ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

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

1. China claims that Article 9(5) of Council Regulation No 384/96 as amended and as codified and replaced by Council Regulation (EC) No 1225/2009 is, as such, inconsistent with Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the AD Agreement, Articles I and X:3(a) of the GATT 1994 and Article XVI:4 of the WTO Agreement.

2. The EU starts its First Written Submission with a number of **procedural arguments**. First, the EU submits that China's Panel Request failed to meet the requirement of Article 6.2 of the DSU since it failed to "present the problem clearly" with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the AD Agreement and X:3(a) of the GATT 1994. However, in making this argument, the EU confuses the procedural requirements of Article 6.2 of the DSU with the substantive analysis of the measure at issue. Indeed, Article 6.2 does not impose obligations regarding the substantive question of whether the "scope" or "content" of the measure at issue is related to the obligations that are claimed to be violated. The latter question forms part of the substantive issues. Furthermore, the EU's argument that China failed to plainly connect the challenged measure with the provisions claimed to be violated confuses "claims" and "arguments". By alleging that China's Panel Request failed to meet the Article 6.2 requirement because it did not explain how the provisions that deal with specific legal obligations are violated by the measure at issue, the EU is in fact taking issue with the "arguments" relating to the claims made by China. In the Panel Request, however, only the "legal basis" of the complaint must be precisely identified. The arguments relating thereto may be progressively developed and clarified during the proceedings. China further points out that the EU fails to demonstrate that the alleged failure to meet the Article 6.2 requirements has prejudiced its ability to defend its interests, although this is a prerequisite in order to establish a violation of Article 6.2 of the DSU. Finally, China stresses that, in addition to these general comments which should already be sufficient for the Panel to reject the EU's claim that China's Panel Request failed to meet the Article 6.2 requirements, a claim by claim analysis leads to the same conclusion.

3. Second, the EU claims that China has expanded the scope of this dispute to "other measures and issues" which are outside the Panel's terms of reference. First, the EU argues that, since "China's Panel Request described the measure at issue as "Article 9(5) of Council Regulation No 384/96 as amended", and because "Council Regulation No 1225/2009 did not amend, correct or rectify the measure identified by China" but "repeals" Council Regulation No. 384/96, Article 9(5) of Council Regulation No. 1225/2009 is "a measure outside the Panel's terms of reference". However, this argument is purely semantic and ignores the fact that there is absolutely no difference in substance between the two provisions. Second, the EU argues that China's First Written Submission contains "other issues which fall outside the Panel's terms of reference", in particular the calculation and determination of dumping margins. This, however, is a substantive issue that is not relevant for the definition of the Panel's terms of reference. In any event, it is perfectly clear from China's Panel

Request that China considers that Article 9(5) effectively governs not only the imposition of anti-dumping duties but also the determination of individual dumping margins.

4. Having made these procedural arguments, the EU still addresses China's claims on its merits. At the outset, it is necessary to address the **nature and scope of Article 9(5) of the Basic AD Regulation**, an issue which underlies several arguments (both of a procedural and substantive nature). Article 9(5) does not deal with Market Economy Treatment (MET) but only with Individual Treatment (IT) which relates to the question whether dumping margin and anti-dumping duty must be calculated for the exporting producer from China on an individual or a country-wide basis. Contrary to what the EU argues, Article 9(5) is not limited to the "very specific issue which refers to the imposition of definitive anti-dumping duties". Whether the conditions set out in Article 9(5) of the Basic AD Regulation are fulfilled do not only determine for an individual exporting producer whether the anti-dumping duty is imposed on an individual basis or a country-wide basis but also whether the dumping margin is calculated on an individual basis or country-wide basis. Contrary to what the EU submits, whether the dumping margin is determined on an individual or country-wide basis does not flow from Article 9(4) of the Basic AD Regulation which only lays down the broad principle that the amount of the anti-dumping duty may not exceed the dumping margin, but from Article 9(5). This position is supported by the description provided by the EU itself in its First Written Submission of how anti-dumping duties and dumping margins are determined in case of imports from non-market economy countries, in particular at paragraph 81 of its First Written Submission. This is further supported by the statements of the EU in various EU anti-dumping investigations concerning imports from, *inter alia*, China.

5. Turning to the **claim by claim analysis**, China's rebuttal is as follows.

6. China's claim in relation to **Article 9.2 of the AD Agreement** is that the obligation in Article 9(5) requiring that exporting producers from non-market economy countries fulfill additional criteria in order to receive an individual anti-dumping duty instead of a country-wide anti-dumping duty is inconsistent with Article 9.2 of the AD Agreement. The EU first argues that the measure at issue does not fall within the scope of Article 9.2 of the AD Agreement and that Article VI of the GATT and Article 9.2 do not require a company specific approach to the imposition of anti-dumping duties. China fails to see the connection between this statement and the scope of the obligation in Article 9.2. Whether investigating authorities are permitted to impose anti-dumping duties on a country-wide basis in the case of imports from China is a question of interpretation of Article 9.2 itself and does not relate to the scope of Article 9.2. It should, therefore, not be examined as a preliminary issue. In any event, Article 9.2 does not permit an interpretation which would, as a rule, require or allow the imposition of anti-dumping duties on a country-wide basis.

7. The EU further submits that Article 9.2 does not require that anti-dumping duties are imposed on an individual basis for each supplier involved and that, even assuming that such a principle exists, it is not correct to argue that the only exception to this principle is where it is impracticable to do so because of the large number of suppliers involved. China submits that a correct interpretation of Article 9.2 pursuant to the principles of treaty interpretation leads to the conclusion that anti-dumping duties must, as a rule, be imposed on an individual basis and that, even if this principle is not absolute, Article 9.2 does not allow investigating authorities to impose automatically a country-wide duty on exporting producers from non-market economy countries. This position is supported by the "ordinary meaning" of the relevant terms of Article 9.2, in particular, the terms "appropriate amounts", "sources" and the obligation to "name the supplier(s)" and the exception thereto when this is "impracticable". The ordinary meaning of the word "impracticable" or "not practicable" as defined in the relevant edition of the New Shorter Oxford Dictionary implies something which is not feasible, unable to be carried out, impossible in practice. This position is further supported by the context of the provision, in particular Articles 6.10 and 9.4 of the AD Agreement, the object and purpose of the AD Agreement, that is, to set out the specific conditions under which anti-dumping measures may be

imposed and the preparatory works of Article 8 of the Kennedy Round Anti-Dumping Code. Finally, China points out that the EU's argument that China's Protocol of Accession codifies the understanding that China is not yet a market economy country and that this implies that all provisions of the AD Agreement, including Article 9.2, must be interpreted as authorizing a special treatment for exporting producers from China, fails. It is factually incorrect since no such understanding is included in China's Protocol of Accession. Moreover, China is now a market economy country, as acknowledged by many WTO Members. In any event, whether or not China is a market economy country is irrelevant for this dispute. The obligations in Article 9.2 and 6.10 do not distinguish between market economy and non-market economy countries.

