ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. CLAIMS CONCERNING ARTICLE 9(5) OF COUNCIL REGULATION (EC) NO. 384/96 OF 22 DECEMBER 1995 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EUROPEAN COMMUNITY, AS CODIFIED AND REPLACED BY COUNCIL REGULATION (EC) NO. 1225/2009

1. The first measure that China challenges in this dispute is Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community as amended, which has now been codified and replaced by Council Regulation (EC) No. 1225/2009 (the "Basic AD Regulation"). This provision deals with the "Individual Treatment" ("IT") practice of the EC regarding exporting producers in anti-dumping investigations concerning imports from China. The fact that China's challenge is limited to Article 9(5) is without prejudice to its longstanding position that it strongly opposes the treatment by a few WTO Members, in particular the EC, of China as a non-market economy country. After more than three decades of economic changes, China has indeed undoubtedly become a market economy system in which all business operations are carried out under market signals.

2. Article 9(5) of the Basic AD Regulation sets out a number of specific conditions that exporting producers from China involved in EC anti-dumping proceedings must fulfil in order to qualify for an individual dumping margin and an individual anti-dumping duty (so-called "individual treatment" or "IT"). Only if a Chinese exporting producer successfully demonstrates that it fulfils all the conditions listed in Article 9(5) will the EC investigating authorities determine for that producer an individual dumping margin and an individual anti-dumping duty, that is, a dumping margin based on a comparison between the normal value established on the basis of data in the analogue country with the Chinese exporting producer's own export prices. However, if the exporting producer cannot demonstrate that it satisfies all the IT criteria, it will be subject to a country-wide dumping margin and anti-dumping duty which is based on a comparison between the normal value established for the analogue country with the average export price of the cooperating exporting producers in the country concerned or on any other basis. Article 9(5) violates several provisions of the AD Agreement and of the GATT 1994.

3. First, Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement. Article 6.10 requires the investigating authorities to determine, as a rule, individual dumping margins to all known exporters and producers. The sole exception to that rule is where the number of exporting producers is so large as to make the determination of an individual dumping margin impracticable. By introducing another exception, namely for exporting producers in non-market economy countries, among which the EC includes China, that are not able to demonstrate that they meet all the criteria set out in Article 9(5), that provision violates Article 6.10 including its chapeau and Article 6.10.2.

4. Second, Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the AD Agreement which requires the anti-dumping duty to be collected in appropriate amounts on a non-discriminatory basis. Article 9.2 requires anti-dumping duties to be imposed on an individual basis. This conclusion finds further support when that provision is read in its context. By providing that the anti-dumping duty for exporting producers in non-market economy countries in which the EC

includes China, will, as a rule, be a country-wide anti-dumping duty, Article 9(5) violates Article 9.2 of the AD Agreement.

5. Third, Article 9(5) of the Basic AD Regulation violates Article 9.3 of the AD Agreement since the country-wide anti-dumping duty that is imposed on all exporters that do not qualify for IT, is based on a margin of dumping that is calculated by comparing a normal value with an average export price which is not determined in accordance with the rules of Article 2. It necessarily leads to the collection of an anti-dumping duty in amounts which exceed the dumping margin for the exporting producers whose export prices are higher than the average export prices used, thereby violating Article 9.3 of the AD Agreement.

6. Fourth, Article 9(5) of the Basic AD Regulation violates Article 9.4 of the AD Agreement in two respects. First, in cases where sampling is used, the anti-dumping duty applied to the cooperating non-sampled exporting producers is based on the weighted average margin of dumping of all sampled exporting producers, including those which do not qualify for IT and for which the dumping margin is not based on their own export prices, i.e. in violation of Article 2 of the AD Agreement. Second, by requiring non-sampled exporting producers that are individually examined to demonstrate that they comply with the five IT criteria, Article 9(5) violates Article 9.4 which requires the investigating authorities to unconditionally apply an individual anti-dumping duty to such exporters.

7. Fifth, Article 9(5) violates Article I:1 of the GATT 1994 since an individual dumping margin and individual anti-dumping duty is not determined for exporting producers from China and a limited number of other WTO Members unless they demonstrate that they meet the specific conditions set out in Article 9(5) while such treatment is automatically granted to exporting producers from all other WTO Members.

8. Sixth, the EC violates Article X:3(a) of the GATT 1994 by failing to administer the provisions of Article 9(5) in a uniform, impartial and reasonable manner. The administration is not uniform since the country-wide dumping margin used for the exporters that do not qualify for IT is calculated using a wide variety of methodologies and it is impossible for Chinese exporting producers to predict which methodology will be used in a particular investigation. The manner in which the EC administers the provisions of Article 9(5) is also unreasonable since the country-wide dumping margin will in most cases be determined on the basis of "facts available" even where the conditions of Article 6.8 of the AD Agreement are not fulfilled.

9. Finally, in violating Articles 6.10, 9.2, 9.3, 9.4 of the AD Agreement and Articles I:1 and X:3(a) of the GATT 1994, the EC also violates Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the AD Agreement.

II. CLAIMS CONCERNING COUNCIL REGULATION (EC) NO. 91/2009 OF 26 JANUARY 2009 IMPOSING A DEFINITIVE ANTI-DUMPING DUTY ON IMPORTS OF CERTAIN IRON OR STEEL FASTENERS FROM CHINA

10. The second measure that China challenges in this dispute is Council Regulation (EC) No. 91/2009, by which the EC has imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China. This measure violates numerous substantive and procedural provisions of the AD Agreement.

