Report, *US – Hot-Rolled Steel*, para. 200; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 177 and 178; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168; Appellate Body Report, *US – Carbon Steel*, paras. 156 and 157.

<sup>473</sup>Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.



obligations. The Appellate Body recognized that there will be instances in which a panel's assessment of municipal law will go beyond the text of the instrument on its face, in which case further examination may be required, and may involve factual elements. The Appellate Body explained that it would not lightly interfere with a panel's assessment of municipal law that went beyond the text of an instrument on its face and involved such factual elements.<sup>474</sup> The Appellate Body clarified that the examination of a municipal legal instrument will focus on its text, but may also include the context of the provision and the "overall structure and logic"<sup>475</sup> of the municipal law.<sup>476</sup> In this dispute, the Panel did not review factual elements concerning the application of Article 9(5), such as pronouncements by EU domestic courts or opinions of legal experts or recognized scholars<sup>477</sup>, but assessed Article 9(5) of the Basic AD Regulation, based on the text of the provision, its context, and its operation.<sup>478</sup>

297. Therefore, we conclude that the Panel's assessment of the meaning and scope of Article 9(5) of the Basic AD Regulation, which is based on the text of the provision, its context within the structure of the other relevant provisions of the Regulation, and its operation is not a "factual matter" and is not excluded from appellate review. Rather, the Panel examined Article 9(5) for the purpose of determining its consistency with a number of provisions of the *Anti-Dumping Agreement* and the GATT 1994, which, as a matter of legal characterization, is subject to appellate review according to Article 17.6 of the DSU.

298. Having clarified that the Panel's findings concerning the meaning and scope of Article 9(5) of the Basic AD Regulation are subject to appellate review, we now turn to the European Union's appeal that the Panel erred in finding that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping.

299. The European Union contends that, even if the determination of dumping and the imposition of duties are closely related issues, this does not mean that "any consequence of the Article 9(5) determination, such as the nature of the dumping margin calculation, was part of the measure at

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<sup>474</sup> Appellate Body Reports, *China – Auto Parts*, para. 225.

<sup>475</sup> Appellate Body Reports, *China – Auto Parts*, para. 238.

<sup>476</sup> Appellate Body Reports, *China – Auto Parts*, paras. 225-245; Appellate Body Report, *China – Publications and Audiovisual Products*, para. 177.

<sup>477</sup> Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>478</sup> The Panel stated that:

... the meaning of national law of a WTO Member is a *matter of fact* for panels to establish. We note that the European Union has not provided any evidence of the meaning of Article 9(5) of the Basic AD Regulation, such as, for instance, an interpretation from the EU courts having relevant jurisdiction. Thus, we consider that it falls upon us to clarify the scope/operation of Article 9(5) of the Basic AD Regulation *as a factual matter* before engaging in a substantive analysis of China's claims.

(Panel Report, para. 7.68 (emphasis added; footnotes omitted))

issue".<sup>479</sup> The European Union contends that provisions of the Basic AD Regulation other than Article 9(5) speak directly or indirectly to the separate issue of the determination of dumping margins and whether those determinations are individual or country-wide. In particular, the European Union refers to: (i) Article 2(7), as the basis on which a supplier meeting the MET test would be assigned an individual margin of dumping; (ii) Article 9(4), which establishes the ceiling for the amount of anti-dumping duties by reference to the margin of dumping to be established; (iii) Article 9(6), which addresses the calculation of dumping margins and the imposition of anti-dumping duties in the context of sampling; (iv) Article 11(4), which provides for the calculation of individual margins of dumping for new exporters in reviews; and (v) Article 11(8), which requires that the dumping margin be established on an individual basis in refund proceedings. According to the European Union, these provisions address the separate issue of the individual determination of dumping margins.<sup>480</sup>

300. Like the Panel, we note that the text of Article 9(5) of the Basic AD Regulation does not explicitly mention dumping margins. However, we observe that Article 9(5) requires that an anti-dumping duty "be imposed in the appropriate amounts in each case" and that such duty be specified for each supplier or in certain circumstances for the supplying country concerned. We agree with the Panel that there is "a close and necessary link" between the calculation of a dumping margin and the imposition of an anti-dumping duty.<sup>481</sup> In particular, we consider that the determination of a dumping margin is a prerequisite for the imposition of an anti-dumping duty and that, therefore, a duty cannot be imposed unless a margin has been calculated, in part because the margin sets the ceiling on the amount of anti-dumping duty that may be imposed. Moreover, the requirement in Article 9(5) that the amount of the duty be "appropriate" also presupposes that an individual duty be based on an individual margin, and a country-wide duty be based on a country-wide margin. It thus follows that, if individual duties are imposed, individual margins are calculated; if country-wide duties are imposed, country-wide margins are calculated.<sup>482</sup>

301. We are not persuaded that any of the other provisions of the Basic AD Regulation cited by the European Union addresses the question of whether individual or country-wide dumping margins should be calculated. Article 2 of the Basic AD Regulation, like Article 2 of the *Anti-Dumping Agreement*, is entitled "Determination of Dumping", and contains rules concerning the determination of normal value and export price, the comparison between normal value and export price, and methodologies to determine the existence of margins of dumping. Article 2 of the Basic AD Regulation, however, like Article 2 of the *Anti-Dumping Agreement*, does not contain a rule that

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<sup>479</sup>European Union's appellant's submission, para. 108.

<sup>480</sup>European Union's appellant's submission, para. 96.

<sup>481</sup>Panel Report, para. 7.72.

<sup>482</sup>See Panel Report, para. 7.74.

requires that dumping margins be determined for each individual exporter or producer. More specifically, Article 2(7) of the Basic AD Regulation does not establish that individual margins of dumping will be calculated for NME suppliers if they fulfil the MET test. Article 2(7) only provides that, in the case of imports from NMEs, the normal value shall be determined on the basis of an alternative methodology and not based on domestic prices or costs, unless exporters from NMEs are able to show that market economy conditions prevail by demonstrating that they fulfil the criteria of the MET test. Article 2(7), however, is silent about the calculation of individual margins and duties. It is Article 9(5) of the Basic AD Regulation that establishes that individual duties will be specified for NME suppliers that have fulfilled the MET test; it also stipulates that, for NME suppliers that did not fulfil the MET test, an individual duty will be specified only if they fulfil the IT test.

302. Furthermore, Article 9(4) of the Basic AD Regulation, which appears to implement Article 9.3 of the *Anti-Dumping Agreement*, does not address the issue of the type of dumping margins that should be calculated for NME suppliers. Article 9(4) of the Basic AD Regulation concerns another issue, that is, the ceiling amount of anti-dumping duties, which must not exceed the dumping margin. This ceiling applies regardless of whether dumping margins have been calculated for each individual supplier or for all suppliers from a given country. Indeed, Article 9(4) does not mention at all individual margins or duties, as it is concerned with the maximum ceiling applicable to duties, regardless of whether these duties are imposed on an individual or a country-wide basis.

303. We observe that Article 9(6) of the Basic AD Regulation, which appears to implement Article 9.4 of the *Anti-Dumping Agreement*, addresses the specific situation of the dumping margins and anti-dumping duties that are determined and imposed on non-sampled producers, where the European Commission resorts to sampling. It requires that the anti-dumping duty applied to exporters or producers not included in the sample, who have made themselves known and provided sufficient information within three weeks of initiation of the investigation, should not exceed the weighted average margin of dumping established for the parties in the sample. Article 9(6) thus provides that the margin of sampled exporters be averaged; this determination of a weighted average is consequential to the calculation of individual margins for those sampled exporters, which Article 9(6) does not regulate.

304. Article 11(4) of the Basic AD Regulation, which appears to implement Article 9.5 of the *Anti-Dumping Agreement*, requires that a review be carried out for the purpose of determining individual margins for new exporters. Article 11(4) does not exclude the application of Article 9(5) to new exporters from NMEs. In other words, an exporter from an NME that applies for a new exporter review under Article 11(4) would nevertheless have to fulfil the conditions of Article 9(5) if it wants

to obtain individual dumping margins and duties. Moreover, Article 11(4) does not speak to the calculation of individual margins for exporters or producers who are not "new exporters or producers". Finally, Article 11(8) of the Basic AD Regulation allows an importer to request refunds, and requires that for this purpose the dumping margin for the relevant exporter be established on an individual basis.

305. All of these provisions of the Basic AD Regulation presuppose the prior determination of dumping margins under a different rule; moreover, none of these provisions addresses the specific question of whether individual or country-wide margins should be determined for exporters or producers. We, therefore, agree with the Panel that none of these other provisions of the Basic AD Regulation cited by the European Union implements the requirement contained in Article 6.10 of the *Anti-Dumping Agreement* that, as a rule, individual margins of dumping have to be determined for each exporter or producer.<sup>483</sup>

306. By contrast, Article 9(5) of the Basic AD Regulation, which establishes the circumstances under which anti-dumping duties must be specified on an individual or a country-wide basis, by necessary implication, also requires that dumping margins be determined on such a basis. The fact that other provisions of the Basic AD Regulation cited by the European Union presuppose the determination of a dumping margin supports the view that it is Article 9(5) that regulates the circumstances under which dumping margins should be determined on an individual basis. To suggest that no provision in the Basic AD Regulation implements the requirement of Article 6.10 of the *Anti-Dumping Agreement* that, as a rule, individual dumping margins be determined for each exporter or producer, would result in a lacuna that is not consistent with the structure and operation of the Basic AD Regulation and with the other rules in the Regulation, which presuppose the existence of such a rule.

307. We also consider that the calculation of country-wide margins for non-IT suppliers cannot be described as "any consequence"<sup>484</sup> or as merely a potential consequence of the Article 9(5) determination, as it is directly and necessarily associated with the rule in Article 9(5) that requires the specification of country-wide duties for non-IT suppliers. In other words, it seems to us that the calculation of dumping margins and of the amount of duties are closely linked, in that the method used to determine dumping margins is reflected in the imposition of duties. As a consequence, individual duties presuppose individual margins and country-wide duties presuppose country-wide

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<sup>483</sup>Panel Report, para. 7.75.

<sup>484</sup>European Union's appellant's submission, para. 108.

margins. Therefore, we do not consider that, as the European Union argues<sup>485</sup>, by addressing the country-wide dumping margin calculation that results from the operation of Article 9(5), the Panel incorrectly expanded the scope of the measure at issue.

308. In the light of the above, we consider that the Panel did not err in finding that Article 9(5) of the Basic AD Regulation not only concerns the imposition of anti-dumping duties but also the calculation of dumping margins, and that it could be challenged "as such" under Article 6.10 of the *Anti-Dumping Agreement*, which addresses the calculation of margins of dumping for each exporter or producer.<sup>486</sup>

E. *Articles 6.10 and 9.2 of the Anti-Dumping Agreement*

309. Having concluded that Article 9(5) of the Basic AD Regulation regulates not only the imposition and collection of anti-dumping duties but also the determination of dumping margins, and whether these are determined on an individual or a country-wide basis, we now turn to the Panel's interpretation and application of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*.

310. The Panel ultimately found that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* because it requires the determination of country-wide dumping margins for and the imposition of country-wide anti-dumping duties on exporters or producers from NMEs, unless such producers or exporters show, on the basis of the criteria set out in that provision, that they are independent from the State (IT test).<sup>487</sup> We address below first the Panel's interpretation of Articles 6.10 and 9.2 and then its application of these provisions.

1. Interpretation of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*

(a) *Article 6.10 of the Anti-Dumping Agreement*

311. In its analysis of the consistency of Article 9(5) of the Basic AD Regulation with Article 6.10 of the *Anti-Dumping Agreement*, the Panel observed that "the first sentence of Article 6.10 provides that the investigating authorities must, 'as a rule', calculate an individual dumping margin for each known exporter or producer of the product under investigation"<sup>488</sup> and that "[t]he wording of

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<sup>485</sup>See European Union's appellant's submission, para. 108.

<sup>486</sup>Panel Report, para. 7.77.

<sup>487</sup>Panel Report, paras. 7.98 and 7.112.

<sup>488</sup>Panel Report, para. 7.88.

Article 6.10, particularly the fact that the exception is stated immediately after the rule, seems to suggest that sampling is the sole exception to the rule of individual margins".<sup>489</sup>

312. The European Union claims that Article 6.10 should not be read as establishing a rule subject to a single exception and that it does not impose an unqualified obligation, but rather states a preference for determining individual dumping margins. The European Union maintains that the term "as a rule", which is inserted after the word "shall", "indicate[s] that the obligation is only a general principle and not a strict obligation that is to be complied with in any and all circumstances".<sup>490</sup> The European Union observes that Article 6.10 refers to one affirmative situation (sampling) where such a preference "may" not be followed, and argues that "sampling" is not the only situation in which a Member is not required to determine individual dumping margins.<sup>491</sup> According to the European Union, that Article 6.10, first sentence, does not contain a strict rule, as the Panel found, but a preference, is borne out by the existence of other situations where the preference does not need to be followed.

313. China responds that the use of the word "shall" in the first sentence of Article 6.10 establishes the mandatory nature of this provision, and that "sampling" is the only exception to this rule. In China's view, the expression "as a rule" is necessary to the extent that it creates a "link between the obligation contained in Article 6.10 first sentence which constitutes the rule and the exception to that rule included in the second sentence of that provision".<sup>492</sup> According to China, if the drafters' intention was to allow more exceptions than "sampling", they would have expressly mentioned that the derogation from the general rule was permitted in situations other than the one mentioned in the second sentence of Article 6.10.<sup>493</sup>

314. We observe that two main interpretative questions are raised in respect of the Panel's findings under Article 6.10. First, whether the first sentence of Article 6.10, through the use of the terms "shall" and "as a rule", expresses a mandatory rule or a mere preference to determine individual margins of dumping. Second, whether "sampling", as permitted by the second sentence, is the only exception to the rule formulated in the first sentence.

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<sup>489</sup>Panel Report, para. 7.90. Investigating authorities may resort to sampling when the number of exporters, producers, importers or types of products is so large as to make individual dumping margin determinations impracticable. In such cases, the authorities may limit their examination either: (i) to a reasonable number of interested parties or products by using samples, which are statistically valid; or (ii) to the largest percentage of the volume of exports from the country in question that can reasonably be investigated.

<sup>490</sup>European Union's appellant's submission, para. 114.

<sup>491</sup>European Union's appellant's submission, para. 117.

<sup>492</sup>China's appellee's submission, para. 114.

<sup>493</sup>China's appellee's submission, para. 123.

315. Article 6.10 of the *Anti-Dumping Agreement* reads:

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.<sup>494</sup>

316. We note that the auxiliary verb "shall" is commonly used in legal texts to express a mandatory rule. In the phrase "[t]he authorities *shall, as a rule*, determine an individual margin of dumping for each known exporter or producer"<sup>495</sup>, "shall" is followed by the term "as a rule". The definition of the latter term includes "usually" and "more often than not".<sup>496</sup> The combination of the terms "shall" and "as a rule" does not connote a mere preference. Had the drafters of Article 6.10 wanted to avoid formulating an obligation to determine individual dumping margins, they would have used terms such as "it is desirable" or "in principle" instead of "shall".

317. Although the term "shall" renders the rule in the first sentence of Article 6.10 mandatory, this obligation is qualified by the term "as a rule", and this qualification must have a meaning. In our view, the term "as a rule" in the first sentence indicates that this obligation is not absolute, and foreshadows the possibility of exceptions. Absent the insertion of "as a rule" in the first sentence of Article 6.10, the obligation to determine individual margins would be difficult to reconcile with other provisions of the *Anti-Dumping Agreement* that permit derogations from the rule to determine individual dumping margins. However, while the term "as a rule" should be read as modifying the obligation to determine individual margins, it does not render it a mere preference. Otherwise, the use of "shall" in the first sentence would be deprived of its ordinary meaning.

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<sup>494</sup> Article 6.10.2 reads:

In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

<sup>495</sup> Emphasis added.

<sup>496</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 126.

318. The second sentence of Article 6.10 allows investigating authorities to depart from the obligation to determine individual dumping margins in cases where the number of exporters, producers, importers, or types of products is so large as to make such determinations impracticable. In such cases, the authorities may limit their examination either: (i) to a reasonable number of interested parties or products by using samples, which are statistically valid; or (ii) to the largest percentage of the volume of exports from the country in question that can reasonably be investigated. This limited examination is generally referred to as "sampling", even where a statistically valid sample is not used but the second alternative for limiting the examination is used.<sup>497</sup> Sampling is the only exception to the determination of individual dumping margins that is expressly provided for in Article 6.10.

319. According to Article 6.10.2, even if the authorities have limited their examination based on sampling, they are nevertheless required to determine an individual margin of dumping for any exporter or producer not initially selected for individual examination if that exporter submits the necessary information in time during the investigation. We observe, however, that Article 6.10.2 also permits investigating authorities not to determine individual dumping margins for exporters or producers who are not initially selected for sampling, even if they submit the necessary information on time, if the number of producers is so large that individual examinations of each of them would be unduly burdensome and prevent the timely completion of the investigation. Again, a derogation from the rule that an individual margin be determined is explicitly provided for in Article 6.10.2. We find relevant context to the interpretation of Article 6.10 also in Article 9.5 of the *Anti-Dumping Agreement*. Article 9.5 requires investigating authorities to determine individual dumping margins for exporters or producers who have not exported the product during the period of investigation. However, when new exporters cannot show that they are not related to any of the exporters or producers that are subject to the anti-dumping duties, such an individual determination is not required. Thus, an exception permitting derogation from the rule requiring the determination of individual margins for new exporters is again expressly provided for in Article 9.5.

320. By inserting the term "shall, as a rule", the drafters of Article 6.10 were careful not to express an obligation that would conflict with other provisions in the *Anti-Dumping Agreement* permitting derogation from the rule to determine individual margins of dumping apart from the sampling exception, and would oblige investigating authorities to determine individual margins of dumping in all cases. However, in our view, such exceptions must be provided for in the covered agreements, so as to avoid the circumvention of the obligation to determine individual margins of dumping in Article 6.10. The term "as a rule" in the first sentence not only anticipates the exception that follows

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<sup>497</sup>Panel Report, para. 7.85.



in the second sentence of Article 6.10, but also other provisions in the *Anti-Dumping Agreement* that allow Members to depart from the requirement to determine individual margins of dumping. At the same time, we do not consider that the flexibility provided by the term "as a rule" goes as far as providing Members with an open-ended possibility to create exceptions, which would erode the obligatory character of Article 6.10. It would be incompatible with the existence of such an obligation if Members were free to depart from it by unilaterally determining what qualifies as an applicable exception. The general rule, that is, the obligation to determine individual margins of dumping for each known exporter or producer, applies, unless derogation from it is provided for in the covered agreements.

321. In support of its position that sampling is not the only exception to the determination of individual dumping margins and that other exceptions not specified in the *Anti-Dumping Agreement* are allowed, the European Union cites several examples of other situations where the rule to determine individual dumping margins of Article 6.10 need not be observed.

322. The first example cited by the European Union concerns a non-cooperating exporter or producer for whom the dumping margin is calculated based on facts available. We observe, however, that Article 6.8 of the *Anti-Dumping Agreement* allows an investigating authority to rely on "facts available" if an exporter or producer does not cooperate, and that the margin applied to the non-cooperating exporter or producer would still be an individual one even if it is calculated based on facts available rather than on information provided by the exporter or producer.

323. The second example put forward by the European Union, namely, a "mere trader" that exports the product of another producer and that is assigned the dumping margin of the actual producer, is clearly based on the first sentence of Article 6.10, which refers to "exporters or producers". The reference to "exporters *or* producers"<sup>498</sup> allows investigating authorities not to determine a separate margin of dumping for the producer and the exporter of the same product, but a single one for both. This, however, does not constitute an exception to the requirement to determine individual margins, but rather constitutes an application of this very rule.

324. The third example cited by the European Union refers to cases where an authority is unable to identify the actual producer of the product concerned. This situation is compatible with the correct interpretation of the first sentence of Article 6.10, which requires that individual dumping margins be determined merely for each "known" exporter or producer. When an investigating authority is not able to identify an exporter or producer, it cannot be considered as "known" within the meaning of

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<sup>498</sup>Emphasis added.

Article 6.10, and thus the authority cannot be expected to calculate an individual margin for that exporter or producer.

325. The fourth example provided by the European Union concerns those situations where an authority decides to construct normal value and export prices for all producers or exporters on the basis of the same information because it is unable to verify all the necessary information. We observe that the possibility of resorting to constructed normal value and export price is explicitly provided for in Article 2 of the *Anti-Dumping Agreement* and, as such, it cannot be characterized as a non-specified exception to Article 6.10. In any event, the fact that an authority may have to construct normal value and/or export price for one or more exporters or producers does not necessarily imply a departure from the rule in Article 6.10. Dumping margins based on constructed normal value and export price based on the same information for many suppliers are not the same as a country-wide margin.

326. Finally, in its fifth example, the European Union refers to the situation of a known producer that does not export the product during the period of investigation and that will not be entitled to an individual dumping margin because it is related to existing exporters or producers. As noted above<sup>499</sup>, this situation is expressly provided for in Article 9.5 of the *Anti-Dumping Agreement*, which establishes that new exporters or producers will be entitled to individual duties in a review only if they can show that they are not related to any of the exporters or producers subject to the original investigation.

327. We thus consider that the examples cited by the European Union involve situations that either do not constitute departures from the individual margins rule or are provided for in Article 6.10 itself or in other provisions of the *Anti-Dumping Agreement*. Indeed, the term "as a rule" in the first sentence of Article 6.10 anticipates the possibility of departures from the general rule, but as explained above, any such exceptions must be provided for in the covered agreements. In this respect, we consider that the examples cited by the European Union are consistent with the binding nature of the rule set forth in the first sentence of Article 6.10 and, therefore, do not support the European Union's claim that Article 6.10 states a mere preference.

328. Having said that, we do not find any provision in the covered agreements that would allow importing Members to depart from the obligation to determine individual dumping margins only in respect of imports from NMEs. We have explained above<sup>500</sup> that Section 15 of China's Accession Protocol permits derogation in respect of the domestic price or normal value aspect of price comparability, but does not address the export price aspect of price comparability. It, therefore, has

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<sup>499</sup>See *supra*, para. 319.

<sup>500</sup>See *supra*, section IV.C of this Report.

no entailment in respect of the obligation in Article 6.10 of the *Anti-Dumping Agreement* to determine individual dumping margins. In our view, therefore, Section 15 of China's Accession Protocol does not provide a legal basis for flexibility in respect of export prices and for justifying an exception to the requirement to determine individual dumping margins in Article 6.10 of the *Anti-Dumping Agreement*.

329. In the light of the above, we interpret Article 6.10 of the *Anti-Dumping Agreement* as expressing an obligation, rather than a preference, for authorities to determine individual margins of dumping. This obligation is qualified and is subject not only to the exception specified for sampling in the second sentence of Article 6.10, but also to other exceptions to the rule to determine individual dumping margins that are provided for in the covered agreements.

(b) Article 9.2 of the *Anti-Dumping Agreement*

330. In its analysis of the consistency of Article 9(5) of the Basic AD Regulation with Article 9.2 of the *Anti-Dumping Agreement*, the Panel noted important similarities between Article 9.2 and Article 6.10 of the *Anti-Dumping Agreement*. Although Article 6.10 concerns dumping margin calculations and Article 9.2 concerns duty imposition, these two provisions relate to "the same general obligation" to "provide individual treatment" to exporters and producers in the context of anti-dumping proceedings.<sup>501</sup> The Panel interpreted Article 9.2 of the *Anti-Dumping Agreement* as requiring investigating authorities to name the individual suppliers, that is, the exporters or producers, on whom anti-dumping duties are imposed, except when the number of exporters or producers is so large that it would be impracticable to do so, in which case the authorities would be allowed to name the supplying country. Accordingly, the Panel concluded that Article 9.2 "does not ... allow the imposition of a single country-wide anti-dumping duty in an investigation involving [an NME]".<sup>502</sup>

331. There are a number of interpretative questions that arise under Article 9.2. The first question is whether the first and second sentences of Article 9.2 require investigating authorities to specify anti-dumping duties for individual suppliers or merely to specify the names of the suppliers of the product concerned. The second question concerns the scope of the exception to this rule contained in the third sentence of Article 9.2 that permits the authorities to name the supplying country concerned when it is "impracticable" to name all individual suppliers. Specifically, the question is whether this exception is limited to the sampling scenario or whether it also covers situations where it would not be "effective" to impose individual duties in respect of NMEs, as the European Union suggests.

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<sup>501</sup>Panel Report, para. 7.108.

<sup>502</sup>Panel Report, para. 7.112.

332. Article 9.2 of the *Anti-Dumping Agreement* provides:

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

333. The European Union claims on appeal that, like Article 6.10 of the *Anti-Dumping Agreement*, Article 9.2 does not contain a mandatory rule regarding the imposition of individual anti-dumping duties, but merely a principle or a preference. The European Union argues that Article 9.2 of the *Anti-Dumping Agreement* reflects a product-wide and country-wide approach in that it refers to the imposition of an anti-dumping duty on a "product", not a company.<sup>503</sup>

334. China responds that "the wording of Article 9.2 read in its context" (including Article 6.10) "confirms that Article 9.2 contains the obligation for investigating authorities to impose anti-dumping duties on an individual basis and that the only exception to that rule is the one identified in Article 9.2, third sentence".<sup>504</sup> China submits that there is no contradiction in acknowledging that the imposition of anti-dumping duties is made with respect to "products" as well as for each "producer" or "exporter" concerned. In China's view, the fact that Article 9.2, first sentence, refers to the imposition of anti-dumping duties with respect to a "product" does not entail an authorization to impose country-wide duties.<sup>505</sup>

335. We observe that the fact that anti-dumping duties are imposed on products is not inconsistent with the requirement that dumping margins and anti-dumping duties be specified for each individual supplier. The *Anti-Dumping Agreement* contains rules that focus on products as well as importers, exporters, and producers. Article 9.2 itself refers to both products and suppliers. We do not consider, therefore, that a focus on products in certain provisions of the *Anti-Dumping Agreement* is inconsistent with the requirement that anti-dumping duties be specified by supplier in the appropriate amounts in each case.

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<sup>503</sup>European Union's appellant's submission, paras. 160 and 161.

<sup>504</sup>China's appellee's submission, para. 238.

<sup>505</sup>China's appellee's submission, para. 225.

336. Article 9.2 states that anti-dumping duties "*shall* be collected in the appropriate amounts in each case" and that "authorities *shall* name the supplier or suppliers of the product concerned".<sup>506</sup> It is thus clear from the wording of this provision, which uses the auxiliary verb "shall", that the collection in appropriate amounts of anti-dumping duties and the naming of the supplier are of a mandatory nature. The mandatory nature of the first and second sentences of Article 9.2 can be contrasted with the preference expressed in the second sentence of Article 9.1 for duties lesser than the margin of dumping, if lesser duties are adequate to remove the injury to the domestic industry. To express such a preference, Article 9.1 uses the expression "it is desirable".

337. The European Union claims that Article 9.2 does not impose an obligation to grant individual treatment to exporters or producers, but merely contains an obligation to "specify by name" exporters or producers.<sup>507</sup> According to the European Union, the term "appropriate" in the first sentence of Article 9.2 may be interpreted as referring to "the duty rate appropriate to the country concerned", and the "source" found to be dumped and causing injury within the meaning of Article 9.2 "could be the relevant country".<sup>508</sup> China rejects the European Union's reading of the term "appropriate" in Article 9.2, first sentence, as referring to the "duty rate appropriate to the country concerned", and submits that the use of the word "appropriate" rather "confirms" the rule that "anti-dumping duties must be imposed on an individual basis".<sup>509</sup>

338. We note that Article 9.2 of the *Anti-Dumping Agreement* requires that anti-dumping duties be collected on a non-discriminatory basis from "all sources" found to be dumped and causing injury, except from "those sources" from which price undertakings have been accepted. We agree with the Panel that the term "sources", which appears twice in the first sentence of Article 9.2, has the same meaning and refers to individual exporters or producers and not to the country as a whole.<sup>510</sup> This is indicated by the fact that price undertakings mentioned in the first sentence of Article 9.2 are accepted, according to Article 8 of the *Anti-Dumping Agreement*, from individual exporters and not from countries. Therefore, the requirement under Article 9.2 that anti-dumping duties be collected in appropriate amounts in each case and from all sources relates to the individual exporters or producers subject to the investigation.<sup>511</sup>

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<sup>506</sup>Emphasis added.

<sup>507</sup>European Union's appellant's submission, para. 163.

<sup>508</sup>European Union's appellant's submission, para. 161.

<sup>509</sup>China's appellee's submission, para. 228.

<sup>510</sup>Panel Report, para. 7.103.

<sup>511</sup>We address below the situation where an authority can demonstrate that "exporters or producers" constitute a single entity with the State.

339. We have concluded above that Article 6.10 of the *Anti-Dumping Agreement* contains an obligation to determine individual dumping margins for each exporter or producer, except when sampling is used or if a derogation is otherwise provided for in the covered agreements. We observe that, where an individual margin of dumping has been determined, it flows from the obligation contained in the first sentence of Article 9.2 that the *appropriate* amount of anti-dumping duty that can be imposed also has to be an individual one. We do not see how an importing Member could comply with the obligation in the first sentence of Article 9.2 to collect duties in the *appropriate* amounts in each case if, having determined individual dumping margins, it lists suppliers by name, but imposes country-wide duties. In other words, unless sampling is used, the *appropriate* amount of an anti-dumping duty in each case is one that is specified by supplier, as further clarified and confirmed by the obligation to name suppliers in the second sentence of Article 9.2.<sup>512</sup>

340. The second sentence of Article 9.2 contains a requirement that authorities name the supplier or suppliers of the product concerned. It is not clear from the terms of the second sentence alone what the purpose of naming suppliers would be, considering that the term "name" can be defined simply as "mention or specify by name".<sup>513</sup> However, in our view, the content of the obligation "to name" is clarified by the requirements in the first sentence that anti-dumping duties be collected in the appropriate amounts on a non-discriminatory basis from all sources.

341. An interpretation of Article 9.2, second sentence, as requiring the specification of anti-dumping duties by individual suppliers is also confirmed by the context provided by Article 9 of the *Anti-Dumping Agreement* as a whole. Article 9 of the *Anti-Dumping Agreement* sets forth specific rules concerning the imposition of anti-dumping duties. Paragraph 1 states that it is desirable that the duty be less than the margin if a lesser duty would be adequate to remove injury; paragraph 2 requires that duties be imposed in the appropriate amounts and that authorities name suppliers, unless to do so would be impracticable; paragraph 3 states that the amount of the duty should not exceed the dumping margin; paragraph 4 sets forth rules for the application of anti-dumping duties to imports from exporters or producers not included in the sample; and paragraph 5 provides for reviews to determine individual margins for new exporters or producers. All the paragraphs of Article 9 set forth rules concerning the imposition of anti-dumping duties, as reflected in the title of this provision, "Imposition and Collection of Anti-Dumping Duties". All the paragraphs of Article 9, read together,

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<sup>512</sup>The requirement in Article 9.2 to specify duties by individual suppliers is also consistent with the obligation in that provision not to discriminate in the collection of duties on imports from all sources found to be dumped and causing injury. In this case, if an individual dumping margin has been determined for each exporter or producer consistently with Article 6.10, the principle of non-discrimination requires that each exporter or producer obtains an anti-dumping duty that corresponds to its individual dumping margin.

<sup>513</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1887.

thus suggest that the obligation to name individual suppliers in the second sentence of paragraph 2 is closely related to the imposition of individual anti-dumping duties and that the requirement to name suppliers that are subject to imposition and collection of anti-dumping duties should be interpreted as a requirement to specify duties for each supplier.<sup>514</sup>

342. Having concluded that the first and second sentences of Article 9.2 contain obligations to specify individual anti-dumping duties and to name suppliers, we now turn to the third sentence of Article 9.2. It provides for an exception, which allows importing Members to specify duties for the supplying country concerned, where specification of individual suppliers is "impracticable".

343. The European Union claims that the Panel erred in finding that Article 9(5) of the Basic AD Regulation does not fall within the exception under Article 9.2, third sentence, of the *Anti-Dumping Agreement*. It argues that, like Article 6.10, Article 9.2 expressly permits the imposition of duties on a country-wide basis in cases other than "sampling", in particular when it is "impracticable" to impose duties and name suppliers on an individual basis, consistently with the notion that these provisions "should ... be interpreted in a flexible manner".<sup>515</sup> China submits that the Panel correctly concluded that Article 9.2 requires that anti-dumping duties be imposed on an individual basis and that a country-wide duty can only be imposed in the circumstances described in Article 9.2, third sentence. In China's view, however, the third sentence does not authorize generally the imposition of a country-wide duty in the case of imports from NMEs.

344. We observe that there is significant parallelism between Article 6.10 and Article 9.2 of the *Anti-Dumping Agreement*. Article 6.10 requires the determination of individual margins of dumping, which corresponds to the obligation to impose anti-dumping duties on an individual basis in Article 9.2. We further note that the fact that the same term "impracticable" is used in both Article 6.10 and Article 9.2 to describe when the exception applies provides an indication that both exceptions refer to the situation where an authority determines dumping margins based on sampling.

345. The interpretative question before us, however, does not concern the precise scope of the exception in the third sentence of Article 9.2, and whether it exactly overlaps with the exception for sampling in Article 6.10 or it has a broader scope. Rather, the issue is whether this exception may be

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<sup>514</sup>We also note that Article 9(5) of the Basic AD Regulation, which according to the European Union "bring[s] into the EU's legal order" and "mirrors the language of Article 9.2 of the *Anti-Dumping Agreement*" (European Union's appellant's submission, para. 95), appears to interpret the first two sentences of Article 9.2 as containing a requirement to specify anti-dumping duties by individual suppliers. Article 9(5) of the Basic AD Regulation states in relevant part that "[t]he Regulation imposing the duty *shall specify the duty for each supplier* or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned". (emphasis added)

<sup>515</sup>European Union's appellant's submission, para. 168.

interpreted as permitting the situation envisaged in Article 9(5) of the Basic AD Regulation, that is, the imposition of a country-wide duty on suppliers from NMEs that do not fulfil the IT test under Article 9(5). In particular, we need to ascertain whether it can be considered "impracticable" to impose individual anti-dumping duties on suppliers from NMEs that do not meet the IT test.

346. The European Union contends that the exception in the third sentence of Article 9.2 covers situations such as those envisaged in Article 9(5) of the Basic AD Regulation, which provides for the imposition of country-wide duties where anti-dumping duties cannot be imposed on an individual basis for "practical" reasons.<sup>516</sup> The European Union explains that it would not be "effective" to impose individual anti-dumping duties on suppliers that are all related to the State, because this may lead to the circumvention of the higher anti-dumping duties imposed on some individual exporters by channelling exports through related exporters with the lowest anti-dumping duties.<sup>517</sup>

347. We observe that the dictionary definition of the word "impracticable" is "[n]ot practicable; unable to be carried out or done; impossible in practice".<sup>518</sup> The dictionary definition of the word "ineffective" is "[n]ot producing any, or the desired effect; ineffectual, inoperative, inefficient".<sup>519</sup> It is evident from the dictionary definitions that "impracticable" and "ineffective" describe different qualities or characteristics of an action. Thus, the notion of "ineffective" is not included in the notion of "impracticable". In particular, we observe that the notion of "ineffective" is concerned with bringing about or producing an effect or result, which is absent from the notion of "impracticable", which describes the action itself.

348. The reasons adduced by the European Union to justify the imposition of a country-wide duty on non-IT suppliers from NMEs focus on effectiveness rather than on practicability. In other words, if the State in an NME were able to circumvent individual anti-dumping duties imposed on suppliers by channelling exports through the exporter with the lowest duty rate, this may mean that individual anti-dumping duties are "ineffective" to counter dumping, not that their imposition is "impracticable". In our view, Article 9.2, third sentence, allows Members to name the supplying country concerned only when it is impracticable to name individual suppliers; it does not permit naming the supplying country when the imposition of individual duties is ineffective because it may result in circumvention of the anti-dumping duties.

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<sup>516</sup>European Union's appellant's submission, para. 172.

<sup>517</sup>European Union's appellant's submission, para. 186.

<sup>518</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1332.

<sup>519</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1363.



349. We further note that the very content and structure of Article 9(5) of the Basic AD Regulation reveals that the IT test and "impracticability" in Article 9.2 refer to different situations. We recall that Article 9(5) of the Basic AD Regulation states in relevant part:

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

350. Thus, Article 9(5) itself distinguishes situations where the imposition of individual duties would be "impracticable" from situations where Article 2(7)(a) applies, that is, where exporters from NMEs will receive a country-wide duty unless they meet the IT test. The use of the conjunction "and" in Article 9(5) suggests that these are two separate situations justifying departure from the individual duty rule and that the imposition of country-wide duties on NME suppliers does not fall within the "impracticability" exception, because it is reflected as a separate exception.

351. In the light of the above, we do not consider that the exception in the third sentence of Article 9.2 of the *Anti-Dumping Agreement*, which permits naming the supplying country where naming individual suppliers is "impracticable", authorizes the European Union to impose country-wide duties on suppliers from NMEs that do not meet the IT test in Article 9(5) of the Basic AD Regulation.