8. With respect to China's claim that Article 9(5) of the Basic AD Regulation violates **Article 6.10 of the AD Agreement**, including the chapeau of Article 6.10 and Article 6.10.2, the EU's preliminary argument that Article 9(5) does not fall within the scope of Article 6.10 must be rejected since Article 9(5) effectively deals with the question whether dumping margins for Chinese exporting producers are determined on an individual or a country-wide basis. On the substance of the claim, the EU argues that there would be exceptions other than the one referred to in Article 6.10 second sentence (i.e. sampling) to the rule requiring that dumping margins are determined on an individual basis and that in the case of imports from non-market economy countries, the State, and not the individual exporting producers, is to be regarded as the actual "producer" for which a margin of dumping will be determined. It is, however, clear from the wording and context of Article 6.10 that the use of sampling is the only permissible exception to the general rule contained in the first sentence of Article 6.10. Furthermore, the reasoning applied by the Panel in *Korea – Certain Paper* cannot be used by analogy in the context of Article 9(5) since the examination under the latter provision is totally different from the situation examined by the Panel in that case. Even considering that one could apply the reasoning of *Korea – Certain Paper* by analogy, it is clear that that the Article 9(5) of the Basic AD Regulation test applies criteria which go far beyond the conditions found to be acceptable in that case. Moreover, Article 9(5) is discriminatory as it only applies in the case of imports of non-market economy countries. There is no objective justification for this treatment since there is no reason why the risk or "circumvention" or "manipulation" would be less in countries considered as being market economy countries than in those regarded as being non-market economy countries. Finally, the object and purpose of the AD Agreement and the preparatory works of Article 6.10 support the finding that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement.

9. In relation to China's claim that the EU violates **Article 9.3 of the AD Agreement** by applying an anti-dumping duty which is determined on the basis of a country-wide dumping margin for those exporting producers that do not fulfill the conditions set out in Article 9(5) of the Basic AD Regulation, the EU first argues that Article 9(5) does not fall within the scope of Article 9.3 of the AD Agreement. Article 9(5), however, will determine whether the duty is based on an individual or a country-wide dumping margin and thus falls within the scope of Article 9.3. On the substance, the EU argues that Article 9(5) does not violate Article 9.3 of the AD Agreement because it is permitted under Articles 9.2 and 6.10 to determine a single country-wide anti-dumping duty and a country-wide dumping margin for "the actual source of price discrimination", namely the State, in the case of imports from non-market economy countries. However, this argument fails since these provisions do not permit investigating authorities to determine automatically a single country-wide dumping margin and a country-wide anti-dumping duty for all exporting producers who fail to meet the IT criteria. The application of Article 9(5) leads to a result where exporting producers who sold at export prices which are higher than the average export price determined for non-IT exporting producers are subject to a duty which exceeds their individual dumping margin as established under Article 2. The imposition of an anti-dumping duty which is higher than the individual dumping margin is a clear violation of Article 9.3 of the AD Agreement.

10. With respect to China's claim under **Article 9.4 of the AD Agreement**, the EU's preliminary claim that Article 9(5) does not fall within the scope of Article 9.4 must be rejected. Indeed, Article 9(5) imposes specific conditions that must be met before exporting producers included in the sample or which have obtained individual examination can receive an individual anti-dumping duty. Article 9(5) thus clearly falls within the scope of Article 9.4 since this Article specifically deals with the imposition of duties where sampling is used. China's claim under Article 9.4 is twofold. First, China claims that Article 9(5) violates Article 9.4 since the anti-dumping duty applied to the cooperating non-sampled exporting producers pursuant to Article 9(6) of the Basic AD Regulation is based on the weighted average margin of dumping of all sampled exporting producers, including those that do not qualify for IT and for which the dumping margin is not based on their own export prices. The rebuttal by the EU is contradicted by its own practice. Second, China claims that Article 9(5) of the Basic AD Regulation also violates Article 9.4 since it requires that the non-sampled exporters who benefit from an "individual examination" demonstrate that they comply with the IT criteria laid down in Article 9(5) while Article 9.4 expressly requires investigating authorities to unconditionally "apply an individual anti-dumping duty to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6". China notes that the EU does not submit any argument in rebuttal to that second part of its claim.

11. China further claims that the EU violates **Article I:1 of the GATT 1994** since the specific conditions imposed by Article 9(5) only apply to so-called "non-market economy countries". Contrary to what the EU alleges, there is no conflict between the AD Agreement and Article I:1 of the GATT 1994. Furthermore, it needs to be stressed that a product is not different in nature, as alleged by the EU, depending on whether it originates in a market economy or a non-market economy country and that the conditions to be met under Article 9(5) are not origin-neutral. On the contrary, the advantage granted depends exclusively on the origin of the product under investigation. As such, these conditions amount to discrimination with respect to the origin of like products.

12. China further challenges the *manner in which Article 9(5) of the Basic AD Regulation is administered* by the EU under **Article X:3(a) of the GATT 1994** since it is not administered in a uniform and reasonable manner.

13. Furthermore, since Article 9(5) of the Basic AD Regulation "as such" violates Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement and Articles I:1 and X:3(a) of the GATT 1994, it automatically follows that the EU is also in violation of **Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the AD Agreement**.

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

14. China first claims that by making the benefit of an **individual dumping margin and the imposition of an individual anti-dumping duty dependent on compliance with the conditions set out in Article 9(5) of the Basic AD Regulation**, the EU violated Articles 6.10, 9.2 and 9.4 of the AD Agreement. The EU's defense is limited to two arguments. First, it submits that China's claim under Article 9.4 is outside the Panel's terms of reference. However, as is clear from the Panel Request as a whole, the issue which is being challenged "as such" is being challenged "as applied" with respect to the second measure at issue and given that Article 9.4 of the AD Agreement has been included in China's Panel Request in connection with its challenge of Article 9(5) "as such", China's claim that Article 9(5) as applied in the anti-dumping fasteners investigation violates Article 9.4 is properly within the Panel's terms of reference. Second, the EU submits that China is challenging a non-existent measure since in the anti-dumping investigation concerned IT was granted to all sampled and individually examined cooperation suppliers that requested IT. The EU, however, distorts China's

claim since China does not challenge the fact that the sampled and individually examined cooperating exporters did not receive IT or could, hypothetically, have failed to meet the Article 9(5) conditions. Instead, China challenges the non-automatic character of the benefit of an individual dumping margin and an individual anti-dumping duty for the Chinese exporting producers in the anti-dumping investigation which led to the measure at issue.