A. THE EC VIOLATED ARTICLES 6.10, 9.2 AND 9.4 OF THE AD AGREEMENT

11. In order to qualify for IT and receive the benefit of an individual dumping margin and an individual anti-dumping duty, the Chinese exporting producers concerned, namely those included in the sample and those non-sampled exporting producers that were individually examined, had to

demonstrate that they fulfilled all five conditions set out in Article 9(5) of the Basic AD Regulation. Thereby, the EC violated Articles 6.10, 9.2 and 9.4 of the AD Agreement.

B. THE EC'S "STANDING" DETERMINATIONS VIOLATED ARTICLE 5.4 OF THE AD AGREEMENT

12. Article 5.4 of the AD Agreement obliges the investigating authorities to play an active role in examining whether the application has been made by or on behalf of the domestic industry. In the anti-dumping investigation which led to the measure at issue, however, the EC failed to properly examine whether the standing thresholds were met before initiating the investigation.

13. First, the EC did not check whether the total EC production actually amounted to 1,430 KT as alleged in the Complaint, before initiating the investigation. Second, the EC did not properly examine the degree of support for, or opposition to, the application by all EC producers, before initiating the investigation.

14. Furthermore, the EC violated Article 5.4 of the AD Agreement since the Complainants did not meet the standing thresholds set out in that provision and in particular the absolute minimum that the application must be expressly supported by producers accounting for at least 25 per cent of total production of the like product produced by the domestic industry.

15. Indeed, the evidence shows that the figure of total EC production relied upon by the EC, namely 1,430 KT for 2006, is largely underestimated. The total EC production of the like product is significantly higher. As a result, the 25 per cent threshold was not met. The EC thus violated Article 5.4 of the AD Agreement by initiating this investigation.

C. THE EC'S DETERMINATIONS OF THE "DOMESTIC INDUSTRY" VIOLATED ARTICLES 4.1 AND 3.1 OF THE AD AGREEMENT

16. The determination of the domestic industry in the anti-dumping investigation which led to the measure at issue suffers from several substantive flaws.

17. First, the EC violated Articles 4.1 and 3.1 of the AD Agreement by excluding from the outset from the definition of the domestic industry all those companies that did not make themselves known within 15 days as of the date of publication of the notice of initiation as well as those companies that did not support the investigation. Article 4.1 only allows the exclusion from the outset of two specific categories of producers. By excluding other categories, the EC violated Article 4.1 of the AD Agreement. This is furthermore contrary to Article 3.1 which requires investigating authorities to carry out an "objective examination" of the domestic industry that is based on positive evidence.

18. Second, the EC violated Article 4.1 of the AD Agreement since the domestic industry, as defined by the EC, did not include domestic producers whose collective output of the like product constituted a major proportion of the total domestic production.

19. In its Definitive Regulation, the EC indicated that the producers constituting the domestic industry represented 27 per cent of the total production of the like product.

20. The volume of total EC production on the basis of which this percentage has been calculated has been largely underestimated, however. The "domestic industry" as defined by the EC represented significantly less than 27 per cent of the actual total production of the like product in the EC and thus did not constitute a "major proportion".

21. In any case, 27 per cent of total EC production does not constitute a "major proportion" within the meaning of Article 4.1 of the AD Agreement. A "major proportion" cannot be equated to

25 per cent or more of total domestic production as the EC seems to consider. A "major proportion" refers to an important, serious or significant proportion of the domestic industry. This has not been satisfied in the context of this investigation. The 27 per cent of total production represented by the domestic industry, as defined by the EC, consisted of only 46 producers out of more than 300 companies (and even more according to the data submitted by the Chinese exporting producers), from which 114 came forward. Thus, these 46 companies represented barely more than one quarter of EC production, less than one sixth of the total number of EC producers estimated by the EC and less than half of those which came forward in the context of the investigation. In such a context, the domestic industry as defined by the EC can hardly be regarded as constituting a "major proportion" and therefore fails to meet the threshold set out in Article 4.1 of the AD Agreement.

22. Third, the domestic industry was defined by relying exclusively on data relating to 2006. By failing to define the domestic industry on the basis of data concerning the Investigation Period (1 October 2006 until 30 September 2007), the EC violated Article 3.1 of the AD Agreement that requires the investigating authorities to make a determination of injury that involves an objective examination of the domestic industry.

23. Fourth, in order to make its injury determination, the EC selected a sample of domestic producers, namely 6 producers amounting only to 17.5 per cent of the total EC production. The EC violated Article 4.1 since the sample thus selected does not represent a major proportion of total domestic production. The EC also violated Article 3.1 since this sample cannot be regarded as representative of the total domestic production.

24. Fifth, the EC violated Article 4.1 of the AD Agreement by failing to exclude from the definition of the domestic industry EC producers that were related to the exporters or importers or were themselves importers of the allegedly dumped product. The evidence in the file demonstrates that the EC included in the definition of the domestic industry (and even selected in the sample) producers that had set up subsidiaries in China whose production was principally destined for the EC market.

D. THE EC'S DETERMINATIONS OF THE "LIKE PRODUCT" VIOLATED ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

25. The EC violated Articles 2.1 and 2.6 of the AD Agreement in concluding that the fasteners produced and sold by the Community industry in the Community, fasteners produced and sold on the domestic market in the PRC, those produced and sold on the domestic market in India and those produced in the PRC and sold to the Community were "alike".

26. The EC noted that the vast majority of – if not all – exports of the product concerned by the investigated companies were "standard" fasteners. Instead, a substantial part of the EC production concerned "special" fasteners.

27. The EC noted that the difference between "standard" and "special" fasteners was so significant that it should be taken into account for the purposes of the dumping and injury margin calculations.

