ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX D-1

THIRD PARTY ORAL STATEMENT OF CHILE

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as third party in this dispute, would like to thank the Panel for the opportunity to present its views on certain systemic aspects of this case.

2. Chile does not propose to evaluate the substance of the dispute, nor will it question whether the procedure used by the European Union to determine whether or not the granting of Market Economy Treatment or Individual Treatment to Chinese producers is contrary to the rules of the GATT 1994 or the Anti-Dumping (AD) Agreement.

3. The first systemic issue that we would like to address is the determination of the domestic industry. Regarding the criteria used to exclude certain categories of domestic producers, it is my delegation's view that investigating authorities are not entitled to choose, at their own discretion, the producers to be excluded from the concept of domestic industry.

4. Articles 3 and 4.1 of the AD Agreement clearly stipulate that the investigating authority must carry out an objective examination of the totality of the domestic industry. The application of criteria that deviate from this principle means that the authority is "choosing" the producers that perform less well within that industry as part of the investigation.

5. Similarly, the determination, without the necessary evidence, of a given percentage of domestic production as constituting a major proportion of the total domestic production is, in our view, at odds with Article 4.1 of the AD Agreement.

6. A second issue that we consider important is the determination of the volume of dumped imports. A correct reading of Article 3.2 and 3.5 of the AD Agreement precludes the inclusion of the imports that are not being dumped in the volume of dumped imports.

7. This is particularly important when it comes to assessing the injury and the causal relationship. We think that it is wrong to extrapolate the results of surveys directed at all non-examined exporters, thereby including them in the volume of dumped imports.

8. Thirdly, with respect to the comparison of the normal price with the export price, Article 2.1 and 2.6 of the AD Agreement preclude the comparison of the price of products that are not identical without first separating them into categories. Indeed, the AD Agreement requires the investigating authority to conduct a thorough analysis of the characteristics of the product in question before making the comparison between the normal price and the export price.

9. At the same time, we consider the determination of injury to the domestic industry made by the European Union to be inconsistent with Article 3.1 and 3.4 of the AD Agreement. Indeed, the European Union considered that the displacement of domestic sales of one segment of the product ("special fasteners") was a result of the increase of imports from another segment of the product ("standard fasteners"). This analysis is very much at variance with the basic principles that should guide any investigating authority when determining injury.

10. The fourth and last issue of importance to us is the application of Article 6.5 of the AD Agreement, which requires the investigating authority to safeguard the confidential nature of the information provided. The mentioned article distinguishes between two types of confidential information: (a) information which is by nature confidential, and (b) information which is provided

on a confidential basis by parties to an anti-dumping investigation. Nevertheless, the treatment of information as confidential will be contingent upon there being good cause for treating the information in question as such.

11. Chile considers that for this provision to be correctly applied, the reasons justifying the disclosure of the information provided must be known to those who provided the information. If in the course of the investigation the authority sees no good cause for maintaining the confidentiality of the information, the authority must expressly so state. It is not something that can be done subsequently, still less once the dispute settlement proceedings have begun, in the first written submission. The disclosure of information considered by the authority to be non-confidential must be properly substantiated and must be expressly authorized by the party that supplied the information. If this were not the case, the position of the investigated party would be undermined and the rules of due process violated.

ANNEX D-2

THIRD PARTY ORAL STATEMENT OF COLOMBIA

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the panel, on behalf of the Government of Colombia, I thank you for giving us this opportunity to express our views on this important matter.

2. Our participation as a third party in this dispute is based on our systemic interest in the interpretation of the Antidumping Agreement. In our written submission, Colombia commented on a number of legal aspects pertaining to this dispute and we do not intend to repeat those comments today. Rather this intervention will focus in two issues: first, the relation between articles 3.1, 4.1 and 5.4 when identifying the domestic industry in an antidumping proceeding; and, second, the conditions in which a fair price comparison should be undertaken for the purposes of the dumping determination.

II. DOMESTIC INDUSTRY DETERMINATION IN LIGHT OF ARTICLES 3.1, 4.1 AND 5.4 OF THE ANTIDUMPING AGREEMENT

3. We consider that in the discussion of the determination of the domestic industry, the Panel has an interesting opportunity to clarify the relation between articles 3.1, 4.1 and 5.4 of the Antidumping Agreement.

4. Article 4.1 establishes how Members have to define the concept of domestic industry. This general definition affects both the application of articles 5.4 and 3.1 of the Antidumping Agreement.

5. Article 5.4 establishes a general obligation of Members to assess, before the initiation of an anti-dumping investigation, if the request is being made by or on behalf of the domestic industry.

6. Article 3.1, read in conjunction with article 4, contains the conditions that have to be met in order to identify the domestic industry, for the purpose of determining the injury caused by the dumped products.

7. The threshold set in article 5.4 does not have to be reviewed throughout the development of the investigation. Indeed, the panel in *Mexico – Steel Pipes and Tubes*, affirmed that there is no obligation arising from article 5.4 that would imply an assessment of the support of the request of the investigation at any different time than its initiation. Nonetheless, it is important to clarify that the requirements of article 5.4 set a threshold that has to be met in order for an authority to commence an antidumping investigation.

8. On the other hand, the evaluation of injury caused to domestic industry pursuant to the conditions set out in article 3.1 has to be rendered in light of the investigation as a whole, considering all positive evidence provided during the proceedings, and not just those submitted at the initiation of the investigation; hence in this case the notion of domestic industry, as presented by article 4.1, should be taken into account during all the stages of the investigation.

9. In light of the above, the analysis of the compliance of the requirements of articles 3.1 and 4.1 of the Antidumping Agreement for the purpose of injury determination is independent from the standing requirement as established in article 5.4.

10. Moreover, the obligation of article 5.4 is different from that of articles 3.1 and 4.1. National authorities should make an appropriate identification of the domestic industry before the investigation commences. At a later stage of the investigation, the concept of domestic industry, meeting the standards set in articles 3.1 and 4.1 of the Antidumping Agreement, could change without breaching the Agreement.

11. While not taking a final position on the facts of this case, it is our view that the Members of the Panel should assess whether the European Union's authorities followed this procedure, and as such complied with their obligations under the Antidumping Agreement.

III. FAIR PRICE COMPARISON

12. At this point we will like to draw your attention to the debate between the parties, as to the conditions in which a fair price comparison should be undertaken.