15. China claims that the **EU's standing determination** violated Article 5.4 of the AD Agreement. The EU raises on a preliminary basis three procedural objections which must all be rejected. Indeed, (i) China has consulted with the EU concerning its Article 5.4 claim as required by Article 4 of the DSU; (ii) China's Panel Request is specific and presents the problem clearly, as required by Article 6.2 of the DSU; and (iii) the EU erroneously submits that the standing determination is governed exclusively by the Notice of Initiation 2007/C 267/11 and not by Council Regulation (EC) No. 91/2009. China's claim that the EU's standing determination violated Article 5.4 of the AD Agreement is based on three main arguments. First, the EU failed to examine whether the figure for total EU production was reliable and correct. In this respect, the EU in fact argues that it is permissible for investigating authorities to base themselves exclusively on the information submitted in the Complaint when making their standing determination. However, the approach proposed by the EU is not consistent with the "examination" requirement in Article 5.4 which imposes on investigating authorities the obligation to "investigate", that is, "inquire into" the degree of support for, or opposition to, the application and this imposes something more than merely accepting the information provided by the complainants. Second, the EU did not properly examine the degree of support for, or opposition to, the application expressed by domestic producers of the like product prior to the initiation. A mere statement that the matter has been "examined" and/or "determined" is not enough to demonstrate that the EU effectively conducted an examination. Third, the EU improperly concluded that the application had been made by or on behalf of the domestic industry. According to the EU, China failed to make a *prima facie* case. However, in order to determine whether the threshold of Article 5.4 of the AD Agreement is met, it is necessary to at least identify, on the one hand, the production figure of those producers expressly supporting the application and, on the other hand, the total domestic production of the like product. In its First Written Submission, China provided substantial evidence which demonstrates that neither the determination of the production figure of the complainants, nor the figure of total domestic production was correct and that the threshold of 25% was not met. These elements are sufficient to meet the *prima facie* case threshold. The EU, however, fails to rebut the evidence and even remains silent with respect to some of the arguments raised. In other words, the EU failed to rebut the *prima facie* case made by China.

16. China further demonstrated that the EU's **determination of the "domestic industry" violated Articles 4.1 and 3.1 of the AD Agreement**, for at least five reasons. First, by excluding from the domestic industry EU producers that did not make themselves known within 15 days of the initiation of the investigation or that did not support the complaint, the EU violated Articles 4.1 and 3.1 of the AD Agreement. As a preliminary remark, it must be noted that China's claim is covered by the Request for Consultations. With respect to China's claim that there is a violation of Article 4.1, the EU submits that there is no violation given that Article 4.1 gives 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. However, apart from the two explicit exclusions provided in Article 4.1, there are no other categories of producers that the investigating authorities may exclude *from the outset* from the definition of the domestic industry. This is plainly consistent with the Panel's findings in *EC – Salmon (Norway).* Furthermore, these findings are not limited to categories of producers "which produce a 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. Moreover, the justification given by the EU to explain why it did exclude certain categories of producers is not relevant. This exclusion also constitutes a violation of Article 3.1 of the AD Agreement. Contrary to the assertions of the EU, it is clear that the objective determination of the domestic industry is an integral part of an objective injury examination. By restricting the definition

of the domestic industry to only those producers that came forward within the 15-day period, the EU investigating authorities made it more likely that the Community industry only included producers supporting the investigation and, as a result, made it more likely that injury would be found.

17. Second, the domestic industry as defined by the EU does not include domestic producers whose collective output constitutes a major proportion of the total domestic production for two reasons. First, the total EU production figure is underestimated and based on unreliable data. Second, the Community producers included in the definition of the domestic industry do not represent a "major proportion" of the total domestic production of the like product. In relation to this argument, it has to be pointed out that, although the EU states that a major proportion "is not something that can be determined in the abstract or based on specific percentages", it immediately contradicts itself by submitting that "there exists a legitimate presumption that producers representing 25% or more of total domestic production constitute "a major proportion" of such production". Moreover, the Basic AD Regulation expressly provides that the "major proportion" requirement of Article 4.1 is identical to the 25% test which is used in the framework of the standing determination. This link established by the EU between the "major proportion" test in Article 4.1, which deals with the domestic industry definition, and the 25% test in Article 5.4 which concerns the standing determination, even in the form of a "presumption", is manifestly erroneous and legally flawed. In the investigation that led to the measure at issue, the EU did not examine whether the domestic producers constituting the domestic industry fulfilled the major proportion requirement. Moreover, the producers constituting the domestic industry failed to meet the major proportion requirement in light of the specific circumstances of the case: they are not representative of the whole domestic production; it was practically feasible for the investigating authorities to include more producers than those actually included in the domestic industry; the producers included in the "domestic industry" represented only a small portion of the total number of producers; and the investigating authorities excluded categories of producers other than the ones referred to in Article 4.1 (i) and (ii).

18. Third, the domestic industry was not defined in relation to the Investigation Period and this constitutes a violation of Article 3.1 of the AD Agreement. This is confirmed, *inter alia*, by the Panel's findings in *Argentina – Poultry Anti-Dumping Duties*.

19. Fourth, the EU violated 3.1 of the AD Agreement since it made an injury determination with respect to a sample that was not representative of the domestic industry, first, to the extent that the "domestic industry" was defined in violation of Article 4.1 and, second, even assuming that the domestic industry has been defined correctly – *quod non* –, the sample has not been selected in conformity with Article 3.1 since the only criterion used by the investigating authorities was the producers' volume of production.

20. Fifth, the EU's determination of the "domestic industry" violated Articles 4.1 and 3.1 of the AD Agreement since it included in the domestic industry and the sample a number of producers that were related to the exporters or importers or were themselves importers of the allegedly dumped product.

21. China further claims that the **EU's determinations concerning the product concerned and the like product violated Articles 2.1 and 2.6 of the AD Agreement**. First, the investigating authorities included in the product concerned products that were not like. The EU argues that Article 2.1 of the AD Agreement only imposes obligations with respect to the meaning of "dumping" and "margin of dumping" and how they are calculated and not with respect to the selection of the product concerned. However, a correct interpretation of Articles 2.1 and 2.6 of the AD Agreement, based on the ordinary meaning of their terms and in their context and in light of the object and purpose of the AD Agreement, leads to the conclusion that the product concerned must include only "like" products. By including in the scope of the product concerned both special and standard fasteners, which are not "like", the EU thus violated Articles 2.1 and 2.6 of the AD Agreement.

Second, the EU violated Articles 2.1 and 2.6 of the AD Agreement by concluding that the fasteners produced and sold by the Community industry in the Community, the fasteners produced and sold on the domestic market in China, those produced and sold on the domestic market in India and those produced in China and sold to the Community are alike. The EU argues that China's claim is without object. This is, however, based on a distortion of China's claim.

