ANNEX F

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

ANNEX F-1

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

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

1. Procedural arguments raised by the EU

1. The EU's first procedural claim, namely that the Panel Request failed to meet the Article 6.2 requirement to provide a brief summary of the legal basis of the complaint sufficient 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 Article X:3(a) of the GATT 1994, confuses the requirements of Article 6.2 which are merely *procedural* with the analysis of the content of the measure at issue which is *substantive*. The same comment applies to the EU's second procedural objection, namely that China sought to incorporate issues dealing with the calculation and determination of individual margins within the scope of the measure at issue while these issues are not covered Article 9(5) of the Basic AD Regulation which is the measure identified in the Panel Request.

2. The EU's third procedural argument, namely that the Panel should refrain from examining Article 9(5) of Council Regulation No. 1225/2009 since this measure is outside the Panel's terms of reference, should be rejected for at least two reasons. First, if China's Panel Request covers the amendments to Council Regulation (EC) No. 384/96, it *a fortiori* and necessarily covers a subsequent measure which merely codifies Council Regulation No. 384/96 as amended into one consolidated text. Second, since Article 9(5) of Council Regulation (EC) No 384/96 as amended is identical in its content to Article 9(5) of Council Regulation (EC) No. 1225/2009, the latter is necessarily within the Panel's terms of reference since both measures are "in essence" the same.

2. Substantive Issues

a) The "scope" or "content" of Article 9(5) of the Basic AD Regulation

3. The EU claims that the only issue which results from [Article 9(5)] is, *strictu senso*, the imposition of anti-dumping duties on a country-wide basis or on an individual basis and that Article 9(5) does not deal with the issue of the calculation or determination of individual dumping margins. Such a restrictive interpretation of the scope of Article 9(5) is manifestly unjustified in particular when Article 9(5) of the Basic AD Regulation is seen in the context of the other provisions of the Basic AD Regulation. **None** of the provisions quoted by the EU, namely Articles 2, 9(4) and 9(6) of the Basic AD Regulation, deals with the specific issue of whether the dumping margin for exporting producers from non-market economy countries is to be determined on an individual or a country-wide basis. Why? Because this issue is directly dealt with by Article 9(5) of the Basic AD Regulation. This is in fact acknowledged by the EU itself when stating that "[T]he EU authorities do not calculate individual dumping margins for non-IT suppliers".

4. Finally, the EU erroneously submits that "[w]hat China pretends […] is that *any consequences* from the determination provided by Article 9(5) of Council Regulation No 384/96 should be included in the measure at issue". The EU appears to submit that the measure at issue could only be challenged with respect to one single provision of the AD Agreement. A measure, even "as

such", may be found to violate several distinct provisions of the AD Agreement. China is not challenging issues which are not covered by Article 9(5) of the Basic AD Regulation.

b) Articles 6.10, 9.2 and 9.4 and China's Protocol of Accession

5. The EU claims that **Article 6.10** first sentence does not contain a strict obligation requiring investigating authorities to always determine dumping margins on an individual basis but merely a "preference" that, by definition (since it is not an obligation), investigating authorities may disregard, whenever they wish. The EU further claims that Article 6.10 second sentence is not an exception to the rule included in Article 6.10 first sentence but merely includes an "affirmative statement relating to (i) the conditions for sampling and (ii) the composition of the sample". The EU's interpretation is manifestly flawed: it is contrary to the text of Article 6.10, its structure and context as well as its negotiating history.

6. The EU bases its view that Article 6.10 first sentence only contains a preference on the words "as a rule". The EU, however, manifestly ignores the word "shall" which clearly establishes the mandatory nature of the rule. The terms "as a rule" rather than relaxing the obligation of the first sentence further strengthens such obligation. The words "as a rule" are necessary as they create the link between the obligation contained in Article 6.10 first sentence which constitutes the rule and the exception to that rule included in Article 6.10 second sentence.

7. The EU argues that the negotiating history of Article 6.10 confirms its reading of the first sentence. A close examination of the evolution of the texts in the successive drafts, however, clearly shows the firm intention of the drafters to establish a strict obligation for the investigating authorities to determine an individual dumping margin since even in those cases where sampling is used, such an individual dumping margin shall be determined for those companies not included in the sample which provide the necessary information in time except only "where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation".