352. The European Union further submits that its interpretation of the exception to the individual treatment of suppliers in the third sentence of Article 9.2, as permitting the imposition of country-wide duties on suppliers from NMEs who do not qualify for individual treatment under Article 9(5), is also confirmed by the analysis of supplementary means of interpretation. In particular, the European Union refers to the negotiating history and the circumstances of the conclusion of the *Kennedy Round Anti-Dumping Code*.<sup>520</sup>

353. We have concluded above, based on the text of the provision read in its context, that Article 9.2 of the *Anti-Dumping Agreement* requires the imposition of anti-dumping duties on an individual basis and that the exception in the third sentence of Article 9.2 does not justify the imposition of country-wide duties on non-IT suppliers from NMEs. We, therefore, consider that we do not need to have recourse to supplementary means of interpretation under Article 32 of the *Vienna*

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<sup>520</sup>European Union's appellant's submission, para. 175.

*Convention*, such as the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm or determine the meaning resulting from the application of Article 31.

354. We thus conclude that Article 9.2 of the *Anti-Dumping Agreement* requires investigating authorities to specify an individual duty for each supplier, except where this is impracticable, when several suppliers are involved. We reach this conclusion by reading the first sentence of Article 9.2 in conjunction with the second sentence of Article 9.2. The first sentence requires investigating authorities to collect anti-dumping duties in the appropriate amounts in each case and on a non-discriminatory basis on imports from all sources—that is, suppliers—while the second sentence requires investigating authorities to name the supplier or suppliers of the product concerned. We also consider that the exception in the third sentence of Article 9.2 does not allow the imposition of a single country-wide anti-dumping duty in investigations involving NMEs where the imposition of individual duties is alleged to be "ineffective", but is not "impracticable".

2. Application of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*

355. The European Union claims that, even assuming that the Panel correctly interpreted Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, it erred in the application of Articles 6.10 and 9.2 and, in doing so, also acted inconsistently with Article 11 of the DSU. The European Union argues that the Panel ignored its contention that the function of the IT test in Article 9(5) of the Basic AD Regulation is to identify the actual source of price discrimination in the context of imports from NMEs, and thus determine if the State and those entities that do not act independently from the State in NMEs should be treated as a single supplier for the purposes of Articles 6.10 and 9.2.<sup>521</sup> The European Union relies on the findings of the panel in *Korea – Certain Paper*, which, in its view, stand for the proposition that, for the purpose of determining individual dumping margins, Article 6.10 permits investigating authorities to determine that two or more exporters and producers are part of the same entity.<sup>522</sup>

356. The Panel found that, unlike the test in *Korea – Certain Paper*, the IT test does not serve the purpose of establishing whether the State and the exporters or producers are in fact a single entity, nor does it identify the actual source of price discrimination.<sup>523</sup> Moreover, the Panel found that the IT test, unlike the test in *Korea – Certain Paper*, is based on a presumption that in NMEs the State and the exporters constitute a single legal entity and that such a presumption has no legal foundation in the covered agreements.

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<sup>521</sup>European Union's appellant's submission, para. 191.

<sup>522</sup>European Union's appellant's submission, para. 139 (referring to Panel Report, *Korea – Certain Paper*, paras. 7.163-7.168).

<sup>523</sup>Panel Report, paras. 7.94 and 7.106.

357. In the next sections, we first address the questions of whether the presumption in Article 9(5) of the Basic AD Regulation that in NMEs all exporters and producers are related to the State is consistent with the provisions of the *Anti-Dumping Agreement* and whether the Panel acted inconsistently with Article 11 of the DSU because it disregarded evidence submitted by the European Union relating to such a presumption. We then address the question of whether an importing Member may determine that the exporters and producers from an NME constitute a single legal entity together with the State for the purposes of applying Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*; more specifically, we will explore whether the operation of the IT test results in the identification of such a single entity.

(a) Whether the European Union Is Entitled to Presume that in NMEs the State and the Exporters Constitute a Single Entity

358. The panel in *Korea – Certain Paper* found that Article 6.10 could be interpreted as allowing the treatment of legally separate entities as a single supplier in "circumstances where the structural and commercial relationship between the companies in question is sufficiently close to be considered as a single exporter or producer".<sup>524</sup> The panel then went on to find that the majority shares of the three companies in question were owned by the same parent company, which had thus considerable controlling power over the operations of the three companies concerned; that there were important commonalities of management between the three companies where most of the directors of each company were present on the board of directors of the other companies; and that the three companies had the ability to shift production amongst themselves, to harmonize commercial activity and basic common corporate objectives, and to make their domestic sales through the same company. Accordingly, the panel concluded that these companies were in a structural and commercial relationship that justified treating them as a single exporter or producer for purposes of Article 6.10 of the *Anti-Dumping Agreement*.<sup>525</sup>

359. We recall that under the IT test in Article 9(5) of the Basic AD Regulation an exporter from an NME that did not qualify for market economy treatment under Article 2(7)(c) is not entitled to an individual anti-dumping duty unless it can demonstrate that:

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;

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<sup>524</sup>Panel Report, *Korea – Certain Paper*, para. 7.162.

<sup>525</sup>Panel Report, *Korea – Certain Paper*, para. 7.168.

- (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
- (d) exchange rate conversions are carried out at the market rate; and
- (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty."

360. The Panel considered that there is a fundamental difference between the IT test and the test applied by the panel in *Korea – Certain Paper*. In its view, the latter test requires investigating authorities to demonstrate the existence of a close structural and commercial relationship between a number of producers such that they constitute a single supplier for which a single dumping margin may be calculated and a single anti-dumping duty may be applied. By contrast, under the IT test, the European Union presumes that in NMEs all exporters and producers are related to the State (and subject to a country-wide dumping margin and anti-dumping duty) unless a producer demonstrates that it has no such relationship with the State and thus qualifies for individual treatment. According to the Panel, applying such a presumption to NME producers "would seriously undermine the logic of Article 6.10", which requires that individual margins be calculated for each known exporter or producer.<sup>526</sup>

361. The European Union submits that in the case of market economies, as found by the panel in *Korea – Certain Paper*, the close relationship between separate legal entities has to be established by the investigating authority on a case-by-case basis; by contrast, in NMEs "the presumption of State control is the general rule".<sup>527</sup> The European Union also contends that the Panel acted inconsistently with Article 11 of the DSU, because it disregarded evidence submitted by the European Union concerning the nature of NMEs and China's status as an NME, as well as the fact that China's Accession Protocol entitles the European Union to treat China as an NME until 2016. This evidence, which, according to the European Union, was not contested by China, supports the presumption underlying Article 9(5) of the Basic AD Regulation that all producers and exporters in an NME constitute a single entity together with the State.

362. China responds that the presumption advocated by the European Union that in NMEs the State and exporters constitute a single entity has no legal basis in the covered agreements and China's

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<sup>526</sup>Panel Report, para. 7.96.

<sup>527</sup>European Union's appellant's submission, para. 150.

Accession Protocol in particular. China further argues that its Accession Protocol does not reflect a general understanding or recognition that China is an NME. Paragraph 15(a) merely authorizes WTO Members to apply until 2016 a temporary and limited derogation from certain rules in the *Anti-Dumping Agreement* concerning normal value. Pursuant to paragraph 15(d), these Members may discontinue the application of paragraph 15(a) prior to that date with respect to certain industries or the entire economy.<sup>528</sup> In any event, China points out that whether China is a market economy or an NME is irrelevant for the purposes of this case, because there is no basis under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* to distinguish between imports from market economies and imports from NMEs in relation to the determination of individual dumping margins and anti-dumping duties.

363. We recall that Article 9(5) of the Basic AD Regulation establishes a presumption that producers or exporters that operate in NMEs are not entitled to individual treatment; in order to qualify for such treatment, NME exporters bear the burden to demonstrate that they satisfy the criteria of the IT test. We observe that under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* it is the investigating authority that is called upon to make an objective affirmative determination, on the basis of the evidence that has been submitted or that it has gathered in the investigation, as to who is the known exporter or producer of the product concerned. It is, therefore, the investigating authority that will determine whether one or more exporters have a relationship with the State such that they can be considered as a single entity and receive a single dumping margin and a single anti-dumping duty. In other words, where certain exporters or producers are separate legal entities, that evidence will be taken into account in treating them as separate exporters or producers for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. An investigating authority, however, may also need to consider other evidence that demonstrates that legally distinct exporters or producers are in a sufficiently close relationship to constitute a single entity and should thus receive a single dumping margin and anti-dumping duty. By contrast, under Article 9(5) of the Basic AD Regulation, country-wide dumping margins and country-wide anti-dumping duties are established for exporters from NME WTO Members unless such exporters request individual treatment and demonstrate that they satisfy all criteria of the IT test. Failure to meet only one of those criteria leads to denial of individual treatment.

364. We consider that placing the burden on NME exporters to rebut a presumption that they are related to the State and to demonstrate that they are entitled to individual treatment runs counter to Article 6.10, which "as a rule" requires that individual dumping margins be determined for *each known exporter or producer*, and is inconsistent with Article 9.2 that requires that individual duties be specified by *supplier*. Even accepting in principle that there may be circumstances where exporters

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<sup>528</sup>China's appellee's submission, para. 195.

and producers from NMEs may be considered as a single entity for purposes of Articles 6.10 and 9.2, such singularity cannot be presumed; it has to be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation.

365. We are also of the view that no other provision in the *Anti-Dumping Agreement* or in other covered agreements provides a legal basis for the European Union's presumption in Article 9(5) of its Basic AD Regulation that results in exporters and producers from NMEs having to demonstrate that they are unrelated to the State in order to qualify for individual treatment. In particular, we do not consider that there is a legal basis in the provisions of China's Accession Protocol for a presumption that country-wide dumping margins be calculated and country-wide duties be imposed on all Chinese exporters of a product under investigation. We have explained above that Section 15 of China's Accession Protocol is silent as to the individual and country-wide determination of dumping margins and imposition of anti-dumping duties. Section 15 only permits derogations in respect of the use of domestic prices and costs—that is, normal value—but not in respect of export prices in the calculation of margins and the consequential imposition of duties.

366. It is true that paragraph 15(a) of China's Accession Protocol places the burden on Chinese exporters to "clearly show" that market economy conditions prevail in order for the importing WTO Members to be obliged to use Chinese domestic prices and costs in determining price comparability. However, this rule concerns only the normal value aspect of price comparability, and does not permit derogation from the disciplines of the *Anti-Dumping Agreement* regarding export price. Paragraph 15(a) of China's Accession Protocol does not provide a legal basis for a presumption that an exporter's individual export prices cannot be used and that, as a consequence, country-wide export prices should be used and hence country-wide margins should be determined and country-wide duties should be imposed. Neither can paragraph 15(d) be interpreted as authorizing WTO Members to treat China as an NME for matters other than the determination of normal value. As explained above, paragraph 15(d) does not pronounce generally on China's status as a market economy or NME. Rather, it permits an importing WTO Member to specify when the special rules regarding normal value contained in paragraph 15(a) no longer apply—that is, either in 2016 or earlier—if China establishes that it is a market economy or that market economy conditions exist in specific industries. In the light of the above, we conclude that there is no legal basis in the covered agreements for the general presumption that in an NME the State and all exporters are sufficiently related to constitute a single entity, for which a single export price and hence a single duty can be determined.

367. In our view, whether the European Union's presumption under Article 9(5) of its Basic AD Regulation that in NMEs the State and all exporters constitute a single entity is consistent with

Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* is a legal question, not a factual one that depends on the economic structure of a particular WTO Member. Rather, the economic structure of a WTO Member may be used as evidence before an investigating authority to determine whether the State and a number of exporters or producers subject to an investigation are sufficiently related to constitute a single entity such that a single margin should be calculated and a single duty be imposed on them. It cannot, however, be used to imply a legal presumption that has not been written into the covered agreements.

368. The European Union submitted to the Panel evidence that it claimed supported the presumption in Article 9(5) of the Basic AD Regulation that the State and the exporters are to be treated as a single entity. In particular, the European Union provided a definition of an NME. It referred to situations where the "State control over the means of production and State intervention in the economy, including international trade, imply that all the means of production and natural resources belong to one entity, the State" and where "[a]ll imports from non-market economy countries are therefore considered to emanate from a single supplier, the State" so that "[t]he State in this sense can be considered as one supplier".<sup>529</sup> The European Union also pointed to paragraph 15(d) of China's Accession Protocol which, it argues, allows it to treat China as an NME until 2016 and provided other evidence concerning China's intervention in its economy and international trade.<sup>530</sup>

369. We have explained above why we conclude that Section 15 of China's Accession Protocol does not provide a legal basis for the European Union's presumption in Article 9(5) of the Basic AD Regulation. We are also of the view that the evidence submitted by the European Union concerning NMEs in general and China in particular is not relevant to the *legal* question of whether the European Union is permitted to presume under Article 9(5) of the Basic AD Regulation that the State and the exporters are a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. The review of this evidence reveals that it is possible that in specific circumstances an investigating authority may reach the conclusion that the State and certain exporters are so closely related that they constitute a single entity. However, the evidence submitted by the European Union cannot establish that the economic structure in China justifies a general presumption that the State and all the exporters in all industries that might be subject to an anti-dumping investigation constitute a single legal entity, where no legal basis for such a presumption is provided for in the covered agreements. Consequently, whether the Panel considered this evidence is of no relevance to the

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<sup>529</sup>European Union's appellant's submission, para. 152 (quoting European Union's first written submission to the Panel, para. 61).

<sup>530</sup>European Union's appellant's submission, para. 51. These include publications providing definitions of NMEs and describing mechanisms relating to how the Chinese Government intervenes in the economy and international trade.

question of whether a legal presumption exists or whether the Panel made an objective assessment of the matter pursuant to Article 11 of the DSU.

370. We have concluded above that a presumption that the State and all exporters or producers in all industries in NMEs are sufficiently related to constitute a single entity lacks a legal basis in the covered agreements. As such, the European Union's presumption is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, which requires individual treatment for each exporter or producer. Moreover, the evidence the European Union submitted to the Panel regarding the operation of NMEs in general and China in particular was not relevant to the legal question of whether a presumption is permitted. Therefore, irrespective of the evidence presented by the European Union, the Panel did not err in finding that the European Union had not shown a legal basis for its presumption. Thus, we also find that the Panel did not fail to comply with its duties under Article 11 of the DSU in its assessment of the evidence submitted by the European Union in support of its presumption.

(b) Whether in NMEs the State and the Exporters Can Be Considered as a Single Entity

371. The Panel understood the panel in *Korea – Certain Paper* to have found that Article 6.10 of the *Anti-Dumping Agreement* does not preclude investigating authorities from treating multiple legally distinct entities as a single exporter or producer for purposes of an anti-dumping investigation where the structural and commercial relationship between the companies in question is sufficiently close for them to be considered as a single exporter or producer.<sup>531</sup> The Panel also stated that it is possible in principle for an investigating authority to determine that "one or more nominally distinct producer(s) or exporter(s) is/are, in fact, sufficiently related to the State to justify concluding that they are a single producer or exporter".<sup>532</sup>

372. The Panel distinguished the situation before the panel in *Korea – Certain Paper* from Article 9(5) of the Basic AD Regulation on the ground that the criteria of the IT test in Article 9(5) do not concern the structural and commercial relationship between distinct legal entities, but are concerned with the role of the State in the way business is conducted in a given country. The Panel noted that, under the European Union's approach, the State would be considered as a "parent company" for potentially thousands of distinct legal entities producing and exporting a product under

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<sup>531</sup>Panel Report, para. 7.92.

<sup>532</sup>Panel Report, para. 7.94.



investigation. The Panel considered that this was not a plausible application of the reasoning of the panel in *Korea – Certain Paper*.<sup>533</sup>

373. The Panel also found that the IT test does not aim at ascertaining whether the State is the "source of price discrimination" as the European Union claims. According to the Panel, even if an exporter from an NME is able to determine its export prices—which would suggest that it is not the State that is the source of the price discrimination—it would fail the IT test unless it meets all of the other criteria.<sup>534</sup>

374. In our view, the panel in *Korea – Certain Paper* did not develop an interpretation that expanded the meaning of the term "each known exporter or producer", nor did it read new exceptions into Article 6.10 of the *Anti-Dumping Agreement*. Rather, that panel considered that there may be situations where several closely related suppliers may be deemed a single supplier for the purposes of Article 6.10 and referred to a "structural and commercial relationship".<sup>535</sup> In the present dispute, the Panel did not exclude the possibility that in a given investigation the authorities might determine that one or more legally distinct exporter(s) or producer(s) is/are, in fact, sufficiently related to the State to justify a conclusion that they are a single exporter or producer. In such a situation, the Panel noted, the authorities could well treat the exporter(s) or producer(s) and the State as a single exporter and calculate a single dumping margin for, and assign a single duty to, that single exporter.<sup>536</sup>

375. Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* require respectively that individual dumping margins be determined for *each exporter or producer* and that individual anti-dumping duties be imposed on individual *suppliers*. These requirements for individual treatment are respected, the European Union contends, as long as a single country-wide margin and duty is determined for the single State entity.

376. In our view, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct,

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<sup>533</sup>Panel Report, para. 7.93.

<sup>534</sup>Panel Report, para. 7.106.

<sup>535</sup>That panel report was not appealed and the issue of whether several suppliers can be considered as a single supplier that is assigned an individual margin and duty, if they are in a sufficiently close commercial and structural relationship, has not been addressed by any other panel.

<sup>536</sup>Panel Report, para. 7.94.

two or more exporters are in such a relationship that they should be treated as a single entity. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output. We note that the *Anti-Dumping Agreement* addresses pricing behaviour by exporters; if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter. In our view, however, this is not the function of the IT test.

377. The IT test contained in Article 9(5) of the Basic AD Regulation has a different function than the determination of whether several distinct exporters constitute a single exporter because of structural and commercial integration or due to control or material influence by the State. The function of the IT test is to determine whether exporters or producers are sufficiently distinct from the State to overcome the presumption of singularity, such that they should be entitled to individual treatment pursuant to Article 9(5). Such a test cannot be used to determine whether distinct exporters are sufficiently integrated with each other or with the State to constitute a single exporter. Nonetheless, given that the purpose of the IT test is to demonstrate the independence of exporters from State interference, we do not exclude that some of its elements would be relevant to the question of integration, while others would not.

378. Only one of the five criteria of the IT test, for example, directly relates to the structural relationship of the company with the State: the requirement that the majority of the shares belong to private persons and that State officials holding management positions be in the minority. Another criterion relates to the State interference with prices and output. All the other criteria, however, appear to be related to State interference with exporters or State intervention in the economy in general and are likely to lead to the denial of individual treatment with respect to exporters that have little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State. This is because the criteria of the IT test apply on a cumulative basis and that failure to comply with only one of them will result in the denial of individual treatment under Article 9(5).

379. Moreover, by focusing on State interference with exporters and State intervention in the economy in general, the IT test captures broader market distortions in the economy and different kinds of interferences by the State than that of the control or material influence by the State over the

exporters in respect of pricing and output of a particular like product. As a consequence, the cumulative criteria of the IT test are likely to result in the denial of individual treatment where the relationship between individual exporters and the State is not such as to justify treating the State and one or several exporters as a single entity for the purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*.

380. Therefore, even if, as the European Union argues, the purpose of the IT test was to identify the actual source of price discrimination, we cannot see why the failure to comply with one of the criteria of the IT test provides conclusive evidence that the price discrimination by individual suppliers can be attributed to the State, when some of the criteria do not touch on the question of whether an exporter is free to determine its own prices. We thus consider that the IT test is not capable of establishing whether, similar to the situation in *Korea – Certain Paper*, the State and one or more exporters can be deemed a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. Nevertheless, the test developed by the panel in *Korea – Certain Paper* may not capture all situations where the State effectively controls or materially influences and coordinates several exporters such that they can be considered a single entity. The panel in *Korea – Certain Paper* addressed the question of when two or more legally distinct private companies can be deemed a "single exporter" under Article 6.10 of the *Anti-Dumping Agreement* due to their commercial and structural relationship. The situation analyzed by the panel in *Korea – Certain Paper* presents some relevance to the determination of whether the State and several exporters constitute a single entity. However, the criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty.

381. Criteria relating to corporate structure may in certain circumstances be relevant to the determination of whether the State and certain exporters constitute a single entity. In other circumstances, however, an investigating authority might have to take into account factors and positive evidence other than those establishing a corporate or commercial relationship in assessing whether the State and a number of exporters are a single entity and that, therefore, the State is the source of price discrimination. These, for instance, may include evidence of State control or instruction of, or material influence on, the behaviour of certain exporters in respect of pricing and output. These criteria could show that, even in the absence of formal structural links between the State and specific exporters, the State in fact determines and materially influences prices and output.

382. In the light of the above, we are of the view that in principle there may be situations where nominally distinct exporters may be considered as a single entity for the purpose of determining individual dumping margins and anti-dumping duties under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, due to State's control or material influence in and coordination of these exporters' pricing and output. We reiterate, however, that the IT test in Article 9(5) of the Basic AD Regulation is not directed at such an inquiry.

383. We further note that, even where it could be determined that particular exporters that are related constitute a single supplier, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* would nonetheless require the determination of an individual dumping margin for the single entity, which should be based on the average export prices of each individual exporter, and the imposition of a corresponding single anti-dumping duty. Instead, the European Union does not determine such a single dumping margin for the State and non-IT suppliers, but rather calculates a country-wide dumping margin and duty. If cooperating non-IT exporters account for significantly less than 100 per cent of all exports, this duty will be based on facts available for the missing information.<sup>537</sup> Such a country-wide dumping margin and duty is applicable to all cooperating non-IT exporters as well as to all non-cooperating exporters.<sup>538</sup>

384. In our view, only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters. We also do not consider that a country-wide duty imposed on a group of exporters could be considered as being "collected in the appropriate amounts in each case" within the meaning of Article 9.2 of the *Anti-Dumping Agreement*, to the extent it is determined for the group of fully cooperating non-IT exporters on the basis of facts available because cooperating exporters account for significantly less than 100 per cent of all exports.

### 3. Conclusions under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*

385. In the light of all of the above, we therefore uphold, albeit for different reasons, the Panel's findings, in paragraphs 7.98 and 7.112 of the Panel Report, that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, because it conditions the determination of individual dumping margins for and the imposition of individual anti-dumping duties on NME exporters or producers to the fulfilment of the IT test. We

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<sup>537</sup>If the level of co-operation is high, that is, if the cooperating non-IT exporters account for close to 100 per cent of all exports, the export price will be based on a weighted average of the actual price of all export transactions effected by these exporters.

<sup>538</sup>Panel Report, para. 7.50.

also find that the Panel did not act inconsistently with Article 11 of the DSU in finding that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*.

F. *Article I:1 of the GATT 1994*

386. The Panel considered that Article 9(5) of the Basic AD Regulation constitutes a rule or formality, maintained by the European Union in connection with importation. According to the Panel, Article 9(5) results in imports of the same product from different WTO Members being treated differently in anti-dumping investigations. The Panel reasoned that imports from NMEs may be treated differently from imports of like products from market economy countries only to the extent that a relevant provision of the covered agreements allows for such differential treatment.<sup>539</sup> The Panel found that the European Union had not demonstrated that any provision of the *Anti-Dumping Agreement*, or any other provision of the WTO covered agreements, allows for the specific different treatment of imports from NMEs that is provided for in Article 9(5) of the Basic AD Regulation. Moreover, the Panel considered that the European Union had not established a sufficient factual basis to conclude that there was a relevant difference in the nature of the imports concerned from NMEs as compared to those from other WTO Members, and stated that this argument by the European Union was merely an assumption.<sup>540</sup>

387. Regarding Article I:1 of the GATT 1994, the Panel therefore concluded:

[I]t is clear that the application of Article 9(5) will, in certain situations, result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union. Thus, we consider that Article 9(5) violates the MFN obligation of Article I:1 of the GATT 1994.<sup>541</sup>

388. The European Union claims that the Panel erred in the interpretation and the application of Article I:1 of the GATT 1994, and acted inconsistently with Article 11 of the DSU, when it found that Article 9(5) of the Basic AD Regulation is inconsistent with the MFN obligation of Article I:1 of the GATT 1994. The European Union contends that the alleged advantage granted to market economies was based on the nature of the suppliers involved, and not on the product itself, and that this means that discrimination between like products originating in different countries does not arise in this

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<sup>539</sup>The Panel mentioned the second *Ad Note* to Article VI:1 of the GATT 1994 and Section 15 of China's Accession Protocol as examples of relevant provisions allowing for differential treatment in respect of the determination of normal value. (Panel Report, footnote 306 to para. 7.125)

<sup>540</sup>Panel Report, paras. 7.124 and 7.125.

<sup>541</sup>Panel Report, para. 7.124.

case.<sup>542</sup> The European Union argues that it is entitled to grant different treatment to imports from market economies and from NMEs because such imports are different in nature. The European Union adds that the word "unconditionally" in Article I:1 does not preclude an advantage being subjected to conditions as long as this does not result in *de facto* discrimination.<sup>543</sup>

389. China responds that the Panel properly found that Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994, because the different treatment that the European Union provides in its anti-dumping investigations to imports from NME and non-NME WTO Members "cannot be justified on the ground that the origin of the product somehow reflects a difference in nature".<sup>544</sup> China also submits that the Panel did not fail to comply with Article 11 of the DSU and that it did not err in finding that the *Anti-Dumping Agreement* does not allow for the different treatment of imports from NMEs provided for in Article 9(5) of the Basic AD Regulation.

390. Article I:1 of the GATT 1994 requires that:

[w]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

391. Article VI:2 of the GATT 1994 states that:

[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

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<sup>542</sup>European Union's appellant's submission, para. 213.

<sup>543</sup>European Union's appellant's submission, para. 212.

<sup>544</sup>China's appellee's submission, para. 330.

392. We observe that Article VI of the GATT 1994 permits the imposition of anti-dumping duties, which may otherwise be inconsistent with other provisions of the GATT 1994, such as Article I:1.<sup>545</sup> Therefore, in our view, a preliminary question to be addressed before determining whether an anti-dumping duty has been imposed inconsistently with Article I:1 of the GATT 1994 is whether the anti-dumping duty had been imposed consistently with Article VI of the GATT 1994.

393. In *Brazil – Desiccated Coconut*, the Appellate Body upheld the panel's finding that the applicability of Article VI of the GATT 1994 to a countervailing duty investigation also determined the applicability of Articles I and II of the GATT 1994. The panel had found that Article VI of the GATT 1994 did not apply to a countervailing duty measure that was the result of an investigation initiated prior to 1 January 1995. Moreover, the panel had found that, if Article VI of GATT 1994 does not constitute applicable law, claims under Articles I and II, which derive from claims of inconsistency with Article VI of the GATT 1994, cannot succeed.<sup>546</sup>

394. Article 9(5) of the Basic AD Regulation regulates the conditions under which an anti-dumping duty is to be imposed by the European Union. In its panel request, however, China did not raise a claim under Article VI of the GATT 1994 in respect of Article 9(5) of the Basic AD Regulation. Thus, it was not argued before the Panel and it is not disputed before us whether Article 9(5) of the Basic AD Regulation is applied consistently with the provisions of Article VI of the GATT 1994. This has significant implications for the question of whether Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994.

395. The Panel, however, found that Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994, without addressing the preliminary question that arises in this case of whether Article 9(5) of the Basic AD Regulation was consistent with Article VI of the GATT 1994. The Panel did not engage with the implications of the absence of a claim under Article VI of the GATT 1994 for a claim under Article I:1 of the GATT 1994. Nor did the Panel consider the relationship between Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, which according to Article 1 of the *Anti-Dumping Agreement* "govern the application of

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<sup>545</sup>This relationship is also reflected in Article II:2(b) of the GATT 1994, which states that:  
Nothing in this Article shall prevent any Member from imposing at any time  
on the importation of any product:

...

(b) any anti-dumping or countervailing duty applied consistently with  
the provisions of Article VI.

<sup>546</sup>Appellate Body Report, *Brazil – Desiccated Coconut*, p. 21, DSR 1997:I, 167, at 185; Panel Report, *Brazil – Desiccated Coconut*, paras. 280 and 281.

Article VI of the GATT 1994".<sup>547</sup> We thus consider that the Panel's finding under Article I:1 of the GATT 1994 lacks an essential step in the sequence of its legal analysis, that is, the determination of whether and under what circumstances an anti-dumping measure that is inconsistent with the *Anti-Dumping Agreement* may be reviewed under Article I:1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994.

396. As we explained above, China did not claim before the Panel that Article 9(5) of the Basic AD Regulation is inconsistent with Article VI of the GATT 1994, nor did the parties present arguments in this dispute in respect of the relationship between the provisions of the *Anti-Dumping Agreement* and those of Articles VI and I of the GATT 1994. Thus, we do not consider it appropriate to explore further ourselves the implications of the absence of a claim under Article VI of the GATT 1994 for a claim under Article I:1 of the GATT 1994.

397. In addition, we have already upheld the Panel's findings that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and we consider that a ruling under Article I:1 of the GATT 1994 is unnecessary for purposes of resolving this dispute.

398. Therefore, for the reasons given above, we decline to rule on the Panel's finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994 and declare this finding moot and of no legal effect. We see no need to address the claim by the European Union that the Panel acted inconsistently with Article 11 of the DSU, because we have declared the Panel's finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994 moot and of no legal effect.

G. *Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement*

399. Article XVI:4 of the *WTO Agreement* requires WTO Members to ensure that their laws, regulations, and administrative provisions are consistent with the provisions of the covered agreements. Article 18.4 of the *Anti-Dumping Agreement* requires each Member to take all necessary steps to ensure the conformity of its laws, regulations, and administrative procedures with the

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<sup>547</sup>Article 1 of the *Anti-Dumping Agreement* states that "[t]he following provisions govern the application of Article VI of the GATT 1994 insofar as action is taken under anti-dumping legislation or regulations." (emphasis added) We further note that Article 18.1 of the *Anti-Dumping Agreement* states that no specific action against dumping "can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The Panel did not analyze the implications of the terms "application" in Article 1 and "as interpreted" in Article 18 of the *Anti-Dumping Agreement* with respect to the relationship between the obligations in the *Anti-Dumping Agreement* and Articles VI and I of the GATT 1994.



provisions of the *Anti-Dumping Agreement*. Having concluded that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as such", the Panel also found that:

... the European Union has acted inconsistently with Article XVI:4 of the WTO Agreement and Article 18.4 of the [*Anti-Dumping Agreement*] by failing to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the relevant Agreements.<sup>548</sup>

400. As a consequence of the European Union's contention that the Panel wrongly found that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, the European Union also requests the Appellate Body to reverse the Panel's findings that the European Union acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements.

401. We have upheld the Panel's findings that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as such". As a consequence, we also uphold the Panel's finding, in paragraph 7.137 of the Panel Report, that the European Union has acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant Agreements.

**V. The Panel's Findings Regarding Article 9(5) of the Basic AD Regulation "As Applied" in the Fasteners Investigation**

402. The Panel considered that the fact that all the requests for individual treatment were granted to all Chinese producers or exporters that requested such treatment in the underlying investigation did not preclude it from considering whether the application of Article 9(5) of the Basic AD Regulation in the fasteners investigation was inconsistent with the *Anti-Dumping Agreement*. The Panel further noted that the very existence of Article 9(5) of the Basic AD Regulation as part of the legal framework that applies to anti-dumping investigations conducted by the European Union may have discouraged other Chinese producers from coming forward and cooperating and from requesting individual treatment in the investigation at issue.<sup>549</sup>

403. Thus, having found that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as such", the Panel considered that it was

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<sup>548</sup>Panel Report, para. 7.137.

<sup>549</sup>Panel Report, footnote 334 to para. 7.148.

"difficult to see how its application in this investigation could be considered consistent with the obligations of the European Union under the [*Anti-Dumping Agreement*]" and found that "for the same reasons, its application in the fasteners investigation was also inconsistent with these two provisions".<sup>550</sup>

404. The European Union argues that, since the Panel erred in finding that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with the provisions of the *Anti-Dumping Agreement*, the Appellate Body should also reverse the Panel's "as applied" findings with respect to the determinations made in the fasteners investigation.<sup>551</sup> Moreover, the European Union claims that the Panel found that Article 9(5) "as such" prevents the result that suppliers from NMEs are entitled to obtain from the European Union's compliance with the obligations contained in the *Anti-Dumping Agreement* and the GATT 1994. However, in a case where all companies requesting individual treatment were granted such treatment, there is no basis for a finding of inconsistency "as applied" because the result obtained by these companies was the same as it would have been had the European Union complied with its obligation. According to the European Union, for the Panel to say that there is a possibility that Article 9(5) affected participation by Chinese exporters in the fasteners investigation and/or the quality and quantity of information Chinese exporters provided to the Commission is pure "speculation", and "not based on evidence".<sup>552</sup>

405. China submits that a measure that is found to be "as such" inconsistent with WTO obligations will also necessarily be inconsistent "as applied". China argues that Article 9(5) of the Basic AD Regulation not only prevents the result that suppliers from NMEs are entitled to obtain but also subjects them to an additional burden by requiring such exporters to request and demonstrate that they fulfil the conditions laid down in Article 9(5).<sup>553</sup>

406. We observe that in the fasteners investigation the European Union applied Article 9(5) of the Basic AD Regulation. Those Chinese suppliers that were not granted market economy treatment under Article 2(7) of the Basic AD Regulation and requested individual treatment pursuant to Article 9(5) obtained it, once they had demonstrated that they fulfilled each and every requirement of the IT test. If Article 9(5) would not condition the granting of individual treatment on the fulfilment of the IT test, all exporters from NMEs that are WTO Members would be entitled to individual treatment, based on Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, regardless of whether they qualify for market economy treatment under Article 2(7) or not. Article 9(5) of the Basic AD

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<sup>550</sup>Panel Report, para. 7.148.

<sup>551</sup>European Union's appellant's submission, para. 228.

<sup>552</sup>European Union's appellant's submission, para. 231.

<sup>553</sup>China's appellee's submission, para. 369.

Regulation subjects the right of NME exporters to individual treatment to a number of conditions, which are not provided for under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* as a prerequisite for obtaining individual treatment. The fact that in this investigation all suppliers who requested individual treatment under Article 9(5) met the burden of demonstrating that they fulfil all the conditions set out in Article 9(5) does not, in our view, render this specific application of Article 9(5) consistent with the *Anti-Dumping Agreement*.

407. We also disagree with the argument of the European Union that there are two categories of measures that can be found "as such" inconsistent: measures whose application will always produce an inconsistent result and "measures where the result which is found WTO inconsistent may or may not take place in an 'as applied' context depending on the configuration of facts".<sup>554</sup> In our view, any instance of application of a measure that is "as such" inconsistent with a covered agreement will produce an inconsistent result even in a situation where suppliers succeed in demonstrating the conditions of the IT test and qualify ultimately for individual treatment. In other words, granting individual treatment without conditioning it on the fulfilment of the IT test would be consistent "as applied", while granting or denying individual treatment subject to the fulfilment of the IT test and the administrative burden it imposes remain inconsistent "as applied".

408. Granting individual treatment subject to the fulfilment of the IT test would produce a result that may be less inconsistent than a complete denial of individual treatment, but it would nevertheless fall short of the requirements in Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. We see a difference between the granting of individual treatment without additional obstacles pursuant to Articles 6.10 and 9.2 and the granting of individual treatment subject to a showing that the conditions of the IT test have been fulfilled. The existence of the IT test itself, even where exporters succeed in demonstrating that they meet its conditions, places an additional burden on those exporters who apply for individual treatment, and it has a potential impact on those exporters who may be discouraged by the administrative burden from cooperating with the investigating authority and from requesting individual treatment. The very existence of the IT test adversely affected Chinese exporters who were concerned by the fasteners investigation. These exporters bore the burden of demonstrating that they were entitled to individual treatment, whereas under the *Anti-Dumping Agreement* no such demonstration is required, and for this reason alone it is possible that some exporters did not apply for individual treatment.

409. In the light of the above, having upheld the Panel's findings that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, we

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<sup>554</sup>European Union's appellant's submission, para. 230.

also uphold the Panel's finding, in paragraph 7.148 of the Panel Report, that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as applied" in the fasteners investigation.

**VI. China's Other Appeal of the Panel's Findings under Articles 4.1 and 3.1 of the *Anti-Dumping Agreement***

**A. Introduction**

410. We turn now to address China's other appeal of the Panel's findings that the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* with respect to the definition of the domestic industry in the fasteners investigation. We begin our analysis with the interpretation of these provisions, in particular the term "a major proportion" in Article 4.1 of the *Anti-Dumping Agreement*. We then examine China's allegation that the Panel erred in rejecting China's claim that the domestic industry defined in the fasteners investigation did not include producers whose collective output "constitutes a major proportion of the total domestic production" within the meaning of Article 4.1 of the *Anti-Dumping Agreement*. Next, we address China's claims that the Panel erred in finding that: (i) the European Union did not act inconsistently with Article 3.1 of the *Anti-Dumping Agreement* by making an injury determination on the basis of a sample of producers that were not representative of the domestic industry; and (ii) the European Union did not act inconsistently with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* by excluding certain producers from the definition of the domestic industry.