13. On this issue, China claims that the European Union failed to make a fair price comparison between normal value and export price, in accordance with article 2.4 of the Antidumping Agreement, due to the fact that the European Union did not take into consideration the full Product Control Number used for the investigation, and that it did not adjust the prices taking due allowance of certain conditions that might affect price comparability, such as the different physical characteristics, terms of sale, taxation, levels of trade and quantities.

14. In response, the European Union holds that China failed to make a *prima facie* case with respect to the alleged unfair price comparison, since it did not take into account relevant recitals of the measure at issue, which are evidence of the compliance with article 2.4 of the Antidumping Agreement. Additionally, the European Union claims that not using all the criteria of the Product Control Number does not *per se* constitute a breach of the mentioned provision.

15. We consider that this part of the dispute brings forth the discussion of how the due allowance of conditions that affect price comparability should be undertaken in an antidumping investigation.

16. When doing a price comparison, the national authority is bound to make a due allowance of the differences and their merits that may affect the price comparability of the products. This obligation has a two – fold burden, one on the investigating authority and the other on the producers of the products under investigation. The first burden is on the authority to request the necessary information to make a fair price comparison. As a response, the producers have to provide evidence of which are the differences in the products that affect their price comparability. Faced with that evidence, the authority is bound to make an assessment of the merits of that difference, in order to adjust the prices for the purposes of making a fair price comparison.

17. The panel in *Argentina – Ceramic Tiles* clarified that although the decision with respect to the adjustment of the prices due to specific conditions that affect the price comparability has to be based in the evidence provided by the representatives of the producers, it still has a minimum burden to make an evaluation of, at least, the physical differences of the products according to the best information available. Based on such minimum evaluation, the authority should make the appropriate price adjustments to ensure a fair price comparison.

18. Once again, while not taking a final position on the facts of this case, it is Colombia's opinion, that in as much as the European Union's authorities can demonstrate that they duly evaluated the physical differences and all others mentioned by the producers in order to adjust the prices for the purposes of a fair price comparison, their action may be considered by the Members of the Panel, to be in accordance with the requirements of article 2.4 of the Antidumping Agreement. If the Panel

concludes that the European Union did not satisfy this burden, then a breach of article 2.4 of the Antidumping Agreement would have to be acknowledged.

19. Mr. Chairman, distinguished Members of the Panel, with these comments, Colombia expects to have contributed to the legal debate of the parties of this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate of the interpretation of the Antidumping Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF INDIA

1. India welcomes this opportunity to present its views as a third party in this dispute brought by the Peoples Republic of China (China) regarding the consistency of European Union's definitive anti dumping measures on iron or steel fasteners from China with certain provisions of Anti Dumping Agreement, GATT 1994. India understands that important systemic issues were raised in this dispute which merits careful consideration by the Panel. While not taking any particular position on the facts of the case presented by the Parties, India would like to express its systemic views in the proper legal interpretation of certain provisions of the Anti Dumping Agreement, GATT 1994 and China's Protocol of Accession to the WTO.

2. India would like to address two important systemic issues which have been raised in the dispute:

(i) China's challenge of Article 9 (5) of European Union's basic AD Regulation on the ground that whether the European Union's determination of anti dumping duty in respect of exporters not granted Individual treatment was consistent with Article 6.10 of AD Agreement. Related to this issue are the consequential alleged violation of Article 9.2, 9.3 and 9.4.

(ii) Whether the European Union's injury determination based on sample of domestic producers representing 17.5 per cent of domestic production was in accordance with Article 4.1 and Article 3.1 of AD Agreement.

3. First on the issue of China's challenge of Article 9 (5) of the EU' s basic AD Regulation and the alleged inconsistency with Article 6.10 of AD Agreement, India considers that this allegation of inconsistency can be scrutinized in the light of the pertinent Articles of the Anti-Dumping Agreement, and of China's Protocol of Accession. Article 6.10 of the Anti-Dumping Agreement requires, as a general rule, for the Investigating Authority (IA) to determine an individual margin of dumping for each known exporter or producer concerned. As per the second sentence of Article 6.10, the authorities may limit their examination (i.e. resort to sampling) where the number of exporters, producers is so large as to make such an individual determination impracticable. However, it is India's understanding or would like to seek more clarification on our understanding from the Panel, that there is a possibility of other exceptions, besides the above provision of sampling, to the general rule of determining individual margin of dumping. Article 2.7 of ADA gives reference to the Supplementary provisions to Article VI.1 of GATT 1994 (Ad Article VI 2) as under:

> *"It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison* ***with domestic prices*** *in such a country may not always be appropriate. (emphasis added)"*

4. In this regard it is our view that Paragraph 15 (a) of China's Protocol of Accession may be relevant, which inter-alia provides that:

> *(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and **sale** of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;*
>
> *(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.*

5. The question that arises is whether the word "sale" used in the above provisions of the Protocol covers domestic sales and export sales or only the domestic sales. Both the above provisions in paragraph 15 (i) of the Protocol refer to market economy conditions prevailing in the industry producing the like product with regard to manufacture, production and sale of that product. Costs for the industry are normally associated with the determination of normal value in the exporting country. However under sub para (ii) above a WTO Member may use a methodology that is not based on a strict comparison with domestic prices in China. In India's view Whether the words "domestic prices" referred here cover prices of domestic sales as well as prices of export sales is not amply clear. The Panel may be required to interpret the meaning of domestic prices in the above provisions of the Protocol. In case the word "domestic prices" includes prices of goods sold in home market as well as export prices, then this may support the view that there is another exception to the requirement to determine an individual dumping margin under Article 6.10 of AD Agreement.

The other systemic issue on which India would like to express its views is with respect to the question, whether the European Union's injury determination based on the sample of domestic producers representing 17.5 per cent of domestic production was in accordance with Article 4.1 and Article 3.1 of AD Agreement.

6. China has alleged that EU's injury determination is flawed and violates, amongst others, obligations under Article 3.1 and 4.1 of the Anti-Dumping Agreement. The EU conducted the injury determination on the basis of a sample of producers accounting for 17.5 per cent of total EU production of the like product. European Union contends that the "Community industry" consisted of those domestic producers whose collective output constituted 27 per cent of domestic production is "a major proportion" of domestic production and therefore EU's definition of domestic industry is consistent with Article 4.1. The European Union also contends that Article 4.1 does not refer to sampling. Further, it does not impose any obligations on the representativeness of sample producers in terms of the percentage of the production that they should cover. A sample is a representative subset of something. It is thus essentially less than the total. The domestic industry was defined by EU as consisting of those producers representing a major proportion of total production. They form the "Community industry". It is in respect of this Community industry's total production that one should examine the representativeness of the sample. In other words EU argues that the sampled domestic producers accounting for 17.5 per cent of total production need not necessarily represent a major proportion of total domestic production. Instead the sampled domestic producers are representative of the Community industry.

