ANNEX C

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

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. In this dispute, China challenges two measures: (i) Article 9(5) of Council Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the EC, as amended, as codified and replaced by Council Regulation (EC) No. 1225/2009; and (ii) Council Regulation (EC) No. 91/2009 which imposes a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

2. In its First Written Submission, the EU has raised a broad range of *procedural* arguments. If these procedural deficiencies are so substantial, China fails to understand why the EU did not request such a preliminary ruling. Unfortunately, the absence of a request for preliminary ruling has denied China the opportunity to reply in writing to the procedural objections before this first substantive meeting. China fears that the EU's unwillingness to request a preliminary ruling is just one more element of the EU's litigation tactics. China recalls that procedural arguments are important where they are invoked to ensure due process rights and that they should not be abused as tactical instruments to prevent a panel from addressing the substantive issues underlying the dispute.

3. In its Oral Statement, China will address the main procedural arguments raised by the EU and reply to the remaining procedural objections in its second written submission. Likewise, China will not enter into a detailed refutation of all substantive arguments but will focus on demonstrating the fundamental errors in the EU's arguments relating to China's main claims.

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

4. As a preliminary remark, China rejects the EU's allegation that there is a common understanding that China is not yet a market economy country. Following its WTO accession, China has gradually evolved into a market economy country. This view is shared by many WTO Members that have granted full market economy status to China. In any case, whether China is a market economy or a non-market economy country is not relevant in this dispute.

5. It is therefore regrettable that the EU seems to confuse the rules governing "Market Economy Treatment" or MET and "Individual Treatment" or IT. In the EU's anti-dumping regime, MET and IT are completely different issues. MET relates to the question whether the domestic prices and costs of the exporting producer in the non-market economy country can be used for determining normal value (Article 2(7)). The provisions on IT, on the contrary, only relate to the question whether an individual dumping margin and duty must be calculated for the exporting producer on the basis of his own export prices or, on the contrary, such exporting producer must be subjected to the country-wide residual duty (Article 9(5)). China does not address the WTO consistency of the EU's rules contained in Article 2(7) of the Basic AD Regulation which deal with the normal value determination. China's "as such" claim is only directed at Article 9(5) of the Basic AD Regulation and thus only relates to the "individual treatment" issue.

6. The EU intentionally ignores the difference between both sets of rules. Instead, it tries to transform the limited exceptions which concern the normal value determination into a legal justification for all forms of different treatment applied to non-market economy countries. This tactic becomes obvious in the section entitled "background"[1], where the EU invokes Article 8 of the Kennedy Round Anti-Dumping Code to support its position, contrary to the documented negotiating history thereof, and in the EU's analysis of China's Protocol of Accession.[2]

7. China submits that a correct application of the rules of treaty interpretation can only lead to the conclusion that Article 9(5) of the Basic AD Regulation violates *inter alia* Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement. Contrary to what the EU alleges, there is no rule or "codified understanding" in the AD Agreement according to which the provisions of that Agreement would only be applicable to market economy countries.

8. The procedural arguments raised by the EU against the claims made by China relating to the first measure can be grouped into two main categories. The EU first submits that China's Panel Request failed to satisfy the requirements of Article 6.2 since the Panel Request failed to present the claims relating to Articles 6.10, 9.3 and 9.4 of the AD Agreement and Article X:3(a) of the GATT 1994 sufficiently clearly because there is allegedly no connection between the measure at issue, i.e. Article 9(5) of the Basic AD Regulation, and the WTO provisions that China claims this measure violates.[3]

9. The EU submits that Article 9(5) only deals with the issue of the imposition of anti-dumping duties while the provisions that China claims this measure violates deal with other issues. This issue is however a substantive issue that has nothing to do with the procedural requirements of Article 6.2 of the DSU, which merely requires the complaining party to identify in its Panel Request the specific measure at issue and the claims so as to enable the defending party to know the problem at issue. On the basis of China's Panel Request, the EU was manifestly aware of the specific measure challenged and the legal basis for the alleged nullification or impairment of China's WTO benefits.

10. Furthermore, when submitting that the "*explanation* provided by China"[4] with respect to these claims fails to plainly connect the specific measure at issue with the specific claim so that the problem is presented clearly, the EU obviously confuses the "claims" with the "arguments" that refer to the explanations. While "claims" must be set out in the Panel Request in a precise manner, arguments will necessarily be expanded upon and clarified progressively during the proceeding. Finally, the EU failed to demonstrate that China's alleged failure to "present the problem clearly" has prejudiced its ability to defend itself.

11. The second set of procedural arguments relate to "issues" that have been raised by China in its First Written Submission and which were allegedly not covered by the Panel Request. First, the EU claims that Council Regulation (EC) No 1225/2009 is outside the Panel's terms of reference because the measure identified in the Panel Request is Council Regulation No 384/96, "*as amended*" while Council Regulation (EC) No 1225/2009 does not *amend* but *repeal* Council Regulation No 384/96. This is a purely formalistic argument which, if adopted, would seriously undermine the effectiveness of the dispute settlement system. Since the wording and content of the measure at issue has not changed, the Panel has to conclude that Article 9(5) of Council Regulation (EC) No 1225/2009 is within its terms of reference.

[1] EU FWS, para. 11 – 14.
[2] EU FWS, para. 123 – 129.
[3] EU FWS, para. 51.
[4] EU FWS, para. 53, 56, 61, 65 and 67.

12. Second, the EU submits that China has sought to "expand the scope of the measure at issue to cover other issues".[5] According to the EU, the measure identified in the Panel Request is Article 9(5) of the Basic AD Regulation which deals only with the imposition of anti-dumping duties[6] and China's First Written Submission "seeks to incorporate issues dealing with the calculation and determination of individual margins within the scope of the measure at issue".[7] The EU's claim appears to take issue with the "content" of the measure at issue. However, contrary to what the EU alleges, Article 9(5) deals not only with the imposition of anti-dumping duties but also determines whether or not an individual dumping margin will be calculated. China's views on the scope of the measure are clear from its Panel Request.

13. With respect to the substantive issues raised by the EU regarding China's challenge of Article 9(5) of the Basic AD Regulation, China's comments will, for the purposes of this Oral Statement, be limited to some observations concerning the EU's arguments relating principally to Articles 6.10 and 9.2 of the AD Agreement and Article I of the GATT 1994. The other issues will be addressed in China's second written submission.

14. As a preliminary remark, China would like to emphasize the fundamental error in the approach taken by the EU when interpreting the provisions concerned. Rather than starting from the ordinary meaning of the terms read in their context, the EU follows a teleological approach. China also considers it necessary to respond to the EU statements that Article 9(5) of the Basic AD Regulation has a much more limited scope than that claimed by China. The EU submits that Article 9(5) deals only with the very specific issue which refers to the imposition of definitive anti-dumping duties and that it does not address the determination of margins of dumping which is allegedly governed by Article 9(4) of the Basic AD Regulation. The EU's analysis is incorrect. Whether an individual or a country-wide dumping margin is determined for a particular exporting producer is not governed by Article 9(4) but by Article 9(5) of the Basic AD Regulation. The EU actually confirms this in paragraphs 81 of its First written Submission where it explains how anti-dumping duties and dumping margins are determined in case of imports from non-market economy countries. As such, Article 9(5) concerns both the determination of an individual duty and an individual dumping margin.