28. The EC considered nonetheless that the products manufactured in China and in the EC were "like" on the ground that "many of the types manufactured in the PRC for export to the Community and those manufactured by the Community industry were largely marketed under similar industry standards." However, the fasteners produced in China for export to the EC and those produced by the EC industry are not like due to their differences in physical and technical characteristics, their lack of interchangeability and their differences in end-uses and prices.

29. The EC industry produced much more sophisticated "special" fasteners which, while normally complying with industry standards, must also comply with additional specific customer requirements. This means that they have different properties than those of standard fasteners and are not "comparable" or "like". Moreover, standard and special fasteners have different end-uses and are not interchangeable. Finally, the significant differences in the average prices between Chinese fasteners and fasteners produced by the EC industry can only be explained by the fact that the EC industry supplies a higher market segment which, as noted by the EC, is "significantly more expensive to produce and to sell" but "generate higher revenues than standard products".

E. THE EC'S DETERMINATION OF DUMPING VIOLATED ARTICLE 2.4 OF THE AD AGREEMENT

30. For all exporting producers, the normal value was determined on the basis of the data provided by one Indian producer. The EC stated that the normal value had been calculated per product type and thus not on the basis of the Product Control Numbers (PCN) that were supposed to be used for making the comparison. Despite repeated requests for clarification, the EC refused to provide relevant information regarding the "product types" and the comparison methodology. It only stated that the comparison had not been made on the full PCN but on part of the characteristics, namely the strength class and the distinction between special and standard fasteners.

31. The EC violated Article 2.4 of the AD Agreement, first, since the EC did not make the comparison between normal value and export price on a PCN basis. By comparing the export price data provided by the Chinese exporters on a PCN basis with normal value data provided by the producer in the analogue country on a "product type" basis, the EC failed to make a fair comparison.

32. Second, the only adjustment made by the EC concerned the alleged difference in quality control costs. The EC violated Article 2.4 since it failed to make adjustments for differences in physical characteristics that affect price comparability and which were reflected in the characteristics used for the construction of the PCNs. It also violated Article 2.4 given that it failed to make further adjustments regarding the differences in quality between the fasteners produced by the Chinese exporting producers and the fasteners produced by the Indian producer.

F. THE EC VIOLATED ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT IN ITS UNDERCUTTING CALCULATIONS

33. The EC has acknowledged that the undercutting margins have not been calculated on the basis of the full PCNs but rather on the basis of simplified product groupings.

34. By eliminating important product characteristics in order to "simplify" the PCNs, the EC grouped together fasteners with very different physical characteristics and prices, thus failing to make an "objective" examination of the impact of prices on the EC industry.

35. These distortions have been compounded by the methodology applied by the EC to differentiate between special and standard fasteners. All or almost all fastener types exported by the Chinese exporting producers were standard fasteners while most fasteners produced by the EC producers were special fasteners.

36. The EC thus violated Articles 3.1 and 3.2 of the AD Agreement.

G. THE EC VIOLATED ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE AD AGREEMENT IN ITS EXAMINATION OF THE VOLUME OF DUMPED IMPORTS

37. When examining the volume of dumped imports, the EC incorrectly treated all imports from China as being dumped.

38. First, while the EC had found that two of the Chinese exporting producers which were subject to individual examination were not dumping, the EC failed to exclude the imports of those two Chinese exporting producers from the volume of dumped imports. The EC thus violated Articles 3.1 and 3.2 of the AD Agreement.

39. Second, the EC incorrectly included in the volume of dumped imports all imports from non-sampled exporting producers that were not individually examined. Indeed, after having found that two exporting producers were not dumping, the EC could not automatically assume that imports from all exporting producers that were not examined were dumped. The EC therefore violated Articles 3.1 and 3.2 of the AD Agreement.

40. By failing to properly determine the "dumped imports" the EC also violated Article 3.4 and 3.5 of the AD Agreement.

H. THE EC VIOLATED ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT BECAUSE IT FAILED TO OBJECTIVELY EXAMINE ON THE BASIS OF POSITIVE EVIDENCE THE IMPACT OF THE ALLEGEDLY DUMPED IMPORTS ON DOMESTIC PRODUCERS OF THE LIKE PRODUCT

41. First, the EC failed to examine the injury factors in relation to an EC industry defined in a consistent manner. In fact, the EC examined production, production capacity, capacity utilization, sales, market share, employment and productivity for the Community industry, as defined by the EC, that is, 46 Community producers claiming to represent 27 per cent of the total EC production. Instead, the other injury factors were examined for the sampled producers only, that is, six producers allegedly representing 17.5 per cent of the total EC production.

42. The EC should have consistently used the same set of companies in order to make its injury analysis rather than examining some injury factors in relation to a domestic industry consisting of 46 producers and other factors in relation to a domestic industry consisting of 6 sampled producers. This lack of consistency is fundamentally non-objective and biased and therefore contrary to Articles 3.1 and 3.4 of the AD Agreement.

43. Second, the EC's analysis of the "profitability" of the domestic industry, namely that the alleged dumped imports had a "negative impact on profitability" and that the level of profitability was "low" while the evidence pointed to the contrary, is not "objective" and is therefore contrary to the requirements of Articles 3.1 and 3.4 of the AD Agreement.

44. Third, the EC incorrectly concluded that the domestic industry suffered material injury while an objective examination of the relevant factors pursuant to Article 3.4 shows a positive state of the domestic industry. In fact, the sole factor possibly showing a negative trend was a declining market share in a rapidly growing market. A finding of injury, however, cannot solely be based on one negative factor. Moreover, the decrease in market share only concerned the relative sales volume of the domestic industry and not the absolute sales volume, sales prices or total sales revenue. Therefore, through its analysis of the impact of the alleged dumped imports on the state of the domestic industry, the EC violated Articles 3.1 and 3.4 of the AD Agreement.