8. The EU's interpretation is also contrary to the structure of Article 6.10. That the sampling scenario of the second sentence constitutes the exception to the rule included in Article 6.10 first sentence is obvious. Article 6.10 second sentence refers to cases where the number of exporters, producers, importers or types of products involved is so large as to make impracticable "***such a determination"*** – that is the "***determination***" of an individual margin of dumping for "each known exporter or producer concerned" pursuant to Article 6.10 first sentence. Moreover, even in those cases where sampling is used, Article 6.10.2 requires investigating authorities to determine ***an individual margin of dumping*** for those exporters or producers not included in the sample but which submit the necessary information in time. Thus, and as confirmed by panels and the Appellate Body in various disputes, Article 6.10 is structured in the manner of a rule / only exception.

9. In support of its argument, the EU provides several examples allegedly presenting cases in which "the preference for the individual determination of dumping margins does not need to be followed". None of them is, however, relevant. The examples provided by the EU merely reflect its own practice and cannot as such legitimize the EU's interpretation. Furthermore, the legality of the EU's practice appears to be dubious.

10. Furthermore, the WTO case-law to which the EU refers, namely *Korea – Certain Paper* and *EC – Salmon (Norway)* does not support the EU's contention that there are situations other than sampling where Article 6.10 first sentence does not need to be followed. These Panel Reports merely clarify the meaning of the term "exporter" and "producer" in Article 6.10 first sentence.

11. Finally, contrary to what the EU submits, Article 9.2 does not support the view that there are exceptions to the rule that dumping margins must be determined on an individual basis other than the

sampling scenario. By limiting the exception to the imposition of an individual anti-dumping duty to those situations where it is impracticable to do so, Article 9.2 supports the view that the rule in Article 6.10 first sentence is a general obligation having as its sole exception the one set out in Article 6.10 second sentence.

12. Regarding the application of the reasoning followed by the Panel in *Korea – Certain Paper* to Article 9(5) of the Basic AD regulation, it must be pointed out, at the outset, that the *Korea – Certain Paper* case is entirely irrelevant in the context of the present dispute. Indeed, the issues examined in *Korea – Certain Paper* and in the present dispute are fundamentally different in nature. The most fundamental difference is that while *Korea – Certain Paper* deals with the issue of whether different entities are in a relationship that is close enough to be treated as a single "exporter" or "producer" within the meaning of Article 6.10 first sentence, the Article 9(5) test focuses on the relationship of each identified exporter or producer with the State. The different nature of the two tests is also demonstrated by the fact that they are applied sequentially by the EU in its anti-dumping investigations.

13. Even if the Panel were to consider the Panel Report in *Korea – Certain Paper* as relevant, it is obvious that there is no similarity between the facts in *Korea – Certain Paper* and the Article 9(5) test.

14. Finally, it is very important to correct the misleading presentation by the EU of how the country-wide dumping margin is determined for non-IT exporting producers. Contrary to what the EU claims, the methodology applied by the EU to determine the *country-wide* dumping margin in the case of imports from non-market economy countries is fundamentally different from that applied by the EU to determine the dumping margin in the case of a group of related companies. In the case of non-IT exporting producers, the EU does not merely examine the information provided by each of them. Instead, it considers that all co-operating non IT-exporting producers must be treated together and even assume that all exporting producers which do not co-operate are equally non-IT exporting producers. The investigating authorities only base the dumping margin on the information provided by the co-operating non-IT exporting producers if the latter represent more than 80% of all exports not accounted for by MET or IT suppliers. This is a very high threshold which is not met in most cases.

15. Regarding **Article 9.2**, the arguments put forward by the EU must be rejected. The meaning of the term "impracticable" put forward by the EU as "ineffective, not feasible or not suited for being used for a particular purpose" is not consistent with the ordinary meaning of that term. Furthermore, Article 8.3 of the AD Agreement supports China's position.