15. China will now briefly elaborate on its claims that Article 9(5) violates several WTO provisions. China will start with the Article 9.2 ADA claim. The EU seems to consider that it would always be permissible for WTO Members to limit their examination to the exporting country as a whole and to impose one country-wide duty. Article 9.2 would merely require that the investigating authority name the supplier or suppliers of the product concerned. Yet, the above interpretation is wrong, *inter alia* because it would make no sense to require the suppliers to be named on an individual basis if the intention was to impose a country-wide duty. The EU's interpretation of Article 9.2 is also dangerous since it would allow investigating authorities to disregard the individual dumping margins calculated for specific exporters as long as the duty imposed on them does not exceed the country-wide dumping margin.

16. The EU further submits that the ordinary meaning of the word "impracticable" used in Article 9.2 of the AD Agreement is "ineffective". However, based on the *New Shorter Oxford Dictionary*[8], "impracticable" refers to something which is not feasible in practice or impossible in practice while the word "ineffective" refers to something which has no effect or result. Moreover, the EU's reference to Article 8.3 of the AD Agreement does not support its position either, but, on the contrary, demonstrates the erroneous nature of the EU's interpretation. Thus, the word "impracticable" only refers to situations in which the specific action is not feasible for practical

[5] EU FWS, para. 77.
[6] EU FWS, para. 78 – 80.
[7] EU FWS, para. 79.
[8] The New Shorter Oxford English Dictionary, 1993, 3rd edition, Volume I, p.1325 and p.2317.

reasons. The typical situation where this arises is where the number of exporters is too large or where certain exporters are not known. This interpretation of the term "impracticable" is furthermore confirmed by the negotiating history of the Kennedy Round Anti-Dumping Code.

17. The EU's arguments relating to Article 6.10 must similarly be rejected. China submits that Article 9(5) of the Basic AD Regulation violates Article 6.10 of the AD Agreement because it provides specific conditions that exporting producers from non-market economy countries must fulfil in order to receive individual treatment, i.e. an individual dumping margin and an individual duty rate. The EU argues that the departure from the general rule contained in Article 6.10 first sentence is permissible in situations different from the sampling scenario.[9] However, Article 6.10 expressly limits the possibility to derogate from this general rule to this one specific case, as also confirmed by consistent case-law.[10]

18. The EU further refers to the Panel's findings in *Korea – Certain Paper* and *Norway – Salmon*[11], to argue that the terms "exporter or producer" in Article 6.10, first sentence, cannot be interpreted *strictu senso* as a "company that exports" or a "company that produces" but rather in a manner which also permits to combine separate entities into a single supplier which is the actual source of price discrimination, and in case of non-market economy countries, the State.[12] However, Article 9(5) deals with a different issue than the question examined by the Panel in *Korea – Certain Paper*, namely whether several legal entities are related and should be regarded as one exporter. Article 9(5) of the Basic AD Regulation is both different from and additional to the criteria used to determine whether different legal entities should be considered as one "exporter" or "producer" for the purposes of the dumping margin determination. The "individual treatment" test of Article 9(5) applies **in addition to** the examination of whether several exporters are related and should be treated as a single exporter or producer. The criteria of Article 9(5) are also stricter than the general criteria used by the EU investigating authorities to determine whether distinct legal entities should be treated as a single exporter or producer.

19. China can agree with the finding reached by the Panel in *Korea – Certain Paper* that the terms "exporter" or "producer" in Article 6.10 do not necessarily refer to a single legal entity and that one individual dumping margin may be determined for several legal companies that are found to be related. China maintains, however, that this margin still has to be "individual" for that group of companies. However, under Article 9(5), exporting producers from non-market economy countries who cannot demonstrate that they fulfil the criteria set out in that provision will be subject to the residual ***country-wide dumping*** margin and anti-dumping duty. This is plainly inconsistent with the requirement of Article 6.10 that the dumping margin be determined on an individual basis, no matter whether the "exporter" or "producer" is a single legal entity or a group of companies. Also, the country-wide dumping margin is not based on the data concerning all exporters/producers found to be "related".

20. The EU tries to defend the use of the additional and stricter criteria of Article 9(5) and the imposition of a country-wide duty where such criteria are not met by referring to the State as being the actual producer and the source of the dumping.[13] The EU does not explain, however, why State-owned or State-controlled companies should be treated differently from other related group companies. Neither does the EU justify why such companies should be made subject to the higher residual duty.

21. Finally, the obligation to impose a country-wide duty unless a company demonstrates that it meets the IT criteria of Article 9(5), does not apply to all State-owned or State-controlled companies,

[9] EU FWS, para. 142, 147 and 152.
[10] See, e.g., Panel Report, *Mexico – Beef and Rice*, para. 7.137.
[11] EU FWS, para. 144 – 147.
[12] EU FWS, para. 147.
[13] EU FWS, para. 153.

but only to such companies in countries classified as non-market economy countries by the EU. There is no objective justification for this discriminatory treatment.

22. With respect to the Protocol of Accession, it does not allow any derogation as to the export prices which must be used or from the rule that dumping margins and anti-dumping duties must be determined on an individual basis.

23. However, the EU considers that such specific provision would not be required and that it is sufficient as a legal justification that the Protocol of Accession contains a "common understanding that China is not a market economy country" to make "the specific provisions" dealing with non-market economy countries contained in the AD Agreement applicable, namely Articles 6.10 and 9.2 of the AD Agreement.[14] This conclusion is wrong on both counts, since (i) China's Protocol of Accession does not contain a "common understanding that China is not a market economy country"; and (ii) neither Article 6.10 nor any provisions of Article 9 specifically address issues in connection with non-market economy countries.

24. In conclusion, the imposition of additional and stricter criteria for obtaining an individual anti-dumping duty on exporting producers from China compared to the criteria applicable to exporting producers from market economy countries has no legal justification in the AD Agreement or in China's Protocol of Accession.

25. Moreover, this discriminatory treatment also violates Article I:1 of the GATT 1994. The EU submits that no violation of Article I.1 can be found, on the basis of the *lex specialis* principle and Article II:2(b) of the GATT.[15] However, this reasoning is flawed as (i) Article II:2(b) of the GATT 1994 only relates to Article II:1 but not to Article I of the GATT 1994; and (ii) there is no "conflict" of provisions within the meaning of the General Interpretative Note to Annex 1A of the WTO Agreement since the AD Agreement or the Protocol or Accession does not contain a legal justification for treating exporters from non-market economy countries differently.