45. Fourth, by concluding that the material injury resulted from the displacement of Community products by Chinese imports in some important market segments, the EC violated Articles 3.1 and 3.4

of the AD Agreement. Indeed, once the EC had defined the "like product" as including both standard and special fasteners, it could not find injury as resulting from a displacement of sales from one product segment to another product segment within the same "like product".

I. THE EC VIOLATED ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT IN CONCLUDING THAT THE ALLEGED DUMPED IMPORTS CAUSED MATERIAL INJURY

46. The EC violated Articles 3.1 and 3.5 of the AD Agreement in two ways.

47. First, the EC failed to demonstrate that the alleged dumped imports "are, through the effects of dumping, causing injury" to the domestic industry. The EC concluded that there was a causal link on the basis that the "significant increase in the volume of dumped imports from the PRC […] coincided with the continuously declining loss of market share of the Community producers." However, a mere temporal coincidence does not demonstrate that the alleged dumped imports are, through the effects of dumping, causing injury. Moreover, the EC failed to consider in its analysis of the "effects of the imports of the PRC" the fact that the EC industry decided to improve its presence in the higher quality market segments by increasingly producing special fasteners which command a higher unit price, but are also produced in smaller quantities.

48. Second, the EC failed to properly assess the injurious effects of other known factors.

49. The EC noted that the "increase in raw material prices" constituted a factor that caused injury but considered that it was not "the decisive factor" without explaining the reasons for such a conclusion. In fact, the increase in raw material prices made it more attractive for the domestic industry to focus on high quality products which generated higher revenues and permitted the industry to arrive at a reasonable profit margin during the IP. This explains why the EC producers lost market share while increasing their sales revenue by 21 per cent. Indeed, high quality fasteners are manufactured in smaller quantities but are sold at higher prices.

50. Regarding the "exports of the EC industry to third countries", the EC reported a substantial increase in export volumes, namely by 81 per cent. The EC, however, noted that these exports were made at prices significantly above the sales prices on the EC market and therefore concluded that they could not have been a cause of injury to the EC industry. This conclusion, however, is based on data relating to EC producers as a whole and cannot be extrapolated to the EC industry as defined by the EC for the purposes of the injury determination.

J. THE EC VIOLATED SEVERAL PROCEDURAL REQUIREMENTS UNDER ARTICLES 6 AND 12 OF THE AD AGREEMENT

51. The anti-dumping investigation which led to the measure at issue is characterized by numerous violations of due process and procedural requirements and a complete lack of transparency of the findings and determinations made by the EC. Throughout the investigation, such lack of transparency has made it impossible for the Chinese exporting producers to properly defend their interests. This affected all stages of the anti-dumping investigation, i.e., standing, dumping and injury.

52. First, the EC violated Articles 6.5, 6.5.1, 6.2 and 6.4 of the AD Agreement by failing to disclose the identity and the volume of production of the Complainants.

53. Second, the EC violated Articles 6.5, 6.2, 6.4 and 6.9 of the AD Agreement by failing to provide information concerning (i) the normal value determinations including on the "product types" that were used to determine the normal value and the comparability with the exported PCNs and (ii) the adjustments for differences affecting price comparability.

54. Third, the EC violated Articles 6.5, 6.2 and 6.4 of the AD Agreement since the non-confidential versions of the questionnaire responses submitted by the EC producers and by the Indian producer in the analogue country were largely deficient.

55. Fourth, the EC violated Articles 6.5, 6.2 and 6.4 of the AD Agreement by failing to disclose the Eurostat data allegedly used to determine the production volume in the EC and by failing to provide an explanation as to how the estimation of the production volume in the EC had been made.

56. Fifth, the EC violated Articles 6.2, 6.4 and 6.9 of the AD Agreement by failing to give access to relevant information on the definition of the domestic industry and by failing to provide such information to interested parties.

57. Sixth, the EC violated Article 12.2.2 of the AD Agreement by failing to indicate all relevant information concerning its IT determinations, i.e., not only whether each company requesting IT was granted IT, but also the reasons for its determination.

58. Seventh, the EC violated Article 6.5 of the AD Agreement by disclosing the document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC" to interested parties other than to each of the exporting producers concerned while the information concerned was confidential.

59. Eighth, the EC violated Article 6.1.1 of the AD Agreement by requesting Chinese exporting producers to submit their questionnaire responses concerning MET/IT within 15 days as of the date of publication of the notice of initiation.

III. CONCLUSIONS

60. For the reasons stated above, China requests that the Panel find that the two measures at issue violate various provisions (as identified above) of the GATT 1994, the AD Agreement and the Agreement Establishing the WTO and that the Panel recommend to the Dispute Settlement Body to request that the EC bring the contested measures into conformity with its obligations under the AD Agreement and the GATT 1994. China also requests that the Panel suggests that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In this submission, the European Union will examine China's claims in the order they were presented in China's First Written Submission. Preliminary issues are addressed under each of the relevant claims. In particular, the European Union will address first China's claims with respect to Article 9(5) of Council Regulation No 384/96, as amended. Then, the European Union will address China's claims against Council Regulation No 91/2009 in the consecutive order followed by China in its First Written Submission.