7. In India's view, this argument by the European Union raises an important issue whether the EU's determination on injury was consistent with the requirement of "**objective examination"**. Article 3.1 requires determination of injury based on positive evidence and involve an objective examination of the effect of the dumped imports on the domestic producers. Further, Article 3.4 requires the examination of the impact of the dumped imports on the domestic industry concerned. Article 3.4 does not envisage sampling. Nor does Article 4.1 speak about sampling. Article 4.1

defines domestic industry. India considers, for an objective examination of injury under Article 3, the domestic industry has to be interpreted as referring to the domestic producers as a whole of the like products or those whose collective output of the product constitutes a major proportion of the total domestic production. **Even if an investigating authority resorts to sampling of domestic producers, the obligation of Article 4.1 regarding the definition of domestic industry must prevail for injury examination under Article 3.**

8. India appreciates the opportunity to express its views and hopes the view points furthered in these submissions may assist the panel in examining the matter before it.

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Not re-stating its written submission, Japan will draw the Panel's attention to five points.

II. ARTICLE 15(A)(II) OF CHINA'S ACCESSION PROTOCOL

2. First, with respect to the scope of the application of Article 15(a)(ii) of *China's Accession Protocol*, two questions arise in the context of the present dispute:

(i) whether items (a)-(e) provided in Article 9(5) of the Basic AD Regulation may be used to show that "market economy conditions prevail in the industry"; and

(ii) whether the calculation of a country-wide dumping margin and AD duty based on a comparison between the normal value established for an analogue country with the average export price of the cooperating exporting producers in the country concerned may be considered to be "a methodology that is not based on a strict comparison with domestic prices or costs in China".

3. Several third parties to this dispute suggest in their submissions that, in determining the dumping margin of Chinese exporters, investigating authorities may apply a methodology different than the one provided in the *AD Agreement* unless an individual exporter can demonstrate its independence from the State. The methodology is calculating a country-wide dumping margin and AD duty by comparing the normal value established for an analogue country with the average export price of the cooperating exporting producers in China. The earlier mentioned questions are particularly relevant in determining the discretion of investigating authorities in that regard.

4. Japan respectfully asks the Panel to pay due regard to the relationship between Article 15(a)(ii) of the *China Accession Protocol* and both Article 9(5) of the Basic AD Regulation and Definitive Regulation, and to clarify the scope of application of the Article 15(a)(ii) to the extent necessary to secure a positive solution to this dispute.

III. ARTICLE 6.10 OF THE ADA: TREATMENT OF MULTIPLE LEGAL ENTITIES AS A SINGLE EXPORTER OR PRODUCER

5. Second, the *AD Agreement* allows investigating authorities to calculate a single dumping margin for legally distinct but related entities to the extent that they can be considered a single "exporter" or "producer" in the sense of the first sentence of Article 6.10.[1]

6. Nevertheless, the treatment of legally distinct entities as a single exporter or producer is allowed only in the case where "the structural and commercial relationship between the companies in questions is sufficiently close to be considered as a single exporter or producer".[2]

[1] *See* Panel Report, *Korea – Certain Paper*, para. 7.161.
[2] *See* Panel Report, *Korea – Certain Paper*, para. 7.162.

7. A broader interpretation would undermine the rule set forth in Article 6.10 of the *AD Agreement* that an individual dumping margin must be established for each exporter or producer concerned, with *only one exception* to that rule, namely sampling. Granting investigating authorities overly broad discretion in treating separate legal entities as a single exporter or producer would allow investigating authorities to circumvent this rule, which would be inconsistent with the Article 6.10 of the *AD Agreement*.

IV. ARTICLES 4.1 AND 3.1 OF THE ADA: DEFINITION OF THE DOMESTIC INDUSTRY

8. Third point, the concept of "domestic industry" as provided in Article 4.1 of the *AD Agreement* is "*critical* to an injury determination, as it defines the framework for data collection and analysis".[3] Article 3.1 of the *AD Agreement*, which requires that investigating authorities base their injury determination on "positive evidence" and on an "objective examination", is an "overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to injury determination.[4] Logically, it is only possible to conduct an "objective examination" of injury if the outcome of the examination is not predetermined by the manner in which the investigating authority defines the domestic industry.

9. Therefore, the definition of the domestic industry must capture the *whole* domestic industry[5] and not just part of the domestic industry. Any other interpretation could allow investigating authorities to define the domestic industry in a results-oriented way, which would be inconsistent with the obligation of Article 3.1 of the *AD Agreement*.

10. In a similar vein, the injury examination "must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry".[6]

V. ARTICLE 2.6 OF THE ADA: DETERMINATION OF THE SCOPE OF THE "PRODUCT UNDER CONSIDERATION"

11. The fourth point is that there is no requirement that the "product under consideration" include only "like" products, and that there is no requirement that each individual item within the "like product" be "like" each *individual item* within the "product under consideration".

12. The first step in determining the scope of products subject to an anti-dumping investigation is to identify the allegedly dumped product, *i.e.* to define the product under consideration.

13. The *AD Agreement* does not provide any guidance as to how the "product under consideration" should be determined.[7] Similarly, the *AD Agreement* does not impose an obligation that all items included in the product under consideration must be "like" each other in the sense of Article 2.6 of the *AD Agreement*.[8]

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[3] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.321 (emphasis added).

[4] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114, referring to Appellate Body Report, *US – Hot Rolled Steel*, para. 192, quoting, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 106.

[5] *See* Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 12 January 2000, para. 7.54 (interpreting "producers as a whole," a phrase in Article 4.1(c) of *Safeguard Agreement* identical to Article 4.1 of the *Anti-Dumping Agreement*).

[6] Appellate Body Report, *US – Hot Rolled Steel*, para. 190. For a more detailed discussion, *see* Japan's Third Party Submission at paras. 29 and 30.

[7] Panel Report, *US – Softwood Lumber (V)*, para. 7.153.

[8] Panel Report, *US – Softwood Lumber (V)*, para. 7.157.