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

26. China will address various aspects of its claims concerning the determination of the "**domestic industry**". China submits that the domestic industry determination made by the EU violates Article 4.1 of the AD Agreement in several respects.

27 First, China considers that the EU has violated Article 4.1 of the AD Agreement by excluding from the definition of the "domestic industry" all producers that did not make themselves known within 15 days as of the date of publication of the notice of initiation as well as those producers that did not support the investigation.[16] According to the EU, Article 4.1 gives the investigating authorities the discretion to choose the producers to be included in the "domestic industry" as long as the producers thus selected represent a "major proportion" of the total domestic production.[17]

28. This theory was expressly rejected by the Panel in *EC – Salmon*. The Panel stated that it is not permissible to exclude from the outset from the "domestic industry" certain categories of producers of the like product other than those set out in Article 4.1. Contrary to what the EU alleges, the Panel's findings in *EC – Salmon* were not limited to categories of producers "which produce a

[14] EU FWS, para. 127.
[15] EU FWS, para. 173.
[16] China FWS, para. 233-245.
[17] EU FWS, para. 292-297.

particular type of the like product" but concern *any* category of producers of the like product other than those set out in Article 4.1.

29. The EU did exactly what the Panel so clearly condemned. It excluded from the definition of the "domestic industry" all producers that did not make themselves known within 15 days following the notice of initiation as well as those producers that did not support the complaint. These exclusions alone already introduced a bias in the "domestic industry" definition in favour of a finding of injury.

30. Second, the producers thus selected did not represent "a major proportion" of the total domestic production of fasteners. The EU did not even check whether the producers thus selected constituted "a major proportion" of the total domestic output. The EU automatically assumes that the major proportion criterion is fulfilled as long as the selected producers meet the major proportion definition in Article 5(4) of the Basic AD Regulation which deals with the standing requirements for the complainants. The EU thus interprets Article 4.1 of the AD Agreement as allowing it to define the domestic industry as consisting only of producers expressly supporting the complaint as long as the latter represent more than 25 percent of the Community production.

31. The EU tries to defend the automatic equation between the producers supporting the complaint and the "domestic industry" by stating that meeting the 25 per cent test creates a *legitimate presumption* that the producers represent a major proportion of total production.[18] Since the producers constituting the domestic industry represented 27 per cent of the total domestic production, they did, according to the EU, satisfy the major proportion test of Article 4.1.

32. The EU's interpretation finds no basis in the relevant provisions when examined in the light of the principles of treaty interpretation. In order to represent a "proportion" and thus a *fortiori* "a major proportion", the domestic producers concerned must constitute a "part", a "share" of the whole, that is of the domestic production as a whole. In other words, they must be representative of the whole. This has also been underlined by the Appellate Body in *US – Lamb*.[19] By failing to include in the definition of the domestic industry domestic producers that opposed the complaint or remained neutral, the EU investigating authorities defined a domestic industry that is not "representative" of the whole and does not constitute a "proportion" of the total domestic production and *a fortiori* a "major proportion" of the total domestic production.

33. The Panel in *Argentina – Poultry* merely takes note of the fact that the "major proportion" requirement does not imply a precise quantitative threshold, such as 50 per cent. It states that whether a collective output constitutes a "major proportion" is to be assessed **on the basis of the circumstances of the case**.[20] It is certainly incorrect to deduce from this that meeting the 25 per cent threshold would automatically constitute a presumption that the "major proportion" test has been met. The EU, however, did precisely this. It did not examine whether this conclusion was justified on the basis of the circumstances of the case.

34. China submits that the circumstances in this case demonstrate that the collective output of the 45 producers allegedly representing 27 per cent does not constitute a "major proportion" of the total domestic production. The first relevant circumstance is the "practicability" for the investigating authorities to include more producers in its definition of the domestic industry. In the case at hand, the investigating authorities had identified at the beginning of their investigation, at least, 114 producers representing 45 per cent of the total domestic production. These producers account for almost double the output represented by the producers finally included in the domestic industry definition. In view of this circumstance, it is hardly possible to argue that 27 per cent constitutes a "major proportion".

[18] EU FWS, para. 348.
[19] Appellate Body Report, *US – Lamb*, para. 91.
[20] Panel Report, *Argentina – Poultry*, para. 7.342.

35. Another circumstance that needs to be taken into account is the number of producers constituting the domestic industry in relation to the total number of domestic producers. As noted by the EU itself, there are more than 300 producers of the like product in the EU.[21] Thus, 45 producers amount to only one sixth of this estimated total.

36. In a last-ditch effort to justify its practice, the EU seems to argue that it is irrelevant how the domestic industry is defined when sampling is used.[22] This is obviously not correct.

37. Moreover, the determination of "domestic industry" also violates Article 3.1 of the AD Agreement. If the investigating authorities define the domestic industry by excluding from the domestic industry producers because they oppose the complaint, they act with bias. According to the EU, a violation of Article 4.1 would have no bearing on the obligations imposed on investigating authorities under Article 3.1. China strongly disagrees with this view. It is only possible to conduct an "objective examination" of injury if the result of this examination is not predetermined by the way the domestic industry has been defined. By excluding *inter alia* producers that opposed the complaint, the EU conducted their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

38. Finally, China would like to make a few comments regarding the claims it has made with respect to numerous violations of **due process obligations** by the EU. When reviewing the EU's arguments with respect to these claims, one is struck by how the EU tries to avoid going into the substance of China's claims. The EU consistently claims that China has failed to make a *prima facie* case because the claims are not understandable, are presented in a confusing way, the evidence submitted is irrelevant or inexistent or for other obscure reasons. China believes that the real reason is other, namely that the EU simply lacks any substantive arguments and evidence to rebut China's claims. These procedural arguments should not be allowed to obscure the real issue before the Panel, namely that the Chinese exporting producers were never given an effective opportunity to exercise their due process rights.

[21] EU FWS, para. 322.
[22] EU FWS, para. 284 and 302.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE FIRST MEETING OF THE PANEL

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

1. The European Union considers that the Panel's mandate with respect to China's as such claim is to examine the conformity of the concrete aspects of the specific measure described by China in its Panel Request with the relevant provisions of the covered agreements invoked by China. The specific measure in this case, as defined by China's Panel Request, is a very concrete legislative provision, i.e., Article 9(5) of Council Regulation No 384/96, as amended. The concrete aspects this provision requires or provides for are that, in case of imports from non-market economy countries: (i) an individual anti-dumping duty shall be specified for suppliers that can demonstrate, on the basis of properly substantiated claims, that they fulfil the five criteria listed in that provision; and, otherwise, (ii) the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier. The Panel is thus not called to examine other provisions of Council Regulation No 384/96, as amended; any of the provisions of Council Regulation No 1225/2009; the "individual treatment" or "individual treatment regime or practice" of the European Union; any matters pertaining to the calculation or individual determination of dumping margins; or any other matters different from the one specifically identified by China in its Panel Request. Moreover, the European Union has already shown that the Panel should reject most of China's claims since, contrary to the requirements under Article 6.2 of the *DSU*, China's Panel Request failed to present the problem clearly and, on substance, the specific measure described by China in its Panel Request does not fall within the scope of the obligations contained in Articles 9.2, 6.10, 9.3 and 9.4 of the *Anti-Dumping Agreement* and Article X:3(a) of the *GATT 1994*. In any event, like the third parties expressing a view on this issue, the European Union considers that China's claims against Article 9(5) of Council Regulation No 384/96, as amended, are based on a wrong understanding of the relevant provisions in the *Anti-Dumping Agreement*, the *GATT 1994* as well as China's Protocol of Accession. In particular, China fails to show why Article 9.2 of the *Anti-Dumping Agreement* contains a principle to impose individual anti-dumping duties per known exporter or producer. It is rather the contrary. This provision seems to allow for the imposition of anti-dumping duties on a country-wide basis.