**B. Interpretation of Articles 4.1 and 3.1 of the *Anti-Dumping Agreement***

411. Article 4.1 of the *Anti-Dumping Agreement* provides that the term "domestic industry" must be defined as referring to the "domestic producers *as a whole* of the like product" or "those of them whose collective output of the products constitutes *a major proportion* of the total domestic production", except in two specific circumstances that are not relevant in this dispute.<sup>555</sup> Article 4.1 thus juxtaposes two methods for defining the term "domestic industry". By using the term "a major proportion", the second method focuses on the question of *how much* production must be represented by those producers making up the domestic industry when the domestic industry is defined as less

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<sup>555</sup>Emphasis added. Under Article 4.1(i), domestic producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product may be excluded. Article 4.1(ii) further provides that the domestic industry may be limited to include only those producers within a particular geographic region, if certain criteria are met.

than the domestic producers as a whole. In answering this question, Article 4.1 does not stipulate a specific proportion for evaluating whether a certain percentage constitutes "a major proportion".<sup>556</sup>

412. The absence of a specific proportion does not mean, however, that any percentage, no matter how low, could automatically qualify as "a major proportion". Rather, the context in which the term "a major proportion" is situated indicates that "a major proportion" should be properly understood as a relatively high proportion of the total domestic production. Specifically, when read in the light of the phrase "the domestic producers as a whole", the term "those of them" in the second method for defining the domestic industry clearly refers to those producers among "domestic producers as a whole". Thus, the collective output of "those" producers must be determined in relation to the production of the domestic producers as a whole. Moreover, the term "a major proportion" is immediately followed by the words "of the total domestic production". "A major proportion", therefore, should be understood as a proportion defined by reference to the total production of domestic producers as a whole. "A major proportion" of such *total* production will standardly serve as a substantial reflection of the total domestic production. Indeed, the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole.

413. In our view, the above interpretation is confirmed by the purpose of defining the domestic industry under the *Anti-Dumping Agreement*. As footnote 9 to Article 3 of the *Anti-Dumping Agreement* indicates<sup>557</sup>, the domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers. In this respect, Article 3.1 requires that an injury determination be based on "positive evidence". Pursuant to Article 3.4, such "positive evidence" includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry. Naturally, the "positive evidence" to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered. Thus, "a major proportion of the total domestic production" should be determined so as to ensure that the domestic

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<sup>556</sup>One panel has found that "Article 4.1 of the [*Anti-Dumping*] *Agreement* does not require Members to define the 'domestic industry' in terms of domestic producers representing the majority, or 50+ per cent, of total domestic production". (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341)

<sup>557</sup>Footnote 9 states that:

Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3].

industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.

414. Moreover, Article 3.1 requires that a determination of injury "involve an objective examination" of, *inter alia*, the impact of the dumped imports on domestic producers. The Appellate Body has found that an "objective examination" in accordance with Article 3.1 "requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".<sup>558</sup> In other words, to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product. The risk of introducing distortion will not arise when no producers are excluded and the domestic industry is defined as "the domestic producers as a whole". Where a domestic industry is defined as those producers whose collective output constitutes a major proportion of the total domestic production, it follows that the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted. Therefore, the above interpretation is also consistent with the requirement under Article 3.1 that an injury determination be based on an objective examination of the impact of the dumped imports on domestic producers.

415. We recognize that obtaining information regarding domestic producers may be difficult, particularly in special market situations, such as a fragmented industry with numerous producers. In such special cases, the use of "a major proportion" within the meaning of Article 4.1 provides an investigating authority with some flexibility to define the domestic industry in the light of what is reasonable and practically possible. The practical constraint on an authority's ability to obtain information regarding the domestic producers may also mean that, in such special cases, what constitutes "a major proportion of the total domestic production" may be lower than what is ordinarily permissible in a less fragmented market.

416. Nonetheless, while the proportion of total production that qualifies as "a major proportion" in such a special market situation may be lower than in a normal case, this does not change the purpose of defining the domestic industry, that is, to provide the basis for the injury determination. As in a normal case, the domestic industry defined in such a special case also must ensure that the subsequent injury analysis is based on positive evidence and involves an objective examination pursuant to Article 3.1 of the *Anti-Dumping Agreement*. An injury determination regarding a fragmented industry must therefore cover a large enough proportion of total domestic production to ensure that a proper

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<sup>558</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

injury determination can be made pursuant to Article 3.1. Thus, even if what constitutes "a major proportion" may be lower in the light of the practical constraints on obtaining information in a special market situation, an investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry.

417. Finally, we turn to examine the interpretation advanced by the European Union that Article 5.4 of the *Anti-Dumping Agreement* provides important contextual guidance concerning the interpretation of the term "a major proportion" in Article 4.1 of that Agreement. Article 5.4, which contains the standing requirement for the initiation of an investigation, provides certain numerical benchmarks for evaluating whether a complaint to initiate an anti-dumping investigation has sufficient support by domestic producers. Specifically, Article 5.4 states that an investigation "shall not be initiated" unless the application "has been made *by or on behalf of the domestic industry*".<sup>559</sup> It then provides that "[t]he application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support or opposition to the application." Furthermore, "no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry."

418. According to the European Union, it is "permissible to consider that producers that represent 25% or more of domestic production can *legitimately* represent a major proportion of total production".<sup>560</sup> In our view, however, there is no textual basis for such a proposition. Articles 4.1 and 5.4 concern two different aspects of an anti-dumping investigation. Article 4.1 defines the whole universe of the domestic industry relevant to the injury determination in an anti-dumping investigation. By contrast, Article 5.4 concerns the question of whether an application is made "by or on behalf of the domestic industry", and requires a minimum benchmark defined as expressions of support from those producers representing at least 25 per cent of the "total production ... by the *domestic industry*".<sup>561</sup> Therefore, the 25 per cent benchmark under Article 5.4 does not address the question of how the entire universe of the domestic industry *itself* should be defined. The European Union's recourse to the negotiating history regarding Articles 4.1 and 5.4 of the *Anti-Dumping Agreement* is also unavailing. Although the European Union asserts that the "discussions on major proportion and standing went hand in hand" during the negotiations, this does

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<sup>559</sup>Emphasis added.

<sup>560</sup>European Union's appellee's submission, para. 187. (original emphasis)

<sup>561</sup>Emphasis added.

not change the fact that no agreement was reached in setting a specific proportion for determining what, in abstract, constitutes "a major proportion".<sup>562</sup>

419. In sum, a proper interpretation of the term "a major proportion" under Article 4.1 requires that the domestic industry defined on this basis encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production. This ensures that the injury determination is based on wide-ranging information regarding domestic producers and is not distorted or skewed. In the special case of a fragmented industry with numerous producers, the practical constraints on an authority's ability to obtain information may mean that what constitutes "a major proportion" may be lower than what is ordinarily permissible in a less fragmented industry. However, even in such cases, the authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion. A complainant alleging an inconsistency under the second method for defining the domestic industry bears the burden to prove its claim and to demonstrate that the domestic industry definition does not meet the standard of "a major proportion". Nonetheless, a domestic industry defined on the basis of a proportion that is low, or defined through a process that involves active exclusion of certain domestic producers, is likely to be more susceptible to a finding of inconsistency under Article 4.1 of the *Anti-Dumping Agreement*.

C. *Whether 27 Per Cent of Total Domestic Production in the Fasteners Investigation Constitutes "a major proportion" within the Meaning of Article 4.1 of the Anti-Dumping Agreement*

420. China appeals the Panel's finding that China did not establish that the domestic industry defined in the fasteners investigation did not include domestic producers whose collective output constituted a "major proportion" of the total domestic production. According to China, the Panel erroneously concluded that the fact that the Commission relied on a presumption that 25 per cent of total domestic production constituted "a major proportion" within the meaning of Article 4.1 of the *Anti-Dumping Agreement* was insufficient to demonstrate that the definition of the domestic industry in this dispute was inconsistent with Article 4.1. Moreover, China alleges that the Panel erroneously concluded that certain specific circumstances in the fasteners investigation, such as the possibility of including more producers in the domestic industry definition than were included by the

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<sup>562</sup>European Union's appellee's submission, para. 184.



Commission<sup>563</sup>, were not relevant to the examination of whether the domestic industry defined by the Commission met the requirement of "a major proportion" under Article 4.1.

421. We recall that, with regard to the definition of the domestic industry in the fasteners investigation, recital 114 of the Definitive Regulation provided that:

[t]he production of the Community producers that supported the complaint and fully cooperated in the investigation represents 27,0% of the production of the product concerned in the Community. It is *therefore* considered that these companies constitute the Community industry *within the meaning of Articles 4(1) and 5(4) of the basic Regulation*.<sup>564</sup> (emphasis added)

422. As the European Union acknowledges<sup>565</sup>, in relation to the total domestic production, 27 per cent is at the lower end of the spectrum. Indeed, a figure as low as 27 per cent can hardly be considered a substantial reflection of the total. Nonetheless, the European Union alleges that the fasteners industry is "known to be" a fragmented industry with many producers<sup>566</sup>, and China does not dispute this. The practical constraints on obtaining information from domestic producers in such a market may mean that what normally would not qualify as "a major proportion" may in these circumstances suffice, provided that the process of defining the domestic industry does not introduce material risks of distortion. Nonetheless, as further discussed below, the Commission failed to ensure that the domestic industry definition would not introduce a material risk of distortion to the injury analysis by relying on a minimum benchmark irrelevant to the issue of what constitutes "a major proportion", and by excluding certain known producers on the basis of a self-selection process among the producers.

423. The evidence on the record shows that, in the fasteners investigation, the Commission applied a minimum benchmark of 25 per cent in defining the domestic industry. As the European Union

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<sup>563</sup>See China's other appellant's submission, paras. 250-254. Other specific circumstances alleged by China include: (i) whether the producers included in the domestic industry definition were representative of the entire EU industry; and (ii) the fact that the number of producers included in the domestic industry definition (45) was much smaller than the total number of known EU producers (318). (See *ibid.*, paras. 247-249 and 255-258)

<sup>564</sup>Definitive Regulation, *supra*, footnote 4, recital 114.

<sup>565</sup>European Union's responses to questioning at the oral hearing.

<sup>566</sup>European Union's appellee's submission, para. 191. See also European Union's second written submission to the Panel, para. 122.

explains, Articles 4(1) and 5(4) of the Basic AD Regulation<sup>567</sup>, which "link[] the 'major proportion' requirement to the objective benchmark of Article 5.4 of the *Anti-Dumping Agreement* as a legitimate presumption"<sup>568</sup>, reflect its position that producers that represent 25 per cent or more of domestic production represent a major proportion of total production. We recall that recital 114 of the Definitive Regulation provides that the producers whose output represents 27 per cent of the total domestic production constitutes the domestic industry "within the meaning of Articles 4(1) and 5(4)" of the Basic AD Regulation. This indicates that the Commission considered that producers representing 27 per cent of the total domestic production were sufficient to constitute the domestic industry simply because they fulfilled the 25 per cent test set out in Articles 4(1) and 5(4) of the Basic AD Regulation. The European Union confirms this understanding in stating that it is "permissible to consider that producers that represent 25% or more of domestic production can *legitimately* represent a major proportion of total production and ... this was the case in the fasteners investigation."<sup>569</sup>

424. We note that China has not challenged Articles 4(1) and 5(4) of the Basic AD Regulation, as such, and that the meaning and scope of these provisions were not examined by the Panel. These provisions are therefore not before us. Nonetheless, China challenges the application of these provisions in the fasteners investigation, arguing that the Commission was not permitted to apply a minimum benchmark, but was required to examine the specific circumstances to determine whether the standard of "a major proportion" was met.<sup>570</sup>

425. The Definitive Regulation indicates, and the European Union confirms, that the Commission applied the 25 per cent test under Articles 4(1) and 5(4) of the Basic AD Regulation in the fasteners investigation and concluded that the producers representing 27 per cent of the total domestic production constituted the domestic industry. However, as explained above, we disagree with the European Union's position that 25 per cent of total domestic production can be presumed to meet the requirement of "a major proportion" under Article 4.1 of the *Anti-Dumping Agreement*. In our view, the 25 per cent benchmark in Article 5.4 of the *Anti-Dumping Agreement* concerns the issue of standing and does not address the question of what constitutes "a major proportion" in Article 4.1. Thus, the Commission determined that a proportion as small as 27 per cent met the standard of "a

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<sup>567</sup>Specifically, Article 4(1) of the Basic AD Regulation states that "the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, *as defined in Article 5(4)*, of the total Community production of those products". (Basic AD Regulation, *supra*, footnote 5, Article 4(1) (emphasis added)) Article 5(4) of the Basic AD Regulation, in turn, transcribes the standing requirement provided in Article 5.4 of the *Anti-Dumping Agreement*, including the minimum benchmark of "25% of total production of the like product produced by the Community industry". (*Ibid.*, Article 5(4))

<sup>568</sup>European Union's appellee's submission, para. 186.

<sup>569</sup>European Union's appellee's submission, para. 187. (original emphasis) See also European Union's response to Panel Question 32, para. 98.

<sup>570</sup>See China's other appellant's submission, paras. 223-243.

major proportion" simply because it exceeded a benchmark that was irrelevant to the issue of the definition of the domestic industry. As a result of the application of a benchmark wholly unrelated to the proper interpretation of the term "a major proportion", the domestic industry defined in the fasteners investigation covered a low proportion of domestic production, which significantly restricted the data coverage for conducting an accurate and undistorted injury determination.

426. Moreover, as noted above, recital 114 of the Definitive Regulation defines the domestic industry as including "the Community producers that supported the complaint and fully cooperated in the investigation". We note that the issue of whether the domestic industry, as defined, included only those "producers that supported the complaint" is disputed between the parties, and we will address that issue in the next subsection. It is not disputed, however, that the Commission limited the definition of the domestic industry to those producers who "fully cooperated in the investigation". In this respect, the Definitive Regulation provides that:

... in view of the large number of producers, sampling of the domestic industry was proposed. ... In order to enable the Commission to decide whether sampling would be necessary, and if so to select a sample, Community producers were requested to make themselves known within 15 days from the date of the initiation of the investigation and to provide basic information on their production and sales, and the names and activities of all their related companies involved in the production and/or selling of the product concerned ... *46 Community producers that produced the product concerned in the Community during the investigation period and expressed a wish to be included in the sample within the aforesaid period were considered as cooperating companies and were taken into account in the selection of the sample ...* These Community producers represented over 30% of the estimated production in the Community in 2006. *These producers are considered to constitute the Community industry as mentioned in recital 114.*<sup>571</sup> (emphasis added)

427. In our view, by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion. First, we fail to see the reason why a producer's willingness to be included in the *sample* should affect its eligibility to be included in the *domestic industry*, which is a universe of producers that is by definition wider than the sample. As China argues on appeal, the Commission's approach "confuses two different steps", because the

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<sup>571</sup>Panel Report, para. 7.212 (quoting Definitive Regulation, *supra*, footnote 4, recitals 23-25). As noted above, one producer among the 46 cooperating producers was later found not to be cooperating and was dropped from the definition of the domestic industry, reducing the proportion of the total domestic production represented by the domestic industry to 27 per cent.

domestic industry should be defined first, before a sample may be selected from the producers included in the domestic industry.<sup>572</sup>

428. We note that the Panel expressed "sympathy for the European Union's view that producers who do not support the complaint are not likely to cooperate, and thus cannot effectively be considered as part of the domestic industry unless they specifically come forward and agree to participate in the investigation."<sup>573</sup> However, the evidence on the record shows more producers "specifically [came] forward"<sup>574</sup> than were ultimately included in the domestic industry definition. As the European Union explained before the Panel, the Commission contacted 318 known producers requesting certain basic information, and 70 companies responded by providing the requested information within the 15-day deadline, including information on their production and sales.<sup>575</sup> Thus, as China submits, the Commission identified, and obtained information from, more producers than those it ultimately included in the domestic industry definition.<sup>576</sup>

429. According to the European Union's explanation, the Commission excluded 25 of these 70 producers from the domestic industry definition for various reasons, one of which was the producers' expressed unwillingness to be part of the sample.<sup>577</sup> However, as noted above, the sample of domestic producers is a smaller universe than the domestic industry, and the unwillingness to be part of the sample should not affect whether a producer should be part of the domestic industry. This is confirmed by the relevant facts in the fasteners investigation. Specifically, the Commission

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<sup>572</sup>China's other appellant's submission, para. 163.

<sup>573</sup>Panel Report, para. 7.215. Although we also recognize the potential difficulty in obtaining information from non-cooperating companies, we note that the Commission was not entirely without any ability to solicit information. Article 6(3) of the Basic AD Regulation, for instance, provides that "[t]he Commission may request Member States to supply information, and Member States shall take whatever steps are necessary in order to give effect to such requests." Article 6(4) further provides that "[t]he Commission may request Member States to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers, and to carry out investigations in third countries, provided that the firms concerned give their consent and that the government of the country in question has been officially notified and raises no objection."

<sup>574</sup>Panel Report, para. 7.215.

<sup>575</sup>Upon the Panel's request, the European Union provided the list of the 70 EU producers, including the names of the related companies involved in the production and/or selling of the product concerned. (See List of "Sampling Form for Community Producers" for inspection by interested parties (Panel Exhibit EU-19))

<sup>576</sup>China alleges on appeal that 114 producers, whose output represented 45 per cent of total domestic production, came forward and provided relevant information. China also alleges that the Commission could have included these 114 producers in the domestic industry definition. (See China's other appellant's submission, paras. 253 and 254) This is a factual issue disputed between the parties and on which we make no finding. Section VI.E of this Report contains our detailed analysis of the participants' dispute on appeal concerning certain factual issues before the Panel.

<sup>577</sup>The European Union explained before the Panel that the Commission disregarded 25 of the 70 producers who responded because they: (i) did not produce the product concerned; (ii) did not wish to be included in the sample; or (iii) refused to provide, or did not send, an open version of their reply. (See European Union's response to Panel Question 31, para. 93) We found no evidence on the record regarding how many of these producers were excluded for the sole reason that they were unwilling to be included in the sample.

selected six producers as part of the sample, obtained relevant information from them, and verified the information on their premises.<sup>578</sup> The Commission then used the information obtained from the sampled producers for its analysis of the "microeconomic" injury factors, but conducted its analysis of the "macroeconomic" injury factors on the basis of information obtained from all of the 45 producers included in the domestic industry definition.<sup>579</sup> Thus, by including only those willing to be part of the *sample* in the domestic industry definition, the Commission's approach shrank the universe of producers whose data could have been used for part of the injury determination. Even though, due to the fragmented nature of the fasteners industry, the practical constraints on obtaining information may justify the inclusion of a smaller proportion of domestic production in the domestic industry definition, the Commission's approach in excluding those who provided relevant information but were unwilling to be part of the sample was unrelated to, and cannot be justified by, such practical constraints.

430. In sum, in the fasteners investigation, the collective output of those producers included in the domestic industry definition, which accounted for 27 per cent of the total domestic production, represented a low proportion in relation to the total. The fragmented nature of the fasteners industry, however, might have permitted such a low proportion due to the impracticality of obtaining more information, provided that the process with which the Commission defined the industry did not give rise to a material risk of distortion. Yet, we note that the Commission applied a minimum benchmark of 25 per cent in defining what constituted "a major proportion of total domestic production", even though this benchmark does not address the standard of "a major proportion" or the practicality of achieving a higher proportion. Moreover, by limiting the domestic industry definition to those producers willing to be part of the sample, the Commission excluded producers that provided relevant information. In so doing, the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination. Therefore, we consider that the Panel erred in finding that "the European Union did not act inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners."<sup>580</sup>

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<sup>578</sup>See Definitive Regulation, *supra*, footnote 4, recitals 27, 28, 36, and 37.

<sup>579</sup>The "microeconomic" factors were stocks, profitability and cash flow, investment, return on investments, ability to raise capital, and wages. The "macroeconomic" factors were production, production capacity, capacity utilisation, sales, market share, average prices, employment, and productivity. (See Panel Report, para. 7.385)

<sup>580</sup>Panel Report, para. 7.230.

D. *The Consistency of the Sample with Article 3.1 of the Anti-Dumping Agreement*

431. China alleges that the Panel erred in rejecting its claim that the European Union violated Article 3.1 of the *Anti-Dumping Agreement* because the Commission made an injury determination with respect to a sample of producers that was not representative.<sup>581</sup> China argued before the Panel that, even assuming that the domestic industry was correctly defined, the sample selected by the Commission for purposes of the injury determination was inconsistent with Article 3.1 of the *Anti-Dumping Agreement* because it was not representative of the domestic industry. According to China, the sample was selected on the sole basis of production volume of the like product rather than on the basis of a statistically valid sample.<sup>582</sup> China also argued that the Commission could have carried out the examination of all injury factors with respect to the entire domestic industry it had defined, or at least with respect to more producers than those included in the sample.<sup>583</sup>

432. The Panel rejected these arguments. The Panel found that, "in the absence of any arguments concerning relevant factors either ignored or dismissed by the investigating authority, and given that the sample selected does appear to include producers whose production is representative of that of the industry defined in the investigation, ... China has not demonstrated that the sample selected is not representative of the domestic industry solely because it was selected on the basis of volume of production."<sup>584</sup> Moreover, the Panel stated that it "cannot accept the contention that only a statistically valid sample will be sufficiently representative for purposes of an injury determination".<sup>585</sup> The Panel also found that the fact that the Commission examined certain injury factors with respect to the entire domestic industry did not, as China contended, demonstrate that the Commission could have carried out its examination of all injury factors with respect to the entire domestic industry it had defined, or could have at least included more producers in the sample. On appeal, China claims that the Panel erred in its interpretation and application of Article 3.1 of the *Anti-Dumping Agreement* in reaching these findings.<sup>586</sup>

433. As a preliminary matter, we note the European Union's assertion that China's appeal concerns a claim that was not included in China's panel request and therefore is not properly before the Appellate Body.<sup>587</sup> According to the European Union, China's claim that the European Union violated Article 3.1 of the *Anti-Dumping Agreement* by failing to use a sampling technique that guarantees that

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<sup>581</sup>China's other appellant's submission, paras. 267 and 278.

<sup>582</sup>See Panel Report, para. 7.237.

<sup>583</sup>See Panel Report, para. 7.240.

<sup>584</sup>Panel Report, para. 7.238.

<sup>585</sup>Panel Report, para. 7.239.

<sup>586</sup>See China's other appellant's submission, para. 267.

<sup>587</sup>European Union's appellee's submission, para. 213.

the sample is sufficiently representative of the domestic industry was "suddenly" raised at the second substantive meeting before the Panel and constitutes a new claim not included in the request for consultations or for Panel establishment.<sup>588</sup>

434. In its panel request, China claimed that the European Union violated Article 3.1 of the *Anti-Dumping Agreement* by conducting the injury determination on the basis of a sample of producers accounting for only 17.5 per cent of the total domestic production.<sup>589</sup> China's claim in its panel request thus alerted the European Union to the fact that China considered that the sample was deficient for conducting a proper injury analysis, at least in terms of the volume of production. Thus, like the Panel, we consider that China merely developed a new argument in support of its claim under Article 3.1 of the *Anti-Dumping Agreement* when alleging that the selected sample was also not representative of the domestic industry. Therefore, we agree with the Panel's finding that China's argument did not constitute an entirely new claim, as alleged by the European Union, but was rather a newly developed argument in support of China's claim that the European Union "failed to make a determination of injury with respect to the relevant domestic industry, in part because the sample included producers accounting for only 17.5 per cent of domestic production".<sup>590</sup>

435. Turning to the substance of China's claims, we note that the *Anti-Dumping Agreement* is silent on the issue of whether sampling may be used for purposes of the injury determination. The Agreement thus does not prevent an authority from using samples to determine injury, and China does not contest this view.<sup>591</sup> In the fasteners investigation, the Commission selected a sample comprising six producers, whose output accounted for approximately 65 per cent of the production of the 45 domestic producers defined by the Commission as the domestic industry. The Commission chose these producers on the basis of their production volumes, "so as to achieve the largest representative volume of production of the like product produced in the Community which could reasonably be investigated within the time available".<sup>592</sup> China submits that a sample that is selected merely on the basis of the "largest volume that can reasonably be investigated" is not appropriate to satisfy the requirement under Article 3.1 of the *Anti-Dumping Agreement* that an injury determination involve an objective examination of the effects of the dumped imports, because such a sample is not

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<sup>588</sup>European Union's appellee's submission, para. 214. The European Union raised the same objection before the Panel. (See Panel Report, footnote 509 to para. 7.237)

<sup>589</sup>WT/DS397/3, para. (ii)(k)(iv).

<sup>590</sup>Panel Report, footnote 509 to para. 7.237.

<sup>591</sup>See Panel Report, para. 7.239.

<sup>592</sup>Panel Report, para. 7.216 (quoting Definitive Regulation, *supra*, footnote 4, recital 27).

representative of the domestic industry.<sup>593</sup> Rather, China argues, other methods, such as a statistically valid sample, should be used.

436. We note that, because the *Anti-Dumping Agreement* does not specify whether sampling is allowed for purposes of an injury determination, it also does not contain guidance on how sampling should be conducted. Thus, we see no basis for China's argument that a sample selected on the basis of the largest volume that can reasonably be investigated, rather than a statistically valid sample, necessarily means that an injury determination conducted on this basis is inconsistent with Article 3.1 of the *Anti-Dumping Agreement*. Although we do not disagree with the view that a sample must be properly representative of the domestic industry defined by the investigating authority, we disagree with China's contention that the only way to ensure representativeness is through a statistically valid sample. In our view, as long as the domestic industry is defined consistently with the *Anti-Dumping Agreement*, and that the sample selected is representative of the domestic industry, an investigating authority has discretion in deciding the method with which it selects a sample. A statistically valid sample is a proper way to ensure the representativeness of the sample. Yet, the *Anti-Dumping Agreement* imposes no obligation on an investigating authority always to resort to statistically valid samples.

437. China further argues that, as it demonstrated to the Panel, the Commission conducted its analysis of the "macroeconomic" injury factors on the basis of the information from all of the 45 producers included in the domestic industry definition. China therefore asserts that, if the Commission was in a position to analyze the macroeconomic injury factors for the domestic industry as defined, it could also have analyzed the "microeconomic" injury factors for the domestic industry as defined rather than only for the sampled domestic producers. However, as the Panel correctly found, China has not provided any arguments or evidence to substantiate its assertion.<sup>594</sup>

438. On this basis, we decline to uphold China's claims that the Panel erred in rejecting the contention that only a statistically valid sample would be sufficiently representative of the domestic industry, and in finding that China had not demonstrated that the Commission could have carried out its entire injury examination for the domestic industry it had defined, or could have at least included more producers in the sample. We note that China's above claims concern the issue of whether the sample *itself* selected in the investigation was consistent with Article 3.1 of the *Anti-Dumping Agreement*. In declining to uphold China's claim, therefore, our finding is limited to the issue of

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<sup>593</sup>China's other appellant's submission, para. 271.

<sup>594</sup>Moreover, we note that China has not appealed the Panel's finding that the European Union did not act inconsistently with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* by basing its examination of "microeconomic" injury factors on the sampled producers. (See Panel Report, para. 7.395)



whether the *sample* was inconsistent with Article 3.1 of the *Anti-Dumping Agreement*, and does not address the issue of whether *the domestic industry defined by the Commission* in the fasteners investigation was consistent with this provision.

E. *Exclusion of Certain Producers*

1. The Exclusion of Producers Who Did Not Support the Complaint

439. China claims that, in finding that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement*, the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU and Article 17.6<sup>595</sup> of the *Anti-Dumping Agreement*, in finding that the European Union did not exclude from the definition of domestic industry those producers who did not support the complaint lodged against imports of fasteners from China. Specifically, China claims that the Panel: (i) "disregarded"<sup>596</sup> certain evidence submitted by China, that is, the Information Document<sup>597</sup> issued by the Commission during the investigation, and a letter sent by the Commission; (ii) accepted an "unsubstantiated"<sup>598</sup> factual assertion by the European Union that at least one producer included in the domestic industry definition did not support the investigation; and (iii) drew an incorrect inference from that factual assertion.

440. Article 11 of the DSU states, in relevant part, that:

... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

441. Pursuant to Article 11 of the DSU, a panel, as a trier of facts, must base its findings on a sufficient evidentiary basis on the record<sup>599</sup>, may not apply a double standard of proof<sup>600</sup>, and its

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<sup>595</sup>China did not provide any arguments specifically regarding Article 17.6 of the *Anti-Dumping Agreement* in support of its claim under Article 4.1 of that Agreement. Moreover, we recall that the Appellate Body has found that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'." (Appellate Body Report, *US – Hot Rolled Steel*, para. 55 (original emphasis)) In the light of these findings, and the absence of arguments by China concerning Article 17.6 of the *Anti-Dumping Agreement*, we do not separately address, in our analysis, China's claim under this provision.

<sup>596</sup>China's other appellant's submission, p. 47, heading (F).

<sup>597</sup>European Commission, Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Non-imposition of provisional anti-dumping measures, 4 August 2008 (Panel Exhibit CHN-17).

<sup>598</sup>China's other appellant's submission, p. 38, heading (D).

<sup>599</sup>See Appellate Body Report, *US – Continued Zeroing*, para. 338.

<sup>600</sup>See Appellate Body Report, *Korea – Dairy*, para. 137.

treatment of the evidence must not "lack even-handedness".<sup>601</sup> Moreover, the duty to make an objective assessment of the facts of the case "requires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence"<sup>602</sup>, and a panel should not disregard evidence that is relevant to the case of one of the parties.<sup>603</sup> The Appellate Body has also clarified, however, that a panel is "entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements".<sup>604</sup> In doing so, a panel "is not required to discuss, in its report, each and every piece of evidence."<sup>605</sup> Moreover, "in view of the distinction between the respective roles of the Appellate Body and panels", the Appellate Body will not "interfere lightly" with the panel's fact-finding authority<sup>606</sup>, and "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached".<sup>607</sup>

442. Thus, not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. It is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. Finally, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.<sup>608</sup> With these considerations in mind, we turn to review China's appeal against the Panel's finding regarding the alleged exclusion of certain producers from the definition of the domestic industry.

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<sup>601</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

<sup>602</sup> Appellate Body Report, *US – Continued Zeroing*, para. 331.

<sup>603</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 553 and 615.

<sup>604</sup> Appellate Body Report, *EC – Asbestos*, para. 161.

<sup>605</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202.

<sup>606</sup> See Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *EC – Sardines*, para. 299; and Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>607</sup> Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>608</sup> See Appellate Body Report, *US – Steel Safeguards*, para. 498; and Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

443. The Panel noted the European Union's explanation that, at the time of initiation, the Commission sent sampling forms to 318 EU producers of fasteners, requesting them to provide certain information within 15 days, and to indicate whether they would be willing to be included in the sample.<sup>609</sup> The Panel also noted that the sampling forms do not contain any questions concerning whether the producers supported or opposed the application.<sup>610</sup> On the basis of the sampling forms received, the Commission defined the domestic industry in the fasteners investigation as including 45 EU producers, representing 27 per cent of the total EU production, all of whom responded to the request for information within the 15-day deadline and indicated that they would be willing to be part of the sample.<sup>611</sup> According to recital 114 of the Definitive Regulation, these EU producers "supported the complaint and fully cooperated in the investigation".<sup>612</sup> The European Union explained that, despite the stipulation in recital 114, the issue of support was in fact only relevant to the determination of whether the complaint for the initiation of the fasteners investigation had met the *standing* requirement. The sampling forms sent for purposes of defining the domestic industry did not concern the issue of standing. Rather, they concerned the issue of cooperation, that is, whether a producer would be willing to be part of the sample.<sup>613</sup>

444. In the Panel's view, "by using the term 'producers that supported the complaint'", the Definitive Regulation "suggest[ed]" that only producers expressing support for the complaint were included in the domestic industry.<sup>614</sup> Notwithstanding recital 114 of the Definitive Regulation, the Panel did not immediately reach a finding that producers not supporting the complaint were excluded. Rather, the Panel went on to review several other pieces of evidence as well as the parties' relevant arguments. The Panel noted China's contention that the Commission was aware of the positions of the EU producers with regard to the investigation and defined the domestic industry on the basis of the producers' support for the investigation. According to China, the Information Document, sent to the parties at the time the Commission decided not to issue a provisional measure<sup>615</sup>, indicates that, of the 114 domestic producers who came forward with relevant information, 86, representing 36 per cent

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<sup>609</sup>Panel Report, para. 7.213 (referring to European Union's response to Panel Question 88, para. 17).

<sup>610</sup>Panel Report, para. 7.213 (referring to Non-confidential Sampling Form of Agrati (Panel Exhibit EU-30) and Non-confidential Sampling Form of Fontana Luigi (Panel Exhibit EU-31)).

<sup>611</sup>Panel Report, paras. 7.212 (referring to Definitive Regulation, *supra*, footnote 4, recitals 22-25) and 7.216.

<sup>612</sup>Panel Report, para. 7.212 (quoting Definitive Regulation, *supra*, footnote 4, recital 114).

<sup>613</sup>See European Union's response to Panel Question 31, para. 97; and European Union's response to Panel Question 89, para. 18.

<sup>614</sup>Panel Report, para. 7.214 (referring to European Union's response to Panel Question 30, para. 88).

<sup>615</sup>Definitive Regulation, *supra*, footnote 4, recital 5; Information Document, *supra*, footnote 81.

of estimated EU production, supported the complaint, while 25, accounting for 9 per cent of EU production, opposed the complaint, and three did not express an opinion.<sup>616</sup>

445. The Panel did not rely on the Information Document, but accepted the European Union's contention that the Information Document was "a working document reflecting progress in the investigation to that point, with no legal status in EU law, which was made available to the parties despite there being no obligation to do so, and is not the measure before us".<sup>617</sup> Therefore, the Panel "[did] not consider the representations in the Information Document as constituting part of the measure which [it] must evaluate."<sup>618</sup> Moreover, the Panel noted the European Union's explanations that:

... based on arguments made by Chinese exporters, it continued to consider the question of standing after the initiation, that this continued examination confused the question of the definition of the domestic industry, and that *the "unfortunate standard formulation" in the Definitive Regulation (referring to the use of the term "producers that supported the complaint" with respect to the domestic industry)*, did not affect the definition of the domestic industry, with respect to which no distinction was made between producers who supported the complaint and those that did not.<sup>619</sup> (emphasis added; footnotes omitted)

446. The European Union further explained before the Panel that revisiting the issue of standing was a "mistake" because it caused "confusion"<sup>620</sup>, as demonstrated by certain inaccuracies in the Information Document. Specifically, the European Union submitted that 70 companies (rather than 114 companies indicated in the Information Document) came forward after initiation and provided the information requested in the Notice of Initiation within the 15-day deadline.<sup>621</sup> Only 46 of these 70 producers were considered as cooperating and were included in the domestic industry definition, as confirmed by recital 25 of the Definitive Regulation.<sup>622</sup> In making this determination, the issue of support was not considered by the Commission. However, as a result of the parallel processes on the determination of the domestic industry definition and on the determination of

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<sup>616</sup>Information Document, *supra*, footnote 81, pp. 5-6.

<sup>617</sup>Panel Report, para. 7.214 (referring to European Union's response to Panel Question 30, para. 88).

<sup>618</sup>Panel Report, para. 7.214.

<sup>619</sup>Panel Report, para. 7.214 (referring to European Union's response to Panel Question 89, para. 18; and the European Union's response to Panel Question 34, para. 105).

<sup>620</sup>Panel Report, footnote 357 to para. 7.170 (quoting European Union's response to Panel Question 31).

<sup>621</sup>Upon the Panel's request, the European Union provided the list of the 70 EU producers, including the names of the related companies involved in the production and/or selling of the product concerned. (See List of "Sampling Form for Community Producers" for inspection by interested parties (Panel Exhibit EU-19))

<sup>622</sup>European Union's response to Panel Question 31, paras. 92-94. As noted above, one producer among the 46 cooperating producers was later found not to be cooperating and was dropped from the definition of the domestic industry. (See *supra*, footnote 571)

standing, all of the companies that submitted information, before and after the 15-day deadline, were "wrongly grouped together in the 114 companies that the Information [D]ocument refers to".<sup>623</sup>

447. On appeal, China alleges that the Panel violated Article 11 of the DSU because it "disregarded and ignored evidence submitted by China", including the Information Document, even though such evidence demonstrated that the Commission excluded from the domestic industry all producers who did not support the complaint.<sup>624</sup> China submits that, although the Information Document did not constitute part of the measure at issue, it was nonetheless a piece of evidence and "plainly relevant" for purposes of examining the issue of the definition of the domestic industry.<sup>625</sup>

448. We have sympathy for China's argument that whether the Information Document could be taken into account as a piece of relevant evidence should not depend on its legal status under EU law. Although this document is not part of the measure at issue as a document issued by the Commission during the investigation, it could nonetheless shed light on aspects of the investigation. At the same time, we note that the Panel did pose certain questions to the European Union concerning the Information Document<sup>626</sup>, and therefore did not simply disregard or ignore the evidence submitted by China. Moreover, the European Union's explanation regarding the "confused" and "parallel" processes between the determination of the domestic industry definition and the determination of standing cast doubt on the reliability of the representations regarding the domestic industry contained in the Information Document. We do not, therefore, consider that the Panel exceeded its margin of discretion under Article 11 of the DSU in deciding to attribute less weight than China did to the Information Document in reaching its finding.