22. With respect to China's claim that the **EU's determinations of dumping violated Article 2.4 of the AD Agreement**, it must be noted that the EU's preliminary argument that "China fails to refer to the relevant Section of Council Regulation No. 91/2009 on the comparison between normal value and export price and has thus failed to establish a *prima facie* case" is manifestly contradicted by China's First Written Submission. China's claim is two-fold. First, the EU investigating authorities failed to make the comparison between the export price and the normal value on the same basis, namely, on the basis of the Product Control Numbers ("PCNs") that the investigating authorities themselves had identified at the beginning of the investigation as being necessary to enable a "fair comparison". The EU rephrases China's claim to make it state that investigating authorities must *always* follow a particular methodology when making the comparison between export price and normal value, namely that the comparison must always be made between the export price and the normal value on the basis of the PCNs in the abstract. However, what China claims is that, in light of the specific circumstances of the fasteners investigation, the physical characteristics reflected in the PCNs had to be taken into account when making the comparison between normal value and export price since such characteristics affect the price comparability between export price and normal value. By failing to do so, the EU did not make a "fair comparison" and, therefore, violated Article 2.4 of the AD Agreement. It has to be pointed out that the EU erroneously presents the PCNs as constituting only an "information gathering tool". That the PCN factors are necessary to make a fair comparison is clear, *inter alia*, from the EU standard questionnaires used in the anti-dumping investigation concerned. With respect to the fair comparison standard itself, the EU considers that requesting the necessary information from all interested parties on a PCN basis was sufficient for it to comply with the obligations under Article 2.4 of the AD Agreement. However, to the extent that a comparison is made without taking into account differences that affect price comparability, such comparison is not "fair". In addition to the fact that the physical characteristics identified in the PCN affect price comparability, the EU failed to make a "fair comparison" for two other reasons. The investigating authorities did not evaluate and *a fortiori* did not determine whether the differences in physical characteristics reflected in the PCN factors affected price comparability and whether they had to be taken into account for making a "fair" comparison. Moreover, the investigating authorities had included in the PCNs those physical characteristics that they considered relevant for making a "fair" comparison. Logically, this implied that they had to make at least an evaluation of these differences in order to determine whether they were necessary to ensure a fair comparison. To the extent that the investigating authorities subsequently decided to ignore most of the PCN factors previously identified as relevant and used another methodology, they were required to properly and expressly inform all interested parties in a timely manner. By failing to do so, they prevented the exporting producers from making claims that adjustments for differences in physical characteristics needed to be made.

23. Second, the EU investigating authorities failed to make appropriate adjustments for the differences that affect price comparability, namely the differences in physical characteristics as reflected in the PCN as well as for quality differences. The EU investigating authorities never examined, once they decided to exclude from the PCNs a number of physical characteristics initially used to categorize products, whether the excluded characteristics were to be considered as differences in physical characteristics affecting price comparability and, *a fortiori*, never determined whether or not an adjustment was required. However, it is clear that the characteristics identified in the PCNs constitute physical differences that affect price comparability. The decision to exclude certain physical characteristics from the PCNs had nothing to do with an evaluation that these physical characteristics had no effect on price comparability, but, as admitted by the EU itself, related to the fact that the Indian producer did not provide the necessary information on a PCN basis. However, this

cannot be a justification for the EU to simply ignore those physical characteristics that affect price comparability. In its First Written Submission, the EU tries to defend why it disregarded these factors for the purposes of making the comparison. It has to be emphasized that the mere *a posteriori* rationalizations given by the EU can neither obscure nor cure the fact that during the investigation the investigating authorities did not examine whether the differences in question affected price comparability when making the comparison. Similarly, no adjustment was made for quality differences. Moreover, the EU appears to argue that, in order for it to comply with the obligation to carry out a fair comparison pursuant to Article 2.4, it was sufficient for it to take into account those physical characteristics which appeared to be the most important. However, *all* differences affecting price comparability must be taken into account. Finally, China stresses that the Chinese exporting producers were not informed of the information which was necessary to ensure a fair comparison and that the Chinese exporting producers as a whole were never informed that the comparison had not been made on a PCN basis.

24. China claims that the EU violated **Articles 3.1 and 3.2 of the AD Agreement when making the price undercutting calculations** by failing to make a product comparison on the basis of the full PCNs and by comparing standard and special fasteners without making any adjustments for the differences affecting price comparability when determining the price undercutting margin. On a preliminary basis, it must be noted that China's claim was subject to consultations and is within the Panel's terms of reference. On the substance, the EU erroneously considers that the absence of requirement in Article 3.2 as to a specific methodology that should be used for the undercutting calculation implies that any methodology is necessarily consistent with Articles 3.1 and 3.2 of the AD Agreement. However, only methodologies which are objective, i.e. unbiased and even-handed, are consistent with Articles 3.1 and 3.2 of the AD Agreement. In order to ensure such an unbiased and even-handed undercutting calculation, adjustments may be necessary. Product characteristics, such as length and diameter, which were disregarded by the EU in its price undercutting analysis, are differences which not only affect costs for the producers but "have a perceived importance to the customer" and must, therefore, be taken into account in the framework of the price undercutting analysis. The EU's sole defense is to allege that "China has failed to adduce evidence that the methodology that was followed was not "objective" or not "even-handed"". In its First Written Submission, China has, however, explained and provided supporting evidence as to why the price undercutting calculations made by the EU investigating authorities were not unbiased and even-handed.

25. China makes two claims in connection with the **examination by the EU investigating authorities of the volume of dumped imports**. China claims that the EU violated its obligations under **Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement** first because the EU included in the volume of "dumped imports" imports from Chinese producers that were found not to be dumping and second, because it included in the volume of dumped imports all imports from non-sampled producers. With respect to the first claim, the EU argues that no violation can be found in view of the low percentage of the imports originating from the two Chinese exporting producers that were found not to be dumping. The examination of the volume of "dumped imports" which does not exclude outright the volume of imports from producers which were found not to be dumping is, however, contrary to the direct and clear text of Articles 3.1 and 3.2 of the AD Agreement. As to the second claim, the conclusion that two non-sampled producers which were individually examined in accordance with Article 6.10.2 were found not to be dumping constitutes "positive evidence" within the meaning of Article 3.1 of the AD Agreement. To the extent that such information has been ignored by the EU investigation authorities when determining the volume of dumped imports, their determination that all imports from all non-individually examined producers are "dumped imports" is not based on "positive evidence". As a consequence of these violations of Articles 3.1 and 3.2, the EU also violated Articles 3.4 and 3.5 of the AD Agreement.

26. China also demonstrated that the EU failed to make an **injury determination** consistent with its obligations under **Articles 3.1 and 3.4 of the AD Agreement**. First, the EU failed to examine the injury factors in relation to a Community industry defined in a consistent manner. Certain injury factors were examined on the basis of the data of the Community industry as a whole, whereas other factors were examined on the basis of the data of the sampled producers only. China strongly disagrees with the EU's view that both data sets "are essentially the same and both are interchangeable bases for examining injury to the domestic industry". Furthermore, in the investigation that led to the measure at issue, evidence shows that the analysis of certain injury factors with respect to the domestic industry or the sampled producers leads to different results, thereby demonstrating the biased nature of the examination carried out by the investigating authorities.

27. Second, China submits that, on the basis of the evidence gathered, the EU could not objectively conclude that the level of profitability was "low" and that the dumped imports had a "negative impact on profitability".