2. Even assuming that Article 9.2 of the *Anti-Dumping Agreement* can be read as containing such a principle, *quod non*, imposition of country-wide anti-dumping duties is permitted in cases where such imposition on individual basis would result in the measure being *ineffective*. This is precisely the case of China as non-market economy. Indeed, the objective of offsetting or preventing dumping would be undermined if individual duties were to be imposed on suppliers which do not act sufficiently independent in their export activities from the State, i.e., the actual producer of the product concerned. China's Protocol of Accession also provides useful context to confirm the conclusion that, in the case of imports originating in China, anti-dumping duties can be specified on a country-wide basis when suppliers cannot show that market economy conditions prevail with regard to the manufacture, production and sale of the product concerned.

3. Moreover, as several panels have clarified, Article 6.10 of the *Anti-Dumping Agreement* permits that a single dumping margin can be determined for the actual producer and the source of the price discrimination, even if there are several exporters involved. This is fundamentally the situation

in non-market economy countries, where State control over the means of production and State intervention in the economy including international trade imply that all imports are considered to emanate from a single producer. It follows that the imposition of anti-dumping duties on a single supplier, i.e., China, despite the existence of several exporters which do not act independently from the State, i.e., non-IT suppliers, is permitted by Article 9.2 of the *Anti-Dumping Agreement*. In this respect, the calculation of dumping margins and the imposition of anti-dumping duties on a country-wide basis do not differ much from a situation where the investigating authority is confronted with several exporters all dependent from one single producer, which is the actual source of price discrimination.

4. The European Union observes that China's claims under Articles 6.10, 9.3, 9.4 and 18.4 of the *Anti-Dumping Agreement*, Articles I:1 and X:3(a) of the *GATT 1994* and Article XVI:4 of the *WTO Agreement* are entirely dependent on a finding that Article 9(5) of Council Regulation No 384/96, as amended, "as such" infringes Article 9.2 of the *Anti-Dumping Agreement* and, to some extent Article 6.10 of the *Anti-Dumping Agreement*. Since this is not the case, the Panel does not need to examine those claims.

II. ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS APPLIED" IN COUNCIL REGULATION NO 91/2009

5. The European Union observes that China's first claim is based on the assumption that the application of Article 9(5) of Council Regulation No 384/96, as amended, is inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement* in all cases. Since this is not the case, the Panel should also reject China's claim in connection to Council Regulation No 91/2009.

III. STANDING OF THE EU DOMESTIC INDUSTRY

6. The European Union would like to indicate that China has not consulted with the European Union on this new claim in its Panel Request, as required by Article 4 of the *DSU*. Moreover, China's Panel Request is not specific and does not set out the problem clearly, as required by Article 6.2 of the *DSU*. The European Union also notes that Notice of Initiation 2007/C 267/11 is not a measure at issue. In view of all these, China's claim is outside the Panel's terms of reference. In any event, on the substance of the matter, the European Union submits that, manifestly, it did examine the standing issue prior to initiation, thereby complying with Article 5.4, third sentence, of the *Anti-Dumping Agreement*.

IV. DEFINITION OF THE DOMESTIC INDUSTRY

7. As a preliminary matter, it is important to recall the very general nature of the two provisions that are being invoked by China. Article 4.1 sets forth a fairly general definition of the term domestic industry as consisting of all producers of the domestic like product as a whole *or* those producers whose collective output constitutes a major proportion of total domestic production. The only "obligation" to be derived from this provision is to *define* the domestic industry in a manner that is consistent with this definition. Similarly general in nature is Article 3.1 which requires that the state of the domestic industry, as defined in accordance with Article 4.1, is examined in an objective manner and based on positive evidence, i.e., based on reliable data. China errs when it asserts that these two very general obligations impose very specific obligations. The five claims of China are clear evidence of this erroneous approach. The European Union respectfully requests the Panel to reject all five.

8. First, China claims that the European Union was not allowed to define the domestic industry as consisting of only those cooperating producers that made themselves known within 15 days of initiation of the investigation. As explained in our submission, this brief summary of the legal basis

of China's claim – which is part of the "matter" before you – is nowhere to be found in China's Consultations Request. Since no consultations were held on this matter, China's claim is not properly before the Panel. Moreover, and on the merits, China ignores the fact that Article 4.1 defines the domestic industry as consisting of all producers of the like product *or* of those producers that represent a major proportion of total domestic production. The text of Article 4.1 does not establish a hierarchy of preference between these two possibilities. WTO case-law has confirmed this. The EU's determination that the domestic industry consisted of all those producers willing to cooperate and which made themselves known within 15 days following the initiation of the investigation is thus entirely legitimate as long as these producer represented "a major proportion" of total domestic production. Such was the case, as these producers represented 27 per cent of domestic production. Nothing in Article 4.1 disallows the use of a 15-day deadline for practical reasons. The EU did not "deliberately exclude" any type of domestic producers, and the subparagraphs (i) and (ii) of Article 4.1 are therefore not relevant to the situation at hand. The European Union wishes to clarify one important factual point which appears to have caused some confusion among the third parties. It is *not* so that the European Union excluded all producers that did not support the investigation. The views of the domestic producers were requested by the EU authorities and were relevant for the standing determination *before* the initiation of the investigation. However, once the investigation began, the domestic producers' views on the initiation became irrelevant. In the Notice of Initiation of the investigation, the European Union simply requested domestic producers that wished to cooperate in the investigation to make themselves known within 15 days, without further enquiry as to whether they supported or opposed the investigation. Then, the EU authorities decided to define the domestic industry as consisting of those producers expressing a willingness to cooperate. In other words, contrary to the understanding of some third parties, no producer which made itself known within 15 days was excluded for reason of the fact that it would not support the initiation of the investigation. Any exclusion took place merely because of the express statement by domestic producer of its will not to cooperate in the investigation. Needless to say, if a domestic producer decides not to cooperate, it will be impossible to obtain the relevant data during the investigation. In addition, and insofar as Article 3.1 would impose any requirements in respect of the definition of the domestic industry, *quod non*, there is no basis for the argument that the mere fact that a 15-days cut off date was used for practical reasons would require the Panel to find that the investigation was not conducted in an unbiased or objective manner. The 15-days deadline that was used as the basis for determining the group of producers that would constitute the domestic industry is an objective criterion that does not favour either side. China has failed to demonstrate that this limitation prevented an objective examination of the state of the domestic industry.