449. China claims that the Panel also disregarded a letter sent by the Commission to two Chinese exporters in response to their request for clarification regarding certain production figures contained in the Definitive Regulation.<sup>627</sup> Specifically, the letter explains that the figure on production volume by the domestic industry in recital 128 of the Definitive Regulation corresponds to "the Community producers that supported the complaint and fully cooperated in the investigation". China asserts that,

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<sup>623</sup>European Union's response to Panel Question 31, para. 97.

<sup>624</sup>China's other appellant's submission, p. 47, heading (F).

<sup>625</sup>China's other appellant's submission, para. 93.

<sup>626</sup>For example, the Panel asked the European Union to clarify whether the number of producers who came forward within the 15-day deadline was 114, as indicated by the Information Document, and whether the number of producers expressing willingness to be included in the sample was 86, as indicated by the Information Document, or 46, as indicated in the Definitive Regulation. (See Panel Question 31)

<sup>627</sup>Letter from the European Commission dated 18 November 2008 to Van Bael & Bellis in response to letter from Van Bael & Bellis dated 12 November 2008 (Panel Exhibit CHN-39).

even though this letter "unambiguously demonstrates" that only producers supporting the complaint were included in the domestic industry<sup>628</sup>, the Panel "totally ignored and disregarded"<sup>629</sup> this evidence.

450. The reference in the letter to "the Community producers that supported the complaint and fully cooperated in the investigation" repeats the same phrase contained in recital 114 of the Definitive Regulation. As discussed above, the European Union explained to the Panel that this "unfortunate standard formulation" remained in the Definitive Regulation as a result of the confusion between the issue of standing and the domestic industry definition.<sup>630</sup> Moreover, as the trier of facts, "[a] panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning, and is not required to discuss, in its report, each and every piece of evidence".<sup>631</sup> Given that the information in the letter essentially replicates the information in the Definitive Regulation, and in the light of the European Union's explanation regarding the background of such evidence, we do not consider that the Panel erred in not explicitly mentioning or relying on this letter in reaching its finding.

451. Finally, China alleges that the Panel erroneously accepted as a fact the unsubstantiated statement of the European Union that at least one producer who did not support the complaint was included in the domestic industry and in the sample. According to China, in asserting this fact, the European Union was required to present relevant evidence by, for example, providing the list of complainants and supporters who had come forward before the initiation.<sup>632</sup> Since the European Union did not do so, China claims that the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU by merely accepting the European Union's factual assertion.

452. The European Union made the above statement in response to the Panel's question regarding whether support for the investigation was used as a criterion in determining the definition of the domestic industry. The European Union maintained that support was not used as a criterion, and named a producer included in the sample who "had not supported the complaint", because it "was not a complainant, nor a supporter of the complaint" and "had remained silent at the pre-initiation phase".<sup>633</sup> The Panel, on the basis of this explanation by the European Union, found that "the fact that at least one producer who did not affirmatively state support for the complaint was included in the domestic industry" "demonstrated" that the Commission did not exclude producers not supporting the

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<sup>628</sup>China's other appellant's submission, para. 98.

<sup>629</sup>China's other appellant's submission, para. 99.

<sup>630</sup>Panel Report, para. 7.214 (quoting European Union's response to Panel Question 89, para. 18).

<sup>631</sup>Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202.

<sup>632</sup>China's other appellant's submission, para. 65.

<sup>633</sup>European Union's response to Panel Question 89, para. 19.

complaint from the domestic industry.<sup>634</sup> We note that, before the initiation of the investigation, the Commission sent forms to all producers listed in the complaint brought by certain EU producers against imports of fasteners from China, so as to verify whether they supported or opposed the complaint (the "standing forms").<sup>635</sup> On appeal, the European Union clarifies that the producer it referred to before the Panel had not returned the standing form, and that the Commission was simply not aware of whether that producer supported, opposed, or was neutral to, the investigation on fasteners from China. Thus, in our view, there is evidence that the Commission had no knowledge of this particular producer's position regarding the complaint.

453. Moreover, we note that, subsequent to the initiation of the investigation, this producer was sent a sampling form and returned the form within the 15-day deadline. It is noteworthy that the sampling forms sent upon initiation did not contain any questions relating to support for or opposition to the complaint, and that the sampling forms were sent to *all* EU fasteners producers known to the Commission when the investigation was initiated. This evidence lends support to the European Union's contention that the only relevant criterion for inclusion in the domestic industry definition was that a producer must return the completed form within 15 days and indicate that it would be willing to be included in the sample. In the light of the above analysis, there is no basis to interfere with the Panel's assessment of the facts.

454. In sum, the Panel had before it several pieces of evidence relating to the issue of whether the Commission excluded producers who did not support the complaint from the definition of the domestic industry. There was evidence that supported China's position that only those producers who supported the complaint were included in the domestic industry definition. Such evidence included recital 114 of the Definitive Regulation and a letter sent by the Commission to the Chinese interested parties. There was also evidence that indicated that support was not a condition for inclusion in the domestic industry definition. Such evidence included recitals 22 to 25 of the Definitive Regulation, which explain, *inter alia*, the process of defining the domestic industry and the fact that sampling forms were sent to all known producers at the beginning of the investigation for purposes of defining the domestic industry. As the Panel found, no question was asked in the sampling form regarding support for or opposition to the investigation. In addition, the Panel accepted, with reason, the European Union's factual representation that one producer who did not affirmatively express a position regarding the complaint was nonetheless sent the sampling form and included in the domestic industry definition. The Panel examined and engaged with the above evidence, and ultimately came

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<sup>634</sup>Panel Report, para. 7.215.

<sup>635</sup>See Extract from the Non-Confidential File: To Be Integrated in the File for Inspection by Interested Parties: Note for the File dated 8 November 2007 and attached documents (Panel Exhibit EU-6).

to the conclusion that China had not demonstrated that the Commission excluded producers who did not support the complaint from the domestic industry it defined. Our review of the Panel's reasoning does not indicate that the Panel exceeded its margin of discretion in its weighing of various pieces of evidence and in drawing its conclusions on this basis. Although the Panel attributed different weight to certain evidence than did China, this is insufficient to demonstrate that the Panel's assessment of the facts was not objective. Moreover, even if we might have reached a different conclusion had we been asked to review such evidence *de novo*, we are mindful that we "cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached".<sup>636</sup> We therefore decline to uphold China's appeal in this regard.

2. The Exclusion of Producers Who Did Not Respond within 15 Days

455. China claims that the Panel erred in the interpretation of Article 4.1 of the *Anti-Dumping Agreement* when finding that "nothing in Article 4.1 ... would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry".<sup>637</sup> Moreover, China asserts that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU, when finding that the Commission "did not act to exclude" producers that did not make themselves known within 15 days following the initiation of the investigation<sup>638</sup>, and that the 15-day deadline was not insufficient or unreasonable.

456. In the finding challenged by China, the Panel stated that:

... while it seems clear that producers who did not make themselves known within the 15-day period established at initiation were not included in the domestic industry, we find that the investigating authority did not act to exclude such producers. *There seems to have been a process of considering additional producers* for inclusion in the domestic industry, based on arguments made by the exporters.<sup>639</sup> (emphasis added)

457. Relevant evidence before the Panel nonetheless indicates that the Commission excluded producers who did not make themselves known within the 15-day deadline from the definition of the domestic industry. Before the Panel, the European Union submitted that, upon initiation of the fasteners investigation, the Commission invited all known producers to come forward and indicate willingness to participate within 15 days, and did not include producers who made themselves known

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<sup>636</sup> Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>637</sup> China's other appellant's submission, para. 123 (quoting Panel Report, para. 7.219).

<sup>638</sup> China's other appellant's submission, para. 117 (quoting Panel Report, para. 7.215).

<sup>639</sup> Panel Report, para. 7.215.



after the 15-day deadline.<sup>640</sup> As noted above, the European Union also explained before the Panel that the Commission revisited the issue of standing after initiation in response to comments by the Chinese interested parties. Thus, subsequent to the 15-day deadline, the Commission collected information concerning additional producers, including data on their production volumes and their views on the complaint.<sup>641</sup> This process, according to the European Union, was confused with the issue of the domestic industry definition in the Information Document. This confusion was clarified under the Definitive Regulation, which makes it clear that "the domestic producers that ... constitute[d] the domestic industry [were] those that ma[d]e themselves known within 15 days following initiation, provide[d] the requested information and express[ed] their willingness to participate in the investigation".<sup>642</sup> The European Union repeated these explanations several times during the Panel proceedings.<sup>643</sup> On appeal, the European Union similarly states that, after receiving information provided by the additional producers contacted after the 15-day deadline, the Commission "decided to simply stick to the objective and reasonable deadline of 15 days it had set at the time of initiation in a transparent and predictable manner".<sup>644</sup>

458. Thus, the evidence on the record, including the Definitive Regulation and the European Union's explanations, shows that the Commission excluded producers who did not make themselves known within the 15-day deadline from the definition of domestic industry. The Panel, in reaching its finding that the Commission "did not act to exclude" such producers, stated that "[t]here *seems to* have been a process of considering additional producers for inclusion in the domestic industry, based on arguments made by the exporters".<sup>645</sup> On the basis of the European Union's explanations, this "process of considering additional producers" was conducted for purposes of re-examining the issue of standing, and was not done in order to define the domestic industry.

459. Nonetheless, even though the Panel mistakenly concluded that the Commission did not exclude producers not responding within the 15-day deadline, this did not affect the Panel's final conclusion. The Panel found that "none of the producers [considered after the deadline] were in the

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<sup>640</sup>See European Union's first written submission to the Panel, para. 302.

<sup>641</sup>See European Union's response to Panel Question 31, para. 97.

<sup>642</sup>European Union's response to Panel Question 31, para. 97.

<sup>643</sup>For example, in response to questions posed by China after the first Panel meeting, the European Union stated that "[i]t is clear that this determination was based on those producers that came forward within the 15-day deadline and indicated their willingness to cooperate (see recital 24 of Council Regulation No 91/2009)". (European Union's response to China's Question 4 after the first Panel meeting, para. 10) In response to the Panel's question following the second Panel meeting, the European Union maintained that "[a]ll known producers were contacted regardless of whether they supported or opposed the complaint and all were invited to come forward. Those that did so within the deadline, and that indicated a willingness to cooperate with the authorities were considered as part of the domestic industry." (European Union's response to Panel Question 89, para. 18)

<sup>644</sup>European Union's appellee's submission, para. 92.

<sup>645</sup>Panel Report, para. 7.215. (emphasis added)

end included in the domestic industry".<sup>646</sup> Moreover, the Panel found it "reasonable for investigating authorities to impose deadlines for domestic producers to make themselves known and then define the domestic industry on the basis of those that come forward within that deadline".<sup>647</sup> The Panel also found that there was "no basis for concluding that the 15-day period was necessarily insufficient" for purposes of defining the domestic industry.<sup>648</sup> The Panel therefore found that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement*, even if it did not include producers not responding within 15 days.

460. In our view, in applying Article 4.1 to the facts of the case, the Panel correctly found that it was reasonable for the Commission to set a deadline by which producers were required to make themselves known. Given the multiple steps that must be carried out in an anti-dumping investigation and the time constraint on an investigation, an investigating authority must be allowed to set various deadlines to ensure an orderly conduct of the investigation. Indeed, as Article 5.10 of the *Anti-Dumping Agreement* provides, "[i]nvestigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation." Moreover, Article 6.14 states that the rules of procedures set out in Article 6 of the *Anti-Dumping Agreement* "are not intended to prevent the authorities of a Member from proceeding *expeditiously*".<sup>649</sup> In this regard, the Appellate Body has found that:

[i]nvestigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the timelimits mandated under the *Anti-Dumping Agreement*.<sup>650</sup>

We therefore disagree with China's assertion that the Panel erred in the interpretation of Article 4.1 when finding that "nothing in Article 4.1 ... would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry".<sup>651</sup>

461. China further submits that, even if the imposition of a deadline for domestic producers to come forward may be permissible for reasons of necessity, any deadline granted by the investigating

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<sup>646</sup>Panel Report, para. 7.215.

<sup>647</sup>Panel Report, para. 7.219.

<sup>648</sup>Panel Report, para. 7.219.

<sup>649</sup>Emphasis added.

<sup>650</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 73 (quoting Panel Report, *US – Hot-Rolled Steel*, para. 7.54).

<sup>651</sup>Panel Report, para. 7.219.

authorities to domestic producers to come forward must be "reasonable" and "sufficient".<sup>652</sup> In this respect, China submits that the Panel acted inconsistently with Article 11 of the DSU by "ignor[ing] the 'evidence'" submitted by China in order to demonstrate that the 15-day deadline was insufficient and unreasonable.<sup>653</sup> First, China maintains that, as it argued before the Panel, the 15-day deadline was "very short and makes it much more likely that complainants and [supporters of] the investigation", rather than producers opposing the investigation, will come forward within the deadline.<sup>654</sup> China submits that, in support of this argument, it referred the Panel to the Information Document, which shows that, among the 114 producers who made themselves known up to the date the Information Document was published, 25 producers representing 9 per cent of EU production opposed the complaint. Yet, China argues, because of the 15-day deadline, these 25 producers were not included in the domestic industry.<sup>655</sup>

462. We note that China again sought to rely on the Information Document in support of this claim. As discussed above, in the light of the European Union's explanation as to the inaccuracies contained in the Information Document, we do not consider that the Panel failed to conduct an objective assessment of the facts in not relying on the Information Document for its decision. Moreover, even assuming that the representations in the Information Document could be relied upon, we fail to see how these representations demonstrate that the imposition of a 15-day deadline influenced whether the producers opposing the complaint would respond to the request for information. Indeed, the Information Document states that, among the 114 producers who "came forward and provided the requested information *within the deadline*"<sup>656</sup>, 25 were opposed to the complaint. It does not state that all of these 25 producers came forward after the 15-day deadline, and therefore does not support China's assertion that, *because of the deadline*, those who opposed the complaint were excluded from the definition of the domestic industry.

463. China further argues that, by requiring producers to come forward within 15 days and express willingness to be included in the sample within that deadline, the Commission adopted an approach that was "fundamentally non-objective", because producers opposing the investigation were less likely to be willing to be part of the sample.<sup>657</sup> China, however, has not substantiated this assertion.

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<sup>652</sup>China's other appellant's submission, para. 125.

<sup>653</sup>China's other appellant's submission, para. 130.

<sup>654</sup>China's other appellant's submission, para. 135.

<sup>655</sup>China's other appellant's submission, para. 136; China's first written submission to the Panel, para. 244.

<sup>656</sup>Information Document, *supra*, footnote 81, p. 5. (emphasis added) We recall the European Union's assertion that these 114 producers actually include those who came forward after the 15-day deadline. (See *supra*, para. 446) However, China has not expressed its disagreement with these factual assertions, and instead seeks to rely on certain representations made in the Information Document.

<sup>657</sup>China's other appellant's submission, para. 137.

In any event, China's argument does not concern the reasonableness of the 15-day deadline *per se*. Rather, it concerns the question of whether the definition of the domestic industry was consistent with the *Anti-Dumping Agreement* when it was determined on the basis of producers' willingness to cooperate by being included in the sample.

464. In sum, we do not consider that the Panel erred in its interpretation or application of Article 4.1 of the *Anti-Dumping Agreement*, or acted inconsistently with Article 11 of the DSU, when finding that "the mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers expressing different views with respect to the complaint, or producers who did not come forward within the 15-day period, does not demonstrate that the European Union acted inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining the domestic industry."<sup>658</sup> We therefore decline to uphold China's appeal in this respect.

3. The Exclusion of Producers under Article 3.1 of the *Anti-Dumping Agreement*

465. China claims that the Panel erred in its interpretation of Article 3.1 of the *Anti-Dumping Agreement* by dismissing China's claim under that provision that the Commission erroneously excluded from the domestic industry definition those producers who did not support the complaint and did not come forward within the 15-day deadline simply because it had rejected China's same claim under Article 4.1 of the *Anti-Dumping Agreement*.

466. Before the Panel, China argued that, "by defining the domestic industry as including only those producers that supported the complaint and excluding those who did not, the [European Union] conducted a biased analysis favouring the interests of the complainants", and that "[s]uch an analysis is not 'objective' as required by Article 3.1 of the [*Anti-Dumping Agreement*]".<sup>659</sup> China also argued that, by setting the 15-day period granted to domestic producers for indicating their willingness to be included in the sample, the Commission "acted in a non-objective manner in that only producers supporting the investigation were included in the domestic industry".<sup>660</sup> China then repeated the arguments it had made under Article 4.1 as to why the 15-day period was insufficient and unreasonable for purposes of defining the domestic industry.<sup>661</sup> The Panel rejected China's claim, finding, instead, that:

China asserts that it is only possible to undertake an objective examination pursuant to Article 3.1 if the result of the examination is

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<sup>658</sup>Panel Report, para. 7.219.

<sup>659</sup>China's first written submission to the Panel, para. 244.

<sup>660</sup>China's second written submission to the Panel, para. 577.

<sup>661</sup>See China's second written submission to the Panel, paras. 578-580.

not predetermined by the way the domestic industry is defined. We do not disagree. However, we have rejected China's position with respect to this aspect of its claim challenging the domestic industry definition in this case. China makes no other allegations in support of its claim of violation of Article 3.1, and we therefore dismiss that aspect of China's claim.<sup>662</sup> (footnote omitted)

467. In our analyses in the preceding two subsections, we have declined to uphold China's appeal of the Panel's findings that the European Union did not act inconsistently with Article 4.1 of the *Anti-Dumping Agreement* by excluding producers from the domestic industry definition who did not support the complaint and who did not respond to the sampling forms within 15 days. Given that, with regard to these aspects of the fasteners investigation, China has not provided arguments under Article 3.1 that differ from those under Article 4.1, we also decline to uphold China's appeal of the Panel's finding that the European Union did not act inconsistently with Article 3.1 of the *Anti-Dumping Agreement* by excluding these producers from the domestic industry.

#### F. Conclusion

468. In sum, with regard to China's other appeal of the Panel's findings under Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*, we have reached the following findings. We find that the Panel erred in finding that "the European Union did not act inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners" on the basis that the collective output of these producers represented "a major proportion" of the total domestic production.<sup>663</sup> However, we find that the Panel did not err in finding that China failed to establish that the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* by making an injury determination on the basis of a sample of producers that was allegedly not representative. We also do not consider that the Panel erred in its interpretation or application of Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*, or acted inconsistently with Article 11 of the DSU, when finding that "the mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers expressing different views with respect to the complaint, or producers who did not come forward within the 15-day period, does not demonstrate that the European Union acted inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining the domestic industry"<sup>664</sup> or acted inconsistently with Article 3.1 of that Agreement.

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<sup>662</sup>Panel Report, para. 7.221.

<sup>663</sup>Panel Report, para. 7.230.

<sup>664</sup>Panel Report, para. 7.219.

**VII. Appeal of the Panel's Findings Regarding Aspects of the Dumping Determination in the Fasteners Investigation under Articles 6.4, 6.2, and 2.4 of the *Anti-Dumping Agreement***

**A. Introduction**

469. We turn now to address the European Union's and China's appeals of the Panel's findings regarding certain aspects of the Commission's dumping determination in the fasteners investigation. Specifically, the European Union appeals the Panel's finding that it acted inconsistently with Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* by not providing a timely opportunity for Chinese interested parties to see the product types used by the Commission for purposes of comparing export price and normal value in the dumping determination. China appeals the Panel's finding that the European Union did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by failing to make a "fair comparison" between the export price and the normal value in the dumping determination. We begin our analysis with a description of the relevant factual background underlying both the European Union's and China's claims. We then discuss the relevant interpretation of the provisions of the *Anti-Dumping Agreement* under which the European Union's and China's claims are raised. Next, we address the specific claims and arguments raised on appeal.

**B. The Relevant Factual Background**

470. The Panel found that, in the questionnaires sent to the producer in India, Pooja Forge<sup>665</sup>, and to the Chinese producers, the Commission requested that information on the investigated products be reported on the basis of categories defined by Product Control Numbers ("PCNs").<sup>666</sup> The Panel noted that the following six elements made up the PCNs identified by the Commission: type of fasteners (by CN code); strength/hardness; coating; presence of chrome on coating; diameter; and length/thickness. All but two of these elements, in turn, are further divided into sub-categories, each of which is assigned a code in the form of a number or a letter. The elements contained in the PCNs thus represent 38 narrowly defined specifications of fasteners. The questionnaire provided, as an example, a product having the following characteristics: "self-tapping screw, case hardening, not coated, diameter 4,2 millimeters, length 13 millimeters". On the basis of the corresponding numbers and letters assigned to each of the characteristics, this product would have a PCN of 2XNR042013.<sup>667</sup>

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<sup>665</sup>We recall that, due to the European Union's designation of China as an NME, and the fact that MET was not granted to the Chinese producers in the fasteners investigation, the Commission established the normal value on the basis of the prices of fasteners sold in the analogue country, India. The Commission identified two Indian companies that produced the fasteners that were the subject of the investigation, and one of them, Pooja Forge, cooperated with the investigation. (See Definitive Regulation, *supra*, footnote 4, recitals 38 and 92)

<sup>666</sup>See Panel Report, para. 7.292 (referring to European Commission, Anti-Dumping Questionnaire for Chinese Exporters/Producers (Panel Exhibit CHN-51), pp. 11-13).

<sup>667</sup>See Panel Exhibit CHN-51, *supra*, footnote 666, pp. 11-13.

471. The questionnaire sent to Pooja Forge also requested that information be provided on the basis of the same PCNs. However, Pooja Forge did not provide information categorized on the basis of the PCNs as requested. Because the normal value in the fasteners investigation was established on the basis of the information provided by Pooja Forge, the Commission could not base its comparison between the normal value and export price on full PCNs.<sup>668</sup> Therefore, it resorted to the use of "product types" defined by two factors, strength class and the distinction between standard and special fasteners, in the price comparisons for the dumping determination.<sup>669</sup>

472. The Panel found that the Chinese producers were informed very late in the proceedings of the product types that formed the basis of the comparisons underlying the Commission's dumping determinations. Specifically, the General Disclosure Document, issued towards the end of the investigation on 3 November 2008, indicated that the Commission based its normal value determination on product types, but did not specify the number of, or relevant characteristics of, the product types or how they were determined.<sup>670</sup>

473. On 8 November 2008, two Chinese producers sought clarification from the Commission regarding the product types used, and specifically asked for a linkage between the PCNs on which the Chinese producers based their questionnaire submissions and the product types eventually used by the Commission. According to the Panel, this letter "clearly convey[ed] these two Chinese producers' request to see information regarding the product types that established the basis of the Commission's normal value determination and the relationship between these product types and the PCNs pertaining to the Chinese producers' products".<sup>671</sup> The Commission replied on 13 November 2008, stating that, "beside[s] product characteristics as specified in the PCN, a distinction was introduced between standard and special products since this was found to have a significant impact on prices".<sup>672</sup> It went on to say that, for these two Chinese producers, "their entire export volume was considered as being standard products".<sup>673</sup> The Panel found that this response did "not explain how

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<sup>668</sup>See Panel Report, para. 7.293 (referring to European Union's response to Panel Question 43(b)).

<sup>669</sup>See Panel Report, para. 7.293 (referring to Definitive Regulation, *supra*, footnote 4, recital 102; and Panel Exhibit CHN-31, *supra*, footnote 310, p. 2).

<sup>670</sup>See Panel Report, para. 7.485. In addition, under the heading "Comparison", the General Disclosure Document stated that the price comparison between the fasteners from China and those sold by Pooja Forge on the Indian market was "made by distinguishing between standard and special fastener types". (General Disclosure Document, *supra*, footnote 73, para. 93) The same statement is also contained in recital 102 of the Definitive Regulation.

<sup>671</sup>Panel Report, para. 7.486.

<sup>672</sup>Panel Report, para. 7.487 (quoting Email Message dated 13 November 2008 from the European Commission to Van Bael & Bellis (Panel Exhibit CHN-29), p. 1).

<sup>673</sup>Panel Report, para. 7.487 (quoting Panel Exhibit CHN-29, *supra*, footnote 672, p. 1).

the product types were established in the determination of normal value, or the relevant characteristics of those product types".<sup>674</sup>

474. On 17 November 2008, the Chinese producers again sought clarification. They noted that the non-confidential version of Pooja Forge's questionnaire response contained no indication that Pooja Forge reported sales on the basis of PCNs. Thus, the Chinese producers asked:

In abstract terms, was normal value established on a PCN basis, or were more general types of [the Indian producer's] fasteners matched with groups of PCNs from our clients? In that context, it would still be very useful for us if we could have a listing simply of which type of fastener or which PCNs of [the Indian producer] were matched with the PCNs of our clients.<sup>675</sup>

The Panel described this letter as "clearly repeat[ing] these Chinese producers' request to see information on the basis of which product types for the Indian producer were established".<sup>676</sup>

475. The Commission replied in a letter dated 21 November 2008 that the comparison "was not made on the basis of the full PCN, but on part [*sic*] of the characteristics of the product, namely the strength class as well as the abovementioned distinction between special and standard products".<sup>677</sup> The Panel found that this was the first time the Commission clearly informed the Chinese producers that it did not make its findings based on PCNs, but on the characteristics of strength class and the distinction between standard and special fasteners. The letter came one working day before the deadline to make comments on the General Disclosure Document.<sup>678</sup>

476. The Panel record indicates that, on 24 November 2008, two days after the deadline for comments, one Chinese producer sent another letter to the Commission, expressing the view that it was not possible for it to comment on the Commission's dumping determination without knowing what types or groups of products of Pooja Forge were actually matched with the Chinese products.<sup>679</sup>

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<sup>674</sup>Panel Report, para. 7.487.

<sup>675</sup>Panel Report, para. 7.488 (quoting Letter dated 17 November 2008 from Van Bael & Bellis to the European Commission concerning the Definitive Disclosure Document: Request for Information II on behalf of Kunshan Chenghe Standard Component Co. Ltd and Ningbo Jinding Fastening Piece Co. Ltd. (Panel Exhibit CHN-30), p. 2). (emphasis omitted)

<sup>676</sup>Panel Report, para. 7.488.

<sup>677</sup>Panel Report, para. 7.489 (quoting Panel Exhibit CHN-31, *supra*, footnote 310, p. 2).

<sup>678</sup>Panel Report, para. 7.489.

<sup>679</sup>Letter dated 24 November 2008 from Van Bael & Bellis on behalf of Kunshan Chenghe Standard Component Co. Ltd. to the European Commission, Comments on the Definitive Disclosure Document (Panel Exhibit CHN-59), p. 4.



477. Thus, the Panel's factual findings, as well as the Panel record, indicate the following timeline relating to the relevant events that occurred in the context of the Commission's dumping determination:

Timeline of Relevant Events

9 November 2007	Notice of Initiation
3 November 2008	General Disclosure Document
8 November 2008	First request for clarification
13 November 2008	Commission response
17 November 2008	Second request for clarification
21 November 2008	Commission response clarifying product types
22 November 2008	Deadline for comments on General Disclosure Document
24 November 2008	Comments by the Chinese producer

C. *The Relevant Interpretation of Articles 6.4 and 2.4 of the Anti-Dumping Agreement*

478. Article 6.4 of the *Anti-Dumping Agreement* provides:

The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

479. The Appellate Body has found that Article 6.4 refers to "provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their* cases", and that the possessive pronoun "their" "clearly refers to the earlier reference in that sentence to 'interested parties'".<sup>680</sup> Therefore, it is the interested parties, rather than the authority, who determine whether the information is in fact "relevant" for the purposes of Article 6.4.<sup>681</sup> Moreover, according to the Appellate Body, whether the information was "used" by the authority does not depend on whether the authority specifically relied on that information. Rather, it depends on whether the information is related to "a required step in the anti-dumping investigation".<sup>682</sup> Thus, Article 6.4 concerns information relating to "issues which the investigating authority is required to consider under the [*Anti-Dumping Agreement*], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation."<sup>683</sup>

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<sup>680</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145. (original emphasis)

<sup>681</sup> See Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145.

<sup>682</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147.

<sup>683</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.769. (footnotes omitted)

480. The interested parties' right under Article 6.4, therefore, is to see *all* non-confidential information relevant to the presentation of their cases and used by the investigating authority. Article 6.4 thus applies to a broad range of information that is used by an investigating authority for purposes of carrying out a required step in an anti-dumping investigation. We note the European Union's view that the term "information" in Article 6.4 "concerns facts and raw data rather than factual determinations and conclusions by the investigating authorities".<sup>684</sup> In our view, there is no textual basis in Article 6.4 for limiting information "relevant to the presentation of [parties'] cases" and "used by the authorities" to facts or raw data unprocessed by the authorities. Indeed, the broad range of information subject to the obligation under Article 6.4 may take various forms, including data submitted by the interested parties, and information that has been processed, organized, or summarized by the authority. We do not see why only facts and raw data would be relevant to the parties' presentation of their cases. A proper interpretation of Article 6.4 does not mean, however, that an investigating authority's reasoning or internal deliberation in reaching its final determination is also subject to the obligation under Article 6.4. Article 6.4 concerns the information that is used by an authority, rather than an authority's detailed analysis of the information, or the determination it reaches based on such information.

481. The European Union also argues that the context of Article 6.4, as provided by the other paragraphs of Article 6, confirms that the obligation under Article 6.4 only concerns facts and raw data submitted by interested parties. The European Union submits that Articles 6.1 to 6.3 provide parties the right to submit their *own* information, and Articles 6.6 and 6.7 impose an obligation on investigating authorities to verify the information submitted by the parties. Article 6.8, in turn, allows the use of "facts available" when an interested party does not provide necessary information.<sup>685</sup> Thus, the European Union asserts, Article 6.4 is limited to addressing "the parties' right to know what *other interested parties have submitted* in terms of evidence and information".<sup>686</sup> In our view, however, the European Union's recourse to the other paragraphs under Article 6 is unavailing. The only qualification on the term "information" under Article 6.4 is that it is "relevant to the presentation of their cases", "not confidential as defined in paragraph 5", and "used by the authorities in an anti-dumping investigation". Article 6.2 further confirms that access to all such information is important because, without such information, the interested parties may not have "a full opportunity for the defence of their interests". Moreover, where the term "information" is to be specifically qualified, the relevant paragraphs under Article 6 clearly provide so. For example, Article 6.3 refers to "oral information", Article 6.5 applies to information that is "by nature confidential", and

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<sup>684</sup>European Union's appellant's submission, para. 253.

<sup>685</sup>European Union's appellant's submission, paras. 258, 259, 262, and 263.

<sup>686</sup>European Union's appellant's submission, para. 260. (original emphasis)

Article 6.6 concerns information "supplied by interested parties". Without such qualifications, we see no textual basis in Article 6.4, or contextual basis under Article 6, for limiting the term "information" in Article 6.4 to only that provided by other interested parties.

482. The European Union further argues that, pursuant to Article 6.9, the authorities must inform all interested parties of "the essential facts under consideration which form the basis for the decision" before a final determination is made. In the European Union's view, the use of the phrase "essential facts" rather than the word "information" in Article 6.9 indicates that Articles 6.1 to 6.8 concern the information-gathering process. The European Union also argues that Article 6.9 marks the end of the process and requires a disclosure of the authority's essential factual conclusions<sup>687</sup>, and that the "product types" used to compare export price and normal value fall into the category of essential facts.<sup>688</sup> The European Union further contends that the differences between the obligations under Articles 6.4 and 6.9 are "well established in WTO jurisprudence". For example, the European Union argues that in *Guatemala – Cement II* the panel found that Article 6.4 generally provided an "access to the file"<sup>689</sup> right, whereas Article 6.9 required more and could not be satisfied "simply by offering to provide interested parties with copies of all information in the file".<sup>690</sup>

483. The differences alleged by the European Union between Article 6.9 and the other paragraphs of Article 6 do not, in our view, restrict the meaning of the word "information" in Article 6.4 to the narrow scope the European Union attributes to it. As discussed above, Article 6.4 refers broadly to "all information that is relevant to the presentation of [the interested parties'] cases". Such information may come in different forms, including not only "facts or raw data" submitted by the other parties, but also information that an investigating authority organizes, processes, or summarizes at each stage of an anti-dumping investigation. Although Article 6.9 refers to "the essential facts under consideration which form the basis" for the authority's final determination, we do not consider that what the terms "information" and "essential facts" refer to must be mutually exclusive. Depending on the specific circumstances of a case, the "information" relevant to the presentation of an interested party's case can be a broader concept than the essential facts relied on by the authority, or it may overlap with such "essential facts". The "essential facts" under Article 6.9, which form the basis for a final determination, are those that are material for the authority's decision, whereas "information" that is relevant to the presentation of a party's case, and used by the authority, is not necessarily what the authority relies on in reaching its final determination. Moreover, information

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<sup>687</sup>European Union's appellant's submission, paras. 264 and 265.

<sup>688</sup>European Union's responses to questioning at the oral hearing.

<sup>689</sup>European Union's appellant's submission, para. 261 (quoting Panel Report, *Guatemala – Cement II*, para. 8.133).

<sup>690</sup>Panel Report, *Guatemala – Cement II*, para. 8.230.

within the meaning of Article 6.4 has to be provided to interested parties in a timely fashion throughout the investigation. It is not sufficient to provide such information only "before a final determination is made" within the meaning of Article 6.9. In sum, we consider that the European Union's reliance on the context of Article 6.4 is unavailing to its position.

484. The European Union refers to the panel's finding in *Korea – Certain Paper* to point out that what had to be disclosed upon request in that dispute were the actual figures for cost of manufacture, expenses or profits used in the calculation of the constructed normal value.<sup>691</sup> The European Union further submits that the Appellate Body's finding in *EC – Tube or Pipe Fittings*, that the European Communities was required to disclose a document containing a summary of the "raw data"<sup>692</sup> on some of the injury factors under Article 3.4 of the *Anti-Dumping Agreement*, also supports its understanding of the term "information" in Article 6.4. However, the fact that the findings in prior disputes under Article 6.4 may have concerned such "raw data" only shows that that was the "information" at issue in those disputes. The particular "information" found to be subject to Article 6.4 in specific disputes, however, does not limit the scope of the term in Article 6.4 in all disputes arising under that provision. Moreover, with regard to the Appellate Body's finding in *EC – Tube or Pipe Fittings*, to the extent that the European Union uses the term "raw data"<sup>693</sup> to mean information submitted by the parties and not processed by the investigating authority, we note that this view is contradicted by the facts at issue in that dispute. Rather, the "information" relevant to the Appellate Body's finding under Article 6.4 in that case consisted of data that had been aggregated and summarized by the Commission as well as the Commission's evaluation of this data. More specifically, the "information" contained worksheets prepared by the European investigating authority regarding the injury factors listed in Article 3.4 on the basis of evidence submitted by the interested parties.<sup>694</sup>

485. In sum, under Article 6.4 of the *Anti-Dumping Agreement*, what information is considered "relevant to the presentation of [the interested parties'] cases" and "used by the authorities" would depend on the specific "step" of the anti-dumping investigation and the particular issue before the investigating authority. We recall that, in this dispute, China claims that the Commission failed to provide timely opportunities for the Chinese producers to see certain information relevant to the comparison between the export price and normal value for purposes of the dumping determination in

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<sup>691</sup>European Union's appellant's submission, para. 253 (referring to Panel Report, *Korea – Certain Paper*, para. 7.199).

<sup>692</sup>European Union's appellant's submission, para. 254 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 138-141).

<sup>693</sup>European Union's appellant's submission, para. 254.

<sup>694</sup>Panel Report, *EC – Tube or Pipe Fittings*, para. 7.307 and footnote 256 thereto. See also China's appellee's submission, para. 397.

the fasteners investigation. We therefore focus our analysis on the type of "information" covered under Article 6.4 and when it has to be disclosed, in the context of the comparison between the export price and normal value within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

486. Article 2.4 of the *Anti-Dumping Agreement* provides, in relevant part:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. ... The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (footnote omitted)

487. As the Appellate Body has explained:

[U]nder Article 2.4, the obligation to ensure a "fair comparison" lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports.<sup>695</sup> (original emphasis)

488. However, this does not mean that the interested parties do not have a role to play in the process of ensuring a fair comparison. Rather, panels in previous disputes have found that exporters bear the burden of substantiating, "as constructively as possible"<sup>696</sup>, their requests for adjustments reflecting the "due allowance" within the meaning of Article 2.4. If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment.<sup>697</sup> Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".<sup>698</sup>

489. The process of making a fair comparison must also be understood in the light of the last sentence of Article 2.4, which requires an investigating authority to "indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties". The last sentence of Article 2.4 thus adds a procedural requirement

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<sup>695</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.

<sup>696</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158.

<sup>697</sup> Panel Report, *Korea – Certain Paper*, para. 7.147.

<sup>698</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158.

to the general obligation of investigating authorities to ensure a fair comparison. The sentence imposes an obligation on the investigating authority to tell the parties what information the authority will need in order to ensure a fair comparison. Thus, whereas the exporters may be required to "substantiate their assertions concerning adjustments"<sup>699</sup>, the last sentence of Article 2.4 requires the investigating authorities to "indicate to the parties" what information these requests should contain, so that the interested parties will be in a position to make a request for adjustments. This process has been described as a "dialogue"<sup>700</sup> between the authority and the interested parties.