28. Third, the EU's overall analysis of the impact of dumped imports on the domestic industry is not objective and not based on positive evidence. The EU improperly concluded that the domestic industry suffered injury since an examination of the relevant factors pursuant to Article 3.4 of the AD Agreement shows a positive state of the domestic industry. The overall examination of the injury factors could not have led to a finding that material injury had been suffered by the domestic industry. Indeed, almost all factors regarding the situation of the EU industry showed a favorable trend between 2003 and the IP. The EU's statement that several factors are to be considered as negative developments is manifestly incorrect and contradicted by its own findings. The sole factor possibly showing a negative trend was a loss of market share in a rapidly growing market. A finding of material injury, however, cannot solely be based on one negative factor. Having found that all factors showed a positive trend over the period concerned, the EU should have concluded that the EU industry had not suffered material injury. Furthermore, there is no thorough and persuasive explanation as to whether and how the positive trends of most injury factors were outweighed by any negative factor. Finally, the EU authorities failed to provide a persuasive explanation as to how or why the trends for market share, sales volume, profitability, cash flow, return on investments, margins of dumping and capacity utilization, effectively constitute "negative developments".

29. Fourth, the EU improperly considered the displacement of EU products by imports from China in some market segments as being relevant. The injury analysis is premised on the distinction between the two market segments of special and standard fasteners. For all injury factors which showed a positive trend, the EU investigating authorities claimed that they should not be regarded as "positive" since this "positive" aspect was merely due to the shift from standard to special fasteners which merely attenuated the alleged injurious consequences of dumping. As a result, the injury analysis is *de facto* exclusively based on the standard fastener market segment and is, therefore, inconsistent with Articles 3.1 and 3.4 of the AD Agreement.

30. China further submits that the EU violated **Articles 3.1 and 3.5 of the AD Agreement** in concluding that dumped imports **caused** material injury to the domestic industry, for two main reasons. First, the EU failed to demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry. This includes two sets of arguments. The first argument is that a causal link cannot be demonstrated on the sole basis of a mere "coincidence" in time between the alleged injury and the increase in the volume of alleged dumped imports. The second argument is that a finding of a causal relationship between dumped imports and injury must necessarily be based on positive evidence. The EU did not produce any evidence showing that the shift by the domestic industry towards the production of special fasteners was due to the dumped imports. There is, therefore, no basis for the investigating authorities to conclude that dumped imports have caused injury to the domestic industry.

31. Second, the EU failed to properly assess the injurious effects of other known factors, more in particular, the increase in raw material prices and the export performance of the Community industry. The non-attribution test as developed in the WTO case law requires an identification of the nature and extent of the injurious effects as well as 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. The latter explanation must be clear and unambiguous and the reason provided cannot be a mere "assertion". However, the EU's analysis of the "increase in raw material prices" does not meet this requirement. With respect to the export performance, China's main claim is that, on the basis of the facts on the record, the investigating authorities could not come to the conclusion that the export performance of the domestic industry was not a source of material injury. The EU thus violated Articles 3.1 and 3.5 of the AD Agreement by considering this factor as not causing injury and, therefore, by failing to conduct the non-attribution test. In addition, the EU violated Articles 3.1 and 3.5 of the AD Agreement by using the data concerning all producers in the Community while the injury determination was made with respect to the domestic industry as defined by the EU.

32. China's last claim relates to the violation by the EU of the **procedural requirements imposed by Articles 6 and 12 of the AD Agreement**. The fundamental lack of transparency permeating all stages of the investigation has prevented Chinese exporting producers from effectively defending their interests. The breach of their due process rights is so substantial that it should lead this Panel to recommend that the measure be withdrawn. The EU tries to dismiss China's claims on the basis of a number of procedural tactics, i.e. by claiming that China did not submit any evidence or that the evidence is not relevant, that the claims and arguments are presented in a confusing way or for other obscure reasons. The EU, however, does not present any valid evidence that could rebut China's *prima facie* case on the substance. At the outset, it is necessary to make some general comments. In China's view, the obligation set out in the first sentence of Article 6.2 is so broad that a finding of violation of Article 6.4 necessarily entails a violation of Article 6.2 first sentence. Furthermore, contrary to what the EU seems to consider, a complaining party may claim the violation of different obligations, in this case Articles 6.4 and 6.9, with respect to the same set of facts. Moreover, the EU intends to create confusion between, on the one hand, the claims made by China and, on the other hand, the arguments and evidence submitted to support such claims. As evidence to support its claims under Article 6.4, China has referred to the Definitive Regulation, as well as to the Disclosure Documents and the correspondence between certain Chinese exporting producers and the EU investigating authorities. When China refers to the Disclosure Documents and/or the Definitive Regulation as part of the evidence concerning its claim under Article 6.4, China is not claiming that these documents do not contain the essential facts as required under Article 6.9. In fact, the EU is forced to rewrite China's claims and arguments in order to be able to rebut them.

33. China demonstrated the following due process violations by the EU: (i) the EU failed to disclose the identity of the complainants, thereby violating Articles 6.5, 6.2 and 6.4 of the AD Agreement; (ii) the EU failed to disclose information concerning the normal value determination including product types and the comparison with export prices including any adjustments for differences affecting price comparability thereby violating Articles 6.5, 6.2, 6.4 and 6.9; (iii) the EU violated Articles 6.5, 6.2 and 6.4 since the non-confidential versions of the Community producers' questionnaire responses and the questionnaire response of the producer in the analogue country were largely deficient; (iv) the EU violated Article 6.5, 6.2 and 6.4 by failing to make Eurostat data available in the non-confidential file and by failing to provide an explanation as to how the estimation of the production in the EU had been made; (v) the EU violated Articles 6.2, 6.5 and 6.9 through its findings on the domestic industry; (vi) the EU violated Article 12.2.2 by failing to state all relevant information concerning its IT determinations; (vii) the EU violated Article 6.5 by disclosing a document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC"; (viii) the EU violated Article 6.1.1 of the AD Agreement by limiting the time period for the submission of MET and/or IT questionnaire responses to 15 days as of the date of publication of the Notice of Initiation.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union takes issue with China's attempt to disregard the numerous and precise arguments raised by the European Union under Articles 4.2, 4.3, 4.5, 4.7, 6.2, 7.1 and 11 of the *DSU*. As a matter of fact, the European Union's First Written Submission has addressed *all* the claims raised by China in its Panel Request and its First Written Submission, going even beyond in many aspects of what was required, due to the lack of both factual evidence and clarity of the legal arguments made by China. Pursuant to Article 11 of the *DSU*, the European Union requests the Panel to examine whether China has complied with the fundamental rules contained in the *DSU* when making its claims in the present dispute.

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

A. PANEL'S TERMS OF REFERENCE

2. The European Union maintains that China's Panel Request failed to meet the requirements of Article 6.2 of the DSU with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994. The European Union disagrees with China's views on Article 6.2 of the DSU. Article 6.2 of the DSU thus does not require that the brief summary of the legal basis of the complaint amounts to an "argument" (something which is developed at a later stage in the course of the panel proceedings); however, it requires that the brief summary of the legal basis of the complaint explains how and why the measure at issue violates the WTO obligation in question in a sufficient manner to present the problem clearly. Put simply, if a panel request identifies a measure in a precise manner but then includes legal claims which do not directly pertain to the operation of the measure, the respondent Member is left wondering how that measure can be the source of the alleged impairment.