14. The second step in determining the scope of products subject to an anti-dumping investigation is to identify those products that are "like" the product under consideration. Article 2.6 of the *AD Agreement* defines what constitutes a "like product".

15. There is no requirement that each *individual* item within the "like product" must be "like" each *individual* item within the product under consideration.[9] Rather, what is required is a comparison of the overall scope of the product under consideration with the overall scope of the "like product".

VI. ARTICLE 3.1 OF THE ADA: DETERMINATION OF THE VOLUME OF DUMPED IMPORTS

16. The fifth and final point is that Japan disagrees with the view, when assessing the "volume of dumped imports" in the context of an injury determination under Article 3.1 of the *AD Agreement*, that information from non-sampled but individually examined producers *must per se* be taken into account when extrapolating findings to non-sampled producers.

17. In particular, there is no requirement in the *AD Agreement* for investigating authorities to follow a specific methodology when applying sampling, other than being required to conduct the investigation on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination".[10] An "objective examination" requires that the investigation be conducted in an *unbiased* manner, *without favoring the interests of any interested party*, or group of interested parties, in the investigation.[11]

18. Extrapolating the findings of the sample to all companies that were not individually examined is "unbiased" and does not "favor the interests" of any interested party in the investigation. Given that, a sample must be selected on the basis of its representativeness of the domestic industry as a whole, the approach does not in any way prejudge the outcome of the investigation.[12] Indeed, the purpose of sampling is to make an assessment for non examined companies based on findings relating to a *representative*, albeit limited, group of companies.

[9] Panel Report, *US – Softwood Lumber (V)*, para. 7.157.
[10] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 113, 114 and 117.
[11] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114.
[12] Panel Report, *EC – Salmon (Norway)*, para. 7.130.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF NORWAY

A. Introduction

1. Norway would like to thank you for this opportunity to make a brief statement at this meeting.

2. In its written submission, Norway addressed a number of interpretative issues raised by China and the EU in this case. Norway focused on the determination of the domestic industry, the product scope, the impact of dumped imports in the injury determination, the volume of dumped imports and the fulfilment of certain procedural requirements. The arguments in respect of these issues are explained in our written submission and I shall here only refer you to the arguments presented therein.

3. Today, Norway would like to address two additional issues raised by China and the EU in their written submissions:

- *First*, Norway would like to offer its views on China's claim that the EU violated Article 5.4 of the *Anti-Dumping Agreement* by initiating the investigation without ensuring that the application was supported by producers accounting for at least 25 per cent of the total production of the like product produced by the domestic industry.

- *Second*, Norway would like to address certain interpretative aspects related to China's claim that the EU violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* in concluding that the alleged dumped imports caused material injury, without properly assessing the injurious effects of other known factors.

B. The threshold for initiation

4. As to the first question, China claims that the EU failed to properly examine whether the industry support thresholds were met before initiating the investigation, as required by Article 5.4 of the *Anti-Dumping Agreement*.[1]

5. To recall; Article 5.4 requires that the investigating authorities "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry". Support for the initiation of an investigation is measured by reference to the collective volume of production of the supporters, seen in relation to the "total production of the like product" by domestic producers.

6. Simply put; to initiate an examination the EU needs to determine the relationship between two production volumes: the volume of its total domestic production and the collective volume of production of the companies that supports initiation of the investigation. And this determination needs to be made, objectively and based on an examination of positive evidence, at the time of initiation.

7. Article 5.4 expressly sets out that this examination and determination has to take place *no later than* at the time of initiation of the investigation. Reference is made to the wording "an investigation shall not be initiated" and "no investigation shall be initiated". It follows from this that

[1] First Written Submission of China, paras. 198-224.

the investigating authority cannot put forward facts received or revealed *after* the initiation of the investigation as evidence for the existence of the requisite industry support at that earlier point in time. Consequently, lack of the requisite support *at the time of initiation* cannot be *repaired* by adding new supporters later on in the investigation.

8. Furthermore, this determination is subject to scrutiny by Panels and the Appellate Body. It must, thus, be set out in the relevant notices and reports with sufficient clarity for interested parties to become acquainted with its basis and be able to contest it. Determinations that are mere statements, without proper explanation, do not suffice.

9. Now, China claims that the EU:

(i) *for total domestic production,* simply relied on the figure of 1.430 KT given by the complainants, without further investigation[2]; and

(ii) *for the collective volume of production of the supporters* included volumes not just from the complainants and supporters as the situation stood at the date of initiation, but also the production volumes of those domestic producers that made themselves known *after* the initiation.[3]

10. Norway leaves aside the question of whether this issue is properly before this Panel, something that is contested by the EU, or the appropriateness of relying on Eurostat data.

11. Norway simply wishes to highlight a few factual points raised by China in its First Written Submission, and that do not seem to be contested by the EU.

12. Norway notes that the contested Notice of Initiation[4] simply states that the complainants (alone) represent more than 25 per cent of total community (EU) production. No figures are given for either total domestic production or for the collective production volume of the complainants.

13. Furthermore, the *identity* of the complaining companies was not disclosed to China or to the exporters or producers.[5] China thus had no possibility to double-check the reliability of the declaratory statement regarding the sufficient support figure given in the notice of initiation.

14. China also states, with reference to a letter sent by the European Commission to certain Chinese exporters, that the EU included 46 new companies as supporters of initiation *after* the determination referred to in the Notice of Initiation was made.[6]

15. And, finally, the Definitive Regulation provides that the collective production of all domestic producers supporting the investigation – including those that came forward after initiation – represented 27 per cent of total community production.[7]

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[2] China, First Written Submission, para 207.

[3] China, First Written Submission, para 216.

[4] Notice of initiation of an anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China; Official Journal of the European Union (2007/C 267/11).

[5] China, First Written Submission, paras. 527 – 528.

[6] China, First Written Submission, para. 211.

[7] China, First Written Submission para. 216, with reference to Recital 114 of the Definitive Regulation (Exhibit CHN-4).

16. It seems credible, as argued by China[8], that the determination of the standing threshold *at the time of initiation* was flawed, in light of the later addition of these companies and their production volumes.

17. The Panel will have to assess, however, whether these points, together with other evidence and arguments presented by China, represents a *prima facie case* of a breach of Article 5.4. And, furthermore, whether the EU has been able to rebut.