490. In our view, as a starting point for the dialogue between the investigating authority and the interested parties to ensure a fair comparison, the authority must, at a minimum, inform the parties of the product groups with regard to which it will conduct the price comparisons. For example, the authority may choose to make comparisons of transaction prices for a number of groups of goods within the like product that share common characteristics, thus minimizing the need for adjustments, or it may choose to make adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared.<sup>701</sup> Without knowing which particular method the authority will use to categorize the products for purposes of price comparison, it would not be possible for the interested parties to know what information will be necessary for purposes of ensuring a fair comparison, and to request adjustments accordingly. Thus, as the Panel correctly found in its analysis of China's claim under Article 6.4 of the *Anti-Dumping Agreement*:

Ensuring that the comparison of normal value and export price is based on comparable goods is, as provided for in Article 2.4, an obligation on investigating authorities. Foreign producers have a role in that process, by requesting due allowance for differences demonstrated to affect price comparability. In order to fulfil their role, and thus ensure that their interest in a fair comparison is protected, however, it is necessary that they know the basis on which the investigating authority undertakes to make the comparison of normal value and export price, and in sufficient time to allow the exporters to make and substantiate requests for due allowance.<sup>702</sup>

491. Furthermore, in an anti-dumping investigation of imports from NMEs, where the normal value is not established on the basis of the foreign producers' domestic sales, but is established on the basis of the domestic sales in an analogue country, the investigating authority's obligation to inform the interested parties of the basis of the price comparison is even more pertinent for ensuring a fair comparison. This is because foreign producers are unlikely to have knowledge of the specific products and pricing practices of the producer in an analogue country. Unless the foreign producers

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<sup>699</sup>Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158.

<sup>700</sup>Panel Report, *Egypt – Steel Rebar*, para. 7.352.

<sup>701</sup>See Panel Report, para. 7.297.

<sup>702</sup>Panel Report, para. 7.491.

under investigation are informed of the specific products with regard to which the normal value is determined, they will not be in a position to request adjustments they deem necessary.

492. With the above interpretation in mind, we turn to review the European Union's and China's claims and arguments raised on appeal.

D. *The European Union's Appeal of the Panel's Findings under Articles 6.4 and 6.2 of the Anti-Dumping Agreement*

493. The European Union appeals the Panel's finding that the European Union acted inconsistently with Articles 6.4 and 6.2 of the *Anti-Dumping Agreement* when the Commission failed to disclose information regarding the product types to Chinese producers until one working day before the deadline for submitting comments. Specifically, the Panel found that, by failing to disclose information regarding the product types, "the European Union failed to provide a timely opportunity for the Chinese [interested parties] to see information"<sup>703</sup> pertaining to the basis on which the Commission made the comparison of normal value and export price, in violation of Article 6.4 of the *Anti-Dumping Agreement*. Because the Commission failed to disclose the product types on a timely basis, the Panel also found that it had denied the Chinese interested parties a "full opportunity for the defence of their interests", in violation of Article 6.2 of the *Anti-Dumping Agreement*.<sup>704</sup>

494. The European Union's appeal under Article 6.4 is based on the following two grounds. First, the European Union maintains that the grouping of products into product types was a "factual determination" made by the Commission and was not "information" as that term is used in Article 6.4 of the *Anti-Dumping Agreement*.<sup>705</sup> Second, the European Union argues that the Panel violated Article 11 of the DSU in making its determination under Article 6.4 because it refused to consider certain evidence regarding the "timeliness" of the Commission's disclosure, and therefore did not consider the evidence in its totality.<sup>706</sup>

495. With respect to the first ground of appeal, as discussed above, we disagree with the European Union's view that the term "information" in Article 6.4 only "concerns facts and raw data rather than factual determinations and conclusions by the investigating authorities".<sup>707</sup> Rather, Article 6.4 applies to a broad range of information that is relevant to the presentation of the interested parties' cases and is used by an investigating authority for purposes of carrying out a required step in an anti-dumping investigation. Such information includes evidence submitted by the interested

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<sup>703</sup>Panel Report, para. 7.492.

<sup>704</sup>Panel Report, para. 7.495.

<sup>705</sup>European Union's appellant's submission, para. 248.

<sup>706</sup>European Union's appellant's submission, para. 279.

<sup>707</sup>European Union's appellant's submission, para. 253.

parties, as well as data processed, organized, or summarized by the authority. An authority's reasoning or internal deliberation in reaching a determination, however, does not constitute "information" subject to the obligation under Article 6.4.

496. In this dispute, the product types used by the Commission concerned "a required step"<sup>708</sup> in an anti-dumping investigation, namely, the comparison between export price and normal value for purposes of the dumping determination. The product types used by the Commission for purposes of the dumping determination were particularly relevant to the interested parties' cases, given the factual background of this case. We recall that the questionnaire sent to the Chinese producers and the Indian producer requested that products be identified on the basis of PCNs, thus leaving at least two Chinese exporters<sup>709</sup> with the impression that such PCNs would be used for purposes of the comparison between export price and normal value. As the Panel noted, "it appears from the structure of the questionnaires that [requests for adjustments to ensure a fair comparison] will not be necessary because of the categorization of the product according to PCN groups".<sup>710</sup> Indeed, by using the PCNs as the organizing principle when gathering product information from the interested parties, the Commission's approach created a reasonable expectation that price comparisons would be conducted on a very particular basis. Moreover, in the light of the very precise nature of the physical characteristics listed under the PCNs, it was also reasonable to assume that few adjustments would be necessary, as prices of narrowly defined products by the Chinese producers would have been compared to prices of equally narrowly defined products in the analogue country, India.

497. Nonetheless, although the Chinese producers provided information on the basis of PCNs, the Indian producer, Pooja Forge, did not provide information on that basis. Consequently, the Commission decided to use a different method of product grouping to conduct the comparison, namely, what it called "product types", which it defined on the basis of two factors: strength class and the distinction between standard and special fasteners. The product types used by the Commission were thus a critical piece of information relating to a required step in the investigation, and these product types were in turn established on the basis of the product information provided by the Indian producer. They were not simply the Commission's reasoning in reaching its final determination.

498. Moreover, we recall that the PCNs include six elements further divided into 38 specifications, which could have resulted in hundreds of different combinations. Yet, the PCN characteristics and the product types overlap only with regard to one element, namely, the strength class. Thus, the

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<sup>708</sup>Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147.

<sup>709</sup>These two producers later requested the Commission to clarify the meaning of "product types" used in the dumping determination.

<sup>710</sup>Panel Report, para. 7.491.



differences between the PCNs and the product types used by the Commission could have prompted the Chinese producers to request that adjustments be made for any differences that might have affected price comparability between the Chinese and Indian fasteners, within the meaning of Article 2.4 of the *Anti-Dumping Agreement*. Indeed, without knowing what constituted "product types", "it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."<sup>711</sup> Thus, the information concerning the product types, including their characteristics and how they were determined, constituted "information" within the meaning of Article 6.4 of the *Anti-Dumping Agreement*, because they were used in the dumping determination made by the Commission<sup>712</sup>, and were indispensable to the parties' presentation of their cases concerning the dumping determination.

499. Turning to the European Union's claim that the Panel violated Article 11 of the DSU, we recall that, as discussed above in section VI.E, not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. Rather, a participant claiming that a panel ignored certain evidence, and hence acted inconsistently with Article 11, must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.

500. In this regard, we note the European Union's assertion that "[o]ne *might* wrongly conclude from the Panel's findings" that the Chinese producers requesting to see the product types were unable to make any presentations due to time constraints.<sup>713</sup> According to the European Union, one Chinese producer "did submit comments" on the requested information in a letter dated 24 November 2008<sup>714</sup> and, in that letter, it did not request an extension of the time for making presentations.<sup>715</sup> The European Union argues that this letter shows that "timing was *not* the problem for the interested parties", but the letter was not mentioned by the Panel in its reasoning.<sup>716</sup> In our view, the assertion that the Panel's findings "might" give a certain impression does not explain why the Panel's alleged "disregard" of a piece of evidence calls into question the objectivity of the Panel's factual assessment.

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<sup>711</sup>Panel Report, para. 7.491.

<sup>712</sup>See Panel Report, *EC – Salmon (Norway)*, para. 7.769.

<sup>713</sup>European Union's appellant's submission, para. 291. (emphasis added)

<sup>714</sup>European Union's appellant's submission, para. 291. (emphasis omitted)

<sup>715</sup>European Union's appellant's submission, para. 292.

<sup>716</sup>European Union's appellant's submission, para. 294. (original emphasis)

On its face, such a claim simply does not rise to the level of egregiousness that a violation of Article 11 of the DSU requires.<sup>717</sup>

501. The European Union further submits that the Panel disregarded the Information Document, which "signall[ed] the use of 'product types'" three months prior to the issuance of the General Disclosure Document.<sup>718</sup> Thus, in the European Union's view, any "problem with the timing of the disclosure" regarding product types "was in large part due to the fact that the Chinese interested parties never requested to see the basis for the product type groupings until very late in the proceedings."<sup>719</sup>

502. Although the European Union's argument suggests that the Information Document was an important piece of evidence supporting its position, a review of the relevant evidence indicates the contrary. The Information Document, like the General Disclosure Document, stated that the Commission based its normal value determination on product types, but did not specify the relevant characteristics of the product types or how they were determined.<sup>720</sup> Moreover, as the Panel properly found, the correspondence between the Commission and the two Chinese producers requesting clarification regarding the product types showed that "until the receipt of the General Disclosure Document, the Chinese producers were under the impression that the Commission would make its dumping determinations on the basis of PCNs, as requested in the questionnaires sent to the Chinese and the Indian producers".<sup>721</sup> It should also be recalled that the "information" sought by the Chinese producers was a clarification of what constituted "product types" as referenced in the General Disclosure Document. Thus, the fact that the Information Document referred to the concept of product types does not alter the Panel's ultimate finding that the Commission did not disclose the requested clarification until one working day before the deadline for comments. We therefore do not agree with the European Union's assertion that the Panel erroneously ignored the evidence contained in the Information Document in reaching its finding.

503. The European Union also claims that, because some Chinese producers submitted information describing certain characteristics that, they believed, distinguished different types of fasteners, and

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<sup>717</sup>In any event, we note that, in the letter referred to by the European Union, the Chinese producer expressed the view that it was not possible to comment on the Commission's dumping determination without knowing what types or groups of products of Pooja Forge were actually matched with the Chinese products. The letter thus shows that the Chinese producers still considered the information provided by the Commission insufficient for them to comment properly on the dumping determination. This letter, therefore, does not lend support to the European Union's position, and the Panel acted properly in not relying on this evidence for reaching its finding.

<sup>718</sup>European Union's appellant's submission, para. 284.

<sup>719</sup>European Union's appellant's submission, para. 286.

<sup>720</sup>Information Document, *supra*, footnote 81, p. 12.

<sup>721</sup>Panel Report, para. 7.490.

because the product types used for purposes of the dumping determination reflected the same characteristics, the Chinese producers "clearly were able to make presentations based on this 'information'".<sup>722</sup> Specifically, the European Union refers to a submission made on 22 February 2008 by Jiaxing Association of Fastener Import & Export Companies ("Jiaxing Association") describing the difference between fasteners produced by Chinese producers and those produced by EU producers. Jiaxing Association argued that the Chinese companies mostly produced standard fasteners in lower strength classes, while EU producers mostly produced non-standard fasteners in higher strength classes<sup>723</sup>, and that fasteners by Chinese and EU producers were not competitive with each other. The European Union asserts that "the Panel's conclusion that Chinese producers were not given a timely opportunity to 'see information relevant to the presentation of their cases' is flawed as the alleged 'information' was no other than what the Chinese interested parties had been presenting as being the main characteristics for distinguishing between product types throughout the investigation."<sup>724</sup>

504. However, the evidence that the European Union claimed the Panel "disregarded" was not apposite to the issue examined by the Panel under Article 6.4 of the *Anti-Dumping Agreement*. As discussed, what information may be considered "relevant for the presentation" of the interested parties' cases under Article 6.4 depends on the particular stage of the anti-dumping investigation and the specific issue before the investigating authority. China's claim and the Panel's finding under Article 6.4 concern the information on product types that the Commission used for purposes of price comparisons between fasteners produced by the Indian producer (rather than EU producers) and by the Chinese producers in its dumping determination. Thus, the information contained in Jiaxing Association's submission, which was made in a context unrelated to the issue of price comparisons between the Indian and Chinese fasteners, cannot be considered as information that the two Chinese producers requested as relevant to the presentation of their cases regarding the dumping determination. Therefore, we do not consider that the Panel erred in not relying on the evidence concerning Jiaxing Association's submission in making its finding under Article 6.4.

505. In sum, we consider that the product types used by the Commission for purposes of comparing the export price and normal value in the fasteners investigation constituted "information relevant to the presentation" of the Chinese parties' case. This is because, without such information, "it would be difficult if not impossible, for foreign producers to request adjustments that they consider

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<sup>722</sup>European Union's appellant's submission, para. 288.

<sup>723</sup>Jiaxing Association of Fasteners Import & Export Companies, Submission of 22 February 2008 (Panel Exhibit EU-13), p. 4. The two Chinese producers requesting clarification regarding product types were not part of this association.

<sup>724</sup>European Union's appellant's submission, para. 288 (referring to Panel Report, para. 7.492).

necessary in order to ensure a fair comparison."<sup>725</sup> We further consider that the Panel correctly found that the European Union violated Article 6.4 of the *Anti-Dumping Agreement* "by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established".<sup>726</sup> We therefore decline to accept the European Union's appeal of these findings.

506. With regard to the Panel's finding under Article 6.2 of the *Anti-Dumping Agreement*, the European Union maintains that, because it has demonstrated that the Panel's finding under Article 6.4 was flawed, the Panel's "purely consequential" finding under Article 6.2 was also in error.<sup>727</sup> In the light of our finding that the Panel did not err in reaching its finding under Article 6.4, we also disagree with the European Union's assertion that the Panel's finding under Article 6.2 was in error.

507. The European Union further submits that the first sentence of Article 6.2, which provides that all interested parties "shall have a full opportunity for the defence of their interests", cannot "be read as a catch-all due process provision" because doing so "would effectively render redundant *all* of the other provisions of Article 6 which impose specific obligations on investigating authorities".<sup>728</sup> We recall that, in the fasteners investigation, the Chinese producers could not make relevant requests for adjustment in order to ensure a fair comparison within the meaning of Article 2.4 of the *Anti-Dumping Agreement*, because they were not informed, in a timely manner, of the basis on which the export price and normal value was compared. Consequently, they did not have a full opportunity to defend their interests in relation to the Commission's dumping determination. Thus, contrary to the European Union's assertion, the Panel did not simply treat Article 6.2 as a "catch-all due process provision". Rather, the Panel's finding is consistent with the Appellate Body's interpretation, in *EC – Tube or Pipe Fittings*, that the "presentations" referred to in Article 6.4 "logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests" within the meaning of Article 6.2.<sup>729</sup> On this basis, we consider that the Panel properly found that "the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings" and that, therefore, "the European Union acted inconsistently with Article 6.2" of the *Anti-Dumping Agreement*.<sup>730</sup>

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<sup>725</sup>Panel Report, para. 7.491.

<sup>726</sup>Panel Report, para. 7.494.

<sup>727</sup>European Union's appellant's submission, para. 275.

<sup>728</sup>European Union's appellant's submission, para. 277. (original emphasis)

<sup>729</sup>Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 149.

<sup>730</sup>Panel Report, para. 7.495.

E. *China's Other Appeal of the Panel's Findings under Article 2.4 of the Anti-Dumping Agreement*

508. China alleges that the Panel erred in finding that the European Union did not fail to conduct a fair comparison between the export price and normal value within the meaning of Article 2.4 of the *Anti-Dumping Agreement*. Specifically, China asserts that the Panel erred in not addressing a "substantial argument"<sup>731</sup> that China raised on the basis of the last sentence of Article 2.4, which requires that the authorities indicate to the parties what information is necessary to ensure a fair comparison. China also contends that the Panel's failure to address its arguments is inconsistent with a correct interpretation and application of Article 2.4.<sup>732</sup> China therefore requests the Appellate Body to complete the analysis by applying Article 2.4 to the facts, and to find that the Commission's failure to indicate to the Chinese producers the information necessary to ensure a fair comparison constituted a violation of Article 2.4 of the *Anti-Dumping Agreement*.<sup>733</sup> Furthermore, China alleges that the Panel erred in its interpretation of Article 2.4 of the *Anti-Dumping Agreement*, and acted inconsistently with Article 11 of the DSU, when finding that the Commission did not have to make adjustments for the physical differences reflected in the PCN characteristics. Finally, China maintains that the Panel erred in its interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* when finding that the Commission did not have to make adjustments for quality differences.<sup>734</sup> We turn now to address each of these claims.

509. China alleges that, contrary to its duty under Article 11 of the DSU, the Panel failed to address "one of China's main arguments concerning its claim of violation of Article 2.4" of the *Anti-Dumping Agreement*, that is, the argument with regard to the Commission's failure to inform the interested parties of the "product types" on the basis of which the comparison was made between the normal value and export price.<sup>735</sup> We note that, in its first written submission to the Panel, China maintained that the Commission failed to disclose "the list of product types on the basis of which normal value had been determined and how these product types had been compared with the PCNs of the Chinese exporting producers"<sup>736</sup>, although China did not specifically refer to the last sentence of Article 2.4. In its second written submission, China, for the first time before the Panel, referenced the last sentence of Article 2.4 and argued that, because the Commission failed to indicate to the parties in

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<sup>731</sup>China's other appellant's submission, para. 306.

<sup>732</sup>Although China's other appellant's submission alleges that the Panel erred in its interpretation (see para. 296), China clarified at the oral hearing that its claim also covers the Panel's application of Article 2.4 to the facts of the case.

<sup>733</sup>See China's other appellant's submission, paras. 315-334.

<sup>734</sup>Although China's other appellant's submission alleges that the Panel erred in its interpretation (see paras. 296 and 367), China clarified at the oral hearing that its claim also covers the Panel's application of Article 2.4 to the facts of the case.

<sup>735</sup>China's other appellant's submission, para. 311.

<sup>736</sup>China's first written submission to the Panel, para. 372.

question what information was necessary to ensure a fair comparison, the European Union violated Article 2.4.<sup>737</sup>

510. The Panel did not address this argument in its findings under Article 2.4 of the *Anti-Dumping Agreement*. Regarding China's request during the interim review stage that the Panel address this argument, the Panel responded:

With respect to China's concern that the Panel failed to address its argument that, by failing to inform the Chinese producers of its decision not to base the dumping determinations on full PCNs, the European Union violated Article 2.4 of the [*Anti-Dumping Agreement*], we recall that this is the main argument China raises in connection with its claim under Articles 6.2, 6.4, 6.5 and 6.9 of the [*Anti-Dumping Agreement*], which is addressed in the Report at paragraphs 7.477-7.483.<sup>738</sup>

511. The above review of China's arguments before the Panel indicates that China did not raise a separate claim under the last sentence of Article 2.4, but referred to that sentence in support of its claim that the Commission acted inconsistently with the obligation to conduct a fair comparison under Article 2.4 of the *Anti-Dumping Agreement*. On appeal, China has also characterized its allegation under the last sentence of Article 2.4 as an "argument put forward by China".<sup>739</sup> Thus, we disagree with China's view that the Panel's failure to address this argument constitutes "a false exercise of judicial economy"<sup>740</sup>, because the issue of judicial economy is only relevant to the manner in which a panel deals with a party's *claims*. Moreover, as the Appellate Body has found, a panel has the discretion "to address only those arguments it deems necessary to resolve a particular claim" and "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU".<sup>741</sup>

512. Although the Panel's failure to address China's argument does not rise to the level of a violation of Article 11 of the DSU, we nonetheless consider that, in the light of its findings under Article 6.4 of the *Anti-Dumping Agreement*, the Panel should have considered China's argument under the last sentence of Article 2.4 of the *Anti-Dumping Agreement* in reaching its finding. As discussed above, Article 2.4 obliges investigating authorities to indicate to the parties what information is necessary to ensure a fair comparison and requires an investigating authority, at a minimum, to inform the parties of the products or product groups used for purposes of the price comparison. This will

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<sup>737</sup> China's second written submission to the Panel, paras. 778-787 and 796.

<sup>738</sup> Panel Report, para. 6.98.

<sup>739</sup> China's other appellant's submission, para. 306.

<sup>740</sup> China's other appellant's submission, para. 312.

<sup>741</sup> Appellate Body Report, *EC – Poultry*, para. 135. (emphasis omitted)

then allow the parties to decide whether a request for adjustment regarding any differences affecting price comparability should be made.

513. We recall that, in the fasteners investigation, the structure of the questionnaire sent to the Chinese producers suggested that requests for adjustments would not be necessary because of the categorization of the product under investigation according to PCN groups. However, the Commission decided to use a different method of product grouping to conduct the comparison, namely, the "product types" defined on the basis of strength class and the distinction between standard and special fasteners. As noted above, significant differences existed between PCNs and the "product types" defined by the Commission. Had the Chinese producers known that these product types were used instead of PCNs, such differences could have prompted the Chinese producers to request adjustments within the meaning of Article 2.4. In this respect, the Panel correctly found, in its analysis under Article 6.4, that, without knowing what "product types" were used by the Commission, "it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."<sup>742</sup> Thus, the facts of the case indicate that, because the Commission did not clearly indicate the product types used for purposes of price comparisons until very late in the proceedings, the European Union acted inconsistently with its obligations under Article 2.4 by depriving the Chinese producers of the ability to request adjustments for differences that could have affected price comparability.

514. The Panel found, however, that the European Union acted consistently with Article 2.4 of the *Anti-Dumping Agreement*. In so finding, the Panel analyzed China's claim under Article 2.4 in isolation from its analysis under Article 6.4 of that Agreement. Specifically, in disagreeing with China's argument that the Commission should have made adjustments for differences reflected in the PCN codes, the Panel stated that, "in the course of the investigation at issue, none of the Chinese producers argued that there were factors which affected price comparability within the meaning of Article 2.4 other than those used by the Commission to categorize the product for comparison purposes, that is, strength class (which was an element of the PCNs) and the distinction between standard and special fasteners (which was not an element of the PCNs)".<sup>743</sup> The Panel further stated that, "[g]iven the absence of such a request [for adjustments for differences affecting price comparability] from the Chinese exporters, and any showing that there was a factor which affected

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<sup>742</sup>Panel Report, para. 7.491.

<sup>743</sup>Panel Report, para. 7.306.

price comparability which should have been apparent to the Commission", China's claim was unfounded and must be rejected.<sup>744</sup>

515. Yet, as the Panel found in the context of Article 6.4, "[i]n a case such as this one, where it appears from the structure of the questionnaires that such requests will not be necessary because of the categorization of the product according to PCN groups, *we consider that it is not unreasonable for exporters to not request specific adjustments which are already reflected in those PCN groups.*"<sup>745</sup> The Panel further found that "Chinese producers were informed very late in the proceedings of the product types that formed the basis for the comparisons underlying the Commission's dumping determinations."<sup>746</sup> Thus, because of the Commission's failure to provide a timely opportunity to see the information concerning the basis of the price comparisons, the Chinese producers were precluded from requesting any adjustments for purposes of ensuring a fair comparison. The "absence"<sup>747</sup> of a request from the Chinese producers for adjustments on the basis of the PCN characteristics, therefore, should not have prevented a finding of inconsistency under Article 2.4. On the contrary, it further demonstrates that, due to the Commission's failure to indicate what information was necessary for a fair comparison, the Chinese producers were unable to exercise their rights under Article 2.4 to ensure that the Commission conducted a fair comparison of the export price and the normal value. Thus, in failing to consider the last sentence of Article 2.4 in the light of the relevant facts of the case and its finding under Article 6.4, the Panel erred in its application of Article 2.4 of the *Anti-Dumping Agreement*.

516. China further maintains that the Panel erred in the interpretation of Article 2.4 of the *Anti-Dumping Agreement* by failing to distinguish between two obligations encompassed under that provision: first, the obligation for an investigating authority to evaluate identified differences that might affect price comparability; second, the obligation of the authority to make adjustments if it finds that the differences indeed affected price comparability. In this dispute, China argues, because the Commission requested information on the basis of PCNs at the beginning of the investigation, the physical characteristics indicated in the PCNs were identified by the Commission.<sup>748</sup> Thus, even in the absence of a request, the Commission should have evaluated whether any of the identified differences could have had an impact on the prices compared.

517. The Panel, quoting the panel's finding in *EC – Tube or Pipe Fittings*, found that the investigating authorities "must take steps to achieve clarity as to the adjustment claimed and whether

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<sup>744</sup>Panel Report, para. 7.306.

<sup>745</sup>Panel Report, para. 7.491. (emphasis added)

<sup>746</sup>Panel Report, para. 7.492.

<sup>747</sup>Panel Report, para. 7.306.

<sup>748</sup>China's other appellant's submission, para. 360.



and to what extent that adjustment is merited".<sup>749</sup> Logically, as a step "to achieve clarity as to the adjustment claimed", authorities must first evaluate the differences identified to assess whether they affect price comparability. Therefore, we do not consider that the Panel's interpretation of Article 2.4 differs from China's view that an investigating authority must evaluate identified differences and then make adjustments.<sup>750</sup> We are less convinced, however, by China's assertion that the authority must evaluate any identified differences, regardless of whether a request for adjustment has been made. It is likely that, in an anti-dumping investigation, the differences between the products sold in the foreign producer's domestic and export markets would be numerous. Differences between the products, however, would not always affect price comparability and require adjustments by the authorities. China's assertion may place an undue burden on an investigating authority to assess each difference in order to determine whether adjustment is needed in every case, even without a request by the interested party.

518. China further argues that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU, in finding that China did not provide evidence in support of its claim that the PCN characteristics necessarily affected price comparability.<sup>751</sup> In addition, according to China, the Panel acted inconsistently with Article 17.6(i) of the *Anti-Dumping Agreement* when it found that, because the Commission did not conclude that the PCN characteristics indicated differences affecting price comparability, it was inappropriate for the Panel to consider this issue itself.<sup>752</sup> China requests the Appellate Body to complete the analysis and find that "an unbiased and objective investigating authority in this situation could only have concluded that such adjustments had to be made."<sup>753</sup>

519. We emphasize that our finding above, that the Panel failed properly to apply Article 2.4 of the *Anti-Dumping Agreement*, does not suggest that the PCN characteristics *necessarily* reflect differences that affect price comparability. Neither does it suggest that the Commission, had it examined the characteristics, would have made adjustments. Rather, the authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".<sup>754</sup> Thus, it is the investigating authority's duty to review the requested adjustments in order to determine whether any physical differences identified before it are differences that affect price comparability within the meaning of Article 2.4.

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<sup>749</sup>Panel Report, para. 7.298 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

<sup>750</sup>See also European Union's appellee's submission, para. 272.

<sup>751</sup>See China's other appellant's submission, para. 383.

<sup>752</sup>See China's other appellant's submission, para. 386. See also Panel Report, para. 7.302.

<sup>753</sup>China's other appellant's submission, para. 400.

<sup>754</sup>Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158.

520. In this dispute, because the Chinese producers were not able to claim adjustments, the Commission did not examine the issue of whether any of the PCN characteristics, when compared to the product types used to establish the normal value, were differences that affect price comparability. The numerous PCN characteristics were thus not compared with the product types chosen by the Commission and discussed for purposes of price comparison. In this context, it was therefore reasonable for the Panel to state that, "while it may be plausible that the PCN characteristics described in this case indicate differences affecting price comparability"<sup>755</sup>, there is no evidence on the Panel record that would support this conclusion. Moreover, it was the Commission's duty to review any requested adjustments to determine whether the request would be warranted. As the Panel rightly found, absent any discussion during the investigation at issue, it was not appropriate, nor feasible, for the Panel to assume the role of an investigating authority and analyze the differences between each of the narrowly defined PCN characteristics and the product types used by the Commission.<sup>756</sup> Similarly, it is not within our mandate to review whether the various PCN characteristics reflect physical differences that would have affected price comparability in the fasteners investigation, in the absence of any factual findings in this regard by the Commission or by the Panel. Therefore, we decline to accept China's claim that the Panel acted inconsistently with Article 11 of the DSU, or Article 17.6(i) of the *Anti-Dumping Agreement*, and, consequently, we also decline China's request for completion of the analysis.

521. Finally, China alleges that the Panel erred in its interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in disagreeing with China's argument that the European Union violated that provision because the Commission failed to evaluate, and make adjustments for, quality differences<sup>757</sup> between Indian and Chinese fasteners, even though China demonstrated to the Panel that one Chinese producer requested such an adjustment.<sup>758</sup> According to China, the Commission was under a duty at least to evaluate the claimed differences in quality between the Indian and Chinese products. Moreover, because "the quality differences affected price comparability, the Commission was required to make the necessary adjustments".<sup>759</sup>

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<sup>755</sup>Panel Report, para. 7.302. The Panel recalled that the PCN characteristics were: type of fasteners (by CN code); strength/hardness; coating; presence of chrome on coating; diameter; and length/thickness. (*Ibid.*, footnote 617 to para. 7.302)

<sup>756</sup>See Panel Report, para. 7.302.

<sup>757</sup>We recall that quality is not one of the characteristics identified in the PCNs.

<sup>758</sup>China's other appellant's submission, paras. 405 and 406.

<sup>759</sup>China's other appellant's submission, para. 408.

522. In reaching the finding challenged by China, the Panel noted China's assertion that, at recital 52 of the Definitive Regulation, the Commission "acknowledged" that there were quality differences between Indian and Chinese fasteners.<sup>760</sup> Recital 52 states, in relevant part:

The submission from the PRC authorities mentioned in recital 48 enclosed an analysis report detailing alleged quality differences between fasteners of a given standard (DIN 933 is used as an example) manufactured in the Community and the PRC. ... Any perceived differences in quality, which may subsist from a user's point of view, can be dealt with through an adjustment for physical differences (see recital 103) but do not mean that the two products are not comparable.

523. In reviewing recital 52, the Panel found that China's argument was based on a misreading of that recital. Specifically, the Panel found that "recital 52 relates to the issue of like product, not dumping determinations", and that "it refers to an analysis of differences between fasteners produced in China, and fasteners produced in the European Union", which China alleged in support of its argument that Chinese and EU fasteners are not comparable, and therefore should not be considered "like".<sup>761</sup> Furthermore, the Panel noted that "China's argument seem[ed] to rest on the premise that the Commission stated in recital 52 that any perceived quality differences would be dealt with through adjustments, and that therefore such adjustments should have been made."<sup>762</sup> The Panel observed, however, "that recital 52 says that any perceived differences in quality can be dealt with through adjustments", and "it is clear that this recital does not even address any differences between Indian and Chinese fasteners."<sup>763</sup> On the basis of its review, therefore, the Panel concluded:

Thus, despite the reference to recital 103 [in recital 52], where the Commission explains the adjustment made for differences in the cost of quality control between Indian and Chinese producers, we do not see what relevance recital 52 has to the issue raised by China, that the Commission should have made an adjustment for quality differences between Chinese and Indian fasteners.<sup>764</sup>

524. On appeal, although China claims that the Panel erred in its interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in finding that the Commission was not required to make adjustments for quality differences, it does not provide any specific argument that addresses such an error in legal interpretation. Rather, China's appeal hinges on its disagreement with the Panel concerning the meaning and scope of the above recital in the Definitive Regulation. In our view, the Panel's finding, that recital 52 of the Definitive Regulation did not support the view that the

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<sup>760</sup>Panel Report, para. 7.307.

<sup>761</sup>Panel Report, para. 7.308.

<sup>762</sup>Panel Report, para. 7.309 (referring to China's response to Panel Question 94). (original underlining)

<sup>763</sup>Panel Report, para. 7.309. (original underlining)

<sup>764</sup>Panel Report, para. 7.309.

Commission acknowledged quality differences between Indian and Chinese fasteners, was based on a reasoned analysis of the text of the measure at issue. As the Panel correctly found, recital 52 "does not even address any differences between Indian and Chinese fasteners".<sup>765</sup> Moreover, China has not identified any specific differences in quality that had been identified during the fasteners investigation. We therefore see no basis for China's argument that Recital 52 of the Definitive Regulation demonstrates that these quality differences were "identified".<sup>766</sup>

525. China further argues that it submitted to the Panel a letter sent by the Commission in reply to questions by certain Chinese exporters, in which the Commission stated that "[p]hysical differences are addressed by ... adjustment for the cost of quality control which reflects the general difference in quality level."<sup>767</sup> China maintains that this letter demonstrated that the Commission was aware of a "general difference in quality level".<sup>768</sup>

526. The Panel dismissed the relevance of the letter, finding that "nothing in this letter indicates that any evidence was proffered to the Commission to demonstrate that this alleged difference in quality affected price comparability", and that the letter did not clearly show that the Commission acknowledged that there were quality differences affecting price comparability.<sup>769</sup> In our view, the Panel's finding is properly premised on the content of the letter. The letter clearly shows that it concerns adjustments for "cost of quality control" rather than any differences in quality of the fasteners by Chinese and Indian producers. Moreover, on appeal, China did not raise any claims under Article 11 of the DSU alleging that the Panel's above review of a piece of evidence submitted by China was inconsistent with its obligation to conduct an objective assessment of the facts. Thus, it is not for us to second-guess the Panel's conclusion on the basis of its assessment of this evidence. We consider, therefore, that China's claim is not properly substantiated and should therefore be dismissed. Consequently, China's allegation that the Commission should have made adjustments for such "acknowledged" differences in quality also cannot stand.<sup>770</sup>

#### F. *Conclusion*

527. In sum, with respect to the Panel's findings on certain aspects of the dumping determination, we *find* that the Panel correctly found that the European Union violated Article 6.4 of the *Anti-Dumping Agreement* "by not providing a timely opportunity for Chinese producers to see

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<sup>765</sup>Panel Report, para. 7.309.

<sup>766</sup>China's other appellant's submission, para. 412.

<sup>767</sup>China's other appellant's submission, para. 413 (quoting Panel Exhibit CHN-31, *supra*, footnote 310, point 5).

<sup>768</sup>China's other appellant's submission, para. 414.

<sup>769</sup>Panel Report, para. 7.311.

<sup>770</sup>China's other appellant's submission, para. 418.

information regarding the product types on the basis of which normal value was established".<sup>771</sup> The Panel also correctly found that, in view of the Commission's failure to disclose the information on the product types on a timely basis, the European Union denied the Chinese producers a "full opportunity for the defence of their interests", in violation of Article 6.2 of the *Anti-Dumping Agreement*.<sup>772</sup> We further find that, in failing to take into account the last sentence of Article 2.4 in the light of the relevant facts of the case and its finding under Article 6.4 of the *Anti-Dumping Agreement*, the Panel erred in its application of Article 2.4 of that Agreement. We *find*, instead, that, in not disclosing the information on the product types on a timely basis, the European Union acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by failing to indicate to the parties in question what information was necessary to ensure a fair comparison.

528. However, we do not find that the Panel erred in its interpretation of Article 2.4 of the *Anti-Dumping Agreement* by failing to distinguish between an investigating authority's obligation to evaluate identified differences that might affect price comparability, and to make adjustments if it finds that the differences indeed affected price comparability. Neither do we find that the Panel acted inconsistently with Article 11 of the DSU or Article 17.6 of the *Anti-Dumping Agreement* in finding that the Commission was not required to make adjustments for the physical differences between the characteristics reflected in the PCNs and the product types. Finally, we *find* that the Panel did not err in the interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in rejecting China's argument that the Commission acted inconsistently with that provision by failing to evaluate, and to make adjustments for, quality differences.

### **VIII. Confidential Treatment and the Disclosure of Information under Articles 6.5 and 6.5.1 and Articles 6.2 and 6.4 of the *Anti-Dumping Agreement***

#### **A. Introduction**

529. We will now turn to the participants' various appeals regarding the Commission's treatment of confidential information under Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement*, and the disclosure of information under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*.

530. According to Article 6.5 of the *Anti-Dumping Agreement*, information that is "by nature" confidential or that is "provided on a confidential basis" shall, upon "good cause" shown, be treated as such by the investigating authorities. Article 6.5.1 of the *Anti-Dumping Agreement* requires that parties submitting confidential information also furnish a non-confidential summary thereof, in sufficient detail to permit a reasonable understanding of the substance of the information submitted in

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<sup>771</sup>Panel Report, para. 7.494.

<sup>772</sup>Panel Report, para. 7.495.

confidence. In exceptional circumstances, parties may indicate that confidential information is not susceptible of summary, and a statement of the reasons why summarization is not possible must be provided.

531. The participants raise on appeal several issues under Articles 6.5 and 6.5.1. We will address first the European Union's appeal of the Panel's finding that the European Union acted inconsistently with Article 6.5.1 because two domestic producers<sup>773</sup> provided insufficient statements of the reasons why they could not provide non-confidential summaries of information submitted in confidence. The European Union claims on appeal that Article 6.5.1 does not require investigating authorities to ensure that producers provide "appropriate" statements of the reasons why summarization is not possible, because, in the European Union's view, this provision imposes only a "best endeavours" obligation on investigating authorities.