II. CHINA'S "AS SUCH" CLAIM AGAINST ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96, AS AMENDED

2. The European Union understands the measure at issue, which falls within the mandate of the Panel, to be Article 9(5) of Council Regulation No 384/96, as amended, insofar as that provision provides that, in case of imports from non-market economy countries: (i) an individual anti-dumping duty shall be specified for suppliers that can demonstrate, on the basis of properly substantiated claims, that they fulfil the five criteria listed in that provision; otherwise, (ii) the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier. China claims that those aspects of Article 9(5) of Council Regulation No 384/96, as amended, are "as such" inconsistent with Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the *Anti-Dumping Agreement*, Articles I and X:3(a) of the *GATT 1994* and Article XVI:4 of the *WTO Agreement*. This results from the manner in which China described the measure at issue in its Panel Request. Thus, the "matter" on which the Panel has to rule with respect to the "as such" claim brought by China is strictly the following: is Article 9(5) of Council Regulation No 384/96, as amended –insofar as it provides that, in case of imports from non-market economy countries, an individual anti-dumping duty shall be specified for suppliers that can demonstrate, on the basis of properly substantiated claims, that they fulfil the five criteria listed in that provision; and that, otherwise, the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier– as such inconsistent with the provisions of the covered agreements invoked by China? Anything beyond this question would be, in the European Union's view, outside the Panel's terms of reference and, thus, the Panel should refrain from examining any other matter raised by China in connection with its "as such" claim. In particular, the European Union submits that, contrary to the requirements under Article 6.2 of the *DSU*, China's Panel Request failed to present the problem clearly, at least, with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the *Anti-Dumping Agreement* and Article X:3(a) of the *GATT 1994*. Consequently, the European Union requests the Panel not to examine those claims. In addition, the European Union requests the Panel to refrain from examining measures and issues outside its terms of reference in relation to China's "as such" claim, including Article 9(5) of Council Regulation No 1225/2009, any matters pertaining to the calculation or individual determination of dumping margins, or any other matters different from the one specifically identified by China in its Panel Request.

3. In any event, China's claims against Article 9(5) of Council Regulation No 384/96, as amended, are based on a wrong understanding of the relevant provisions in the *Anti-Dumping Agreement* as well as China's Protocol of Accession. Indeed, China fundamentally ignores the meaning of Article 9.2 of the *Anti-Dumping Agreement* and focuses on a parallelism between

Article 6.10 of the *Anti-Dumping Agreement* and Article 9.4 of the *Anti-Dumping Agreement*. Article 9.2 of the *Anti-Dumping Agreement* does not contain a principle to impose individual anti-dumping duties per known exporter or producer; rather, this provision seems to allow for the imposition of anti-dumping duties on a country-wide basis. Even assuming that Article 9.2 of the *Anti-Dumping Agreement* can be read as containing such a principle, the imposition of anti-dumping duties on a country-wide basis is expressly provided for in Article 9.2 of the *Anti-Dumping Agreement* ("if it is impracticable to name all these suppliers"). Seen in its context and in view of its object and purpose, Article 9.2 of the *Anti-Dumping Agreement* implies that the imposition of country-wide anti-dumping duties is permitted in cases where such imposition on individual basis would result in the measure being ineffective. Moreover, contrary to what China alleges, Article 6.10 of the *Anti-Dumping Agreement* cannot be read as providing for only one exception to the determination of dumping margins on an individual basis (i.e., sampling). As the relevant case-law shows, a single dumping margin can be determined for the actual producer and the source of the price discrimination, even if there are several exporters involved. This is fundamentally the situation in non-market economy countries, where State control over the means of production and State intervention in the economy including international trade imply that all imports are considered to emanate from a single producer, which is the source of the alleged price discrimination. In other words, the relevant exporter for which an individual dumping margin should be determined in case of non-IT suppliers (i.e., companies whose export activities are not *de jure* and *de facto* sufficiently independent from the State) is the State. The country-wide dumping margin serves as the maximum ceiling for the proper duty rate which the supplying country, that is the actual supplier including non-IT suppliers, is subject to. The application of a single duty rate is also necessary to avoid circumvention of the duties in those cases where suppliers do not act independently from the State (i.e., in order to avoid the channelling of exports through the supplier with the lowest duty rate). Finally, China advances a partial, very limited reading of its Protocol of Accession. Contrary to what China alleges, its Protocol of Accession, including the Working Party Report, is not strictly limited to derogating from the rules of the *Anti-Dumping Agreement* only as far as the determination of the normal value is concerned. Indeed, China's Protocol of Accession provides useful context to confirm the conclusion that, in the case of imports originating in China, anti-dumping duties can be specified on a country-wide basis when suppliers cannot show that market economy conditions prevail with regard to the manufacture, production and sale of the product concerned.

4. The European Union observes that China's claims under Articles 6.10, 9.3, 9.4 and 18.4 of the *Anti-Dumping Agreement*, Articles I:1 and X:3(a) of *the GATT 1994* and Article XVI:4 of the *WTO Agreement* are entirely dependent on a finding that Article 9(5) of Council Regulation No 384/96, as amended, "as such" infringes Article 9.2 of the *Anti-Dumping Agreement*. Indeed, China's claim under Article 6.10 of the *Anti-Dumping Agreement* is based on a wrong understanding of the parallelism between the imposition of anti-dumping duties and the determination of individual dumping margins. Further, China's claims under Articles 9.3 and 9.4 of the *Anti-Dumping Agreement* are based on the assumption that the investigating authority is obliged to determine an individual anti-dumping duty per company. Likewise, the claim under Article I:1 of the *GATT 1994* depends on a finding as to whether the *Anti-Dumping Agreement* permits an investigating authority to require suppliers in case of imports from non-market economy countries to prove that certain conditions are met. If the *Anti-Dumping Agreement* so permits, in view of the *lex specialis* principle, no violation of Article I:1 of the *GATT 1994* can be found. Similarly, the claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* are entirely dependent on a finding that Article 9(5) of Council Regulation No 384/96, as amended, is "as such" inconsistent with other claims raised by China.