C. Causation

18. Norway would next like to address the second issue previously identified: whether the EU violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* in concluding that the alleged dumped imports caused material injury, without properly assessing the injurious effects of other known factors. In particular, China argues that the EU failed to properly assess the effects of the increase in raw material prices, as well as the EU industry's exports to third countries.[9] Norway does not take a position on the issue of whether the EU has fulfilled its obligations according to Articles 3.1 and 3.5 in this case. Norway will only highlight certain arguments that may be of importance to the Panel when interpreting and applying the requirements of Articles 3.1 and 3.5.

19. According to Article 3.1 of the *Anti-Dumping Agreement*, the injury determination must be based on "positive evidence" and an "objective examination". Article 3.5 further requires a demonstration that "the dumped imports are, through the effects of dumping, ... causing injury". The investigating authority must "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and must not attribute "the injuries caused by these other factors" to the dumped imports.

20. Both Parties recognise[10] the investigating authorities' obligation, as established by the Appellate Body, to "separate and distinguish" the injurious effect of the dumped imports from the injurious effects of other known factors.[11] The Appellate Body has furthermore found this process to require "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports".[12]

21. Norway attaches great importance to these principles, as they represent an important mechanism to ensure that the injury from dumped imports is isolated from the injurious effects of other factors, thus fulfilling the objective of Article 3.5. If not adhered to, an injury determination becomes more likely and the requirement of an "objective examination" in the words of Article 3.1 would not be fulfilled. Norway therefore respectfully asks the Panel to carefully review whether the EU in this case fulfilled its obligation to "separate and distinguish" the effects of the dumped imports from the injurious effects of the increase in raw material prices and exports to third countries by the EU industry, and, furthermore, whether the EU ensured that any injurious consequences from such other factors were not attributed to the dumped imports.

Mr. Chairman, distinguished Members of the Panel,

22. This concludes Norway's statement here today. Thank you for your attention.

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[8] China, First Written Submission, para. 216.

[9] First Written Submission of China, paras. 478-493.

[10] First Written Submission of China, para. 480 and First Written Submission of the EU, paras. 647 and 650.

[11] Appellate Body Report, *US – Hot Rolled Steel*, para. 226.

[12] Appellate Body Report, *US – Hot Rolled Steel*, para. 226.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM"), as a third party in this dispute, would like to thank the panel for this opportunity to present its views in this proceeding brought by the People's Republic of China ("China") over the consistency with the Agreement on Implementation of Article VI of the GATT (the "AD Agreement") of European Union's ("EU's") measures imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China.

2. TPKM has systemic interests in ensuring fair and objective interpretation and application of the AD Agreement. While there are several issues that deserve more thorough treatment, TPKM would only pick one issue to express its views in the hope that Panel would benefit from its observations. Without taking a final position on the merits of this dispute, TPKM would like to comment on the issue regarding interpretation of the term "like product" and the concept of "products under consideration" in Articles 2.1 and 2.6 of the AD Agreement.

II. THE INTERTWINED ISSUES INVOLVING THE CONCEPTS OF "LIKE PRODUCT" AND THE "PRODUCT UNDER CONSIDERATION" IN ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

3. China argued in this dispute that the EU erred in concluding that "standard" fasteners and "special" fasteners are "like" products.[1] China asserted that Chinese producers essentially produce standard products designed for the tradesmen, building, maintenance, Do-it-Yourself markets and supermarkets, whereas EU producers generally produce special fasteners that focus on the high-end aeronautic, automotive, auto assembly and other safety-critical markets.[2] Those special fasteners require extra features that go beyond what is described in the relevant ISO/DIN standards.[3] China further argued that such differences in the physical and technical characteristics, interchangeabilities, end-uses and prices of the standard and special fasteners that are manufactured in China and the EU respectively are so significant that renders Chinese and EU-made fasteners not comparable, and thus, not "like products" under the AD Agreement.[4]

4. Rebutting China's assertions, the EU argued that as long as items are used to mechanically join two or more elements in construction, engineering, and … etc., they can be identified as fasteners. Based on their basic physical and technical characteristics and end uses, all fasteners are considered to constitute a single product for the purpose of the proceeding in a wide variety of industrial sectors, as well as by consumers. Therefore, the investigating authority does not need to differentiate markets such as industrial use or daily use and it also has nothing to do with prices or purposes. Moreover, the EU asserted that "fasteners (standard or special) are like fasteners (standard

[1] First Written Submission of China, paras. 297-356.
[2] First Written Submission of China, para. 143.
[3] First Written Submission of China, para. 143.
[4] First Written Submission of China, paras. 340-356.

or special)".[5] In other words, the EU considered that "fasteners (standard or special) produced by the domestic industry, fasteners (standard or special) produced and sold in China, fasteners (standard or special) produced in the analogue country, and fasteners (standard or special) produced in China and sold in the European Union are all alike."[6]

5. While not taking any final position on the factual arguments presented by both Parties to this dispute, TPKM found it not in a position to fully agree with the EU's framing of the issue as merely one regarding the "selection of product concerned" or with the associated string of arguments asserting that Articles 2.1 and 2.6 are neither applicable nor having any bearing in this regard.[7]

6. Distinguished Members of the Panel, one of the most significant issues before you today is whether the EU has properly determined that fasteners produced in China for both China and EU markets, the fasteners produced in analogue country such as India, and fasteners produced by EU domestic industries, either standard or special, are all like products according to the AD Agreement, or whether the EU has properly determined which fasteners, standard or special, shall be products under consideration.

7. To answer this question, we urge the Panel to look closely at both Articles 2.1 and 2.6 of the AD Agreement. Article 2.1 of the AD Agreement provides rules on how dumping is determined and the roles of the "product exported", i.e., "product concerned" as well as "like product" in such determination. Article 2.1 of AD Agreement provides that:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

8. According to Article 2.1 of the AD Agreement, before a Member's investigating authority decides whether certain "product exported" constitutes dumping or not, the investigating authority will first need to determine the scope of the "product exported", i.e., the "product concerned" so that it can conduct the rest of the anti-dumping investigation process including making the necessary comparisons on "likeness". Determining the scope of the products concerned is therefore one of the most important decisions to be taken in the entire AD investigation proceedings as it set forth the perimeter of the pivotal steps in those proceedings.