9. Second, China argues that the domestic industry as defined by the European Union does not consist of producers producing "a major proportion" of domestic output since these producers represent "only" 27 per cent of total domestic production. China's interpretation of the term "a major proportion" in Article 4.1 is in error. China argues that "a major proportion" has to be as close as possible to 100 per cent. The WTO case-law to which China itself refers with approval clearly disavows this erroneous interpretation considering that "a major proportion" is rather an "important, serious or significant" proportion. It is clear that 27 per cent is a significant proportion of production. China presents no arguments or evidence to contradict this conclusion in the context of the particular circumstances of this case as it was required to do. The European Union wishes to clarify that the legal question before the Panel is not, as some third parties seem to suggest, whether 25 per cent is sufficient in all circumstances to constitute a major proportion. Indeed, the European Union considers that a percentage that is higher than 25 per cent should legitimately be considered as constituting a major proportion, unless there is evidence that shows that, in the particular circumstances of the case, such a percentage is not a major proportion. In sum, the European Union requests the Panel to reject China's claim that the EU's definition of the domestic industry violated Article 4.1 of the *Anti-Dumping Agreement*.

10. Third, China argues that the domestic industry was "not defined in relation to the investigation period" and therefore violates Article 3.1 of the *Anti-Dumping Agreement*. China errs both in respect of the facts on the record and in respect of the applicable law. To begin, the facts. China refers to the October 2006 – 2007 period as the period for determination of injury while this is actually primarily the period of investigation for dumping as the injury trends were examined using a longer period of time starting in 2003. The injury data examined thus covered the period January 2003 – October 2007. The determination of a "major proportion" was based on data relating to the last full year prior to initiation for which statistics were available, the year 2006, thus including part of the period of investigation for dumping purposes. Absent any evidence to the contrary, this is an objective and entirely reasonable approach to take. And to continue, the law. Article 3.1 simply does not impose an obligation to expressly determine the existence of a major proportion, let alone that it would require such a determination to be made in relation to the exact same period as the period of investigation for dumping purposes. Article 3.1 is entirely silent on this issue and relates only to the manner in which the data of the domestic industry are to be examined (objectively) and the reliability of the evidence that is to be examined (positive evidence). In any case, and applying for the sake of argument the generally applicable reasonableness standard to the determination of "a major proportion", it is clear that a recent and relevant period was used consisting of the last full year prior to initiation for which statistical data were available, including part of the period of investigation for dumping purposes. There is therefore no factual nor legal basis for China's claim of violation in respect of the EU's determination of the domestic industry in the context of the investigation period.

11. Fourth, China argues that the determination of injury on the basis of a sample of domestic producers representing 17 per cent of total domestic production violates Article 4.1 and 3.1 of the *Anti-Dumping Agreement* since the sampled producers do not represent a major proportion of total domestic production. First, China fails to demonstrate that Article 4.1 imposes any obligation in respect of sampling. Furthermore, it would not make sense to require a sample to comply with the same "major proportion" obligation that the domestic industry itself is to comply with. As rightly noted by Japan in its Third Party Written Submission, "accepting China's argument … would vitiate the purpose of sampling". The requirement of Article 3.1 is arguably that the sampled data should be sufficiently representative of the *domestic industry as defined in accordance with Article 4.1*. That is different from requiring that the sample be representative of the *totality of the domestic producers* as a whole, as China erroneously alleges to be required. As explained in our First Written Submission, the sample chosen was representative of the domestic industry both in terms of volume, types of products and size of the producers. China's argument in respect of the volume of total production represented by the sampled producers is thus without merit.

12. Fifth, China argues that the European Union should have excluded a number of domestic producers from the definition of the domestic industry for the simple reason that these producers were related to producers / exporters in China and that the European Union failed to objectively examine this relationship. However, it is clear that the *Anti-Dumping Agreement permits*, under certain conditions, the authority to exclude related producers, but certainly *does not require* an authority to do so. Even China accepts this. That leads to two conclusions: first, without an "obligation" to do something there can be no "violation"; second, it is only when the authority would want to exclude such related producers that there exists a prior obligation to determine in an objective manner whether such a relationship exists and whether this relationship was such to cause the related producer to behave differently. The EU authorities did not exclude any related producers and therefore no obligation to make an objective determination could have been violated. In any case, China fails to demonstrate that the facts do not support the reasonable finding of the EU authorities that the centre of interest of these domestic producers remained in the European Union and that it was therefore neither necessary nor appropriate to exclude these producers from the scope of the domestic industry.

V. SELECTION OF THE PRODUCT CONCERNED

13. The European Union further submits that the Panel should reject China's claim that the European Union acted inconsistently with Articles 2.1 and 2.6 of the *Anti-Dumping Agreement* because it included in the scope of the product concerned both standard and special fasteners as "like" products despite their readily apparent differences and uses. Fundamentally, China ignores that like product and product concerned are two distinct issues in the *Anti-Dumping Agreement*, and that there is nothing requiring investigating authorities to carry out a likeness analysis within the product concerned. Moreover, China ignores the fact that the measure at issue does not contain any determination to the effect that standard fasteners are like special fasteners, so China is referring to a non-existent determination. Thus, China's claim is based upon challenging a non-existent determination by reference to a non-existent obligation, something which the Panel must reject.

VI. FAIR COMPARISON UNDER ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

14. We now turn to China's claim under Article 2.4 of *the Anti-Dumping Agreement* – the need to conduct fair comparison between normal value and export price. Once again, China refers to a very "general and abstract" obligation in order to impose very specific obligations that are nowhere to be found in the *Anti-Dumping Agreement*. China alleges that the European Union failed to make a fair comparison between normal value and export price because the EU authorities did not base this comparison on the *full* Product Control Number ("PCN"). It is clear however that Article 2.4 of the *Anti-Dumping Agreement* does not specify the methodology to be followed in order to conduct a fair comparison. The mere fact that the comparison was not made on the basis of the full PCN can therefore not *ipso facto* constitute a violation of Article 2.4 as erroneously argued by China. Importantly, China misunderstands the role and relevance of the PCNs which are merely a tool for gathering information in a particular manner that may allow the authority to compare identical products without the need to make any adjustments. The PCN is determined at the beginning of the investigation when it is not even clear which elements are actually affecting price comparability. It is thus not correct that the PCN necessarily identifies product characteristics affecting price comparability or that, simply because the information was requested to be provided on the basis of a particular PCN, the authority would be precluded from adopting a different methodology for comparing normal value and export price. What is necessarily unfair, biased, or not "even-handed" about the fact that the comparison was not made on the basis of the full PCN? China does not seem to have answered this question yet.