III. CLAIM 1: ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS APPLIED" IN COUNCIL REGULATION NO 91/2009 (ARTICLES 6.10, 9.2 AND 9.4 OF THE *ANTI-DUMPING AGREEMENT*)

5. China's claim is based on the assumption that the application of Article 9(5) of Council Regulation No 384/96, as amended, is inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement* in all cases. As the European Union has shown before, China's "as such" claim is without merit. Therefore, the Panel should also reject China's claim in connection to Council Regulation No 91/2009. In addition, the European Union notes that China's claim under Article 9.4 of the *Anti-Dumping Agreement* is outside the Panel's terms of reference and that China is challenging a non-existent measure.

IV. CLAIM 2: STANDING OF THE EU DOMESTIC INDUSTRY FOR THE PURPOSES OF INITIATION (ARTICLE 5.4 OF THE *ANTI-DUMPING AGREEMENT*)

6. China has not consulted with the European Union on the new claim in the Panel Request, as required by Article 4 of the *DSU*. Moreover, China's Panel Request is not specific and does not set out the problem clearly, as required by Article 6.2 of the *DSU*. The European Union also notes that Notice of Initiation 2007/C 267/11 is not a measure at issue and the relevant matter is outside the Panel's terms of reference. Turning to the substance of the matter, the European Union submits that, manifestly, it did examine the standing issue prior to initiation. Finally, the European Union considers that China's assertion that Eurostat figures are incorrect and that the domestic producers expressly supporting the application accounted for less than 25 per cent of total production of the like product produced by the domestic industry is both outside the Panel's terms of reference and incorrect.

V. CLAIM 3: DETERMINATION OF "DOMESTIC INDUSTRY" (ARTICLES 4.1 AND 3.1 OF THE *ANTI-DUMPING AGREEMENT*)

7. China claims that the EU's determination of "domestic industry" violated Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*. In particular, China presents five sets of claims against the EU's determination of the domestic industry. All five of these claims are to be rejected. First, China claims that the European Union was not allowed to define the domestic industry as consisting of only those cooperating producers supporting the complaint that made themselves known within 15 days of initiation of the investigation. The European Union considers that China's claim is to be rejected for a number of reasons. First, China's claim is not properly before the Panel since it was not subject to consultations and this claim is thus outside the panel's mandate. Second, Articles 4.1 and 3.1 of the *Anti-Dumping Agreement* do not impose a requirement to include any and all producers of the like product in the definition of the domestic industry. Article 4.1 allows an authority to define the domestic industry as consisting of all producers of the like product or of only those producers that represent a major proportion of total domestic production. There is no hierarchy of preference between these two possibilities. It is therefore entirely legitimate to define the domestic industry in the more limited manner that the European Union considered to be appropriate in this case. Article 3.1 deals with the quality of the evidence provided with respect to the industry as defined in accordance with Article 4.1 and the manner in which this evidence is examined by the authority. It does not impose obligations in respect of the definition of the domestic industry as such. In any case, the 15-days deadline that was used as the basis for determining the group of producers that would constitute the domestic industry is an objective criterion that does not favour either side. China has failed to demonstrate that this limitation prevented an objective examination of the state of the domestic industry.

8. Second, China argues that the domestic industry as defined by the European Union does not consist of producers producing "a major proportion" of domestic output since these producers represent "only" 27 per cent of total domestic production. China's interpretation of the term "a major

proportion" in Article 4.1 is in error. China argues that a major proportion has to be as close as possible to 100 per cent. The WTO case law to which China itself refers with approval clearly disavows this erroneous interpretation considering that "a major proportion" is an "important, serious or significant" proportion. It is clear that 27 per cent is a significant proportion of production. China presents no arguments or evidence to contradict this conclusion in the context of the particular circumstances of this case. The European Union therefore requests the Panel to reject China's claim that the EU's definition of the domestic industry violated Article 4.1 of the *Anti-Dumping Agreement*.

9. Third, China argues that the domestic industry was "not defined in relation to the investigation period" and therefore violates Article 3.1 of the *Anti-Dumping Agreement*. China errs both in respect of the facts on the record and in respect of the applicable law. It is not so, as China erroneously argues, that the authority examined injury data for a particular 2006 – 2007 period but examined only 2006 data to determine that the domestic producers represented a major proportion of total domestic production. In addition, Article 3.1 simply does not impose an obligation to expressly determine the existence of a major proportion with respect to the period of investigation for dumping purposes. A recent and relevant period was used consisting mainly of the last full year for which statistical data were available. China does not present evidence to disavow the authority's reasonable conclusion. There is therefore no factual nor legal basis for China's claim of violation in respect of the EU's determination of the domestic industry in the context of the investigation period.

10. Fourth, China argues that the determination of injury on the basis of a sample of domestic producers representing only 17 per cent of total domestic production violates Article 4.1 and 3.1 of the *Anti-Dumping Agreement* since the sampled producers do not represent a major proportion of total domestic production. China fails to demonstrate that Article 4.1 imposes any obligation in respect of sampling. Furthermore, it would not make sense to require a sample to comply with the same "major proportion" obligation that the domestic industry itself is to comply with. The requirement of Article 3.1 is arguably that the sample should be sufficiently representative of the domestic industry as a whole, as defined in accordance with Article 4.1. That is different from requiring that the sample be representative of the totality of the domestic producers as a whole, as China erroneously alleges to be required. China's argument in respect of the volume of total production represented by the sampled producers is without merit.