9. It is of fundamental importance that an investigating authority determines the scope of products concerned and the like product according to the relevant provisions of the AD Agreement, in particular, Article 2.6. Article 2.6 of the AD Agreement defines "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration", or, in the absence, and only in the absence of such an identical product, a product that "has characteristics closely resembling those of the product under consideration". According to such definition agreed by all WTO Members, "like product" shall first be interpreted to mean an identical product, and if such is not the case, then it could be interpreted to cover products with characteristics closely resembling those of the product concerned. In interpreting the term "like product" under Article 2.1 and 2.6 of the AD Agreement, TPKM believes that even though two products may share the same functions, such as being used to mechanically join two or more elements in construction, engineering and so on, or fall within the same HS Code, there might still be significant differences between them that prevent these products from being considered like products.

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[5] First Written Submission of the EU, para. 441.
[6] First Written Submission of the EU, para. 441.
[7] First Written Submission of the EU, paras. 424-442.

10. The Appellate Body and panels in various prior disputes have already laid down grounds for interpretation of the term "like products" albeit not in the context of the AD Agreement. While we are not going to repeat all those jurisprudence here, TPKM reckons that the panel's approach in interpreting the term "like product" in the dispute *Indonesia – Autos*[8] may be helpful for the Panel's consideration in the present dispute. Although *Indonesia – Autos* was a dispute in the context of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), the wordings of the relevant provision[9] on "like product" are exactly identical in the SCM Agreement and Article 2.6 of the AD Agreement. What we would like to point out today is that while EU has shaped its argument based on an issue it framed over the selection of products concerned, one of the core issues to be determined in the dispute between China and the EU remains how like products shall be determined and how the scope of the product under consideration shall be delineated according to the AD Agreement, and in particular, Articles 2.1 and 2.6.

11. The EU's written submission rebuts China's claim that EU has allegedly considered its domestically produced fasteners, Chinese fasteners for both EU and Chinese markets and Indian fasteners, either standard or special, are all like products. Questions and uncertainties remain. Are these fasteners identical? Probably not. Do they all have characteristics closely resembling each other? It seems that the EU sees no need to further elaborate whether the characteristics of all those types of fasteners closely resemble each other or not. TPKM considers that the intertwined relationship between the issue how the scope of the products concerned be determined and the issue whether the like product definition as provided in Article 2.6 of the AD Agreement is somehow connected to that determination, which may need to be further clarified by the Panel. Thus, we would respectfully urge the Panel to look into how the EU evaluates the characteristics and other relevant aspects among domestic fasteners, Chinese fasteners and Indian fasteners, either standard or special.

12. Furthermore, how an investigating authority determines the scope of the term "product concerned" or "product under consideration" and how much latitude the AD Agreement allows the investigating authority in this regard would be another significant question that the Panel may need to tackle. While TPKM is not providing a clear-cut suggestion on how the Panel should approach these difficult questions, it would like to respectfully remind the Panel that it is of utmost importance to preserve a sophisticatedly-struck balance between the respective interests of exporting Members in enjoying the benefit of market access and the interests of importing Members in protecting its industry from injury caused by dumping. Any alleged "latitude" or "flexibilities" that the investigating authorities may enjoy while delineating the scope of the products under consideration would need to be carefully restrained so as to maintain such carefully designed balance under the AD Agreement.

13. In light of the systemic implications of this dispute, TPKM respectfully requests the Panel to consider its views in examining the facts and arguments presented by the parties to ensure fair and objective interpretation of the relevant provisions of the AD Agreement. We appreciate this opportunity to express our views in this proceeding and would be glad to respond to any question the Panel may have.

[8] Panel Report, *Indonesia-Autos*, paras. 14.173-14.177.
[9] Footnote 46 to Article 15.1 of the SCM Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF TURKEY

I. Introduction

1. Turkey takes no position as to the defense and allegations presented by the parties. Turkey wishes to contribute by focusing on two major issues, namely Market Economy Treatment and Individual Treatment Assessments within the framework of dumping margin calculation.

II. Market Economy Treatment (MET)/Individual Treatment (IT) Assessments within the Framework of Dumping Margin Calculation

2. According to Article 2.1 of the Anti-Dumping Agreement , an investigating authority has to work on two data groups (normal value and export price) to determine whether dumping is present. Accordingly, the investigating authority is legally obliged to make a fair comparison based on the rules and standards stipulated in Article 2.4 of the Anti-Dumping Agreement between normal value and export price.

3. Furthermore, GATT 1994 Article VI, Ad Article VI.2 and Articles 2.2 and 2.3 of the Anti Dumping Agreement point out certain sources which the investigating authority shall take into consideration if either the normal value or the export price can not be determined from the data provided by the producer/exporter due to the reason that the internal sales do not permit a proper comparison or because of the absence or unreliable nature of export prices.

4. In Turkey's view, Ad Article VI.2 of GATT 1994 and Anti Dumping Agreement Article 2.2 permits the investigating authority to rely on an unbiased calculation method in order to determine the normal value in the event of exports from a country in which the prices are not set by dynamics of a free-market economy.

5. In addressing the IT assessment, it is understood that Article 9.5 of the EU Basic Regulation envisages the use of the export price of the producer/exporter itself if it can fulfill the criteria stipulated in the Article. If the exporter/producer fails, however, the EU investigating authority has the option to employ weighted average export price of cooperating producer/exporter companies for comparison.[1]

6. Therefore, the IT assessment is not solely an evaluation whether the producer/exporter has properly proved that it is fulfilling the criteria of Article 9.5, but a legal instrument directly affecting the calculation of the dumping margin by determining data group to be used as the export price which has been argued to be an indispensable component of the dumping margin calculation pursuant to the GATT 1994 Article VI and Article 2.2 of the ADA.

7. In this regard, both the MET and IT assessment are instruments that directly relate to the *calculation of the dumping* margin which provides the investigating authority with alternative routes on the question of which group of data will be used to determine the *normal value* and *export price*.

[1] EU First Written Submission Para. 23.

III. Setting a Threshold In Order To Provide for Individual Treatment

8. It can be clearly understood from Article 6.10 of the Anti Dumping Agreement that individual treatment, i.e. calculation of individual dumping margin for each known exporter/producer is a **general rule**. However there are always exceptions to general rules when the conditions prevail. The PRC rightly mentions that the second sentence of the Article 6.10, i.e. sampling, provides an exception to the general rule of individual treatment.

9. The legal question here is whether sampling is the sole exception to the general rule of IT, or Members can require in their domestic legislation some conditions to have met in order to provide IT. Turkey is of the view that this may not be the sole exception.