15. In respect of China's claim of lack of making adjustments for differences affecting price comparability, it is recalled that the EU authorities complied with the obligation under Article 2.4 to make adjustments for those differences affecting the price comparability in this case. In particular, the European Union ensured a fair comparison by distinguishing between products on the basis of strength class and between standard and special fasteners. These were the two main characteristics referred to by the Association of Chinese Exporters and Importers of Fasteners. It is thus incorrect of China to argue that the PCN *necessarily* identifies *the* factors affecting price comparability for which adjustments should have been made. In sum, China clearly failed to demonstrate that the EU authorities violated their obligations under Article 2.4 of the *Anti-Dumping Agreement*.

VII. PRICE UNDERCUTTING

16. China argues that the European Union violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* since the EU authorities allegedly failed to make a price undercutting comparison between export prices and prices of domestic producers on the basis of the full PCN. As an important preliminary matter, we would note that this claim was not part of China's Consultations Request and, thus, this claim is outside the Panel's terms of reference. In any case, Article 3.2 of the *Anti-Dumping*

Agreement does not require any particular methodology for conducting a price undercutting analysis and China's claim that the European Union violated its obligations simply because it used a "simplified" PCN is thus clearly without merit. Nor is it clear why the alleged failure to use the full PCN would necessarily reveal a bias against Chinese exporters. The most important aspect of the price comparison between EU fasteners and Chinese fasteners was the difference between special versus standard fasteners. This difference was taken into account by the EU authorities. Given the "considerable discretion" that is to be given to authorities in respect of the price undercutting analysis and taking into consideration the fact that the more detailed methodological obligations of Article 2 on dumping cannot simply be transposed into the provisions of Article 3, there simply is no basis for China's claim that the price undercutting analysis was not even-handed or was biased simply because the full PCN was not used to make this comparison. In any case, the relevant PCN characteristics were taken into consideration as well as the important distinction between special and standard fasteners, and the EU authorities thus clearly complied with any obligation of reasonableness that could be imposed in this respect. In sum, China's claims under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* in respect of the price undercutting analysis are to be rejected.

VIII. VOLUME OF DUMPED IMPORTS

17. China argues that the European Union violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 because the EU authorities failed to exclude the volume of two marginal exporters that were found not to be dumping from its volume analysis under Article 3.2 and because the EU authorities assumed for the purposes of that same volume analysis that all non-examined exporters were dumping. The European Union requests the Panel to reject China's claim in this respect.

18. First, the European Union recalls that the two exporters that China claims should have been excluded represented a *totally negligible* amount of exports. This marginal amount of non-dumped imports is incapable of undermining the objectivity of the determination which remains based on almost 100 per cent of imports. This is even more so since the actual examination is to determine whether there exists a "significant" increase in dumped imports. The failure to exclude this marginal amount which is simply incapable of impacting on the "significance" of the increase found to exist cannot be the basis for a finding of violation of Article 3.1 and 3.2. We thus urge the Panel not to adopt a formalistic approach but to look at what the European Union did and whether, as a whole, it objectively determined that there existed a significant increase in dumped imports when it found that imports increased by 103 per cent. The answer to that question is and remains, yes. It is clear that if the volume of non-dumped imports had been excluded, the outcome would have been exactly the same, dumped imports would have been found to have significantly increased. The European Union requests the Panel not make the same mistake that was made by the panel in *Japan – DRAMs (Korea)* when that panel considered that to conduct this type of examination of whether the determination by the authorities still stood, irrespective of the alleged error that was made, would constitute a *de novo* review. The Appellate Body faulted the panel for not having conducted such an examination, and rightly so.

19. Second, China errs when it asserts that the EU authorities were not entitled to include the imports of all non-examined producers in the total volume of dumped imports. Since all of the sampled producers were found to be dumping, the EU authorities were entitled to conclude, by extrapolation, that all imports from non-examined producers were equally dumped. This is precisely one method for determining the volume of dumped imports that the Appellate Body in *EC – Bed Linen* considered to be appropriate in a sampling context. All of China's claims in respect of the volume analysis are thus to be rejected including its consequential claims under Articles 3.4 and 3.5.

IX. INJURY FACTORS UNDER ARTICLE 3.4 OF THE *ANTI-DUMPING AGREEMENT*

20. First, China asserts that the EU's injury determination is flawed because the EU authorities allegedly did not consistently use the same dataset for examining injury. But the EU authorities *did* consistently use data relating only to the *same domestic industry*. The fact that the EU authorities examined certain factors on the basis of data relating to a representative sample of the domestic industry while other factors were examined based on data relating to all producers that are part of the domestic industry does not vitiate the objectivity of the analysis in any way. It is not because sampling is used that it would not be permissible for an authority to base certain of its conclusions on the more complete dataset, where available. In the words of the panel in *EC – Bed Linen* in respect of an identical argument by India, to require an authority to ignore such information would be "anomalous" and "inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence". Article 3.4 says nothing about the particular methodology to follow in case of injury sampling. And China has certainly not demonstrated that there is anything inherently biased about this approach either. The example of market share to which China refers is based on an inaccurate presentation of the facts as the conclusions of the EU authorities are essentially similar, whether based on the sampled data or on the data for the industry as a whole. The situation in this case is thus entirely different from that discussed in the WTO case-law referred to by China which concerned situations in which the authorities did not examine the domestic industry as defined in accordance with Article 4.1 in a consistent manner, but used a broader or narrower approach depending on the kind of factors examined. Such was not the case in the fasteners investigation.

21. Second, China argues that the European Union failed to objectively examine the factor "profitability" and points to allegedly conflicting statements in respect of this factor in the EU authorities' findings. In fact, however, China is quoting *selectively* from the findings of the authorities. A proper reading of Council Regulation No 91/2009 clearly shows that the authorities reached the reasonable and reasoned conclusion, supported by the facts on the record that profitability remained low. China effectively blames the EU authorities for their detailed discussion of this factor and their nuanced approach to "profitability". China is simply asking the Panel to substitute its judgment for that of the EU authorities, something the Panel is clearly not allowed to do under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the *DSU*.

22. Third, China argues that the European Union failed to conduct an objective examination of the evidence on the record, as the EU authorities allegedly based their injury finding on negative developments in respect of only one of the injury factors of Article 3.4 of the *Anti-Dumping Agreement*, market share. In our First Written Submission, we have explained that China's presentation of the facts and of the relevant findings of the EU authorities is simply not accurate. It is clear from the record that the injury determination was not based on *only* one factor. A reasonable and reasoned determination was made in respect of *all* injury factors, leading the EU authorities to the conclusion that a number of factors were negative when examined in the light of the significant increase in demand: significant decrease in market share, decrease in sales volumes, low profitability, low cash flow and return on investment and low capacity utilisation as well as high dumping margins were *all* examined in their proper context and were all considered to support the conclusion that the domestic industry was suffering "injury". Once again, China is simply requesting the Panel to examine the facts on the record and to determine whether *it* would have reached the same conclusion of injury as the EU authorities did. This, however, is not the role of the Panel as is clear from Article 17.6 of the *Anti-Dumping Agreement* as well as Article 11 of the *DSU*.