3. In its Panel Request, China challenged a precise measure (i.e., Article 9(5) of Council Regulation No 384/96, as amended) as being "as such" inconsistent with certain provisions of the Anti-Dumping Agreement and the GATT 1994. In view of the "as such" nature of China's claim and the requirement that the complaining Member has to state unambiguously the specific measures which are subject to "as such" claims, the European Union was puzzled when reading in China's Panel Request as well as its First Written Submission that the brief summary of the legal claims related to other issues (such as the calculation or determination of dumping margins, the level of anti-dumping duties, and the imposition of anti-dumping duties in a specific context such as sampling) which are not addressed by the specific measure at hand. In any event, the European Union considers that, in view of the "as such" nature of China's claim, any disagreement between the parties on the scope of the measure at issue should be resolved by examining the text of Article 9(5) of Council Regulation No 384/96. The text of Article 9(5) of Council Regulation No 384/96 leaves no doubt that the issue contained in that provision refers to the imposition of anti-dumping duties. When Article 9(5) of Council Regulation No 384/96 is seen in the context of its other provisions, the same conclusion is reached about its meaning and content. In any event, the European Union has also explained in its First Written Submission how Article 9(5) of Council Regulation No 384/96 operates in practice.

Consequently, the measure at issue identified by China in its "as such" claim the Panel is requested to examine is Article 9(5) of Council Regulation No 384/96, on its face, and not everything which may derive from the determination provided for by that provision, or anything under the other provisions of the same regulation that may sequentially come after the Article 9(5) determination during the investigation.

4. Should the Panel find that China's Panel Request plainly connects the challenged measure with the provisions of the covered agreements in accordance with Article 6.2 of the DSU (quod non), the European Union submits that the Panel should refrain from examining China's claims under Articles 6.10, 9.2, 9.3 and 9.4 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994 since the specific measure described by China in its Panel Request (i.e., Article 9(5) of Council Regulation No 384/96) does not fall within the scope of the obligations contained in the provisions of the covered agreements invoked by China.

5. The European Union also requests the Panel to refrain from examining measures and issues outside its terms of reference in relation to China's "as such" claim, including Article 9(5) of Council Regulation No 1225/2009, any matters pertaining to the calculation or individual determination of dumping margins, or any other matters raised by China in its First Written Submission or in any other subsequent submission which is different from the one specifically identified by China in its Panel Request (i.e., Article 9(5) of Council Regulation No 384/96, insofar as it provides for the imposition of anti-dumping duties on a country-wide basis or on an individual basis, if certain criteria are met, in the case of imports from non-market economy countries).

B. ARTICLE 9(5) OF COUNCIL REGULATION NO 384/96 "AS SUCH" IS IN CONFORMITY WITH THE PROVISIONS INVOKED BY CHINA

6. For the reasons mentioned in our First Written Submission, the European Union maintains that Article 9(5) of Council Regulation No 384/96 is as such consistent with the provisions invoked by China. In particular, the European Union will address China's claim under Article 9.2 of the Anti-Dumping Agreement, by examining that provision and referring to Article 6.10, where relevant, as context to address the relationship between these two provisions, and to China's Protocol of Accession. The European Union will also briefly address China's claim under Article I:1 of the GATT 1994.

1. Claim under Article 9.2 of the Anti-Dumping Agreement

7. China's understanding of Articles 6.10 and 9.2 of the Anti-Dumping Agreement is flawed on numerous grounds. First, Article 6.10 does not contain a strict rule requiring investigating authorities to always determine dumping margins on an individual basis.; rather, that provision contains a preference for determining individual dumping margins and then refers to one affirmative situation (i.e., sampling) where such a preference "may" not be followed. Second, contrary to what China asserts, Article 6.10 does not contemplate only one exception (i.e., sampling) where investigating authorities are permitted to depart from the general principle of determining dumping margins on individual basis. The second sentence of Article 6.10 on sampling is simply an affirmative statement relating to (i) the conditions for sampling and (ii) the composition of the sample. There is no direct link between the general principle of the first sentence and the possibility of sampling in the second sentence. These two sentences are simply two affirmative statements of what an authority ought to do in general (individual margin determination), and what it is allowed to do (sampling). The interpretation that Article 6.10, first sentence, does not contain a strict obligation and sampling is just but one situation where the preference for the individual determination of dumping margins does not need to be followed is supported by the existence of other situations where the preference mentioned in Article 6.10, first sentence, may not apply. Third, as the relevant case-law has clarified, Article 6.10 should not be interpreted as requiring the determination of dumping margins for each

legal entity in all cases, regardless of whether they are economically related to each other. Investigating authorities are allowed to determine one dumping margin for related companies as a whole. Article 6.10, first sentence, would require the identification of the actual exporters/producers in an investigation as a condition precedent to the determination of the dumping margin. Once the single producer has been identified, investigating authorities would be able to impose anti-dumping duties on the basis of that identification. Fourth, Article 9.2 does not contain a strict rule to impose anti-dumping duties on individual basis; rather Article 9.2 expressly allows for the imposition of anti-dumping duties on a country-wide basis. This is also the consequence of the preference or guiding principle contained in Article 6.10, first sentence. Fifth, even if Article 9.2 could be read as requiring the imposition of anti-dumping duties on an individual basis, its third sentence provides for exceptions to that obligation (other than sampling) when it is "impracticable" to do so. Even by its own admission, China concedes that such situation arises not only in cases where sampling is used but also in other situations, such as when certain suppliers are not known. The fact that anti-dumping duties do not need to be imposed on individual basis in other situations (e.g., non-cooperating suppliers) mirrors the fact that there are more situations (other than sampling) where the investigating authorities can depart from the general rule contained in Article 6.10, first sentence. In sum, the European Union considers that Article 9.2, when interpreted by using Article 6.10 as a context, does not support China's claim that there is a strict obligation to impose anti-dumping duties on an individual basis, with the only exception of the sampling situation. Indeed, Article 6.10 allows investigating authorities to depart from the general rule to determine dumping margins on an individual basis in other situations than in the sampling scenario. Likewise, Article 9.2 permits the imposition of duties on a country-wide basis in other cases than the sampling scenario, in particular when it is impracticable to do so on an individual basis.

8. Following the rationale of Article 9.2 of the Anti-Dumping Agreement, Article 9(5) of Council Regulation No 384/96 contains certain criteria to assess when it is impracticable to impose anti-dumping duties on an individual basis in the case of imports from non-market economy countries. These criteria serve to identify whether the applicant company is related to the State, i.e., the actual supplier, or is an independent, non-related supplier. If the applicant company is considered as a supplier acting independently from the State, that IT supplier is considered an independent exporter or producer and the source of the alleged price discrimination. Then, an individual anti-dumping duty will be specified for that IT supplier in the provisional and/or definitive measure. In contrast, if the applicant company is considered as a supplier not acting independently from the State, that non-IT supplier is not considered a genuine exporter or producer, but related to State (which is ultimately the actual producer and the source of the alleged price discrimination). Then, that non-IT supplier will be subject to the country-wide duty rate. If the supplier is not acting independently of the State, there is also a risk that the actual producer of the product concerned (i.e., China) would channel all its exports through the company with the lowest duty-rate, thereby undermining the main objective of the anti-dumping measure, i.e., to offset or prevent dumping.