532. Next, we will address the European Union's second claim under Article 6.5 regarding the confidential treatment of the "product type" information submitted by the analogue country producer, whose data the Commission used for the determination of normal value *in lieu* of Chinese domestic prices. We begin by addressing the European Union's preliminary objection that this claim was not within the Panel's terms of reference, and that the Panel's consideration and ruling on this claim deprived the European Union of its due process rights. Then, we will address the issue raised by the European Union as to whether the requirement in Article 6.5 to show "good cause" for confidential treatment applies to an analogue country producer not designated as an "interested party" under Article 6.11 of the *Anti-Dumping Agreement*.

533. We will then turn to the claims raised by China in its Notice of Other Appeal regarding the Panel's finding that "potential commercial retaliation" justified the confidential treatment of the identity of the complainants and supporters of the complaint. China claims that the complainants did not make a sufficient "good cause" showing for treating the identity of the complainants and supporters as confidential, and that the Panel erred in both its application of the burden of proof and in its rejection of China's argument that the Commission's disclosure of the complainants' identity in another context undermined the "good cause" alleged.

534. Finally, we will address the European Union's appeal under Article 6.2 of the DSU that the Panel erred in finding that China's claims under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* challenging the non-disclosure of the identity of the complainants and supporters were within the Panel's terms of reference, despite the lack of an explicit reference in the panel request to China's

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<sup>773</sup>EU producers A. Agrati S.p.A. and Fontana Luigi S.p.A.

claim regarding the non-disclosure of the identity of the complainants and supporters.<sup>774</sup> Since in China's view no "good cause" was shown under Article 6.5 to treat the identity of the complainants and the supporters of the complaint as confidential, China claimed that the non-disclosure of their identity to the Chinese exporters and producers was inconsistent with the transparency and due process requirements of Articles 6.2 and 6.4. The European Union contends on appeal that China's claims under Articles 6.2 and 6.4 with respect to the non-disclosure of the identity of the complainants were not within the Panel's terms of reference because they were not included in the panel request.

B. *Confidential Treatment of Information under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement*

535. We begin with an interpretation of Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement*. Articles 6.5 and 6.5.1 set out specific rules governing an investigating authority's acceptance and treatment of confidential information. The provisions read as follows:

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

536. Under Article 6.5, authorities must treat information submitted by parties to an investigation as confidential if it is "by nature" confidential, or if it is "provided on a confidential basis" and "upon good cause shown". The confidentiality of information that is "by nature" confidential will often be readily apparent. Article 6.5 provides illustrative examples of information that falls into the category of "by nature" confidential, including information that is sensitive "because its disclosure

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<sup>774</sup>We recall that Article 6.2 of the *Anti-Dumping Agreement* provides that interested parties be given a full opportunity to defend their interests throughout an investigation. Article 6.4 in turn requires that the authorities provide timely opportunities for interested parties to see all non-confidential information relevant to the presentation of their cases. (See *supra*, paras. 478 and 507)

would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". One type of such information is commercially sensitive information not typically disclosed in the normal course of business, and which would likely be regularly treated as confidential in anti-dumping investigations.<sup>775</sup> The question of whether information is "by nature" confidential depends on the *content* of the information. Information that is "provided on a confidential basis" is not necessarily confidential by reason of its content, but rather, confidentiality arises from the circumstances in which it is provided to the authorities. These two categories may, in practice, overlap.

537. The requirement to show "good cause" for confidential treatment applies to both information that is "by nature" confidential and that which is provided to the authority "on a confidential basis".<sup>776</sup> The "good cause" alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation, who would otherwise have a right to view this information under Article 6 of the *Anti-Dumping Agreement*. Put another way, "good cause" must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information. "Good cause" must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party.

538. We find that the examples provided in Article 6.5 in the context of information that is "by nature" confidential are helpful in interpreting "good cause" generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved. Article 6.5 states that the disclosure of such information "would be of significant competitive advantage to a competitor" or "would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". These examples suggest that a "good cause" which could justify the non-disclosure of confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired. These examples are only illustrative, however, and we consider that a wide range of other reasons could constitute "good cause" justifying the treatment of information as confidential under Article 6.5.

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<sup>775</sup>This could be the case, for example, for certain profit or cost data or proprietary customer information.

<sup>776</sup>See Panel Report, para. 7.451; Panel Report, *Korea – Certain Paper*, para. 7.335; and Panel Report, *Guatemala – Cement II*, para. 8.219.



539. In practice, a party seeking confidential treatment for information must make its "good cause" showing to the investigating authority upon submission of the information. The authority must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information<sup>777</sup> with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged. The obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a "good cause" showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only "upon good cause shown".

540. In examining the scope of Article 6.5, we note that it extends the need to request confidential treatment to information submitted by "parties to an investigation" rather than those in the specifically defined group of "interested parties". As such, Article 6.5 does not limit the protection afforded to sensitive information to the "interested parties" expressly listed under Article 6.11 of the *Anti-Dumping Agreement*.<sup>778</sup> In our view, the term "parties to an investigation" refers to any person who takes part or is implicated in the investigation.<sup>779</sup> Moreover, Article 6.11 does not contain an exhaustive list of "interested parties", but states that "'interested parties' shall *include*" the persons or groups listed in that Article. In our view, the persons expressly listed in Article 6.11 are those who are in every case considered to be "interested parties", but are not the only persons who may be considered "interested parties" in a particular investigation. We do not believe that an investigating

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<sup>777</sup>Where necessary, the authority must also consider the submitting party's relationship with the source of the confidential information.

<sup>778</sup>Article 6.11 of the *Anti-Dumping Agreement* reads:

For the purposes of this Agreement, "interested parties" shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
- (ii) the government of the exporting Member; and
- (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

<sup>779</sup>The panel in *Argentina – Poultry Anti-Dumping Duties* analyzed a similar term in Article 6.1.2 of the *Anti-Dumping Agreement*, that is, "other interested parties participating in the investigation", and developed a similar interpretation of this term. (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.153)

authority is relieved of its obligations under Article 6.5 merely because a participant in the investigation does not appear on the list of "interested parties" in Article 6.11.<sup>780</sup> Rather, once "good cause" is shown, confidential treatment of sensitive information must be afforded to any party who takes part or is implicated in the investigation or in the provision of information to an authority. Pursuant to Article 6.5 such parties include persons supplying information, persons from whom confidential information is acquired, and parties to an investigation.

541. Whenever information is treated as confidential, transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation. Due process requires that interested parties have a right to see the evidence submitted or gathered in an investigation, and have an adequate opportunity for the defence of their interests.<sup>781</sup> As the Appellate Body has stated, "that opportunity must be meaningful in terms of a party's ability to defend itself".<sup>782</sup>

542. Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon "good cause" shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests. As the Panel found, "Article 6.5.1 serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process".<sup>783</sup> In respect of information treated as confidential under Article 6.5, Article 6.5.1 obliges the investigating authority to require that a non-confidential summary of the information be furnished, and to ensure that the summary contains "sufficient detail to permit a reasonable understanding of the substance of the information submitted

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<sup>780</sup>We note, in this respect, the European Union's argument that the "good cause" requirement for confidential treatment of information in Article 6.5 does not apply to analogue country producers like Pooja Forge, because they do not fall within the definition of "interested parties" under Article 6.11 of the *Anti-Dumping Agreement*. (European Union's appellant's submission, paras. 349-354) In the fasteners investigation, the Commission did not determine normal value on the basis of the information from Chinese producers and exporters, and decided to seek information from analogue country producers. The Indian company Pooja Forge participated in the investigation at the request of the Commission, and provided substantial amounts of information that was used as the basis for determining normal value. In our view, the decision by the Commission to determine normal value based on information from an analogue country producer, and the participation of Pooja Forge in the investigation, require that Pooja Forge be afforded the protection of sensitive information upon "good cause" shown and the obligations of both Articles 6.5 and 6.5.1 apply.

<sup>781</sup>Appellate Body Report, *Australia – Salmon*, para. 272.

<sup>782</sup>Appellate Body Report, *US – Gambling*, para. 270.

<sup>783</sup>Panel Report, para. 7.515.

in confidence".<sup>784</sup> The sufficiency of the summary provided will therefore depend on the confidential information at issue, but it must permit a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests.

543. Article 6.5.1 contemplates that in "exceptional circumstances" confidential information may not be "susceptible of summary". In such exceptional circumstances, a party may indicate that it is not able to furnish a non-confidential summary of the information submitted in confidence, but it is nevertheless required to provide a "statement of the reasons why summarization is not possible". Article 6.5.1 relieves a party of its duty to provide a non-confidential summary of information submitted in confidence only if doing so "is not possible". It is not enough for a party simply to claim that providing a summary would be burdensome or costly. Summarization of information will not be possible where no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence.

544. Where information is kept confidential upon "good cause" shown, and it is not possible to provide a non-confidential summary of the information that permits a reasonable understanding of its substance, the balance struck under Articles 6.5 and 6.5.1 is altered, and the due process rights of other parties to the investigation are not fully respected. Therefore, when it is not possible to furnish a non-confidential summary, Article 6.5.1 requires a party to identify the exceptional circumstances and provide a statement explaining the reasons why summarization is not possible. For its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances<sup>785</sup>, and whether the reasons given appropriately explain why, under the

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<sup>784</sup>The panel in *Mexico – Steel Pipes and Tubes* made a similar finding:

We consider that the conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation. For precisely this reason, we consider it paramount for an investigating authority to ensure that the conditions in these provisions are fulfilled. We consider it equally important for a WTO Panel called upon to review an investigating authority's treatment of confidential information strictly to enforce these conditions, while remaining cognizant of the applicable standard of review.

(Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380)

<sup>785</sup>The panel in *Mexico – Olive Oil* came to a similar conclusion in its interpretation of the parallel provisions of the *SCM Agreement*, finding that:

... the investigating authority should examine the reasons given for not summarizing the confidential information and determine whether, indeed, these reasons constitute "exceptional" circumstances.

(Panel Report, *Mexico – Olive Oil*, para. 7.92)

circumstances, no summary that permits a reasonable understanding of the information's substance is possible.<sup>786</sup> As the Panel found, "in the absence of scrutiny of non-confidential summaries or stated reasons why summarization is not possible by the investigating authority, the potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel."<sup>787</sup> This "would obviously defeat the goal of maintaining transparency during the course of the investigation itself that is one of the purposes of Article 6.5".<sup>788</sup> In sum, Article 6.5.1 imposes an obligation on the investigating authorities to ensure that sufficiently detailed non-confidential summaries are submitted to permit a reasonable understanding of the substance of the confidential information; and, in exceptional circumstances, to ensure that parties provide a statement appropriately explaining the reasons why particular pieces of confidential information are not susceptible of summary.

C. *Domestic Producers' Statements of the Reasons Why Summarization of Confidential Information Was Not Possible*

545. We turn next to the European Union's appeal of the Panel's finding that the Commission failed to ensure that two domestic producers complied with the requirements of Article 6.5.1 of the *Anti-Dumping Agreement*, and thus the European Union acted inconsistently with that provision.<sup>789</sup> In the fasteners investigation, two domestic producers, A. Agrati S.p.A ("Agrati") and Fontana Luigi S.p.A. ("Fontana Luigi"), submitted a substantial amount of information to the Commission on a confidential basis. As required by Article 6.5.1, each producer provided, in addition to the non-confidential version of its questionnaire response, summaries for most of the information submitted in confidence. For certain categories of information, however, no non-confidential summaries were provided, and only limited statements were provided relating to the lack of such summaries.

546. The Panel found that the statements provided by the two producers were not sufficient to comply with the requirement under Article 6.5.1 that, in the exceptional circumstance in which confidential information is not susceptible of summary, parties provide a statement of the reasons why summarization is not possible. The Panel found that the statements submitted by these producers did not "relate to any of the specific information for which no non-confidential summary [was] provided,

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<sup>786</sup>We note that various methods of summarization are used by parties and investigating authorities in anti-dumping investigations, such as indexing data, providing trends analysis, and aggregating data from multiple producers. Where a certain method might be expected to be used for the specific type of information in question, it would be incumbent on the submitting party to explain, *inter alia*, why present circumstances prevent it from employing that method.

<sup>787</sup>Panel Report, para. 7.515.

<sup>788</sup>Panel Report, para. 7.515.

<sup>789</sup>Panel Report, paras. 7.516 and 7.517.

or to anything having to do with [the producer] itself, the party supplying it".<sup>790</sup> Specifically, the Panel found that Agrati's statement simply asserted that the confidential information could not be summarized. The Panel further noted that, in certain cases, Agrati's assertion that it could not summarize the information was undermined by the fact that other domestic producers were able to produce summaries of the same types of information.<sup>791</sup> In the case of Fontana Luigi, the Panel found that the producer did not even assert that the information was not susceptible of summary, but only stated that the various questionnaire responses were "by nature confidential".<sup>792</sup> The Panel further found that there was no evidence "that would even suggest that the Commission ever considered whether [the producers'] stated reason for the lack of a non-confidential summary of such information ... was more than *pro forma*", and concluded that the European Union thereby violated its obligations under Article 6.5.1 to ensure that an appropriate statement of reasons was provided.<sup>793</sup>

547. On appeal, the European Union contends that Articles 6.5 and 6.5.1 impose only two requirements on investigating authorities, that is, to treat information as confidential, upon good cause shown, and to require parties to provide non-confidential summaries of information submitted in confidence. The second, third, and fourth sentences of Article 6.5.1 impose only a "best endeavours" obligation on the investigating authority to ensure that non-confidential summaries provided include "sufficient detail to permit a reasonable understanding" of the underlying information, or to require that a statement of reasons be provided where summarization is not possible.<sup>794</sup> There is no basis, in the European Union's view, for the Panel's finding that investigating authorities must ensure that parties provide "appropriate" non-confidential summaries or "appropriate" statements of the reasons why summarization is not possible.<sup>795</sup> According to the European Union, had the drafters intended Article 6.5.1 to impose a strict obligation on investigating authorities in these respects, the provision would have given authorities the power to penalize non-compliance, for example, by disregarding confidential information when no non-confidential summary, or no statement of reasons explaining why summarization is not possible, is provided.<sup>796</sup>

548. In response, China submits that, as the Panel found, Article 6.5.1 entails a two-part obligation. First, Article 6.5.1 obliges an investigating authority to require non-confidential summaries of confidential information, or, where applicable, statements of the reasons why summarization is not possible. Second, an investigating authority must further require that these summaries or statements

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<sup>790</sup>Panel Report, paras. 7.516 and 7.517.

<sup>791</sup>Panel Report, para. 7.516.

<sup>792</sup>Panel Report, para. 7.517.

<sup>793</sup>Panel Report, paras. 7.516 and 7.517. (original emphasis)

<sup>794</sup>European Union's appellant's submission, para. 317.

<sup>795</sup>European Union's appellant's submission, paras. 298 and 321.

<sup>796</sup>European Union's appellant's submission, para. 319.

be "appropriate" to satisfy the requirements of Article 6.5.1.<sup>797</sup> In China's view, interpreting this provision in a way that would allow less than "appropriate" summaries and statements would render the obligation "useless", and would violate the interpretative principle that an interpreter should not adopt a reading that reduces the provisions of a treaty "to redundancy or inutility".<sup>798</sup>

549. As we have found above, contrary to the European Union's contention, Article 6.5.1 imposes an obligation on investigating authorities to ensure that parties to an investigation provide non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence; and, in the exceptional circumstances in which summarization of confidential information is not possible, that statements be provided appropriately explaining the reasons why this is so.<sup>799</sup> The European Union is correct that the *Anti-Dumping Agreement* does not provide for specific sanctions to penalize parties if they fail to provide a sufficient non-confidential summary or a statement of the reasons why summarization is not possible. The *Anti-Dumping Agreement* places a number of obligations on investigating authorities to make a fair and objective assessment of particular issues in every investigation and to balance the rights and obligations of the interested parties subject to that investigation, with limited power to impose sanctions on a non-complying party. However, this does not derogate from the obligatory nature of the requirements. It does not mean, as the European Union argues, that an investigating authority must merely make best efforts to ensure that such summaries or statements of reasons are provided. The obligation rests on the Members to comply with the requirements of Article 6.5.1, and it is left to each Member to determine how they will do so.

550. In this instance, the Panel found that the non-confidential version of the questionnaire response submitted by Agrati contained non-confidential summaries of information submitted in confidence relating to some injury factors, but not others.<sup>800</sup> For those where a non-confidential summary was not provided, the following statement was included: "[t]he information cannot be summarized without disclosing confidential information which can cause a damage to our company. The information has been provided as limited."<sup>801</sup>

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<sup>797</sup>China's appellee's submission, para. 523.

<sup>798</sup>China's appellee's submission, paras. 524 and 527.

<sup>799</sup>See *supra*, paras. 542-544.

<sup>800</sup>Agrati included a non-confidential summary for employment, sales and re-sales of the subject product, inventories, production, capacity and capacity utilization. No summary was provided for factors such as return on investment, investments, profitability, cash flows, cost of production, suppliers of direct (raw) materials, volume of raw materials used in production, extraordinary items with respect to costs, list of all sales to unrelated domestic customers, and allocation of different cost elements among different types of products. (See Panel Report, para. 7.516)

<sup>801</sup>Panel Report, para. 7.516.

551. In respect of the second domestic producer, Fontana Luigi, while the initial questionnaire response contained "almost no non-confidential summarized information regarding injury factors", a follow-up response based on a specific request by the Commission contained non-confidential summaries for the majority of the information submitted in confidence.<sup>802</sup> However, no summaries were provided for information regarding distribution systems and price settings. The reason given as to why a summary could not be provided was simply that "[the] information is by nature confidential because its disclosure would be of significant competitive advantage to a Competitor."<sup>803</sup>

552. As we have found above, where a party claims that it cannot provide a non-confidential summary of information submitted in confidence, Article 6.5.1 requires an investigating authority to ensure that, in the exceptional circumstances in which confidential information is not susceptible of summary, a submitting party provide instead a statement appropriately explaining the reasons why summarization of that particular information is not possible. As we have also found, summarization of confidential information will not be possible where no alternative method of presenting the information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence.

553. Neither of the statements provided by Agrati or Fontana Luigi indicated why the information for which no non-confidential summary was provided presented an "exceptional circumstance" to justify the lack of a summary, nor did either statement provide reasons explaining why summarization of a particular category of information was not possible. With respect to Agrati, its statement asserting for each category that "[t]he information cannot be summarized without disclosing confidential information" speaks to a justification for providing confidential treatment in the first place. It does not address the issue of why summarization of the information is not possible, or why the particular information presents exceptional circumstances that would justify a failure to provide a non-confidential summary. Nor can the single statement repeated by Agrati be read as adequate justification for treating a number of different pieces of information as equally unsuitable to summarization. Furthermore, Agrati's assertion that it could not summarize information was undermined by the fact that Fontana Luigi was able to produce summaries of the same types of

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<sup>802</sup>These non-confidential summaries relate to information concerning volume of production, production capacity, capacity utilization, total purchases in volume and value, stocks in volume of finished goods, sales and re-sales in value and volume both to related and unrelated companies, captive use, cost of production, consumption of raw material, profitability for the product in question and total company profitability, cash flows, investments, returns on net assets, and employment and labour costs both for the product concerned and for the company. (See Panel Report, para. 7.517 (referring to Annexes to Fontana Luigi's Non-confidential Questionnaire Response (Panel Exhibit EU-28))

<sup>803</sup>Panel Report, para. 7.517.

information.<sup>804</sup> We agree with the Panel that Agrati's statement did not "relate to any of the specific information for which no non-confidential summary [was] provided or to anything having to do with Agrati itself".<sup>805</sup> Therefore, we consider that the Commission failed to ensure that Agrati provided an appropriate statement of why summarization of certain portions of its questionnaire response was not possible.

554. With respect to Fontana Luigi, we note that its statement that the non-summarized information is "by nature confidential because its disclosure would be of significant competitive advantage to a Competitor" also addresses the reasons for seeking confidential treatment in the first place rather than demonstrating that summarization of the information is not possible. Indeed, Fontana Luigi did not even assert that the confidential information could not be summarized, much less make the case that the information at issue qualified as an "exceptional circumstance" under Article 6.5.1. In the complete absence of any statement of reasons why summarization of the confidential information was not possible, we agree with the Panel that the European Union, in accepting these statements as sufficient, did not meet its obligations under Article 6.5.1.

555. Moreover, the Panel record does not indicate that the Commission examined these statements to evaluate their consistency with Article 6.5.1.<sup>806</sup> In its appellant submission, the European Union states that it had requested improved non-confidential summaries from the domestic producers, and that, because interested parties did not complain further about the non-confidential file, "the authorities considered that there was no need to insist further".<sup>807</sup> The European Union further states that "no further investigation was conducted in respect of the few pieces of information for which no summary was provided and for which a statement of reasons was offered."<sup>808</sup> Article 6.5.1 of the *Anti-Dumping Agreement* requires an investigating authority to scrutinize the reasons given by the party to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why summarization is not possible. We do not consider that the European Union did so in this case.

556. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.516 and 7.517 of the Panel Report, that the European Union acted inconsistently with its obligations under Article 6.5.1 of the *Anti-Dumping Agreement* when it failed to ensure that the domestic producers Agrati and

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<sup>804</sup>Panel Report, para. 7.516.

<sup>805</sup>Panel Report, para. 7.516.

<sup>806</sup>For both producers, the Panel stated that "[t]here is nothing in the Definitive Regulation, or any other evidence that has been proffered, that would even suggest that the Commission ever considered whether [the parties'] stated reason for the lack of a non-confidential summary ... was more than *pro forma*." (Panel Report, paras. 7.516 and 7.517)

<sup>807</sup>European Union's appellant's submission, para. 332.

<sup>808</sup>European Union's appellant's submission, para. 332.



Fontana Luigi provide appropriate statements as to why summarization of confidential information was not possible.

D. *Confidential Treatment of Information Submitted by the Analogue Country Producer, Pooja Forge*

557. We turn next to the European Union's appeal of the Panel's finding that the European Union acted inconsistently with its obligations under Article 6.5 of the *Anti-Dumping Agreement* "with respect to the treatment of the confidential information in Pooja Forge's questionnaire response".<sup>809</sup>

558. In the fasteners investigation, the Commission applied Article 2(7) of its Basic AD Regulation to China and therefore did not determine normal value on the basis of the information from Chinese producers and exporters. Rather, the Commission sought information from analogue country fastener producers and ultimately found one company in India, Pooja Forge, that was willing to respond to requests for information from the Commission. Pooja Forge provided substantial amounts of information that was used as the basis for determining normal value. When it returned its questionnaire, Pooja Forge submitted a non-confidential version of its response, in which it designated large portions as confidential, or left them blank.<sup>810</sup> China contended that this information should not have been granted confidential treatment by the Commission. The Panel determined that "China [had] not put forward any evidence or arguments with respect to the confidential treatment of any other category of information than that concerning product types", and limited its analysis to that category.<sup>811</sup> The Panel went on to find that Pooja Forge did not assert or show any "good cause" for treating such "product type" information as confidential, nor did it provide a non-confidential summary or a statement of why summarization of the confidential information was not possible.<sup>812</sup> On this basis, the Panel concluded that the European Union acted inconsistently with its obligations under Article 6.5 of the *Anti-Dumping Agreement* because it treated "product type" information as confidential without requiring Pooja Forge to show "good cause" for such treatment.<sup>813</sup>

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<sup>809</sup>Panel Report, para. 7.525.

<sup>810</sup>The Panel found that the non-confidential response contained information on company turnover, production, capacity and capacity utilization, but did not include information on sales to independent customers, costs or profits. (Panel Report, para. 7.518)

<sup>811</sup>The Panel noted in this respect that, in its second written submission to the Panel, China claimed that the non-confidential summary of Pooja Forge's questionnaire response "does not contain *any information*, and in particular information on the 'product types' on the basis of which the information has been provided by this producer", and the Panel decided to limit its analysis to the confidential treatment of "product types". (Panel Report, para. 7.524 and footnote 1041 thereto (quoting China's second written submission to the Panel, para. 1110 (original emphasis)) We recall that the term "product types", as used in the fasteners investigation, refers to the product categories upon which the Commission based its comparison between normal value and export price.

<sup>812</sup>Panel Report, para. 7.525.

<sup>813</sup>Panel Report, para. 7.525.

559. The European Union appeals the Panel's findings regarding the confidential treatment of Pooja Forge's questionnaire response on procedural and substantive grounds. First, the European Union contends that China's claim regarding the Commission's confidential treatment of information submitted by Pooja Forge was not within the Panel's terms of reference<sup>814</sup>, or, in the alternative, that the manner in which China and the Panel dealt with this claim over the course of the proceedings deprived the European Union of its rights to due process, and that the Panel made the case for the complainant.<sup>815</sup> Second, the European Union claims that the Panel erred in finding that the requirement to show "good cause" for confidential treatment of information in Article 6.5 applies also to analogue third country producers. In the European Union's view, the requirements of Article 6.5 apply only to "interested parties", as that term is defined in Article 6.11 of the *Anti-Dumping Agreement*, and a third country producer like Pooja Forge is not an "interested party" under that provision.<sup>816</sup> The European Union further argues that this interpretation makes sense in the context of an investigation involving an analogue country producer, because it would be too difficult to recruit companies willing to participate in such an investigation if they had to comply with the requirements of Articles 6.5 and 6.5.1.<sup>817</sup>

560. China contends that its claim under Article 6.5 challenging the Commission's confidential treatment of information submitted by Pooja Forge was within the Panel's terms of reference. China argues that the Appellate Body should in any case reject the European Union's appeal, because the European Union did not raise this issue "promptly" before the Panel, and thereby waived its rights to have such an objection considered on appeal.<sup>818</sup> China further contends that Article 6.2 of the DSU requires a party to list its *claims* in the panel request, but does not require a party to include its *arguments* explaining how the identified measure violates the responding party's obligations under a provision.<sup>819</sup> On the substance of the European Union's claim, China points out that, by its own terms, Article 6.5 applies to "parties to an investigation", and not to "interested parties", and that the former term is a more inclusive concept that would also cover an analogue country producer.<sup>820</sup> China argues that, due to the broad discretion investigating authorities have in determining an alternative normal value for NME countries, it is particularly important that the transparency requirements contained in Article 6.5 are strictly enforced.<sup>821</sup> Finally, China argues that, even if Article 6.5 applies only to "interested parties" within the meaning of Article 6.11, it should nevertheless apply to Pooja Forge,

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<sup>814</sup>European Union's appellant's submission, paras. 335 and 336.

<sup>815</sup>European Union's appellant's submission, paras. 343 and 344.

<sup>816</sup>European Union's appellant's submission, paras. 349-353.

<sup>817</sup>European Union's appellant's submission, para. 356.

<sup>818</sup>China's appellee's submission, paras. 572-575.

<sup>819</sup>China's appellee's submission, para. 578.

<sup>820</sup>China's appellee's submission, paras. 599-603.

<sup>821</sup>China's appellee's submission, para. 606.

because the Commission designated the company an "interested party" by virtue of Pooja Forge's involvement in the investigation.<sup>822</sup>

561. Regarding the Panel's terms of reference, the European Union acknowledges that it did not raise its challenge in this respect before the Panel.<sup>823</sup> The Appellate Body has found that parties are required to raise procedural objections "promptly"<sup>824</sup>, but also that matters going to the jurisdiction of a panel are "fundamental" and can therefore be raised at any stage in a proceeding, including on appeal.<sup>825</sup> If a claim is not within a panel's terms of reference, the panel does not have the jurisdiction to hear the claim. Moreover, a party's failure to raise a timely jurisdictional objection cannot operate to cure such a jurisdictional defect. We therefore find that the European Union's failure to raise its terms of reference claim promptly before the Panel does not bar it from bringing this challenge on appeal.

562. Article 6.2 of the DSU lays out the key requirements for a panel request and, by implication, the establishment of a panel's terms of reference under Article 7.1 of the DSU. The complaining party must identify the specific measure at issue and provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. The Appellate Body has found that the panel request "assists in determining the scope of the dispute" in respect of each measure, and "consequently, establishes and delimits the jurisdiction of the panel".<sup>826</sup> The panel request also serves the important due process objective of notifying the respondent of the nature of the case it must defend.<sup>827</sup> As the Appellate Body stated in *EC and certain member States – Large Civil Aircraft*, "[t]his due process objective is not constitutive of, but rather flows from, the proper establishment of a panel's jurisdiction".<sup>828</sup> The panel request must therefore be examined "as it existed at the time of filing" in order to determine whether a particular claim falls within the panel's terms of reference.<sup>829</sup> For its part, a panel must "scrutinize carefully the panel request, read as a whole, and on the basis of

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<sup>822</sup>China's appellee's submission, paras. 608-611.

<sup>823</sup>European Union's appellant's submission, para. 337.

<sup>824</sup>Appellate Body Report, *US – Carbon Steel*, para. 123; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; Appellate Body Report, *US – FSC*, para. 166; Appellate Body Report, *US – 1916 Act*, para. 54.

<sup>825</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 791; Appellate Body Report, *US – Carbon Steel*, para. 123; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; Appellate Body Report, *US – 1916 Act*, para. 54.

<sup>826</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640.

<sup>827</sup>See Appellate Body Report, *US – Carbon Steel*, para. 126 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186). Appellate Body Report, *EC – Chicken Cuts*, para. 155; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>828</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640.

<sup>829</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

the language used"<sup>830</sup>, in order to determine whether it is "sufficiently precise"<sup>831</sup> to comply with Article 6.2 of the DSU. A party's later submissions may be referenced where the meanings of the terms used in the panel request are not clear on their face, but the content of these subsequent submissions "cannot have the effect of curing the failings of a deficient panel request".<sup>832</sup>

563. Turning to the European Union's appeal, we note that China stated in its panel request that the European Union had violated:

... Articles 6.2, 6.4, 6.5 and 6.5.1 of the [*Anti-Dumping Agreement*] because the EC failed to ensure that domestic producers provided non-confidential summaries of confidential information they submitted or because the EC wrongly treated information as being confidential, thereby preventing Chinese producers to have the full opportunity for the defence of their interests.<sup>833</sup>

We read China's panel request as containing the claims that: (i) the European Union failed to ensure that domestic producers provided non-confidential summaries of information submitted as confidential; or (ii) the European Union wrongly treated information as being confidential, and thereby prevented Chinese producers from having a full opportunity to defend their interests.

564. The claim subject to the European Union's terms of reference challenge is whether the European Union wrongly treated information submitted by Pooja Forge in its questionnaire response regarding "product types" as confidential. Because Pooja Forge is not a domestic producer, this claim cannot fall under the first phrase in the panel request. However, the language of the second phrase, "the [European Union] wrongly treated information as being confidential", is broad enough to capture China's claim regarding the confidential treatment of information submitted by Pooja Forge. A claim that "the [European Union] wrongly treated information as confidential" implies that the European Union did so in circumstances where "good cause" was not shown, and so falls within the scope of Article 6.5 of the *Anti-Dumping Agreement*. The fact that the first phrase refers to "domestic producers" does not, in our view, limit or reduce the scope of the second phrase. We therefore *find* that China's claim under Article 6.5 of the *Anti-Dumping Agreement* regarding the Commission's confidential treatment of information submitted by Pooja Forge was within the Panel's terms of reference.

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<sup>830</sup> Appellate Body Report, *US – Carbon Steel*, para. 127; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; Appellate Body Report, *US – Continued Zeroing*, para. 161; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>831</sup> Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>832</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642; Appellate Body Report, *EC – Bananas III*, para. 143; Appellate Body Report, *US – Carbon Steel*, para. 127.

<sup>833</sup> WT/DS397/3, p. 5.

565. As we have found that this claim was properly before the Panel, we turn to the substantive arguments and claims raised by the European Union on appeal. The European Union submits that, through the manner in which the Panel dealt with its claim under Article 6.5, the Panel deprived it of its due process rights and thus acted inconsistently with Article 11 of the DSU. The European Union further claims that the Panel violated Article 11 of the DSU also because it impermissibly "made the case" for China through its questioning during the proceedings related to this claim.<sup>834</sup> Specifically, the European Union argues that, but for the Panel's questioning, China would not have articulated its argument, or established a *prima facie* case, that "good cause" had not been shown to justify the Commission's treatment of information submitted by Pooja Forge as confidential.

566. We note at the outset that the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel. While the DSU, and Article 11 in particular, require a panel to make an objective assessment of the matters that are before it, the panel must turn its attention to and direct its questions at claims and arguments that the parties have articulated. Where a complainant has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, a panel may not use its interrogative powers to make good the absence of relevant substantiating arguments and evidence.<sup>835</sup> We should not be understood to suggest, however, that, where arguments have been affirmatively *raised* by the parties, the panel should not fully scrutinize such evidence and argumentation. Where there is an *absence* of argumentation, however, a panel cannot intervene to raise arguments on a party's behalf and make the case for the complainant.

567. We recall that, in reviewing the European Union's argument that China failed to substantiate its claim under Article 6.5, the Panel stated that "the way in which China had pursued this claim in this dispute is far from ideal", and that it was "particularly troubled by the fact that the claim was not developed at all in China's first written submission".<sup>836</sup> The Panel explained that China's "fail[ure] to put forward a fuller explanation of and argument in support of its claim ... left the European Union in a difficult position in attempting to respond to a claim that was unclear".<sup>837</sup> The Panel determined, however, that China ultimately provided, "in its second written submission and its answer to [Panel] question 71, a sufficiently clear argument in support of its claim to allow the European Union an adequate opportunity to respond".<sup>838</sup>

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<sup>834</sup>European Union's appellant's submission, paras. 340-347.

<sup>835</sup>See also Appellate Body Report, *US – Continued Zeroing*, para. 343; Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

<sup>836</sup>Panel Report, para. 7.522.

<sup>837</sup>Panel Report, para. 7.522.

<sup>838</sup>Panel Report, para. 7.522.

568. We too are troubled by the way in which China pursued its claim under Article 6.5 regarding the confidential treatment of "product type" information submitted by Pooja Forge. As the Panel found, China did not articulate a "good cause" claim or argument under Article 6.5 in its first written submission. The arguments China did make in its first submission were limited to the deficiency of the non-confidential version of Pooja Forge's questionnaire response, which is a claim under Article 6.5.1, and not related to the issue of whether "good cause" for confidential treatment was shown under Article 6.5.

569. The Panel record indicates that, at the first meeting of the parties, the claims regarding Pooja Forge were not addressed by either party in its oral statement. After the first meeting of the parties, referring to China's first written submission, the Panel asked China the following:

Question 71: The Panel notes that in the heading of its claim regarding alleged deficiencies in questionnaire responses, China also refers to questionnaire responses by the producer in the analogue third country. The body of China's argumentation in this regard, however, does not make reference to this issue. Please elaborate.

China submitted its response to this question on the same day that it filed its second written submission. China's answer to Panel Question 71 stated, in part:

In China's view, a lot of (if not all) **information was considered as confidential although no "good cause" was shown**. In this respect, China *inter alia* refers to the fact that not even the categorizations ("product types") used for the provision of the data were disclosed. This information is obviously not confidential and China therefore fails to see any "good cause" for the confidential treatment of this information. Indeed, no "good cause" can be shown for treating the product types applied for the data to be provided, as confidential. By granting confidential treatment to these data, the EU violated Article 6.5 of the [*Anti-Dumping Agreement*].<sup>839</sup> (original boldface)

570. Although China mentioned, for the first time, the issue of "good cause" in its above response, it did not provide any further arguments or evidence in this respect. In its second written submission, China stated that it had not dropped its claim under Article 6.5 "as far as it relates to the deficient character of the questionnaire response of the producer in the analogue country".<sup>840</sup> China then stated that the non-confidential version of Pooja Forge's questionnaire response "does not contain *any information*, and in particular information on the "product types" on the basis of which the information has been provided by this producer which is obviously not confidential".<sup>841</sup> These arguments, however, addressed the issue of whether the non-confidential summary provided by

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<sup>839</sup> China's responses to Panel Question 71, p. 113.

<sup>840</sup> China's second written submission to the Panel, para. 1110.

<sup>841</sup> China's second written submission to the Panel, para. 1110. (original emphasis)

Pooja Forge met the requirement of Article 6.5.1. They were not relevant to the issue of whether "good cause" was shown under Article 6.5 for treating the information submitted by Pooja Forge in its questionnaire response as confidential.<sup>842</sup>

571. The Panel record further indicates that, at the second meeting of the parties, China merely repeated the same argument it had put forward in its second written submission, that Pooja Forge's non-confidential questionnaire response was inadequate.<sup>843</sup> China did not raise the issue of the lack of a "good cause" showing in its oral statement at that meeting. Following the second meeting of the parties, the Panel asked China to clarify whether it "expect[ed] a finding" regarding the issue of "good cause" under Article 6.5, or a finding regarding the consistency of the non-confidential summary of Pooja Forge's questionnaire response with Article 6.5.1.<sup>844</sup>

572. In response, China stated that it sought, first, a finding under Article 6.5, and second, if the Panel concluded that the information was properly treated as confidential, a finding under Article 6.5.1 that the European Union failed to require Pooja Forge to furnish a "non-confidential summary" of such information "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".<sup>845</sup> However, in support of these claims, China again merely reiterated its argument that Pooja Forge's questionnaire response "[did] not contain any information at all and, in particular, concerning the 'product types'".