23. Fourth, China asserts that the European Union improperly concluded that the injury consisted of the displacement from one market segment to another, while injury should be determined for the product as a whole. However, the EU authorities did not make such a finding of market displacement, but related its injury finding to fasteners as a whole. The EU authorities referred to the move of the

domestic industry in the direction of a greater focus on special fasteners as an indicator of how the industry tried to deal with the competition from the dumped imports (which were concentrated in the standard fastener market) by moving into the special fastener market. The EU authorities' conclusion is that in so doing the industry was able to mitigate the negative effects of the dumped imports, but that, in respect of the product as a whole, producers still were suffering injury. Again, it seems that China objects to the nuanced and balanced discussion of this development by the EU authorities.

X. CAUSATION AND NON-ATTRIBUTION

24. China's claim in respect of the causation analysis of the EU authorities is actually limited to the speculative assertion that if the domestic industry had not decided to move into the special fastener segment it would not have lost market share. Not only does China's assertion unduly limit the injury found to exist to a mere loss of market share, China also fails to point to any flaws in the EU authorities' reasonable and reasoned findings in respect of the existence of a causal link between dumped imports and consequent injury to the domestic industry.

25. In terms of the non-attribution requirement, China's allegation that the EU authorities did not adequately distinguish the effects of other factors such as the increase in raw material prices and the export performance of the EU industry is equally unsubstantiated. It is clear from the record that the EU authorities examined the role of the increase in raw material prices but found that there did not exist a similar direct link between the increase in raw material prices and the loss of market share as was found to exist in respect of the dumped imports. The time pattern did not match, the increase in raw material prices was not specific to the EU industry and should have affected all producers, and in any case, under normal circumstances such price increases would have been passed on to consumers. China simply disagrees with the EU authorities' assessment of the impact of the raw material prices factor. However, China fails to demonstrate that the EU authorities did not provide a reasonable and reasoned explanation of how the facts support the determination made.

26. China's claim in respect of the EU authorities' treatment of the export performance of the domestic industry is equally without merit. The reasonable and reasoned conclusion of the EU authorities was that export performance, although relatively unimportant, was very good, and that export sales were made at prices significantly higher than domestic sales prices. Therefore, export performance was not a source of material injury. China's unsubstantiated speculation about what could have happened had more of the export sales been made on the domestic market is not relevant and is in any case contradicted by the facts on the record.

XI. CHINA'S PROCEDURAL CLAIMS

27. Of the 13 procedural claims China advances in its First Written Submission only one relating to Article 6.1.1 of the *Anti-Dumping Agreement* does not suffer of some fundamental problem, be it jurisdictional, presentational or both.

28. China claims that the European Union has breached Article 6.1.1 of the *Anti-Dumping Agreement* because the EU authorities granted to Chinese suppliers only 15 days to submit their claim forms for MET and IT. China asserts that the claim from is actually a "questionnaire" within the meaning of Article 6.1.1 and therefore be subject to the minimum 30-days rule therein. As Japan correctly observes in its Third Party Written Submission, "an MET/IT claim form is an additional element that is present only in the context of anti-dumping investigations concerning non-market economy countries like China, while the overall deadlines for investigations regarding market economy and non-market economy countries are identical". It simply cannot be the initial questionnaire. If all requests for information in an anti-dumping investigation were subject to the 30-day rule in Article 6.1.1, investigating authorities would never be able to complete the investigation within the prescribed time limits. Indeed, as the United States correctly observes in its Third Party

Written Submission, China itself does not practice what it preaches. The European Union considers that the Panel should apply the same logic as that applied by the panel in *Egypt – Rebar* and reject China's claim under Article 6.1.1 of the *Anti-Dumping Agreement*.

29. Finally, we would also like to address some other systemic observations on the relationship between some of the relevant provisions under Article 6 of the *Anti-Dumping Agreement*. First, contrary to what Norway appears to imply, the European Union is not in any way trying to limit the obligation in the first sentence of Article 6.2 of the *Anti-Dumping Agreement* when it has expressed caution on the relationship between Article 6.4 and 6.2. The European Union simply observes that the text of the provisions does not provide for the suggested necessary consequential violation of Article 6.2 if a violation of Article 6.4 would be established in a given case. The European Union invites the Panel to be very cautious on the interpretation of the relevant provisions when confronted with China's very general and erroneous assertions. Indeed, an example of China's broad brushed way of presenting its claims is its position that the Appellate Body would have already found that a violation of Article 6.4 always leads to a violation of Article 6.2. With regard to the relationship between Articles 6.4, 6.5 and 6.9 of the *Anti-Dumping Agreement*, the European Union considers that China has fundamentally misunderstood the respective scope and content of these provisions. In the view of the European Union the most blatant misunderstanding concerns the relationship between Articles 6.4 and 6.9. China systematically accuses the European Union of a breach of Article 6.4 because the disclosure documents or the final regulation is drafted in a certain way. The European Union fails to understand how the drafting of the disclosure documents or the final regulation could possibly provide evidence of a violation of a provision regulating the right to have access to information unless these documents would actually state that access to the file was denied.

ANNEX C-3

CLOSING STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, the Distinguished Members of the Panel,

During the last two days, the EU has argued that the EU's "individual treatment" regime is somehow justified by a common understanding contained in China's Protocol of Accession that China is a "non-market economy". When questioned, the EU was, however, unable to point to any specific wording in the Protocol which would confirm the existence of such an understanding which would be common to the WTO membership. If anything, the third party interventions of this morning have clarified that no such "common understanding" exists. This is not surprising. Paragraph 15 of China's Protocol of Accession only deals with one very limited issue, namely the possibility for some WTO members to determine normal value on the basis of data other than the domestic prices and costs in China. Nothing more, nothing less. In the present dispute, China does not challenge this possibility which is expressly provided for in the Protocol of Accession. It is unacceptable, however, that the EU tries to read into this provision and, in particular, into the word "sale", a justification to ignore the clear obligations contained in Article 6.10 and 9.2 of the AD Agreement.

Whatever the situation may have been in the past, China can no longer be considered as a so-called non-market economy country. In any event, this question is irrelevant since neither Article 6.10 nor Article 9.2 distinguish between any such different categories of WTO Members.

The EU has also tried to convince you that its injury determination was based on an objective and unbiased analysis of the impact of the dumped imports on a domestic industry which had been determined in full compliance with Article 4.1.

China would like to point out that the EU's allegations are not supported by the evidence in the file.

Contrary to what the EU stated, its own documents confirm that it excluded those producers which did not support the complaint from the definition of the domestic industry and that it did not check whether the remaining producers still constituted a major proportion, other than verifying the 25 per cent threshold was met. We understand that, as the EU stated, these documents may not have been phrased as precisely as they should have been. The EU has, however, not submitted any evidence to the contrary.