10. The Anti Dumping Agreement provides rules for economies operating in market economy conditions. There are no specific rules or exceptions for economies that are not operating under market economy conditions. It is not reasonable to look for a non-market economy exception in Article 6.10 itself.

11. Furthermore, Ad Article VI.2 of GATT 1994 provides a special provision for the calculation of prices regarding countries that do not operate under full market economy conditions. This provision mentions that, in the case of imports from a country which has a complete or substantially complete monopoly of its *trade* and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

12. When the object and purpose of Ad Article VI.2 of GATT 1994 and paragraph 150 of PRC's Working Party Report (WT/ACC/CHN/49) are considered; it is understood that these paragraphs are included as an exception to the general rule of "strict comparison with domestic prices" for counties that are not operating in full market economy conditions.

13. Moreover, taking into account the AB Report in the *US – Corrosion Resistant Steel*, and Panel Report in the *Korea – Certain Paper* cases, Turkey understands that treating several distinct legal entities as a single entity, in the event where the conditions require to do so, is approved by case-law and sampling is not the only exception to the general rule of IT.

IV. Conclusion

14. Turkey reserves its rights to make further comments at the third party session of the first substantive meeting of the Panel. Turkey thanks the Panel for the opportunity to present its views in this proceeding and welcomes any questions that Panel may have.

ANNEX D-8

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

1. The US oral statement will focus on the following three issues: (1) the identification of the relevant "producers" or "exporters" under Article 6.10 of the AD Agreement; (2) the identification of the"like product" as defined in Article 2.6 of the AD Agreement; and (3) the identification of the "domestic industry" under Article 4.1 of the AD Agreement.

"Producers" and "Exporters" Entitled to an Individual Margin of Dumping

2. One of China's principal claims is that Article 9(5) of the EU's Basic AD Regulation violates the covered agreements by requiring the investigating authority to apply a single dumping margin to multiple firms unless certain conditions are met. According to China, Article 6.10 of the AD Agreement permits application of a single dumping margin to multiple exporters or producers only where the number of producers and exporters makes impracticable the application of individual dumping margins for specific exporters or producers. China argues that because Article 9(5) does not fit into this narrow exception, it is inconsistent with Article 6.10.

3. The EU responds that China's argument fails because limiting the exporters or producers examined due to their large number is not the *only* exception to the general requirement of an individual margin contained in the first sentence of Article 6.10. According to the EU, Article 6.10 permits application of a single margin of dumping to multiple firms depending on the economic realities of those firms.

4. The United States agrees that the economic realities of the firms included in the investigation are key to implementing the obligations in Article 6.10. However, these economic realities do not provide an *additional exception* to Article 6.10. Instead, evaluation of the economic realities of the firms is part of the investigating authority's task in determining the "exporters" and "producers" for which it must generally determine an individual margin.

5. We begin with the text of Article 6.10, which states that: "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". The provision then provides one exception to this rule when the number of exporter or producers is so large as to make such a determination impracticable. As this provision makes clear, investigating authorities are generally required to determine an individual margin of dumping for each known exporter or producer. Thus, a fundamental question an investigating authority must answer when fulfilling this requirement is what "exporters" or "producers" are included in the investigation. Put differently, Article 6.10 establishes that the identification of the specific producers or exporters in an investigation is a *condition precedent* to calculating a dumping margin.

6. The United States recalls that the AD Agreement does not define an "exporter" or "producer", nor does it establish criteria for an investigating authority to evaluate when making this determination. As other Members have recognized, one particularly meaningful criterion in this inquiry is the economic realities of the firms included in the investigation, including their structure and operations in the particular economy at issue. For example, if a firm included in the investigation has a parent company that controls fundamental business decisions such as those related to production and pricing

for the firm included in the investigation, then it may be appropriate to consider that firm and its parent company as a single exporter or producer.

7. Under such circumstances, it would not make sense to assign the firm and its parent company separate margins of dumping because, as the EU points out, such a close relationship would permit the related exporters or producers to channel exports through an affiliate with a lower dumping margin, thereby significantly undermining the effectiveness of antidumping measures. Nothing in Article 6.10 of the AD Agreement requires such a result.

8. The panel's reasoning in *Korea – Paper* fully supports this understanding of Article 6.10:

> Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations. Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.

9. The United States respectfully submits that, consistent with this reasoning, this Panel should find that nothing in Article 6.10 prohibits an investigating authority from treating multiple firms as one exporter or producer if the facts demonstrate that the firms are sufficiently close that such treatment is appropriate. To the extent that Article 9(5) of the EU Basic AD Regulation is a mechanism for the investigating authority to examine such a close relationship between firms, that mechanism would not appear to be inconsistent with Article 6.10. Rather, such a mechanism would be critical to assist the investigating authority in complying with the general rule in Article 6.10 to calculate a single margin of dumping for every known exporter or producer.

10. The United States would also like to address China's assertion that Article 9(5) unfairly singles out firms from non-market economies for further analysis before these firms can qualify for an individual margin. There is nothing unfair or WTO-inconsistent in an investigating authority analyzing the independence of the firms included in the investigation. As we have just described, Article 6.10 of the AD Agreement does not prohibit an investigating authority from considering the economic realities of a firm when deciding whether the firm on its own qualifies as a "producer" or "exporter" and should therefore receive an individual margin. These economic realities necessarily include *the kind of economy in which the firm operates*.

11. Among the distinguishing features of a non-market economy is that the role of the government distorts the functioning of market principles. As the EU has pointed out, there is no shortage of evidence of the Chinese government intervening in the Chinese economy. Indeed, the fact that WTO Members have recognized the pervasiveness of government interference in the Chinese economy is reflected in both China's Protocol of Accession and Working Party Report.

12. Such interference can result in the government exerting influence over companies, including decisions related to production and pricing. As we have discussed, a lack of independence in production or pricing decisions is an important factor in determining whether a firm constitutes an "exporter" or "producer" for which an individual margin of dumping must be calculated pursuant to Article 6.10. Thus, firms in non-market economies operate under economic realities that make it particularly important for an investigating authority to analyze closely the particular structures and operations of these firms to evaluate their independence.

13. China is also incorrect in suggesting that companies from non-market economies face a heavy burden to demonstrate that they qualify for individual margin results. This so-called burden could be easily discharged, for example, by providing the investigating authority with evidence of a firm's structure and operations that would demonstrate that it functions as an exporter or producer separate from the government. Permitting firms to demonstrate independence also allows investigating authorities to make such evaluations on the basis of the facts in a given investigation and thereby respond to economic changes that occur over time in these non-market economies. Indeed, the investigation at issue in this dispute appears to reflect precisely that type of flexible response to such changes in the Chinese economy, given that *all* the cooperating Chinese companies that requested individual margins received them.