16. The EU repeatedly refers to the alleged need to identify "the actual source of the price discrimination" as a justification for imposing a country-wide duty in the case of imports from a non-market economy country. The EU, however, fails to explain or define this vague concept. China notes that this concept does not have any legal basis and that it cannot be found in either Article VI of GATT 1994 or in the AD Agreement. As underlined by the Appellate Body, the "notion of dumping […] relates to the foreign producer's or exporter's pricing behaviour". Thus, under the AD Agreement, only producers or exporters which are found to be dumping can be the "actual source of the price discrimination".

17. China would also like to briefly address **Article 9.4** of the AD Agreement. In the context of Article 9.4, if even producers not included in the sample must receive an individual anti-dumping duty, it logically follows that producers in the sample are also entitled to receive such an individual anti-dumping duty. This *a fortiori* applies to cases where no sampling is used. Thus, this rule, either directly in cases where sampling is used or as relevant "context" when interpreting Article 9.2, confirms that the authorities must apply individual anti-dumping duties for exporters or producers.

18. Regarding China's **Protocol of Accession**, the EU claims that China's recognition by a large number of WTO Members as a full market economy country is a "concession" made by other parties in the framework of bilateral negotiations "precisely because China is not yet a market economy country". This is clearly a distorting reading of the facts. That many WTO Members have acknowledged that China is a market economy country simply confirms that there is no common "understanding that China is not yet a market economy country".

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

1. The EU's determination of the domestic industry violated Articles 4.1 and 3.1 of the AD Agreement

a) The Information Document

19. As a preliminary issue, China would like to address the relevance and status of the "Information Document". The facts and determinations in the Information Document are important and relevant for the Panel to assess the WTO-consistency of certain parts of the measure that is challenged. The Information Document is part of the record. China can therefore refer to it as relevant evidence in support of its claims.

20. As to the status of this "Information Document", the EU's claim that the Information Document "cannot, and should not, be considered as equivalent to a preliminary determination on the basis of which provisional measures are imposed under Article 7 of the *AD Agreement*" is in sharp contradiction with the description of that document in the cover letter which was sent to all interested parties together with the Information Document. The EU itself even referred in its SWS to the Information Document as containing its "preliminary determination".

21. In any event, the Information Document is clearly not, as claimed by the EU, a "working document" and "thus an informal and essentially internal preliminary document". The Information Document has been drafted with a view to ***actively*** inform all interested parties about the investigation. The EU investigating authorities even requested the interested parties to comment on the Information Document. It seems reasonable to expect that a Document which is prepared with a view to inform all interested parties about the "preliminary findings" of the investigating authorities and on which they are invited to comment is "factually and legally correct".

b) By excluding from the definition of the Community industry all producers that did not make themselves known within 15 days as of the date of publication of the Notice of Initiation, the EU violated Articles 4.1 and 3.1 of the AD Agreement

22. The EU claims that "it is not so that any producers were "arbitrarily excluded" from the scope of the domestic industry" and that "[i]t is not correct that more producers came forward and were subsequently excluded". That statement is contradicted by the evidence on the record. Indeed, what the Information Document shows is that the Community industry was first defined on the basis of the 114 Community producers that had come forward and submitted the necessary information. Of these 114 companies, only the 86 producers supporting the complaint were included in the domestic industry. Thus, by excluding from the scope of the domestic industry, all producers which did not come forward within 15 days as of the date of Initiation, the investigating authorities deliberately excluded numerous producers that they had initially taken into account for the purposes of defining the Community industry.

23. Even assuming that the investigating authorities could legitimately limit the definition of the domestic industry to those producers which came forward within a certain time limit, limiting the

composition of the domestic industry to those producers that came forward within 15 days was not appropriate and constitutes a violation of both Articles 4.1 and 3.1. First, the 15-day period is the time period given for producers to lodge requests to be included in the sample, while 40 days is the deadline granted to the parties to make themselves known. Second, the 15-day limit is very short. Third, the EU incorrectly linked the possibility of being included in the definition of the Community industry to the willingness to be included in the sample.

c) By excluding the producers that did not support the complaint, the EU violated Articles 4.1 and 3.1 of the AD Agreement

24. The EU submits that 70 EU producers came forward during the 15-day period and that 25 were excluded, not because they did not support the investigation but because (i) they did not produce the product concerned (ii) they did not wish to cooperate or (iii) they refused to provide, or did not send, an open version of their reply. China notes that this claim is not substantiated by any evidence.