Similarly, the facts on the file show that during the investigation period used for the injury determination imports from China increased by more than 100 per cent and Chinese prices undercut the prices of the EU producers by more than 40 per cent. Yet, during the same period, the domestic industry not only doubled its profit, the EU producers also increased their sales volume and sales revenue while other injury indicators remained stable. It is true that the EU producers did not increase their sales as rapidly as the market grew. Is it, however, reasonable to base a finding of material injury solely on a loss of potential sales?

The foregoing facts also raise a more fundamental question. Is it really credible that the EU producers were able to increase their selling pries and sales volumes if the Chinese producers offered comparable product types at a price which was more than 40 per cent lower? This flies in the face of economic logic. Yet, the EU wants you to believe that the comparison for both dumping and injury

was made by comparing identical products. Indeed, the EU has acknowledged that no adjustments were made for differences in physical characteristics. In other words, no differences were found which had an effect on price comparability.

The EU does not provide a reasonable explanation for the fundamental inconsistency between its findings and economic logic. Its defence consists in stating that it is free to choose its own methodology for making price comparisons. Moreover, the EU states that China has provided no evidence that the EU's methodology was not objective or unfair. The EU itself stated in the questionnaires sent to the Chinese exporting producers that the information on a PCN basis was necessary to "ensure a fair comparison" and that it would be used "to compare prices of imports from the country concerned and prices charged by the Community industry and to compare sales data to the cost of production". This constitutes evidence that the PCN factors were necessary to make a fair comparison. Furthermore, it was only after repeated requests by the Chinese exporting producers and at a very late stage in the investigation, that is, a few days before the deadline for the submission of comments on the definitive disclosure, that some information on the methodology used was provided. In fact, the criteria used to distinguish standard from special fasteners were never clearly identified. Neither were the Chinese exporters told which PCNs of the EU producers had been grouped together into the newly created "product types" with which their products would be compared. The latter is essential. As demonstrated by China in paragraph 394 of its First Written Submission, prices of PCNs which were grouped into single "product types" by the EU may differ by 80 per cent. Such differences are larger than the price undercutting found. These price differences are based on the only data the Chinese producers had access to, i.e. their own data. China, however, submits that these data are sufficient to make a *prima facie* case. China submits that until now, the EU has failed to provide a satisfactory rebuttal.

The EU has invoked on several occasions the fact that China has been unable to submit specific evidence demonstrating that the determinations made by the EU were incorrect. With all due respect, the EU itself has simply made it impossible for Chinese exporters to have access to most data used by the EU in reaching its standing, injury and dumping determination. In doing so, the EU has violated the due process rights of the Chinese exporters and breached Articles 6.1.1, 6.2, 6.4, 6.5, 6.9 and 12.2.2 of the AD Agreement.

China submits that its First Written Submission includes the necessary evidence to make a prima facie case. The EU, however, simply chooses to ignore such evidence. The clearest example of this tactic is the approach taken by the EU with respect to the Information Document and the disclosure documents which the EU summarily dismisses as being irrelevant for China's claims.

Finally, China considers that the debate during the last two days has clarified that the many procedural objections raised by the EU are purely formalistic or factually unfounded. Moreover, nowhere has the EU been able to shown that any of the alleged procedural violations has prejudiced its ability to defend itself.

This concludes our closing statement. China thanks the Panel and the secretariat for their attention and detailed questioning during this meeting. China is ready to provide any further information and evidence you may require to bring this dispute to a satisfactory solution.

ANNEX C-4

CLOSING STATEMENT OF THE EUROPEAN UNION AT THE FIRST MEETING OF THE PANEL

1. The European Union would like to thank you again for all your efforts. We look forward to the next steps in the procedure in order to facilitate your tasks in the present dispute.

2. We would like to be brief in our closing statement and insist on some points which we believe should be relevant for the proper assessment of the matter before you.

3. First, the European Union has engaged in these proceedings in good faith, as required by Article 3.10 of the DSU. Contrary to China's assertion which attempts to put into doubt the good faith of the EU in its procedural handling, we have not made "procedural allegations" to mask our measure, avoiding any discussion on the substance of the issue. The reality is rather the contrary. Even if China has failed to make its prima facie case in its First Written Submission, the European Union has been more than forthcoming and has extensively provided both clarification of the facts of the case and interpretations of the legal provisions invoked by China. The so-called "procedural allegations" - as China qualifies them - are fundamental rules under the DSU granting rights to the parties and governing dispute settlement proceedings which must be respected for a proper functioning of the multilateral trading system.

4. Second, the European Union considers that, under the Panel's Working Procedures and the provisions of the DSU, China should have presented all the evidence and should have made its case, at the latest, during this first hearing. However, China has mentioned that a more precise rebuttal of the EU's arguments will be reserved only for its Second Written Submission. In this respect, the European Union cautions the Panel to avoid making the case for the complainant. Once more, we would like to note that China not only has to rebut the arguments the European Union has provided for in its First Written Submission – again, arguments that we have made in good faith although we still do not know what China's arguments are – but also has to make its case with respect to many of the claims included in China's Panel Request.

5. Third, on China's as such claim against Article 9(5) of Council Regulation No 384/96, as amended, we would like to briefly elaborate on your question about any other situations where the exception mentioned in Article 6.10 of the ADA may apply. In this respect, in addition to the case at hand, where it is permissible to impose a country-wide duty in view of the existence of a single producer, there may be cases where the authority would not be required under Article 6.10 of the ADA to calculate individual dumping margins to known exporters or producers. For instance, a known exporter may decide to drop its cooperation in the middle of the investigation. In that case, that exporter would be subject to the residual country-wide duty for the non-cooperating exporters and thus, in other words, an individual dumping margin would not be calculated for such exporter. Another example can be mentioned for the sake of completeness. Indeed, it may occur that in a particular case an exporter has not produced the product concerned during the Period of Investigation but merely has exported the products of another supplier. Such an "exporter" would be considered as a mere trader of the product concerned and thus would be subject to the anti-dumping duty found for the actual supplier.

6. Fourth, and since this is a matter that has received particular attention in China's oral statement, on the question of the definition of the domestic industry, we would like to reiterate that no producers were "arbitrarily excluded" – as China claims –, but rather all producers were invited to

participate and make their willingness to participate known within a reasonable and objective time period of 15 days and no producers were excluded for reason of the fact that they at one point in time had opposed the investigation. These producers constituted a major, important, significant proportion of total domestic production and China is unable to point to any particular circumstances of this case that would demonstrate that 27 per cent of production represented by these producers was anything other than "major". Even China in the course of this hearing has accepted that 25 per cent or even less of production can be a major proportion for the purposes of Article 4.1. Mr. Chairman, what more can we add to this admission which is a far cry from China's original position as expressed in its First Written Submission that 27 per cent cannot be a major proportion.

Mr. Chairman, Members of the Panel, this concludes our closing statement. Thank you again for your efforts.