"Like Product"

14. China argues that "standard" fasteners and "special" fasteners are significantly different from each other. In its view, most fasteners from China were of the "standard" variety, whereas the EU had included "special" fasteners within the scope of the "like product". According to China, this failure of the EU to appreciate the distinction between "standard" fasteners and "special" fasteners when identifying the "like product" in this investigation was inconsistent with Articles 2.1 and 2.6 of the AD Agreement. This argument, however, fundamentally misunderstands the nature of the "like product" determination.

15. First, China appears to consider that the mere fact that both "standard" and "special" fasteners were included within the EU's "like product" evidences a violation of Article 2.6 because these two types of fasteners are themselves not "like" each other. In its third party submission, Norway similarly argues that Article 2.6 "requires that *any* given category of the 'like product' must be 'like' *each and every* category of the product under consideration".

16. This is an incorrect understanding of Article 2.6. That provision defines a "like product" to be "a *product* which is identical, i.e. alike in all respects to the *product* under consideration, or in the absence of such a product, another *product* which, although not alike in all respects, has characteristics closely resembling those of the *product* under consideration". (Emphasis added) The requirement of "likeness" is therefore determined at the level of the *product*, by comparing the specific product under consideration with another product. Nothing in the AD Agreement requires an investigating authority to make a determination at a more micro level, namely, by examining the "likeness" of models or categories within that particular product.

17. To the contrary, Article 2.4 specifically contemplates that meaningful "differences which affect price comparability" may exist among models within a single product definition. It is in this respect that the EU appears to have recognized the differences between "standard" and "special" fasteners.

18. Ultimately, what China appears to be complaining about is that the EU considered "fasteners" – including "standard" *and* "special" fasteners – to be the "product under consideration" or, in the words of Article 2.1, "the product exported". By characterizing this action as a failure to identify the "like product" properly, China confuses the "product under consideration" with the "like product". These two concepts, however, are distinct under the AD Agreement. Article 2.6 of the AD Agreement provides a definition of "like product", which contemplates that an investigating authority will evaluate the "likeness" of a given product by reference to the "product under consideration" that has already been identified. In contrast, as multiple panels have recognized, the AD Agreement imposes no definition or specific obligation in respect of the identification of the "product under consideration". The AD Agreement therefore provides no textual basis for China's complaint about the EU's selection of the "product under consideration".

"Domestic Industry"

19. China claims that the EU violated Articles 3.1 and 4.1 of the AD Agreement by excluding from the definition of the domestic industry all companies that did not make themselves known within 15 days of the date of publication of the notice of initiation, as well as those companies that did not support the investigation. Although the United States takes no position on the merits of China's factual allegations, the United States explained in its written submission why it agreed with China that a biased exclusion of certain producers from the injury examination would violate Article 3.1. That is, by fashioning an investigation so as to exclude all companies that did not support the investigation, an investigating authority fails to undertake an "objective examination" of the impact of dumped imports on the domestic industry as required by Article 3.1. The United States will focus now on how the deliberate exclusion of such producers from the "domestic industry" is also inconsistent with Article 4.1.

20. A proper definition of the domestic industry in accordance with Article 4.1 is essential to ensure that the investigating authority's examination under Articles 3.2, 3.4, and 3.5 addresses the impact of dumped imports on the appropriate set of domestic producers. Indeed, if an investigating authority fails to define the domestic industry consistently with Article 4.1, its consideration under Article 3.4 of the relevant economic factors having a bearing on the "domestic industry", and its examination under Article 3.5 of a causal link between dumped imports and injury to the "domestic industry", will be fatally flawed from the outset.

21. Article 4.1 obliges an investigating authority to define the domestic industry as "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". This provision is subject to two exceptions that do not apply here, but, as we will discuss, these exceptions illustrate why it is inconsistent with this provision to selectively exclude a group of domestic producers from the "domestic industry".

22. The EU appears to argue that, by virtue of the "major proportion" language, an investigating authority has virtually unfettered discretion to exclude whichever producers it wishes, as long as the remaining producers represent a "major proportion" of the industry's production. The EU's unduly narrow reading is not supported by the text.

23. First, the United States notes that the term "major proportion" is not simply a *quantitative* criterion indicating that an investigating authority need only include a certain *number* of producers in its "domestic industry". As the panel in *Argentina – Poultry* recognized, the word "major" as used in Article 4.1 is not a fixed percentage benchmark, but instead refers to producers of "an important, serious or significant" proportion of total domestic production. The text of Article 4.1 indicates that the "importance" of this proportion could be examined not only by reference to quantity of output. For example, Article 4.1(i) allows for an exception from the "major proportion" requirement in situations where "related" producers have been excluded. By focusing on the nature of the relationship between producers, this sub-paragraph indicates a *qualitative* element that may be considered when evaluating whether a "major proportion" of the industry has been included.

24. Second, one of the relevant qualitative factors is the extent to which the firms that an investigating authority seeks to exclude from the "major proportion" are themselves a distinct category of producers. As already noted above, Article 4.1(i) explicitly authorizes the exclusion of "related" producers from the "domestic industry". Similarly, Article 4.1(ii) sets out the only circumstances where an investigating authority may focus its definition of "domestic industry" on the extent to which a *certain defined group* of producers is uniquely injured, which is by virtue of the geographic concentration of imports and of domestic shipments. The language of Article 4.1 thus reveals that the only categories of producers that may be entirely excluded from the domestic industry

as a category are "related" producers and those falling under the regional industry exception. As the *EC – Salmon* panel noted, "[N]othing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision."

25. By spelling out the narrow exceptions in sub-paragraphs (i) and (ii), Article 4.1 ensures the inclusion of domestic producers from various segments and sectors of the industry in an unbiased manner. An approach to interpreting "major proportion" that allows an investigating authority to exclude from the "domestic industry" a defined group of producers that does not meet the conditions in sub-paragraph (i) or (ii), would appear to be inconsistent with the limited exceptions spelled out in Article 4.1.

26. The United States submits that, when viewed in this light, a domestic industry definition that is framed to exclude all or virtually all non-petitioning and non-supporting producers does not represent an important, significant, or serious proportion of domestic production.