25. Furthermore, the EU claims that the EU's position "is *not*, as stated in the question, that "an investigating authority may define the domestic industry in an anti-dumping investigation by focusing exclusively on known producers of the like product **expressing support for the application**" (emphasis added). This claim is directly contradicted by the EU's own longstanding practice in anti-dumping investigations. China refers to various EC anti-dumping cases which show that support to the complaint is a necessary condition for a domestic producer to be included in the domestic industry.

26. As regards the anti-dumping investigation concerning fasteners in particular, China would like to draw the Panel's attention to the following elements. First, the Information Document shows that all producers that opposed the investigation or that did not express any opinion were excluded from the scope of the domestic industry. Second, the fact that the EU investigating authorities limited the domestic industry to those producers that supported the complaint is further demonstrated by the definition of the Community industry at Recital 114 as "the Community producers that supported the complaint **and** fully cooperated in the investigation". Third, the EU claims that if producers which came forward within the 15-day period were excluded, it is not because they did not support the initiation of the investigation. However, it is clear from Recital 114 of the Definitive Regulation that, even if a producer opposing the complaint would have expressed its willingness to be included in the sample, it would have been excluded from the definition of the domestic industry by the very fact that it did not support the complaint. Fourth, it is further clear from the Notice of Initiation that only companies ***supporting the complaint*** were to be included in the domestic industry from which the sample would be selected.

d) 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

27. The Definitive Regulation (in particular from the reference in the last sentence of Recital 114 to Articles 4(1) and 5(4) of the Basic AD Regulation) shows that the EU investigating authorities never examined the circumstances in the anti-dumping investigation to determine whether the producers effectively represented a "major proportion" and limited themselves to examining the percentage the production of the producers included in the domestic industry represented in comparison to the total production of the domestic producers. The considerations to which the EU refers are merely *a posteriori* rationalizations.

28. The EU claims that "[a]s with any determination by the authorities, the interested parties at the time of the determination may challenge this determination. They did not do so". The EU investigating authorities, however, never informed the interested parties about the details of the

domestic industry's determination. The EU never disclosed the identity of the producers which were included in the scope of the domestic industry.

29. Furthermore, it is fundamentally and legally erroneous to claim that a presumption of "major proportion" exists when the producers constituting the domestic industry together constitute more than 25%. Such a presumption has no legal basis and is legally incorrect. Moreover, nothing in the EU practice suggests that this alleged "presumption" is refutable. On the contrary, the inclusion of an express reference in Article 4(1) of the Basic AD Regulation to Article 5(4) makes the 25 per cent threshold a legally binding criterion rather than a "presumption".

30. Finally, as explained in China SWS, the specific circumstances of this case show that the producers making up the domestic industry did not represent a "major proportion".

2. The EU's determinations of dumping violated Article 2.4 of the AD Agreement

31. Contrary to what the EU claims, China does not argue that "simply because the information was requested to be provided on the basis of a particular PCN, any other method would be unfair or not even-handed".

32. China first submits that having identified the characteristics in the PCN as being relevant for the purposes of making the fair comparison, the EU should have examined and determined to which extent these differences affected price comparability and by failing to do so, it violated Article 2.4 of the AD Agreement. Second, China submits that, to the extent the investigating authorities decided not to make their comparison on the basis of the PCN, they should have informed the Chinese exporting producers in order to allow them to claim adjustments for differences in physical characteristics. Third, China submits that all the PCN characteristics affected price comparability and thus had to be taken into account by the investigating authorities when making the comparison.

33. The EU is putting forward a legally erroneous interpretation of Article 2.4 when claiming that it could limit itself to the "two main characteristics referred to by the interested parties in the course of the investigation", namely the strength class and the distinction between standard and special fasteners. It is first of all incorrect, as a matter of fact, to claim that these were the only two characteristics referred to by the interested parties during the investigation. It is furthermore legally erroneous to state that investigating authorities could limit themselves to those differences which they consider to be the most important. Moreover, the fact that the PCN mechanism could not be used in the dumping determination because the Indian producer did not provide the information in this manner does not relieve the investigating authorities from their obligation to take account of the differences reflected in the PCN to ensure that the comparison made is a fair comparison. Finally, China notes that the EU does not comment on the second aspect of China's claim which relates to the absence of adjustments for differences affecting the "quality" of the products being compared.