573. Thus, as the Panel record clearly shows, the only time that China used the term "good cause" was in its response to Panel Question 71, and there it was used in a cursory manner that only asserted a claim, without providing substantiating arguments or evidence. Throughout the Panel proceedings, China focused on the lack of information regarding "product types" in the non-confidential version of

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<sup>842</sup>Although addressed to China, the European Union submitted its own comments in response to Panel Question 71, stating that, to the extent that China maintains its claims with regard to Pooja Forge, "the Panel should simply rule that China has failed to make a *prima facie* case", because it "failed to provide any evidence in accordance and within the deadlines set out in paragraph 16 of the Panel's working procedures". (European Union's response to Panel Question 71 after the first Panel meeting, para. 170)

<sup>843</sup>In response, the European Union stated that the Panel's *Working Procedures* prevented it from allowing China to articulate its arguments so late in the proceedings, and asserted that "the Panel should not go any further because China had its opportunity to try to make its case but it failed to even try". (Panel Report, para. 7.520)

<sup>844</sup>Panel Question 103, which reads in full:

With respect to the claim regarding the non-confidential versions of the questionnaire responses of the two EU producers and that of the Indian producer, the Panel notes that, in its written submissions, China refers to Article 6.5 only but in its response to Question [71] from the Panel it refers to Article 6.5.1. China's panel request refers both to Article 6.5 and 6.5.1. Please explain whether China expects a finding under the chapeau of Article 6.5 or under Article 6.5.1 from the Panel with respect to this claim.

<sup>845</sup>China's response to Panel Question 103 after the second Panel meeting, p. 24.

the questionnaire response, rather than the lack of a "good cause" showing for confidential treatment in the first place.

574. Rule 4 of the Panel's Working Procedures requires that, "[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments." As described above, the Panel record shows that China asserted its claim under Article 6.5 regarding the lack of a "good cause" showing for the confidential treatment of Pooja Forge's questionnaire response only in response to questions from the Panel, and articulated this claim only after the parties had provided the Panel with written submissions and had attended a substantive meeting. We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law. The late assertion of a claim under Article 6.5 with respect to the lack of a "good cause" showing for confidential treatment of Pooja Forge's "product type" information, and the absence of proper argumentation and of the provision of relevant evidence in support of this assertion, demonstrates that the European Union was not called upon to respond to China's claim under Article 6.5.

575. In the light of the above, we *find* that China failed to substantiate its claim under Article 6.5 of the *Anti-Dumping Agreement* that the confidential treatment of the "product type" information submitted by Pooja Forge in its questionnaire response was improper. Therefore, we *reverse* the Panel's finding, in paragraph 7.525 of the Panel Report, that the European Union acted inconsistently with its obligations under Article 6.5 of the *Anti-Dumping Agreement* "with respect to the treatment of confidential information submitted by Pooja Forge". Having reversed the Panel's finding on this basis, we see no need to make a separate finding under Article 11 of the DSU that the Panel, as argued by the European Union, deprived it of its due process rights and impermissibly made the case for China.<sup>846</sup>

E. *Confidential Treatment of the Identity of the Complainants*

576. We now turn to China's other appeal of the Panel's findings under Article 6.5 of the *Anti-Dumping Agreement* that the European Union did not err in treating the identity of the complainants and supporters of the complaint as confidential. In the fasteners investigation, the complainants and supporters of the complaint requested the Commission to grant such treatment in order "to avoid a potential retaliation which could be carried out by some of their Customers who also

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<sup>846</sup>European Union's appellant's submission, paras. 340-347.



buy products directly from P.R. China".<sup>847</sup> The complainants alleged that, if these customers knew which European producers had requested or supported the initiation of this investigation, they might discontinue purchasing fasteners from those producers. The Commission accepted this request and granted confidential treatment.

577. The Panel found that, although the complainants' "good cause" showing was limited to the allegation contained in the complaint, this was not a "fatal lack of evidence" under Article 6.5.<sup>848</sup> In the Panel's view, the reason for the confidential treatment provided in the complaint, that the retaliation could be carried out by customers who also bought products from Chinese producers, "substantiated their assertion to a certain degree by explaining the circumstances which they thought showed that commercial retaliation could happen".<sup>849</sup> The Panel stated that "unless there is some reason to believe that the fear of retaliation is unreasonable, unfounded, or untrue—and China has proffered none—we consider that the allegation of the complainants in this case is a sufficient basis for the Commission's conclusion."<sup>850</sup> The Panel therefore concluded that the European Union had not acted inconsistently with Article 6.5 when it treated the complainants' identity as confidential based on their allegation of potential commercial retaliation.<sup>851</sup>

578. On appeal, China argues that the Panel erred in finding that the "potential commercial retaliation" alleged by the complainants satisfied the "good cause" requirement of Article 6.5. China claims that the commercial retaliation asserted by the complainants was not sufficient to constitute "good cause", because it was "merely hypothetical".<sup>852</sup> China further submits that the complainants failed to provide any evidence to support the assertion of potential commercial retaliation contained in the complaint.<sup>853</sup> Moreover, China claims that the Panel erred in the interpretation of Article 6.5, and acted inconsistently with Article 11 of the DSU, when it shifted the burden to China to show that the complainants' assertion of potential commercial retaliation was "unfounded, unreasonable, or untrue".<sup>854</sup> China contends that it demonstrated that this assertion was unfounded when it argued that the same producers' identity were in fact disclosed as sampled producers in the context of the Commission's injury determination.<sup>855</sup> Finally, should the Appellate Body find that no "good cause" existed to treat the identity of the complainants and supporters as confidential under Article 6.5, China asks the Appellate Body to complete the analysis under Articles 6.2 and 6.4 of the *Anti-Dumping*

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<sup>847</sup>Panel Report, para. 7.448.

<sup>848</sup>Panel Report, para. 7.453.

<sup>849</sup>Panel Report, para. 7.453.

<sup>850</sup>Panel Report, para. 7.453.

<sup>851</sup>Panel Report, para. 7.455.

<sup>852</sup>China's other appellant's submission, paras. 450-453.

<sup>853</sup>China's other appellant's submission, paras. 458 and 459.

<sup>854</sup>China's other appellant's submission, paras. 464-467 (referring to Panel Report, para. 7.453).

<sup>855</sup>China's other appellant's submission, paras. 471-477.

*Agreement* and find that the European Union's failure to disclose the identity of the complainants and supporters was also inconsistent with these provisions.<sup>856</sup>

579. In response, the European Union argues that China's claim ignores the fact that the purpose of protecting confidential information under Article 6.5 is to ensure that any adverse consequences resulting from the disclosure of sensitive information remain hypothetical.<sup>857</sup> According to the European Union, the Panel did not rely on a "mere assertion", but evaluated the evidence in the light of the specific justification given.<sup>858</sup> In addition, the European Union points out that the claim China raises under Article 11 of the DSU was not included in its Notice of Other Appeal, and that it is therefore not properly before the Appellate Body.<sup>859</sup> In any event, the European Union asserts that the Panel did not err in shifting the burden of proof to China, because, having brought the claim before the Panel, it was up to China to make out a *prima facie* case of inconsistency.<sup>860</sup> Regarding the disclosure of the identity of the sampled producers later in the investigation, the European Union contends that China's claim relates to the Panel's weighing of the evidence, and therefore should have been brought under Article 11 of the DSU, which China did not do.<sup>861</sup> On the substance of the argument, the European Union counters that not all of the sampled producers were supporters of the complaint, and that the sampled producers that merely cooperated in the investigation did not face the same risks in having their identity disclosed as the complainants.<sup>862</sup>

580. As a preliminary matter, we address the European Union's challenge that China's claim under Article 11 of the DSU in relation to the Panel's finding that "good cause" had been shown for the confidential treatment by the Commission of the complainants' identity is not properly before us because that claim was not mentioned in China's Notice of Other Appeal. China contends that the language of its Notice of Other Appeal was sufficient to notify the European Union of the nature of China's claim despite the absence of an explicit listing of Article 11 of the DSU in this respect. China further observes that, under the new *Working Procedures* that entered into force on 15 September 2010, the Notice of Other Appeal and the other appellant's submission are filed on the same day. Therefore, any doubt about whether a claim was raised in China's Notice of Other Appeal would have been easily dispelled by its other appellant's submission.<sup>863</sup>

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<sup>856</sup>China's other appellant's submission, paras. 482-488.

<sup>857</sup>European Union's appellee's submission, para. 371.

<sup>858</sup>European Union's appellee's submission, para. 375 (referring to China's other appellant's submission, para. 462).

<sup>859</sup>European Union's appellee's submission, para. 362.

<sup>860</sup>European Union's appellee's submission, para. 378.

<sup>861</sup>European Union's appellee's submission, para. 363.

<sup>862</sup>European Union's appellee's submission, para. 385.

<sup>863</sup>China's responses to questioning at the oral hearing.

581. We are not convinced by China's arguments. Rules 20(2)(d)(ii) and 23(2)(c)(ii)(B) of the *Working Procedures* require a participant to include in its Notice of Appeal or Notice of Other Appeal "a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying". The Appellate Body has recognized the due process function that a Notice of Appeal fulfils, emphasizing:

... the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively.<sup>864</sup>

582. If an appellee is not notified of the claims raised by the appellant or other appellant in the Notice of Appeal or Other Appeal, those claims are not properly within the scope of the appeal, and the Appellate Body will not make findings thereon.<sup>865</sup> China failed to list Article 11 of the DSU in its Notice of Other Appeal with regard to the confidential treatment of the identity of the complainants and supporters of the complaint, and we therefore find that this claim under Article 11 is not properly before us. Thus, absent a claim under Article 11 of the DSU, we are not called upon to evaluate whether the Panel made an objective assessment of the facts or to examine the Panel's weighing of the evidence before it.

583. We recall that, in addition to its claim under Article 11, which we find to be outside the scope of our review, China also raises the following four arguments as to why the Panel erred in finding that confidential treatment of the identity of the complainants and supporters of the complaint was not inconsistent with Article 6.5 of the *Anti-Dumping Agreement*. First, China alleges that the Panel relied upon the hypothetical character of commercial retaliation that "could" happen, rather than that "would" happen.<sup>866</sup> Second, China argues that the Panel relied on a mere assertion contained in the complaint, and did not require any evidence in support of this assertion.<sup>867</sup> Third, China maintains that the Panel shifted the burden to China to show that the assertion contained in the complaint was "unfounded, unreasonable, or untrue".<sup>868</sup> Fourth, China asserts that the Panel erroneously rejected China's argument that the later disclosure of the complainants' and supporters' identity as sampled

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<sup>864</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62.

<sup>865</sup> See Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 72; Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)*/*EC – Bananas III (Article 21.5 – US)*, para. 285; and Appellate Body Report, *Japan – Apples*, paras. 124-128.

<sup>866</sup> China's other appellant's submission, para. 454.

<sup>867</sup> China's other appellant's submission, para. 455.

<sup>868</sup> China's other appellant's submission, para. 464 (referring to Panel Report, para. 7.453).

producers undermined the allegation that "good cause" existed for the non-disclosure of the identity of the same producers as complainants.<sup>869</sup>

584. On this basis, we do not understand China to argue that "commercial retaliation" may not constitute a "good cause" justification for confidential treatment. In this respect, we agree with the Panel that "nothing in Article 6.5 ... would exclude potential commercial retaliation from constituting good cause for the confidential treatment of any information, including the identity of complainants", and China does not challenge this finding.<sup>870</sup>

585. Rather, we understand China to argue that the Commission erred in concluding that a showing of "good cause" was made by the complainants and that the Panel erred in upholding the Commission's conclusion. We have set out above that the standard of "good cause" requires that a balance be struck between the proprietary interests of those seeking protection of information and the transparency and due process that should be accorded to parties that require access to information to defend their interests. On the basis of this test, it is for the investigating authority to strike that balance and to make an objective determination of whether "good cause" has been shown. Based on this test, a panel may review such a determination on the basis of relevant facts and legal arguments. Thus, China's appeal requires us to examine whether the Panel, in reviewing the Commission's determination, made an error in its legal interpretation of Article 6.5 or incorrectly applied Article 6.5 to the ascertained facts on record in this case. With this in mind, we turn to review China's four arguments set out above.

586. First, China contends that a party requesting confidential treatment must demonstrate that potential commercial retaliation "would" happen if the information was disclosed, and it is insufficient merely to show that such retaliation "could" happen. The question before us, therefore, is whether the Panel made an error in the interpretation and application of Article 6.5 because a request to treat information as confidential requires a demonstration that disclosure "would" give rise to the potential for retaliation, and not simply that it "could" do so.

587. As we have found above, "good cause" can be shown when the party requesting confidential treatment demonstrates the risk of a potential adverse consequence. The purpose of granting confidential treatment in this situation is "precisely to make sure that the feared adverse effect, in this case 'potential commercial retaliation', remains hypothetical, and does not actually materialize".<sup>871</sup> We consider that China's argument that the complainants had to demonstrate that potential

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<sup>869</sup>China's other appellant's submission, para. 471.

<sup>870</sup>Panel Report, para. 7.452.

<sup>871</sup>Panel Report, para. 7.453.

commercial retaliation "would" happen—rather than "could" happen—mistakes the nature of the inquiry. Rather, China's claim relates to the gravity and likelihood of the risk of the occurrence of potential commercial retaliation that a complainant alleges, which is a question of degree. We do not consider that the degree of risk of commercial retaliation is an issue of law. The degree of risk does not define what constitutes "good cause" within the meaning of Article 6.5. Nor do we consider the degree of risk to be an application of the "good cause" standard to ascertained facts. Rather, it is a matter relevant to the extent and nature of the evidence required by an investigating authority to support a showing of "good cause". In reviewing the authority's determination of "good cause", the Panel's assessment of the likelihood that commercial retaliation will occur goes to the Panel's weighing of the evidence. Thus, we consider that China's challenge is directed at the Panel's assessment of whether the kind and extent of evidence before the Commission was sufficient for the Commission to have reached the conclusion that a showing of "potential commercial retaliation" as "good cause" had been made.

588. Absent a claim that the Panel failed to conduct an objective assessment of the facts, this is not a matter to be reviewed by us on appeal. The level of risk and, more particularly, the likelihood or probability that such risk may come about are matters of degree and must be assessed on the facts, and the Panel conducted such an assessment in reaching its finding. No claim under Article 11 of the DSU has been properly raised on appeal, and therefore the question before us is whether the Panel made an error of legal interpretation or application. No such error, however, has been demonstrated. Consequently, this factual determination by the Panel warrants no interference by us.

589. Second, with regard to China's claim that the Panel relied on a mere assertion in reaching its finding, we recall that the Panel noted that the complainants alleged in the complaint that confidential treatment of the complainants' and supporters' identity was necessary because retaliation "could be carried out by some of their Customers who also buy products directly from P.R. China".<sup>872</sup> According to the Panel, "'potential commercial retaliation' is not a sufficiently concrete phenomenon that evidence of its existence is likely to be obtainable".<sup>873</sup> The Panel considered that the Commission could rely on the factual circumstance of having customers in common with Chinese suppliers who might be negatively affected by the complainants' actions as evidence of a risk of commercial retaliation. The Panel went on to state that, "unless there is some reason to believe that the fear of retaliation is unreasonable, unfounded or untrue—and China has proffered none—we consider that the

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<sup>872</sup>Panel Report, para. 7.448 (quoting European Industrial Fasteners Institute (EIFI), Complaint against Imports of Carbon Steel Fasteners from China, 24 September 2007 (Panel Exhibit CHN-15)).

<sup>873</sup>Panel Report, para. 7.453.

allegation of the complainants in this case is a sufficient basis for the Commission's conclusion".<sup>874</sup> The Panel concluded that "China [did] not contest the factual assertion that some of the customers of the complainants and the supporters of the application also bought the subject product from Chinese producers."<sup>875</sup> The Panel found that, "by stating that their customers were also themselves importers of the subject product from China, the complainants substantiated their assertion to a certain degree by explaining the circumstances which they thought showed that commercial retaliation could happen."<sup>876</sup>

590. We do not believe that the Panel, in making these findings, misinterpreted Article 6.5 of the *Anti-Dumping Agreement* or misapplied the correct interpretation of that provision to the ascertained facts before it. Rather, the Panel found that the assertion contained in the complaint demonstrated "good cause" for treating the complainants' identity confidential, because potential commercial retaliation could occur due to the uncontested fact that the complainants had customers in common with Chinese suppliers. Moreover, we do not think that China's argument is directed at whether the Panel erred in its interpretation of Article 6.5 or application of that provision to the facts of the case. Rather, China's argument that the Panel relied on this "mere assertion"<sup>877</sup> in reaching its finding concerns the Panel's weighing of the evidence before it. Yet, as stated above, we are not called upon to assess whether the Panel exceeded its authority as the trier of facts in reviewing the Commission's decision to keep the identity of the complainants and supporters confidential, because no claim under Article 11 of the DSU has properly been raised in this respect.

591. Third, China argues that the Panel shifted the burden to China to show that the assertion contained in the complaint was "unfounded, unreasonable, or untrue".<sup>878</sup> We recall that, before the Panel, China claimed that the European Union had acted inconsistently with Article 6.5 by accepting the assertion of "potential commercial retaliation" in the complainants' request as a sufficient showing of "good cause" for the confidential treatment of their identity. In raising this claim before the Panel, it was for China to make out a *prima facie* case that no "good cause" had been demonstrated by the complainants, and that the Commission's decision to grant the complainants' request to treat their identity as confidential was inconsistent with Article 6.5. The Panel did not err, therefore, in asking China to present legal and factual arguments to substantiate its claim that "good cause" was not shown, or, as the Panel put it, China had to show that the complainants' assertion of potential

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<sup>874</sup>Panel Report, para. 7.453.

<sup>875</sup>Panel Report, para. 7.452.

<sup>876</sup>Panel Report, para. 7.453.

<sup>877</sup>China's other appellant's submission, para. 455.

<sup>878</sup>China's other appellant's submission, para. 464 (referring to Panel Report, para. 7.453).

commercial retaliation was "unreasonable, unfounded, or untrue".<sup>879</sup> We thus do not find that the Panel shifted the burden of proof to China by requesting it to do so. As described above, the Panel reviewed the Commission's determination, and explained why it considered that the complainants' assertion of "potential commercial retaliation" provided a sufficient showing of "good cause" for confidential treatment of the complainants' identity. In our view, the thrust of China's challenge regarding these findings is again directed mainly at the Panel's weighing of the evidence. As no claim under Article 11 of the DSU has been properly raised in this regard, we decline to examine further these findings of the Panel.

592. Finally, we recall that the Panel rejected China's argument that the disclosure of the identity of the complainants and supporters as sampled producers undermined the allegation that "good cause" existed for the non-disclosure of the identity of the same producers or supporters. China's argument on appeal relies on its challenge of the Panel's finding under Article 4.1 of the *Anti-Dumping Agreement* that the domestic industry from which the sampled producers were drawn were *not all* complainants or supporters of the complaint, because the view of at least one of the sampled producers regarding support or opposition to the complaint was unknown to the Commission.<sup>880</sup> We have found above that the Panel did not err in finding that at least one producer who did not affirmatively state support for the complaint was included in the domestic industry and selected for the sample.<sup>881</sup> Therefore, China's contention that all producers included in the sample were complainants or supporters of the complaint has not been established before the Panel, nor did the Panel make a factual finding to that effect. Hence, we also do not agree that the disclosure of the identity of the sampled producers demonstrates, as China contends, that no "good cause" was shown for keeping the identity of the complainants and supporters confidential. Moreover, we find again that China's challenge concerns the Panel's factual findings and its weighing of the evidence. We recall that China did not properly raise a claim under Article 11 of the DSU with respect to the Panel's disposition of its argument that the later disclosure of the complainants' identity as sampled producers undermined the allegation that "good cause" existed for the non-disclosure of their identity as complainants. Moreover, China has not pointed to any specific error in the Panel's legal interpretation or application of Article 6.5 to the facts of the case. We therefore decline to address further China's argument in this regard.

593. Based on the foregoing, we *uphold* the Panel's finding, in paragraph 7.455 of the Panel Report, that the European Union did not act inconsistently with its obligations under Article 6.5 of the

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<sup>879</sup>Panel Report, para. 7.453.

<sup>880</sup>See *supra*, para. 451.

<sup>881</sup>See *supra*, para. 452.

*Anti-Dumping Agreement* when the Commission granted the request to treat the identity of the complainants and supporters as confidential.<sup>882</sup>

F. *Whether China's Claim under Articles 6.2 and 6.4 of the Anti-Dumping Agreement Regarding the Non-Disclosure of the Identity of the Complainants Was within the Panel's Terms of Reference*

594. The European Union appeals the Panel's finding that China's claims under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* with respect to the non-disclosure of the identity of the complainants and supporters were within the Panel's terms of reference.<sup>883</sup> The European Union raises this procedural challenge in its Notice of Appeal independently of China's substantive claims in its Notice of Other Appeal that the confidential treatment of the identity of the complainants and supporters is inconsistent with Article 6.5. The European Union appeals the Panel's terms of reference finding notwithstanding the fact that the Panel subsequently found that the confidential treatment of the complainants' identity was not inconsistent with Article 6.5 and that, as a consequence, the European Union had not acted inconsistently with Article 6.2 or 6.4.<sup>884</sup>

595. As we have discussed above, Article 6.2 of the DSU requires a complaining party to identify in its panel request the specific measure at issue and provide a brief summary of the legal basis of the complaint, sufficient to "*present the problem clearly*".<sup>885</sup> If a party fails in its panel request to "present the problem clearly", the claim in question is outside the panel's jurisdiction, and cannot be heard.

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<sup>882</sup>China requests us to complete the analysis under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* regarding the alleged failure to disclose the identity of the complainants only if we reverse the Panel's finding under Article 6.5 that a "good cause" showing of "potential commercial retaliation" had been made. Having upheld this finding of the Panel under Article 6.5, we consider China's request for completion of the analysis under Articles 6.2 and 6.4 moot.

<sup>883</sup>European Union's appellant's submission, para. 361 (referring to Panel Report, para. 7.458).

<sup>884</sup>The Panel reached this finding because information that is properly treated as confidential under Article 6.5 is not subject to the requirement in Article 6.4 to provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases. Moreover, the Panel found that the requirement in Article 6.2 that interested parties have a full opportunity for the defence of their interests throughout the anti-dumping investigation is also conditional upon the need to preserve confidentiality.

<sup>885</sup>Emphasis added. As we have also stated above, the panel request "establishes and delimits the jurisdiction of the panel" and also serves the important due process objective of notifying the respondent of the nature of the case it must defend. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640. See Appellate Body Report, *US – Carbon Steel*, para. 126 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186; also Appellate Body Report, *EC – Chicken Cuts*, para. 155; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108)) This request must be examined as it existed at the time of submission and, if deficiencies exist, they cannot be cured through the examination of the party's subsequent submissions. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642; Appellate Body Report, *EC – Bananas III*, para. 143; Appellate Body Report, *US – Carbon Steel*, para. 127)



596. China's panel request states that the Definitive Regulation was inconsistent with:

... Articles 6.2 and 6.4 of the [*Anti-Dumping Agreement*] and paragraph 151(c)(e) of the *Working Party Report on the Accession of China* because the EC failed to ensure throughout the investigation to Chinese producers/exporters the full opportunity for the defence of their interests and failed to provide timely opportunities for them to see all information that is relevant to the presentation of their cases, including, but not limited to the composition of the domestic industry, data concerning normal value determination, information on the adjustments for differences affecting price comparability, Eurostat data on the basis of which are based the total EC production and EC consumption figures.<sup>886</sup>

China's panel request contains four claims under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* relating to: (i) the composition of the domestic industry; (ii) data concerning normal value determination; (iii) information on the adjustments for differences affecting price comparability; and (iv) Eurostat data on which total EU production and consumption figures are based.

597. We find that China's claim regarding the disclosure of the identity of the complainants and supporters does not fall within the scope of any of the four above descriptions. The Panel did not find otherwise, but considered that China's panel request should not be read as being limited to the specific descriptions contained in the request because they are preceded by the phrase "including, but not limited to".<sup>887</sup> The Appellate Body has previously found, however, that this phrase cannot operate to include any and all other claims not specifically included in the request.<sup>888</sup> Rather, each claim must be presented in a manner that "presents the problem clearly" within the meaning of Article 6.2 of the DSU. China emphasizes the distinction between "claims" and "arguments", and asserts that the above descriptions represent "arguments" that need not be included in a panel request at all pursuant to Article 6.2. This, however, does not mean that the mere listing of Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*, without more, succeeded in "present[ing] the problem clearly" in respect of the alleged failure to disclose the identity of the complainants and the supporters of the complaint.

598. Therefore, we disagree with the Panel that the "nature" of the obligations in Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* is such that a complaining party need only list these Articles in order to satisfy the requirements in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", and to notify the respondent and third parties of the nature of the case raised. We are of the view that the obligations contained in Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* are relatively broad in scope and apply on a

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<sup>886</sup> China's panel request (Panel Report, Annex G, p. G-9).

<sup>887</sup> Panel Report, para. 7.458.

<sup>888</sup> Appellate Body Report, *India – Patents (US)*, para. 90.

continuous basis throughout an investigation. The variety of claims contained in the panel request itself attests to this fact. It may be possible in some circumstances to refer to the initial written submissions of the parties to clarify the meaning of the terms used in a panel request. In this case, however, we do not believe that China's claim under Articles 6.2 and 6.4 challenging the non-disclosure of the complainants' and supporters' identity can be read into the terms actually used in the panel request by recourse to clarification found in China's submissions.

599. We therefore *reverse* the Panel's finding, in paragraph 7.458 of the Panel Report, that China's claims under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* regarding the non-disclosure of the identity of the complainants and the supporters of the complaint were within the Panel's terms of reference. As a consequence, we declare moot the Panel's subsequent finding, in paragraph 7.459 of the Panel Report, that the European Union did not act inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* by not disclosing the identity of the complainants and the supporters of the complaint.

#### **IX. Time-Limit for Submission of the MET/IT Claim Form**

600. We turn now to address China's appeal of the Panel's finding that the "Market Economy Treatment and/or Individual Treatment Claim Form" (the "MET/IT Claim Form") in the fasteners investigation was not subject to the 30-day period for reply provided in Article 6.1.1 of the *Anti-Dumping Agreement*. To provide the relevant background, we recall that, when an anti-dumping investigation involves an NME, the European Union applies an alternative method for calculating normal value, pursuant to Article 2(7) of the Basic AD Regulation, using data from a market economy third country or using a constructed value and also calculates a country-wide anti-dumping duty for all exporters pursuant to Article 9(5) of the Basic AD Regulation.<sup>889</sup> However, if they satisfy certain criteria, NME exporters can individually establish that they operate under market conditions (under the "MET test"), or, in the alternative, that their export prices are free from State intervention (under the "IT test").<sup>890</sup> If an exporter satisfies the MET test, both normal value and export price will be calculated based on its own domestic sales data, and it will receive an individual dumping margin and individual duty, thereby receiving the same treatment as market economy exporters.<sup>891</sup> If an exporter does not fulfil the MET test, but satisfies the IT test, its dumping margin will be calculated based on a comparison of an alternative normal value calculation and that particular exporter's export price, such

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<sup>889</sup>Panel Report, para. 7.47.

<sup>890</sup>See *supra*, section IV.B of this Report for a detailed description of the MET and IT tests contained in the Basic AD Regulation.

<sup>891</sup>Panel Report, para. 7.47.

that it will receive an individual dumping margin and duty rather than a country-wide duty.<sup>892</sup> For purposes of determining what kind of treatment NME exporters will receive during the investigation, the Commission distributes to each exporter a single form entitled "Market Economy Treatment and/or Individual Treatment Claim Form" (the MET/IT Claim Form). The Commission distributed these forms in the fasteners investigation, and gave Chinese producers 15 days from the date of publication of the Notice of Initiation of the investigation to complete them.<sup>893</sup>

601. China argued before the Panel that the European Union acted inconsistently with Article 6.1.1 of the *Anti-Dumping Agreement* because the Commission failed to allow the Chinese exporters and producers at least 30 days to complete the MET/IT Claim Forms, counted one week from the date on which they were sent out by the investigating authority. The Panel rejected China's claim. It found that the 30-day period stipulated in Article 6.1.1 applies only to "questionnaires", which it defined as "the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which ... seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation)".<sup>894</sup> The Panel examined the MET/IT Claim Form and concluded that the form was not a "questionnaire" within the meaning of Article 6.1.1, and that the European Union was not obliged to give producers at least 30 days for its submission.<sup>895</sup>

602. On appeal, China claims that the Panel erred in its interpretation of the term "questionnaires" in Article 6.1.1 of the *Anti-Dumping Agreement*, as well as in its application of this interpretation to the MET/IT Claim Form. China argues that the proper interpretation of the term "questionnaires" covers all "information requests ... which are so substantial that they deserve verifications being carried out and [which] do not prevent the investigating authorities from complying with the time-frames set out in the [*Anti-Dumping Agreement*]".<sup>896</sup> In the alternative, if the Appellate Body upholds the Panel's interpretation of the term "questionnaires", China argues that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* when it found that the MET/IT Claim Form did not fall within its definition of that term.<sup>897</sup>

603. The European Union requests the Appellate Body to uphold the Panel's interpretation of Article 6.1.1 of the *Anti-Dumping Agreement* and argues that China's interpretation "would make the

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<sup>892</sup>Panel Report, paras. 7.48 and 7.49.

<sup>893</sup>Panel Report, para. 7.567.

<sup>894</sup>Panel Report, para. 7.574.

<sup>895</sup>Panel Report, para. 7.577.

<sup>896</sup>China's other appellant's submission, para. 538.

<sup>897</sup>China's other appellant's submission, para. 544.

meaning of the term 'questionnaires' arbitrary and dependent on a case-by-case analysis".<sup>898</sup> The European Union also argues that the Panel's determination that the MET/IT Claim Form was not a "questionnaire" for purposes of Article 6.1.1 was correct, because the MET/IT Claim Form is narrow in scope and serves a different purpose from "the initial comprehensive questionnaire" distributed in an anti-dumping investigation.<sup>899</sup> The European Union further submits that China's claims under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* are not properly before the Appellate Body because they are not included in China's Notice of Other Appeal.<sup>900</sup>

604. As a preliminary matter, we agree that China's Notice of Other Appeal does not explicitly mention claims under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*<sup>901</sup> in connection with its claim that the Panel erred in its application of Article 6.1.1 of the *Anti-Dumping Agreement*. In its Notice of Other Appeal, China "seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Article 6.1.1 of the [*Anti-Dumping Agreement*]". China asserts that "the Panel erred in its interpretation of the term 'questionnaire' in Article 6.1.1", and that "even assuming that the Panel did not err in its interpretation of the term 'questionnaire' ... the Panel erroneously concluded that the MET/IT claim form was not a 'questionnaire' according to this definition". China also requests the Appellate Body "to reverse the Panel's findings and to conclude that the 'MET/IT claim form' is a questionnaire within the meaning of Article 6.1.1 of the [*Anti-Dumping Agreement*] and to complete the analysis by finding that the [European Union] violated Article 6.1.1 of the [*Anti-Dumping Agreement*]".

605. Accordingly, it is clear from the face of the Notice of Other Appeal that this ground of China's other appeal was raised only under Article 6.1.1 of the *Anti-Dumping Agreement*. As discussed above<sup>902</sup>, under Rules 20(2)(d)(ii) and 23(2)(c)(ii) of the *Working Procedures*, only claims under those provisions of the covered agreements specifically listed in a Notice of Appeal or Other Appeal are properly raised on appeal. Therefore, as China's claims under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* regarding the MET/IT Claim Form were not included in its Notice of Other Appeal, we decline to make findings upon them. We proceed next to address the remaining issues raised in China's other appeal under Article 6.1.1 of the *Anti-Dumping Agreement*.

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<sup>898</sup>European Union's appellee's submission, para. 418.

<sup>899</sup>European Union's appellee's submission, para. 429.

<sup>900</sup>European Union's appellee's submission, para. 405.

<sup>901</sup>We note that the European Union has not raised this challenge in its appellee's submission, but we recall that matters going to the jurisdiction of a panel are fundamental and can therefore be raised at any stage in a proceeding. (See Appellate Body Report, *EC and certain Member States – Large Civil Aircraft*, para. 791; and Appellate Body Report, *US – Carbon Steel*, para. 123)

<sup>902</sup>See *supra*, paragraphs 581 and 582.

606. Articles 6.1 and 6.1.1 of the *Anti-Dumping Agreement* read as follows:

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[\*] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

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[\* original footnote 15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

607. The Panel began its interpretation of the term "questionnaires" in Article 6.1.1 by referring to a dictionary definition, namely "a formulated series of questions by which information is sought from a selected group".<sup>903</sup> The Panel determined that this definition "[did] not suffice to answer the question before [it]", because applying such a definition "could make it impossible for the authorities to obtain necessary information while still respecting the time limits on investigation set forth in Article 5.10 of the [*Anti-Dumping Agreement*]".<sup>904</sup>

608. The Panel went on to analyze the context of the term "questionnaires" in Article 6.1.1 provided by other provisions of the *Anti-Dumping Agreement* that contain the term, including Annex I on Procedures for On-the-Spot Investigations Pursuant to Paragraph 7 of Article 6.<sup>905</sup> Annex I states, in paragraphs 6 and 7 respectively, that "[v]isits to explain the questionnaire should only be made at the request of an exporting firm" and that such visits "should be carried out after the response to the questionnaire has been received". The Panel found that these references suggest that "'the questionnaire' is a substantial enough information request to warrant a visit to verify the information", "that it is sent early in the investigation", and that a verification visit is "a significant event" not likely to be repeated with respect to multiple "questionnaires".<sup>906</sup> In addition to Annex I, the Panel also emphasized the use of the singular form of the term in footnote 15 of Article 6.1.1, which states that

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<sup>903</sup>Panel Report, para. 7.571 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2447).

<sup>904</sup>Panel Report, para. 7.571.

<sup>905</sup>Panel Report, para. 7.572 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.276).

<sup>906</sup>Panel Report, footnote 1122 to para. 7.574.

"the time-limit for exporters shall be counted from the date of receipt of the questionnaire".<sup>907</sup> The Panel opined that, if the drafters had intended the obligation in Article 6.1.1 to apply to more than one questionnaire, they might have used a plural or indefinite formulation in the footnote, such as, "'any' or 'a' 'questionnaire'".<sup>908</sup> Instead, in the Panel's view, the language of the footnote suggests that a single questionnaire is sent to each recipient. The Panel found that the term "questionnaires" in the first sentence of Article 6.1.1 refers to:

... one kind of document in an investigation. Turning to the question of what that document might be, we note that the considerations of context ... suggest that it refers to the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which questionnaire seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation).[\*]

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[\* original footnote 1123] We recognize that there may be differences in the initial comprehensive questionnaires sent to the different interested parties, reflecting their different activities and interests in the investigation. Moreover, depending on how a Member organizes the conduct of anti-dumping investigations, there may be separate and distinct initial questionnaires concerning the issues of dumping and injury and causation. These circumstances do not affect our fundamental conclusion, that the initial comprehensive document, or set of documents, covering all of these issues are encompassed by the term "questionnaires" in Article 6.1.1.<sup>909</sup>

609. The question before us is whether the Panel erred in defining the term "questionnaires" in Article 6.1.1 in this manner. The interpretation of Article 6.1.1 requires that the provision be read in its proper context, in particular Article 6.1, which it follows. Article 6.1 states that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." Article 6.1 thus requires an investigating authority to give interested parties: (i) notice of the information the authority requires; and (ii) "ample opportunity" to present their evidence in writing. Where a specific request for information is made by an investigating authority, what constitutes "ample opportunity" to respond will depend upon the specific nature and scope of the request.<sup>910</sup> Along with Article 6.2 of the *Anti-Dumping Agreement*, the Appellate Body has found that the language in Article 6.1 provides for the "fundamental due process

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<sup>907</sup> Panel Report, para. 7.573. (emphasis added by the Panel)

<sup>908</sup> Panel Report, para. 7.573.

<sup>909</sup> Panel Report, para. 7.574.