9. The European Union also disagrees with China's contention that Article 9.2 requires the imposition of anti-dumping duties on an individual basis since this provision refers to the collection of anti-dumping duties in the "appropriate amounts (…) from all sources found to be dumped and causing injury". The European Union also disagrees with China's argument that the term "impracticable" in the third sentence of Article 9.2 refers to something which is "not feasible in practice", rather than "ineffective" and covers only situations in which the specific action (i.e., of naming the suppliers and determining the duties applicable to them) is not feasible for practical reasons.

10. China argues that the European Union has separate rules to deal with the issue of related companies and that Article 9(5) of Council Regulation No 384/96 applies in addition to them. The European Union considers that the application of rules to consider related companies or companies

belonging to the same group as one single entity either before or after or in addition to Article 9(5) of Council Regulation No 384/96 is irrelevant in the present dispute.

11. The European Union also considers that the relationship between non-IT suppliers and the State is similar to that addressed by the panel in *Korea – Certain Paper*. In that case, the reasoning of the panel sought to identify the actual source of price discrimination and thus determine an individual dumping margin for the actual supplier reflecting its real economic structure, duly delineated in legal and factual terms. In order to do so, the panel examined the close relationship of three companies and concluded that they were related in view of the fact that (i) one company owned a majority of shares of the three companies and thus had a considerably controlling power over the operations of its three subsidiaries; (ii) there was a significant commonality with respect to the management of the three companies, where most of the directors of each company were present as directors of the other companies; (iii) the three companies concerned had the ability to shift products among themselves to harmonise their commercial activities to fulfil common corporate objectives; and (iv) the three companies made almost all their domestic sales through one company. Similarly, the criteria under Article 9(5) of Council Regulation No 384/96 examine whether the Chinese suppliers act sufficiently independently from the State by examining, inter alia, that (i) the majority of the shares belong to private persons, and not to the State; that (ii) State officials appearing on the board of Directors or holding key management positions are in minority; that (iii) export prices and quantities, and conditions and terms of sale are freely determined, rather than directed or controlled by the State; and that (iv) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty. In this sense, the criteria contained in Article 9(5) of Council Regulation No 384/96 aim at examining whether the applicant companies are related through the State. Thus, like in *Korea – Certain Paper*, the reasoning behind these criteria is to identify the actual source of price discrimination, the single supplier of the product concerned. Only by doing so, the anti-dumping duty imposed will address the actual source of price discrimination effectively.

12. Moreover, the European Union observes that the notion of whether producers are "related" appears in Article 4.1(i) of the Anti-Dumping Agreement and thus may serve as context to interpret this implicit notion in Article 6.10.

13. Finally, the European Union considers that China's Protocol of Accession cannot be read in such a narrow manner. The term "domestic" in Paragraph 15(a) of China's Protocol of Accession seems to address the fact that domestic prices in China are significantly distorted due to State intervention in the economy. However, the term "market economy conditions" also encompasses the situation when State intervention in the economy including international trade is so substantial that operators cannot act independently from the State in their export activities. This is the case of China. Likewise, the term "sale" also includes "export" sales. Thus, the terms "market economy conditions" in Paragraph 15(i) and (ii) of China's Protocol of Accession would appear to allow investigating authorities to have recourse to "a methodology that is not based on a strict comparison with domestic prices or costs in China (…) in determining price comparability under Article VI of the GATT 1994 and the Anti Dumping Agreement". A methodology which considers the State as the actual producer of the product concerned and uses information available to compare export prices of the actual producer with an analogue country normal value is also "a methodology that is not based of a strict comparison with domestic prices or costs in China".

2. Claim under Article I:1 of the GATT 1994

14. The European Union notes that China's argument is based on the presumption that the Anti-Dumping Agreement does not allow for treating suppliers from non-market economy countries differently. In other words, China assumes what it pleads for (i.e., that Article 9(5) of Council Regulation No 384/96 violates certain provisions of the Anti-Dumping Agreement) in order to conclude that there is no conflict with Article I:1 of the GATT 1994. Such a circular argument should

be rejected. More so where there are other references in the Anti-Dumping Agreement which allow WTO Members to treat non-market economy countries differently.

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

15. The European Union observes China has not raised any additional arguments in connection with this claim. Thus, the European Union requests the Panel to reject China's claim that Council Regulation No 91/2009 is inconsistent with Articles 6.10, 9.2 and 9.4 of the Anti-Dumping Agreement.

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

16. The European Union observes China has not raised any additional arguments in connection with this claim. In fact, by implication, it would appear that China acknowledges that the standing determination was properly made. Thus, the European Union respectfully requests the Panel to reject China's claims.

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

17. China claims that the EU's determination of "domestic industry" violated Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*. In particular, China presents five sets of claims against the EU's determination of the domestic industry. In its first written submission, the EU explained why all five of these claims are to be rejected. In its oral statement, China has failed to rebut any of the EU's arguments. The EU therefore refers to the arguments presented in its first written submission.

18. The EU clarifies that the EU authorities did not exclude any domestic producers but simply defined the domestic industry based on all those producers which made themselves known within 15 days following initiation and which expressed a willingness to cooperate. China has acknowledged that it is permissible to use reasonable deadlines to determine the scope of the domestic industry. China has failed to even attempt to demonstrate that this deadline was not reasonable. The use of this deadline for purposes of defining the domestic industry was an entirely reasonable and objective way of grouping all cooperative domestic producers, and was thus a method which did not "favour either side".

19. Article 4.1 does not require an authority to include producers that indicate from the outset that they are not going to cooperate. The EU's approach is an entirely reasonable approach which is consistent with the discretion that is given to authorities by Article 4.1 and the lack of a hierarchy of preference in this provision.

20. In respect of the question whether 27% of production is a "major proportion", China accepted in the course of the oral hearing that "a major proportion" could be much less than 100%, and even less than 25 % depending on the circumstances of the case. Given this acknowledgement it is all the more revealing that China has still failed to demonstrate why 27 % is not an important, significant or serious proportion in the particular circumstances of this case, even though this is what the panel in *Argentina – Poultry Anti-Dumping Duties* considered it was required to do in order to demonstrate a violation of Article 4.1. The only two particular "circumstances" that China refers to are either completely irrelevant such as the number of producers or simply a different packaging of the erroneous argument made in its first written submission that the term "a major proportion" has to be

as close as practically possible to 100%. Neither explains why 27% of production is not an important part of production.

21. China did not even attempt to re-but the EU's arguments in respect of the lack of merit of China's claims in respect of the time period for the determination of the major proportion requirement, the representativeness of the sampled producers when compared to total production or the need to exclude related producers.

22. In sum, the EU reiterates its request that the Panel reject all of China' claims under Articles 3.1 and 4.1 of the *Anti-Dumping Agreement* in respect of the EU's definition of the domestic industry.