11. Fifth, China argues that the European Union should have excluded a number of domestic producers from the definition of the domestic industry for the simple reason that these producers were related to producers/exporters in China and that the European Union failed to objectively examine this relationship. However, China acknowledges that no such obligation to exclude all related domestic producers exists in the *Anti-Dumping Agreement*. The Agreement permits, under certain conditions, the authority to exclude related producers, but certainly does not require an authority to do so. No obligation to objectively examine the relationship therefore exists either. In any case, China fails to demonstrate that the facts do not support the reasonable finding of the authority that the centre of interest of these domestic producers remained in the EU and that it was therefore neither necessary nor appropriate to exclude these producers from the scope of the domestic industry.

12. In sum, all of China' claims under Articles 3.1 and 4.1 of the *Anti-Dumping Agreement* in respect of the EU's definition of the domestic industry are to be rejected.

VI. CLAIM 4: SELECTION OF THE PRODUCT CONCERNED (ARTICLES 2.1 AND 2.6 OF THE *ANTI-DUMPING AGREEMENT*)

13. As is well known, the issue of what is the product concerned and the issue of what is the like product are distinct issues. Having no case on either issue, China attempts to collapse both issues into a single line of argument. China ignores the fact that the measure at issue does not contain any determination to the effect that standard fasteners are like special fasteners, so China is referring to a

non-existent determination. Similarly, China ignores the fact that the like product standard does not apply to the selection of the product concerned, so China is invoking a non-existent obligation. Thus, China's claim is based upon impugning a non-existent determination by reference to a non-existent obligation. Therefore, the Panel must reject this claim.

VII. CLAIM 5: DETERMINATION OF DUMPING (ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

14. China alleges that the European Union failed to make a fair comparison as required by Article 2.4 of the *Anti-Dumping Agreement* between normal value and export price because the authority did not base this comparison on the full Product Control Number ("PCN"). China fails to establish a prima facie case of violation. First, China fails to even discuss the relevant sections of the Council Regulation No 91/2009. Furthermore, Article 2.4 of the *Anti-Dumping Agreement* does not specify the methodology to be followed in order to conduct a fair comparison. The mere fact that the comparison was not made on the basis of the full PCN cannot ipso facto constitute a violation of Article 2.4 as erroneously argued by China. China misunderstands the role and relevance of the PCNs. In any case, it is clear that the authority complied with the obligation to make adjustments for those differences that the interested parties demonstrated as affecting the price comparability. In particular, the European Union ensured a fair comparison by distinguishing between products on the basis of strength class and between standard and special fasteners. In sum, China failed to demonstrate that the authority violated its obligations under Article 2.4 of the *Anti-Dumping Agreement*.

VIII. CLAIM 6: PRICE UNDERCUTTING ANALYSIS (ARTICLES 3.1 AND 3.2 OF THE *ANTI-DUMPING AGREEMENT*)

15. China argues that the European Union violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* since the authority allegedly failed to make a price undercutting analysis on the basis of the full PCN. China's claim is to be rejected. First, China's claim was not part of its request for consultations and this matter has therefore not been subject to consultations. This claim is therefore outside the Panel's terms of reference. Furthermore, Article 3.2 of the *Anti-Dumping Agreement* does not require any particular methodology for conducting a price undercutting analysis and China's claim that the European Union violated its obligations simply because it used a "simplified" PCN is thus clearly without merit. Finally, China fails to demonstrate that the undercutting analysis was conducted in a non-objective or biased manner simply because it did not use the full PCN. The adjustment that may be required in the context of the injury analysis are not necessarily the same as those that are required by Article 2.4 of the *Anti-Dumping Agreement* in the context of a comparison between normal value and export price where the focus is on cost-related differences. In a price undercutting analysis the emphasis is on market-related differences. China's proposed parallelism with the fair comparison requirement is thus inapposite. In sum, China's claims under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* in respect of the price undercutting analysis are to be rejected.

IX. CLAIM 7: EXAMINATION OF THE VOLUME OF DUMPED IMPORTS (ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

16. China argues that the European Union violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 because the authority failed to exclude the volume of two exporters that were found not to be dumping from its volume analysis under Article 3.2 and because the authority assumed for the purposes of that same volume analysis that all non-examined exporters were dumping. The European Union requests the Panel to reject China's claim in this respect. First, China's argument in respect of the two exporters for which a zero margin of dumping was found to exist is misguided and elevates form over substance. The European Union submits that the authority objectively considered whether

the volume of dumped imports significantly increased and the fact that it did not exclude imports representing an insignificant amount of total imports from the volume of dumped imports does not detract from this conclusion. Second, China errs that the authority was not entitled to include the imports of all non-examined producers in the total volume of dumped imports. Since all of the sampled producers were found to be dumping, the authority was entitled to conclude by extrapolation that all imports from non-examined producers were equally dumped. This is precisely one method for determining the volume of dumped imports that the Appellate Body considered to be appropriate in a sampling context. China's consequential claims under Articles 3.4 and 3.5 are thus equally flawed. However, even if the Panel were to find that the European Union violated its obligation under Article 3.2 of the *Anti-Dumping Agreement* for reason of the fact that it did not exclude the volume of the two exporters not found to be dumping, it is still clear that this alleged error of marginal importance cannot be considered to vitiate the entire injury analysis. China's claims under Article 3.4 and 3.5 of the *Anti-Dumping Agreement* are therefore in any case to be rejected.