<sup>910</sup> See Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 15.23, where that panel made a similar finding.

rights" of interested parties in an anti-dumping investigation.<sup>911</sup> Together, these provisions "suggest there should be liberal opportunities for respondents to defend their interests".<sup>912</sup>

610. Read in this context, Article 6.1.1 is concerned with the circumstance in which "[e]xporters or foreign producers" are asked to complete "questionnaires", and requires the investigating authority to allow these responding parties at least 30 days from the date of receipt to submit responses. Domestic producers can control the timing of the submission of a request for initiation of an anti-dumping investigation because it is their complaint that triggers the authority's investigative process. The complaining producers therefore have an opportunity to gather much of the evidence necessary to support their complaint in advance. The responding parties, on the other hand, typically receive no notice until the initiation of the investigation. Article 6.1.1 protects exporters and foreign producers by requiring investigating authorities to provide them with at least 30 days to reply to "questionnaires", and by allowing that extensions should be granted whenever practicable, upon cause shown. This indicates to us that the specific due process interest of exporters and foreign producers to be afforded an ample opportunity to respond has been expressly provided for.<sup>913</sup>

611. The proper interpretation of Article 6.1.1 must also take into considerations the interests of investigating authorities in controlling their investigative process and bringing investigations to a close within a stipulated period of time. Article 5.10 of the *Anti-Dumping Agreement* requires that investigations be completed within 12 months or, in special circumstances, no more than 18 months. In this vein, Article 6.14 of the *Anti-Dumping Agreement* states that none of the procedures set out under Article 6 is intended "to prevent the authorities of a Member from proceeding expeditiously" in reaching their determinations. The balance between a party's "ample opportunity" and the investigating authority's interest in controlling the investigative process was articulated by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, where it found that:

... the due process rights in Article 6 of the Anti-Dumping Agreement—which include the right to 30 days for reply to a questionnaire—"cannot extend indefinitely" but, instead, are limited by the investigating authority's need "to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion" of the proceeding. As such, the time-limits for completing an investigation serve to circumscribe the obligation in

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<sup>911</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

<sup>912</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

<sup>913</sup> Footnote 15 of Article 6.1.1 ensures that foreign exporters receive a full 30 days for completion and submission of the questionnaires, by specifying that this period "shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent".

Article 6.1.1 to provide all interested parties 30 days to reply to a questionnaire.<sup>914</sup> (emphasis omitted; footnotes omitted)

612. Therefore, while Article 6.1.1 captures a specific due process concern as indicated above, the "questionnaires" referred to in that Article do not refer to every request for information made by an investigating authority to exporters or foreign producers. Rather, the "questionnaires" must be substantial requests, distributed early in the investigation, when a 30-day timeframe for the response would not lead to a delay in the completion of the investigation. They afford the investigating authority an early opportunity to solicit relevant information from exporters and foreign producers on key aspects of the investigation that is to be conducted by the authority.

613. Based on these considerations, we conclude that the meaning and scope of the term "questionnaires" in Article 6.1.1 of the *Anti-Dumping Agreement*, and its application to specific kinds of documents, must reflect a balance between the due process requirement to provide parties with an "ample opportunity" to submit all information they consider responsive to a questionnaire request in an anti-dumping investigation, and the overall timeframe imposed on the investigation under Article 5.10, along with the need for authorities to proceed expeditiously as contemplated in Article 6.14. We therefore find that the "questionnaires" referred to in Article 6.1.1 are a particular type of document containing substantial requests for information, distributed early in an investigation, and through which the investigating authority solicits a substantial amount of information relating to the key aspects of the investigation that is to be conducted by the authority (that is, dumping, injury, and causation). While in many investigations one "questionnaire" may be employed to solicit such information on these aspects of the investigation, we consider that, depending on how different Members organize the conduct of the investigation process, a party may receive several substantial requests soliciting such comprehensive information that are "questionnaires" within the meaning of Article 6.1.1.

614. Having defined the kind of information requests that qualify as "questionnaires", we now turn to examine the MET/IT Claim Form at issue in this case. The European Commission distributes MET/IT Claim Forms to exporters and foreign producers in countries specified as NMEs under Article 2(7) of its Basic AD Regulation. The form is 14 pages long and contains questions regarding corporate identity and other corporate information, primary materials and other cost components for the product concerned, industrial property rights, labour rights and working conditions, production facilities and production, sales prices, financial statements, and accounting principles and practice.

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<sup>914</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 241 and 242; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 73.



The purpose of the MET/IT Claim Form is to determine whether a particular exporter or producer from an NME country should be treated as a market economy exporter or producer, despite the exporting country's designation as an NME; or, if a particular exporter cannot satisfy this MET test, whether that exporter should nonetheless be granted "individual treatment" in the determination of margins and duties because it is sufficiently independent from the State to satisfy the IT test.<sup>915</sup> The Panel found that questions contained in the MET/IT Claim Form "are not relevant in all investigations, and are not directly related to the determinations of dumping, injury and causation".<sup>916</sup> Rather, the information solicited is necessary for the determination of whether an exporter or foreign producer operates under market economy conditions, or whether its export activities are independent from State intervention.<sup>917</sup>

615. We recall that Article 6.1 of the *Anti-Dumping Agreement* requires investigating authorities to give all interested parties "ample opportunity" to submit evidence that they consider relevant to the investigation, and that this obligation applies also to information requests that cannot be considered "questionnaires". In our view, the determinations made regarding MET and IT treatment are important for NME exporters and foreign producers.<sup>918</sup> The MET/IT Claim Form was the first request for information received by the Chinese exporters in the fasteners investigation, and their responses were subject to verification.<sup>919</sup> While much of the information requested would seem to be readily accessible to the responding party, the form requests certain production and sales data for "the product concerned" that may need to be collected and reported in a form that is not regularly kept by the company, and could therefore involve a certain amount of time and effort for completion.<sup>920</sup> Given the consequences of MET/IT status for exporters and foreign producers, and the amount of information solicited in the MET/IT Claim Form, we consider that, under the requirements of Article 6.1, a deadline of 15 days from the date of publication of the Notice of Initiation was too short and did not provide parties with "ample opportunity" to submit all evidence in support of their requests for MET or IT treatment. However, China has not invoked Article 6.1 in this case. Rather, China has limited its claim to the specific time period required for the submission of "questionnaires" under Article 6.1.1, and it is under this provision that we are called upon to make findings.

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<sup>915</sup>European Commission, Market Economy Treatment and/or Individual Treatment Claim Form (MET/IT Claim Form) (Panel Exhibit CHN-72).

<sup>916</sup>Panel Report, para. 7.577.

<sup>917</sup>Panel Report, para. 7.576.

<sup>918</sup>Panel Report, para. 7.577. See *supra*, paragraphs 600 and 614.

<sup>919</sup>Panel Report, para. 7.577.

<sup>920</sup>For example, the MET/IT Claim Form requests Chinese exporters to submit monthly production figures for the product concerned, or, if foreign owned, total volume of production during the investigation period, a list of average unit costs of primary materials, and an explanation of how these materials are procured, including a list of suppliers. (See Panel Exhibit CHN-72)

616. In determining whether an information request is a "questionnaire" under Article 6.1.1, as we have defined this term above, an investigating authority must ascertain whether it is a substantial request seeking to elicit from exporters and foreign producers comprehensive information regarding the key aspects of the anti-dumping determination, that is, dumping, injury, and causation. While the length and complexity of the request are not irrelevant, the determination of whether a particular request for information constitutes a "questionnaire" depends on the content and purpose of the request for information.

617. In order to make determinations on the key aspects of dumping, injury, and causation, pursuant to Articles 2 and 3 of the *Anti-Dumping Agreement*, investigating authorities need to collect, among other things, information on exporters' products, domestic and export sales, production and production capacity, cost of production, and factors relevant to adjustments to carry out a fair comparison. The typical anti-dumping questionnaire used by the Commission for exporters therefore solicits information relating to all of these factors. More specifically, the questionnaire solicits information regarding specifications of export and domestic products, comparison of export and domestic products, turnover, total quantity and value of sales, production and capacity statistics, stocks, employment, investments, export sales to related and unrelated customers in the European Union, domestic sales to related and unrelated customers, accounting system and policies, production process and cost of production, allowances on export sales, and allowances on domestic sales.<sup>921</sup>

618. By contrast, the MET/IT Claim Form is employed by the Commission for a different specifically defined purpose: to select those exporters or producers that operate under market economy conditions or that are sufficiently independent from the State to justify different treatment from non-qualifying NME exporters or producers. In determining whether an exporter or foreign producer operates under market conditions under the MET test, the Commission examines factors including: (i) the "decisions of firms regarding prices, costs and inputs"; (ii) their accounting standards; (iii) the extent to which production costs are "subject to significant distortions"; (iv) the applicability of "bankruptcy and property laws which guarantee legal certainty and stability"; and (v) whether "exchange rate conversions are carried out at the market rate".<sup>922</sup> In order to establish whether an exporter or foreign producer is sufficiently independent from the State under the IT test, the Commission will determine whether: (i) it is "free to repatriate capital and profits"; (ii) "export prices and quantities, and conditions and terms of sale are freely determined"; (iii) "the majority of

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<sup>921</sup>For purposes of this discussion, we refer to the anti-dumping questionnaire sent to exporters and producers of farmed salmon from Norway, which was provided to the Panel by China as Exhibit CHN-63.

<sup>922</sup>Basic AD Regulation, *supra*, footnote 5, Article 2(7)(c).

the shares belong to private persons"; (iv) "exchange rate conversions are carried out at the market rate"; and (v) "State interference [would] permit circumvention of measures if individual exporters are given different rates of duty".<sup>923</sup>

619. China argues that much of the information solicited in the MET/IT Claim Form is *also* relevant to the determinations of dumping, injury, and causation, and that it is therefore similar enough to the European Union's typical anti-dumping questionnaire discussed above to constitute a "questionnaire" for purposes of Article 6.1.1. However, a comparison of these two information requests shows that a typical anti-dumping questionnaire solicits different information and for a different purpose than the MET/IT Claim Form. The latter form solicits information regarding factors such as what bankruptcy or property laws are applicable, whether companies are free to repatriate capital and profits, or whether the majority of the shares belong to private parties that may be of relevance for determining whether exporters operate independently from the State; however, such information is not relevant for the purpose of determining dumping, injury, or causation.

620. Even where the MET/IT Claim Form and the typical "questionnaire" solicit similar information, that information is used for a different purpose. For example, in making its dumping determination, the Commission examines in detail and on a product-by-product basis, factors such as product specifications, sales, and prices in order to make its comparison between export price and normal value. In order to do so, the Commission collects data from exporters to determine *actual* export quantities and prices, production costs, and capacity.<sup>924</sup>

621. By contrast, the MET/IT Claim Form requests production information for the different and specific purpose of determining whether "the production costs and financial situation of firms" are "subject to significant distortions", and whether the "decisions" of NME exporters and producers regarding prices, costs, and inputs are "made in response to market signals reflecting supply and demand, and without significant State interference", such that its production costs "substantially reflect market values".<sup>925</sup> If the MET test is not satisfied, the Commission analyzes the production

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<sup>923</sup>Basic AD Regulation, *supra*, footnote 5, Article 9(5).

<sup>924</sup>For example, the typical questionnaire sent by the Commission to exporters in an anti-dumping investigation requests submission of, *inter alia*, total production and purchases of the product concerned, capacity and capacity utilization including how these factors are calculated, the country of origin and specific sources of purchases of the product, descriptions of production lines and major components, and descriptions of the manufacturing process and production facilities used for each product, including the raw materials used, relationship to the supplier, other products manufactured in the same facilities, other companies involved in the manufacturing process, and the number of days the product concerned is on average held in inventory before sale. All product information must be submitted on the basis of PCNs, which the exporter must create "for each unique combination of product characteristics" using a table provided by the Commission. (See Panel Exhibit CHN-63, *supra*, footnote 921)

<sup>925</sup>Basic AD Regulation, *supra*, footnote 5, Article 2(7)(c).

data submitted to determine, under the IT test, whether export prices and quantities "are freely determined"<sup>926</sup> for the purpose of assessing whether the exporter operates independently from the State. The MET/IT Claim Form requests much less detailed information than the typical anti-dumping questionnaire; it requests that exporters submit monthly production figures for the product concerned, or, if foreign owned, total volume of production during the investigation period, a list of average unit costs of primary materials, and an explanation of how these materials are procured, including a list of suppliers.<sup>927</sup> The MET/IT Claim Form does not request this data to be submitted based on narrowly defined PCNs or other product categories, but only requests that it be submitted for the "product concerned". This information could not serve as the basis for the Commission's determination of actual export prices, as required for a dumping determination.

622. In sum, the categories of information solicited by the MET/IT Claim Form relate to the factors used under the MET and IT tests for the purpose of determining whether an exporter operates under market conditions or, if not, whether it operates independently from the State. The factors examined by the Commission, such as restrictions on repatriation of capital and profits, composition of board members and shareholders, and exchange rate conversions<sup>928</sup>, are not relevant to the Commission's dumping, injury, and causation determinations. Nor is information solicited in the MET/IT Claim Form regarding restrictions on the import of raw materials used, required business authorizations, and information regarding relevant barter or counter trade<sup>929</sup> relevant to the determinations of dumping, injury, and causation. We conclude that the content of the information requested under the MET/IT Claim Form is qualitatively different from the content of the information requested in a typical anti-dumping questionnaire.<sup>930</sup>

623. Therefore, based on the content of the MET/IT Claim Form and the purpose for which it is used, we find that the MET/IT Claim Form is not an information request soliciting from the Chinese exporters and producers a substantial amount of information upon which the Commission would base its determinations regarding the key aspects of an anti-dumping investigation.<sup>931</sup> We therefore *uphold* the Panel's finding, in paragraph 7.579 of the Panel Report, that the MET/IT Claim Form is not a "questionnaire" within the meaning of Article 6.1.1 of the *Anti-Dumping Agreement* and, that,

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<sup>926</sup>Basic AD Regulation, *supra*, footnote 5, Article 9(5)(b).

<sup>927</sup>MET/IT Claim Form, *supra*, footnote 915, pp. 8 and 10.

<sup>928</sup>Basic AD Regulation, *supra*, footnote 5, Article 9(5).

<sup>929</sup>MET/IT Claim Form, *supra*, footnote 914, pp. 8, 10, 13, and 14.

<sup>930</sup>We find that China's further arguments regarding the length and substantial nature of the request, as well as its importance to Chinese exporters and producers, are similarly unavailing. As we have found above, these factors should be taken into consideration when determining whether a party was given "ample opportunity" to present evidence under Article 6.1.

<sup>931</sup>Panel Report, para. 7.577.

therefore, the European Union did not act inconsistently with its obligations under Article 6.1.1 when it did not provide Chinese exporters with 30 days to submit their responses.

## **X. Findings and Conclusion**

624. For the reasons set out in this Report, the Appellate Body:

- (a) with respect to Article 9(5) of the Basic AD Regulation<sup>932</sup>:
  - (i) upholds the Panel's finding, in paragraph 7.77 of the Panel Report, that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties, but also the calculation of dumping margins, and that it could be challenged "as such" under Article 6.10 of the *Anti-Dumping Agreement*, which addresses the calculation of margins of dumping for each exporter or producer;
  - (ii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.98 of the Panel Report, that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Article 6.10 of the *Anti-Dumping Agreement*, because it conditions the determination of individual dumping margins for exporters or producers from NMEs on the fulfilment of the IT test;
  - (iii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.112 of the Panel Report, that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Article 9.2 of the *Anti-Dumping Agreement*, because it conditions the imposition of individual duties on exporters or producers from NMEs on the fulfilment of the IT test;
  - (iv) finds that, in making the findings that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, the Panel did not act inconsistently with Article 11 of the DSU;
  - (v) declares moot and of no legal effect the Panel's finding, in paragraph 7.127 of the Panel Report<sup>933</sup>, that Article 9(5) of the Basic AD Regulation is inconsistent with the MFN obligation in Article I:1 of the GATT 1994;

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<sup>932</sup>See also Panel Report, para. 8.2(a).

- (vi) upholds the Panel's finding, in paragraph 7.137 of the Panel Report<sup>934</sup>, that the European Union has acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements;
- (vii) upholds the Panel's finding, in paragraph 7.148 of the Panel Report<sup>935</sup>, that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as applied" in the fasteners investigation;
- (b) with respect to the Panel's findings under Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*<sup>936</sup>:
  - (i) finds that the Panel erred in finding, in paragraph 7.230 of the Panel Report, that "the European Union did not act inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners" on the basis that the collective output of these producers represented "a major proportion" of the total domestic production;
  - (ii) finds that the Panel did not err in finding, in paragraph 7.241 of the Panel Report, that China failed to establish that the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* in the selection of a sample of the domestic industry for purposes of making an injury determination; and
  - (iii) finds that the Panel did not err in its interpretation or application of Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*, or acted inconsistently with Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*, when finding, in paragraph 7.219 of the Panel Report, that "the mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers expressing different views with respect to the complaint, or producers who did not come forward within the 15 day period,

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<sup>933</sup> See also Panel Report, para. 8.2(a).

<sup>934</sup> See also Panel Report, para. 8.2(a).

<sup>935</sup> See also Panel Report, para. 8.2(b).

<sup>936</sup> See also Panel Report, para. 8.3(b).

does not demonstrate that the European Union acted inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining the domestic industry" or acted inconsistently with Article 3.1 of that Agreement;

- (c) with respect to the Panel's findings regarding certain aspects of the dumping determination in the fasteners investigation:
- (i) finds that the Panel did not err in finding, in paragraph 7.494 of the Panel Report<sup>937</sup>, that the European Union violated Article 6.4 of the *Anti-Dumping Agreement* "by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established";
  - (ii) finds that the Panel did not err in finding, in paragraph 7.495 of the Panel Report<sup>938</sup>, that "the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings" and that, therefore, "the European Union acted inconsistently with Article 6.2" of the *Anti-Dumping Agreement*;
  - (iii) finds that the Panel did not act inconsistently with Article 11 of the DSU in not addressing China's argument that the European Union failed to inform the interested parties of the "product types" it used to compare the export price and normal value;
  - (iv) finds that the Panel erred in its application of Article 2.4 of the *Anti-Dumping Agreement* by failing to take into account the last sentence of Article 2.4 in the light of the relevant facts of the case and of its finding under Article 6.4 of the *Anti-Dumping Agreement*; and finds, instead, that, in not disclosing the information on the product types on a timely basis, the European Union acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by failing to indicate to the parties in question what information was necessary to ensure a fair comparison;
  - (v) finds that the Panel did not err in its interpretation of Article 2.4 of the *Anti-Dumping Agreement* when finding, in paragraph 7.306 of the Panel

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<sup>937</sup>See also Panel Report, para. 8.2(e).

<sup>938</sup>See also Panel Report, para. 8.2(e).

Report, that the European Union did not act inconsistently with Article 2.4 of that Agreement by not making adjustments for every element of the PCN;

- (vi) finds that the Panel did not act inconsistently with Article 11 of the DSU, when finding, in paragraph 7.302 of the Panel Report, that there is no inherent reason to conclude that every element of the PCN necessarily reflects a difference that affects price comparability; and
  - (vii) finds that the Panel did not err in its interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in finding, in paragraph 7.311 of the Panel Report, that the European Union did not have to make adjustments for alleged quality differences;
- (d) with respect to Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement*:
- (i) upholds the Panel's findings, in paragraphs 7.516 and 7.517 of the Panel Report<sup>939</sup>, that the European Union failed to ensure that the domestic producers, Agrati and Fontana Luigi, provide appropriate statements of the reasons why information provided in confidence was not susceptible of summary;
  - (ii) finds that China's claim under Article 6.5 that the European Union failed to establish that "good cause" existed to support the confidential treatment of information submitted by the analogue country producer participating in the investigation, Pooja Forge, was within the Panel's terms of reference; but finds that China failed to substantiate this claim; and therefore
  - (iii) reverses the Panel's finding, in paragraph 7.525 of the Panel Report<sup>940</sup>, that the European Union acted inconsistently with its obligations under Article 6.5 with respect to the treatment of confidential information submitted by Pooja Forge; and
  - (iv) upholds the Panel's finding, in paragraph 7.455 of the Panel Report<sup>941</sup>, that the European Union did not act inconsistently with its obligations under

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<sup>939</sup>See also Panel Report, para. 8.2(f).

<sup>940</sup>See also Panel Report, para. 8.2(f).

<sup>941</sup>See also Panel Report, para. 8.3(h).



Article 6.5 when the Commission granted the request to treat the identity of the complainants and the supporters of the complaint as confidential; and

- (v) finds that China's claim under Article 11 of the DSU regarding the confidential treatment of the identity of the complainants and the supporters of the complaint is not within the scope of this appeal because it was not included in China's Notice of Other Appeal;
- (e) reverses the Panel's finding, in paragraph 7.458 of the Panel Report, that China's claims under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* regarding the non-disclosure of the identity of the complainants were within its terms of reference under Article 6.2 of the DSU; and therefore, declares moot the Panel's finding, in paragraph 7.459 of the Panel Report<sup>942</sup>, that the European Union did not act inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* by not disclosing the identity of the complainants and the supporters of the complaint; and
- (f) with respect to Article 6.1.1 of the *Anti-Dumping Agreement*:
  - (i) upholds the Panel's finding, in paragraph 7.579 of the Panel Report<sup>943</sup>, that the "'Market Economy Treatment and/or Individual Treatment claim form' is not a 'questionnaire' within the meaning of Article 6.1.1"; and that, therefore, the European Union did not act inconsistently with its obligations under Article 6.1.1 of the *Anti-Dumping Agreement* when it did not provide the Chinese exporters with 30 days to submit their responses; and
  - (ii) finds that China's claims under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* regarding the Market Economy Treatment and/or Individual Treatment Claim Form are not within the scope of this appeal because these claims were not included in China's Notice of Other Appeal.

625. The Appellate Body recommends that the DSB request the European Union to bring its measures, found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement*, into conformity with its obligations under those Agreements.

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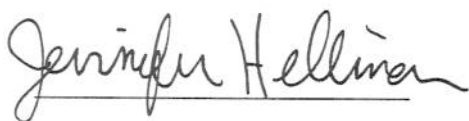
<sup>942</sup>See also Panel Report, para. 8.3(h).

<sup>943</sup>See also Panel Report, para. 8.3(k).

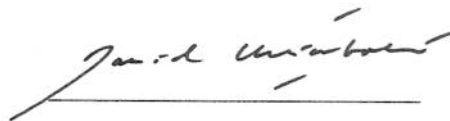
Signed in the original in Geneva this 19th day of June 2011 by:



Shotaro Oshima  
Presiding Member



Jennifer Hillman  
Member



David Unterhalter  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS397/7**  
29 March 2011

(11-1542)

Original: English

**EUROPEAN COMMUNITIES<sup>1</sup> – DEFINITIVE ANTI-DUMPING MEASURES  
ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA**

Notification of an Appeal by the European Union  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 25 March 2011, from the Delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17.1 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* (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 and/or modify the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report.

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<sup>1</sup>On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party.

**I. COUNCIL REGULATION NO. 1225/2009 ("THE BASIC AD REGULATION")**

The Panel erred in its interpretation and application of Articles 6.10, 9.2 and 18.4 of the *Anti-Dumping Agreement*, Article I:1 of the *GATT 1994* and Article XVI:4 of the *WTO Agreement* and failed to make an objective assessment pursuant to Article 11 of the *DSU* when it concluded that Article 9(5) of the Basic AD Regulation is, as such, inconsistent with those provisions.<sup>2</sup> In particular:

- (a) the Panel erred in the application of Article 6.10 of the *Anti-Dumping Agreement* when finding that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping.<sup>3</sup> Based on its incorrect understanding of the scope of Article 9(5) of the Basic AD Regulation, the Panel wrongly concluded that Article 9(5) of the Basic AD Regulation, as such, is inconsistent with Article 6.10 of the *Anti-Dumping Agreement*<sup>4</sup>;
- (b) the Panel erred in the interpretation and application of Article 6.10 of the *Anti-Dumping Agreement* and also violated Article 11 of the *DSU* when finding that Article 9(5) of the Basic AD Regulation is, as such, inconsistent with Article 6.10 of the *Anti-Dumping Agreement* in that it conditions the calculation of individual margins for producers from non-market economy countries on the fulfilment of the Individual Treatment (IT) test<sup>5</sup>;
- (c) the Panel erred in the interpretation and application of Article 9.2 of the *Anti-Dumping Agreement* and also violated Article 11 of the *DSU* when finding that Article 9(5) of the Basic AD Regulation is, as such, inconsistent with the obligation laid down in Article 9.2 of the *Anti-Dumping Agreement*, which does not allow the imposition of a single country-wide anti-dumping duty in an investigation involving a non-market economy country<sup>6</sup>;
- (d) the Panel erred in the interpretation and application of Article I:1 of the *GATT 1994* and also violated Article 11 of the *DSU* when finding that Article 9(5) of the Basic AD Regulation violates the MFN obligation of Article I:1 of the *GATT 1994*.<sup>7</sup> Moreover, the Panel erred when concluding that the *Anti-Dumping Agreement* does not allow for the different treatment of imports from non-market economy countries provided for in Article 9(5) of the Basic AD Regulation<sup>8</sup>; and
- (e) the Panel erred when finding that the EU acted inconsistently with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the relevant agreements.<sup>9</sup>

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<sup>2</sup>Panel Report, para. 8(2)(a).

<sup>3</sup>Panel Report, para. 7.77.

<sup>4</sup>Panel Report, para. 7.98.

<sup>5</sup>Panel Report, paras. 7.96 and 7.98.

<sup>6</sup>Panel Report, para. 7.112 and footnote 278.

<sup>7</sup>Panel Report, paras. 7.124, 7.126 and 7.127.

<sup>8</sup>Panel Report, para. 7.125 and footnote 307.

<sup>9</sup>Panel Report, para. 7.137.

## II. COUNCIL REGULATION NO. 91/2009 (FASTENERS INVESTIGATION)

The Panel erred in the interpretation and application of Articles 6.2, 6.4, 6.5, 6.5.1, 6.10 and 9.2 of the *Anti-Dumping Agreement* and also violated Articles 6.2, 7.1 and 11 of the *DSU* when it concluded that the EU acted inconsistently with those provisions of the *Anti-Dumping Agreement* in the fasteners investigation.<sup>10</sup> In particular:

- (a) the Panel erred in its interpretation and application of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* when finding that, having found that Article 9(5) of the Basic AD Regulation is, as such, inconsistent with those provisions, its application in the fasteners investigation was, for the same reasons, inconsistent with these two provisions<sup>11</sup>;
- (b) the Panel erred in the interpretation and application of Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* and violated Article 11 of the *DSU* when finding that the EU violated these provisions by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established, information relevant to the presentation of their case<sup>12</sup>;
- (c) the Panel erred in the interpretation and application of Article 6.5.1 of the *Anti-Dumping Agreement* when finding that the European investigating authorities had violated that provision in that they failed to ensure Agrati's and Fontana Luigi's compliance with the requirements of Article 6.5.1<sup>13</sup>;
- (d) the Panel acted inconsistently with Articles 6.2, 7.1 and 11 of the *DSU* when addressing in substance China's claim under Article 6.5 of the *Anti-Dumping Agreement* in connection with Pooja Forge<sup>14</sup>;
- (e) the Panel erred in the interpretation and application of Article 6.5 of the *Anti-Dumping Agreement* when it considered that, absent a showing of "good cause", the European investigating authorities were not entitled to grant confidential treatment to information submitted by Pooja Forge, the analogue country producer<sup>15</sup>; and
- (f) the Panel acted inconsistently with Article 6.2 of the *DSU* when considering that the issue of "the identity of the complainants and supporters" was properly identified in China's Panel Request under its claims referring to Article 6.2 and 6.4 of the *Anti-Dumping Agreement*.<sup>16</sup>

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<sup>10</sup>Panel Report, paras. 8(2)(b), 8(2)(e) and 8(2)(f).

<sup>11</sup>Panel Report, para. 7.148.

<sup>12</sup>Panel Report, paras. 7.494 and 7.495.

<sup>13</sup>Panel Report, paras. 7.516 and 7.517.

<sup>14</sup>Panel Report, paras. 7.518-7.526.

<sup>15</sup>Panel Report, para. 7.525.

<sup>16</sup>Panel Report, para. 7.458.

ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS397/8**  
5 April 2011

(11-1682)

Original: English

**EUROPEAN COMMUNITIES<sup>1</sup> – DEFINITIVE ANTI-DUMPING MEASURES  
ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA**

Notification of an Other Appeal by China  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 30 March 2011, from the Delegation of the People's Republic of China, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the DSU, the People's Republic of China hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel and certain legal interpretations developed by the Panel in its Report in the dispute *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (WT/DS397/R). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, China simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

China seeks review by the Appellate Body of the following aspects of the Report of the Panel:

1. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry in the fasteners investigation by excluding from the definition of the domestic industry the producers that made themselves known after the 15-day deadline following the

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<sup>1</sup>On 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party.

publication of the Notice of Initiation and the producers that did not support the complaint (paragraphs 7.209 – 7.221 and paragraph 8.3(b) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel failed to make an objective assessment of the facts in violation of, *inter alia*, Article 11 of the DSU and Article 17.6 of the AD Agreement in connection with China's claim that the EU violated Articles 4.1 and 3.1 of the AD Agreement by excluding from the definition of the domestic industry producers that did not support the complaint, since:
  - the Panel erroneously accepted as a "fact" the unsubstantiated statement of the EU that "at least one producer which was not a complainant, and had remained silent prior to initiation, was not only included in the domestic industry, but was selected for the sample"<sup>2</sup>;
  - the Panel erroneously concluded that the fact that "at least one producer which was not a complainant, and had remained silent prior to initiation, was not only included in the domestic industry, but was selected for the sample" demonstrated that "the EU investigating authority, in this case, did [not], in fact, exclude producers that did not support the complaint from the domestic industry"<sup>3</sup> and erroneously ignored the explanation put forward by China pointing out that such conclusion cannot be and was not correct;
  - the Panel disregarded and ignored the evidence submitted by China which demonstrated that the EU excluded from the domestic industry all producers that did not support the complaint.

China requests the Appellate Body to reverse the Panel's findings and to complete the analysis by finding that it has been demonstrated that the EU excluded from the definition of the domestic industry the producers that did not support the complaint. China further requests the Appellate Body to complete the analysis by finding that the exclusion from the definition of the domestic industry of the producers that did not support the complaint is inconsistent with Article 4.1 of the AD Agreement.

- The Panel erred in its interpretation of Article 4.1 of the AD Agreement when examining China's claim that the exclusion from the domestic industry of producers that did not come forward within 15 days as of the date of publication of the Notice of Initiation was inconsistent with Article 4.1 and failed to make an objective assessment of the facts in violation of Article 11 of the DSU in connection with that claim:
  - the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU when it concluded that the "EU did not act to exclude"<sup>4</sup> producers that did not make themselves known within 15 days as of the date of initiation of the investigation;
  - the Panel erred in its interpretation of Article 4.1 of the AD Agreement when concluding that there is nothing in Article 4.1 which would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry;

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<sup>2</sup>Panel Report, para. 7.214.

<sup>3</sup> Panel Report, para. 7.215.

<sup>4</sup> Panel Report, para. 7.215.

- the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU when concluding that China has not demonstrated that "the 15 days allowed by the Commission was insufficient".<sup>5</sup>

China requests the Appellate Body to reverse the Panel's findings and to complete the analysis by finding that, on the basis of the facts before the Panel, it has been demonstrated that the EU acted to exclude from the definition of the domestic industry the producers which did come forward within 15 days as of the date of publication of the Notice of Initiation and that, therefore, the EU acted in violation of Article 4.1 of the AD Agreement. China furthermore requests the Appellate Body to conclude that it has been demonstrated that the 15-day period granted to the domestic producers to come forward was not "reasonable" or "sufficient" and that therefore the EU acted in violation of Article 4.1 of the AD Agreement.

- The Panel erred in dismissing China's claim that the EU violated Article 3.1 of the AD Agreement by excluding from the domestic industry the producers which did not come forward within 15 days as of the date of the Notice of Initiation and the producers which did not support the complaint.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the EU violated Article 3.1 since it failed to make an injury determination which is based on an "objective examination" as required by Article 3.1 of the AD Agreement.

2. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry in the fasteners investigation because the domestic industry as defined by the EU did not include domestic producers whose collective output of the like product constitutes a major proportion of the total domestic production (paragraphs 7.222 – 7.230 and para. 8.3(b) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of laws and of legal interpretations developed by the Panel:

- The Panel failed to make a correct interpretation of the terms "major proportion" which is based on the ordinary meaning of these terms and in light of their context, pursuant to the principles of treaty interpretation of the Vienna Convention on the Law of Treaties, and, as a result, made the following erroneous findings and conclusions:
  - (i) the Panel erroneously concluded that the fact that the Commission relied on a presumption is not alone sufficient to demonstrate, *prima facie*, that the definition of the domestic industry in this case is inconsistent with Article 4.1 of the AD Agreement;
  - (ii) the Panel erroneously concluded that the non-quantitative factors raised by China are not relevant in this case or in general.

China requests the Appellate Body to reverse the Panel's findings and to conclude that, by considering that producers accounting for 25% of total domestic production necessarily constitute a major proportion, the EU violated Article 4.1 of the AD Agreement and that the "non-quantitative factors" identified by China are relevant for the purposes of determining whether the major proportion requirement is satisfied and had to be considered by the Commission in the fasteners investigation. China further requests the Appellate Body to conclude that, in light of these non-quantitative factors,

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<sup>5</sup> Panel Report, para. 7.219.



the domestic producers constituting the domestic industry in the fasteners investigation did not represent a "major proportion" of the domestic industry.

3. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Articles 3.1 and 4.1 of the AD Agreement since it made an injury determination with respect to a sample of producers that was not representative (paragraphs 7.234 to 7.241 and 8.3(b) of the Panel Report). China identified, *inter alia*, the following errors in the issues of law and of legal interpretations developed by the Panel:

- The Panel erroneously concluded that "it cannot accept the contention that only a statistically valid sample will be sufficiently representative for purposes of an injury determination";
- the Panel erroneously concluded that China has not demonstrated that the EU investigating authority could have carried out its injury examination for the domestic industry it had defined, or at least include more producers in the sample.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the EU violated Article 3.1 of the AD Agreement.

4. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Article 2.4 of the AD Agreement with respect to the dumping determination in the fasteners investigation (paragraphs 7.291 – 7.311 and para. 8.3(d) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of laws and legal interpretations developed by the Panel:

- The Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU by failing to address China's argument that the EU violated Article 2.4 since the Commission failed to indicate to the interested parties what information was necessary to ensure a fair comparison and made it impossible for them to claim adjustments for differences affecting price comparability and, to the extent the Panel would have implicitly concluded that such a failure was not inconsistent with Article 2.4 of the AD Agreement, the Panel failed to make a correct interpretation of Article 2.4 of the AD Agreement;
- the Panel erred in its interpretation of Article 2.4 of the AD Agreement when it rejected China's argument that the EU violated Article 2.4 by failing to evaluate whether the characteristics identified in the PCNs affected price comparability and whether adjustments for these differences in physical characteristics were warranted;
- the Panel did not make an objective assessment of the facts as required by Article 11 of the DSU and Article 17.6 of the AD Agreement when it concluded that China has pointed to no evidence supporting the conclusion that the PCN characteristics indicated differences affecting price comparability and when claiming that "it would be inappropriate for us, under the standard of review to consider it ourselves";
- the Panel erred in its interpretation of Article 2.4 of the AD Agreement when it rejected China's claim that the EU violated Article 2.4 of the AD Agreement by failing to make the necessary adjustments for quality differences.

China requests the Appellate Body to reverse the Panel's findings and to conclude that, on the basis of the facts before the Panel, it has been demonstrated that the EU violated Article 2.4 of the AD Agreement with respect to each of the identified issue mentioned above.

5. China seeks review of the Panel's conclusions and findings concerning China's claim that the EU violated Articles 6.5, 6.4 and 6.2 of the AD Agreement in connection with the non-disclosure of the identity of the complainants and of the supporters of the complaint (paragraphs 7.445 – 7.459 and para. 8.3(h) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of laws and legal interpretations developed by the Panel in its findings concerning China's claim under Article 6.5 of the AD Agreement:

- The Panel erred in its interpretation of the "good cause" requirement when ignoring the difference between a hypothetical potential retaliation which "could" happen and a retaliation which "would" happen;
- the Panel erred in law in considering that the "good cause" requirement was satisfied without supporting evidence provided by the parties requesting confidential treatment;
- the Panel erred in rejecting China's argument that no good cause was established since the seven EU producers that made up the sample for purposes of the Commission's injury determination were also complainants and supporters and that they did not ask the Commission to treat their identity as confidential information.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the EU violated Article 6.5 of the AD Agreement through the non-disclosure of the identity of the complainants and of the supporters of the complaint. China also requests the Appellate Body to reverse the Panel's findings concerning China's claim under Articles 6.4 and 6.2 of the AD Agreement and to complete the analysis by finding that the EU's failure to disclose the identity of the complainants and of the supporters of the complaint is also inconsistent with Articles 6.4 and 6.2 of the AD Agreement.

6. China seeks review of the Panel's conclusions and findings concerning China's claim that the EU violated Article 6.1.1 of the AD Agreement by limiting the time period for the submission of MET/IT claim form to 15 days as of the date of publication of the Notice of Initiation (paragraphs 7.566 – 7.579 and 8.3(k) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel erred in its interpretation of the term "questionnaire" in Article 6.1.1 of the AD Agreement by adopting an interpretation which is not consistent with the ordinary meaning of that word in light of its context and the object and purpose as required by the principles of treaty interpretation included in the Vienna Convention on the Law of Treaties;
- even assuming that the Panel did not err in its interpretation of the term "questionnaire" in that it would refer to "the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation)", the Panel erroneously concluded that that the MET/IT claim form was not a "questionnaire" according to this definition.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the "MET/IT claim form" is a questionnaire within the meaning of Article 6.1.1 of the AD Agreement and to complete the analysis by finding that the EU violated Article 6.1.1 of the AD Agreement.

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