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

23. The European Union observes China has not raised any additional arguments in connection with this claim. Thus, the European Union requests the Panel to reject China's claim that Council Regulation No 91/2009 is inconsistent with Articles 2.1 and 2.6 of the Anti-Dumping Agreement.

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

24. China alleges that the EU failed to make a fair comparison as required by Article 2.4 of the AD Agreement between normal value and export price because the authority did not base this comparison on the full Product Control Number ("PCN"). In the first written submission, the European Union explained why China's claims based on the alleged failure to use the full PCN are in error and should be rejected by the Panel. China did not address any of these arguments in its oral statement. The EU therefore reiterates its view that China has failed to establish a prima facie case of violation.

25. In the absence of any prescribed methodology and taking into consideration the fact that comparisons were made between normal value and export price between products based on the two main drivers that the exporters themselves considered to be affecting price comparability, it is clear that China has failed to demonstrate that the comparison that was made was not a "fair comparison" as required by Article 2.4.

26. China's argument raised in the course of the hearing that it did not know what the difference was between special and standard fasteners, and that this lack of transparency hindered the defence of the Chinese exporters' interests at the time of the investigation and of China in the current proceedings is clearly contradicted by the facts on the record.

27. In sum, China failed to demonstrate that the authority violated its obligations under Article 2.4 of the *Anti-Dumping Agreement.*

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

28. China argues that the EU violated Articles 3.1 and 3.2 of the AD Agreement since the authority allegedly failed to make a price undercutting analysis on the basis of the full PCN. In the first written submission the EU explained the reasons why China's claim is to be rejected. Once again, none of the EU's arguments were addressed in China's opening oral statement. In addition, and as clarified in response to a number of the Panel's questions, China cannot seriously argue that it was not aware of how the product groups were constituted or what the methodology was that was followed

for the price undercutting analysis. China's own exhibit CHN-50 which is an example of a disclosure document sent to the Chinese producers clearly explains it all in great detail. Three weeks were given to exporters to comment on this approach. No comments challenging the reasonableness of the methodology of the price undercutting comparison were received. China has failed to provide any evidence to show that the price undercutting analysis was not conducted in an objective manner given the broad discretionary power given to authorities under Article 3.2 in this respect.

29. In sum, China's claims under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* in respect of the price undercutting analysis are to be rejected.

IX. CLAIM 7: EXAMINATION OF THE VOLUME OF DUMPED IMPORTS (ARTICLES 3.1, 3,2, 3.4 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT*)

30. China argues that the EU violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 because the authority failed to exclude the volume of two exporters that were found not to be dumping from its volume analysis under Article 3.2 and because the authority assumed for the purposes of that same volume analysis that all non-examined exporters were dumping. For the reasons explained in its first written submission, the EU requests the Panel to reject China's claim in this respect. China did not even attempt to rebut the EU's arguments at the time of the first substantive meeting with the Panel.

31. The European Union requests the Panel not to approach this matter in a mechanistic fashion. The Appellate Body has warned against such a mechanistic approach on many occasions, thus calling for a substantive over a formalistic approach. It is not so that any inclusion of non-dumped imports would necessarily, and ipso facto constitute a violation of Articles 3.1 and 3.2. A violation will exist only if the failure to do so jeopardizes the objectivity of the examination. As explained before, as well as in our First Written Submission, such was not the case in respect of the fasteners investigation.

32. Furthermore, the facts on the record show that in the fasteners case, all sampled producers were found to be dumping. Indeed, in the fastener case, 100% of the sampled producers representing 61% of exports from the cooperating companies and 39% of total exports from the People's Republic of China were all found to be dumping. Clearly the authority's extrapolation of dumping in respect of the non-sampled exporters on this basis was not in error.

33. China's claims under Articles, 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* are therefore to be rejected.

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

34. China argues that the EU violated its obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* to objectively examine the impact of the dumped imports on the situation of the domestic industry. China presents four equally flawed arguments in this respect. In the first written submission, it was clearly demonstrated why all four are in error. China failed to even attempt to rebut these arguments in its oral statement.

35. It is recalled that China's claim lacks merit since the record clearly shows that the EU authorities *did* consistently use data relating only to the *same domestic industry*. WTO case law confirms that China is wrong to suggest that the mere 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 vitiated the objectivity of the analysis.

36. China's claim in respect of the treatment of the factor profitability is based on an incorrect understanding of the reasonable and nuanced explanation provided by the EU authorities. Moreover, in the first written submission, the European Union explained at length that it is simply not so that market share was the "sole factor possibly showing a negative trend", as erroneously argued by China. It is certainly not so that the EU authorities concluded that injury existed "after having found that all factors showed a positive trend over the period concerned", as China wants the Panel to believe. Nor, of course is it factually correct to argue, as does China in its Closing Oral Statement, that the injury determination was based "solely on a loss of potential sales". The EU authorities made an objective determination of the facts in respect of all of these important factors, and provided a reasonable and reasoned analysis of how these facts support a determination of injury to the domestic industry. China's argument in respect of market displacement is also simply factually incorrect since the EU authorities did not make a finding of market displacement, but related its injury finding to fasteners as a whole.

37. In view of the foregoing, the European Union requests the Panel to reject China's claim that Council Regulation No 91/2009 violates Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

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

38. China claims that the EU's causation and non-attribution analysis violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. For the reasons explained in the first written submission, China's claim is without merit. Once again, in the oral statement China completely failed to address let alone rebut any of the EU's arguments in respect of the causation and non-attribution analysis.

39. It is recalled that China's causation-related argument unduly limits the injury to a loss of market share and is contradicted by the facts on the record. China's allegation that the authority did not adequately distinguish the effects of other factors such as the increase in raw material prices and the export performance of the EU industry is equally unsubstantiated. It is clear from the record that export performance was not a factor of injury and that the authority examined the role of the increase in raw material prices but found that there did not exist a similar direct link between the increase in raw material prices and the loss of market share as was found to exist in respect of the dumped imports. China's claims under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* relating to the authority's non-attribution analysis are thus to be rejected.

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

40. Rather than clarifying its position on its procedural claims under Articles 6 and 123 of the *Anti-Dumping Agreement*, China preferred to add to the confusion in its first oral statement. Not a single serious argument was advanced on the procedural claims, no evidence was provided. Instead, a new 14th claim seemed to be in the making when China asserted that "no information was given on how price undercutting was calculated". However, it is wholly unclear on what basis this claim is made. In these circumstances the European Union is not in a position to defend itself in the face of speculation and mere assertions. It is simply not acceptable to accuse the European Union of "obscure reasons" when China continuously and repeatedly fails to respect the most basic rules of dispute settlement procedures. The "matter" before the Panel is not a continuously moving target. It is fixed in the Panel request in which the complainant has to ***present the problem clearly***.

XIII. CONCLUSION

41. In view of the foregoing, the European Union requests the Panel to reject all of China's claims and arguments, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the *Anti-Dumping Agreement*, the *GATT 1994* and the *WTO Agreement*.