X. CLAIM 8: IMPACT OF DUMPED IMPORTS ON DOMESTIC PRODUCERS (ARTICLES 3.1 AND 3.4 OF THE *ANTI-DUMPING AGREEMENT*)

17. China argues that the European Union violated its obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* to objectively examine the impact of the dumped imports on the situation of the domestic industry. China presents four equally flawed arguments in this respect. First, China asserts that the EU's injury determination is flawed because the authority allegedly did not consistently use the same dataset for examining injury. China's argument is misguided since the authority consistently used data relating to the same domestic industry. The fact that the authority examined certain factors on the basis of data relating to a representative sample of the domestic industry while other factors were examined based on data relating to all producers that are part of the domestic industry does not vitiate the objectivity of the analysis in any way. It is not because sampling is used that it would not be permissible for an authority to base certain of its conclusions on the more complete dataset, where available. China has certainly not demonstrated otherwise. China's only example of an alleged bias does not accurately reflect the facts on the record.

18. Second, China argues that the European Union failed to objectively examine the factor "profitability" and points to allegedly conflicting statements in respect of this factor in the authority's findings. However, China does not actually provide evidence that the authority's findings are not proper but simply points to an alleged difference between the preliminary determination and the final determination. Furthermore, a proper reading of the findings and conclusions of the authority reveals that China appears to base its argument on a misunderstanding of the authority's factual findings. China's argument is thus clearly without merit and is to be rejected.

19. Third, China argues that the European Union failed to conduct an objective examination of the evidence on the record, as the authority allegedly based its injury finding on negative developments in respect of only one of the injury factors of Article 3.4 of the *Anti-Dumping Agreement*, market share. The European Union submits that China's presentation of the facts and of the relevant findings of the authority is not accurate. It is clear that the injury determination was not based on only one factor, and that the authority found that a number of factors showed a negative development when examined in the light of the significant increase in demand. China's argument that the loss of market share was caused by the increase in raw material prices is an argument that is relevant to the question of causation and non-attribution but is not germane to the injury determination under Article 3.4. The European Union submits that China is in reality requesting the Panel to examine the facts on the record and to determine whether it would have reached the same conclusion of injury as the authority did. Article 17.6 of the *Anti-Dumping Agreement* states clearly that this is not the role of the Panel.

20. Fourth, China asserts that the European Union improperly concluded that the injury consisted of the displacement from one market segment to another, while injury should be determined for the product as a whole. China's claim is based on a misunderstanding of the findings of the authority in this respect. The authority referred to such displacement as an indicator of how the industry tried to deal with the competition from the dumped imports (which were concentrated in the standard fastener market) by moving into the special fastener market. The authority's conclusion is that in so doing the industry was able to mitigate the negative effects of the dumped imports. The authority did not make the findings suggested by China.

21. For all of these reasons, the European Union requests the Panel to reject China's claim under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* in respect of the authority's injury analysis.

XI. CLAIM 9: CAUSATION AND NON-ATTRIBUTION ANALYSIS ARTICLES 3.1 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

22. China claims that the EU's causation and non-attribution analysis violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. China's claim is without merit. First, China's argument in respect of the causation analysis is limited to the speculative assertion that if the domestic industry had not decided to move into the specialty fastener segment it would not have lost market share. China's assertion unduly limits the injury to a loss of market share and is contradicted by the facts on the record. China fails to point to any flaws in the authority's findings in respect of the causal link between dumped imports and consequent injury to the domestic industry.

23. Second, China's allegation that the authority did not adequately distinguish the effects of other factors such as the increase in raw material prices and the export performance of the EU industry is equally unsubstantiated. It is clear from the record that the authority examined the role of the increase in raw material prices but found that there did not exist a similar direct link between the increase in raw material prices and the loss of market share as was found to exist in respect of the dumped imports. China simply disagrees with the authority's assessment of the impact of this factor (raw material prices). China does not demonstrate that the authority did not provide a reasonable and reasoned explanation of how the facts support the determination made. China's claim in respect of the authority's treatment of the export performance of the domestic industry is equally without merit. China's unsubstantiated speculation about what could have happened had more of the export sales been made on the domestic market is not relevant and is in any case contradicted by the facts on the record. It was entirely reasonable of the authority to base its conclusions on statistical COMEXT export data of the domestic industry to find that this relatively unimportant factor showed a positive evolution and could not therefore be a cause of injury. China's claims under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* relating to the authority's non-attribution analysis are thus to be rejected.

XII. CLAIM 10: CHINA'S PROCEDURAL CLAIMS UNDER ARTICLES 6 AND 12 OF THE *ANTI-DUMPING AGREEMENT*

24. China has made 13 procedural claims under Articles 6 and 12 of the Anti- Dumping Agreement. These claims allege that the due process rights of interested parties have been violated during the investigation that led to the adoption of Council Regulation No 91/2009.

25. The European Union demonstrates in its First Written Submission that several of these claims are outside the Panel's terms of reference and that, in any event, the claims are unfounded to the extent China has even made a prima facie case. China not only misrepresents the many different obligations under Articles 6 and 12 of the *Anti-Dumping Agreement* but even more importantly appears to confuse the relationship between the obligations that come within the scope of the relevant provisions invoked by China and the relevant facts and evidence provided by China. Under most of its procedural claims, China simply makes an assertion that the European Union has breached a given

obligation in the *Anti-Dumping Agreement*, but fails to develop any coherent argumentation or provide any relevant evidence. In essence, China either expects the European Union to accept that the mere formulation of an abstract claim is sufficient to shift the burden of proof to the defendant or expects the Panel to make the case on its behalf.

26. To the extent the Panel considers some of the claims to be within its jurisdiction, the procedural claims by China are without merit and should be dismissed by the panel.

XIII. CONCLUSION

27. For the reasons set out in this First Written Submission, the European Union requests the Panel to reject all of China's claims and arguments, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the *Anti-Dumping Agreement*, the GATT 1994 and the WTO Agreement.