3. The EU violated Articles 3.1 and 3.2 of the AD Agreement when making the price undercutting calculations by comparing products which were not comparable

34. The EU claims that it did comply with Articles 3.1 and 3.2 in view of the fact that (i) Article 3.2 does not impose the use of any particular methodology when making a price undercutting determination, (ii) does not even require that adjustments be made and (iii), even assuming that any requirement to make adjustments exists, in this case the comparison was made on the basis of 5 out of the 6 PCN features.

35. First, it is simply not correct to claim that Article 3.2 does not require adjustments to be made. Second, there is ample evidence that the methodology followed by the EU in its price undercutting analysis is not unbiased and even-handed.

4. The EU violated the procedural requirements imposed by Articles 6 and 12 of the AD Agreement

a) General Comments

36. First, the EU claims that several of China's claims concerning procedural deficiencies are outside the Panel's terms of reference. However, none of these objections is justified. Second, contrary to what the EU claims, China has submitted the necessary evidence and legal arguments to make its case. Third, the EU claims that, pursuant to paragraph 16 of the Panel's working procedures, "China is barred from presenting new evidence to the Panel except in the specific circumstances foreseen by the working procedures". More specifically, the EU claims that because China did not submit the MET/IT questionnaire "as evidence in support of its claim", China failed to make a *prima facie* case because it did not present "the MET claim form "no later than during the first substantive meeting"". The EU appears to make a very dangerous confusion between the rules in the Panel's Working Procedures regarding the timing of the submission of ***factual evidence*** and the requirement for the complainant to make a *prima facie* case which is not limited in time. As to the very specific issue of whether the MET/IT Questionnaire which was submitted by China as Exhibit CHN-72 is admissible, China notes that the purpose of the rule in paragraph 16 of the Panel's Working Procedures is to ensure that the other party has the time to inspect the relevant evidence and to comment on it. Being the author of the MET/IT Questionnaire, the EU knows the content of that document. Furthermore, that document was necessary for purposes of the rebuttal. It is thus plainly admissible.

b) The EU failed to disclose the identity of the complainants and supporters thereby violating Articles 6.5, 6.2 and 6.4 of the AD Agreement

37. China notes that "good cause" for the confidential treatment of the complainants' identity has not been shown. First, the complainants referred to a potential retaliation of a purely hypothetical nature in the sense that retaliation could but was not likely to happen. Second, the complainants did not submit any evidence about such "potential retaliation".

c) The EU violated Articles 6.5, 6.2 and 6.4 of the AD Agreement 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

38. Regarding the EU's claim that "the alleged deficiencies in the questionnaire response by the producer in the analogue third country" should be rejected since "China has in any event failed to provide evidence in accordance and within the deadlines set out in paragraph 16 of the Panel's working procedures", China notes that the Indian producer's questionnaire was submitted together with China's FWS as Exhibit CHN-53.

39. In order to rebut China's claim that the non-confidential questionnaire response of Agrati was largely deficient, the EU refers to a presentation made by interested parties (Exhibit CHN-21) which was, however made on 10 April 2008 on the sole basis of the information which was provided by Agrati in the non-confidential version of its sampling form. However, the information provided in the sampling form is limited to certain injury factors and no information for other injury factors has ever been provided in the deficient non-confidential version of Agrati's questionnaire response.

40. Regarding Fontana Luigi, the EU questions the evidence put forward by China and claims that China only submitted Fontana Luigi's initial questionnaire. A more complete questionnaire would have been attached to the cover letter submitted as Exhibit EU-25. The date of the stamp on the front page of Exhibit CHN-60 bears, however, the date of 02.06.08. This is a date later than that of Fontana Luigi's letter in Exhibit EU-25, namely 30.05.08. China further notes that the EU does not provide any evidence in support of its claims. Furthermore, the fact that the non-confidential version

of Fontana Luigi's sampling form would include information regarding certain injury factors is not relevant. Indeed, the information provided in the main questionnaire covers many additional injury factors other than those referred to in the sampling form.

d) The EU violated Article 6.5 of the AD Agreement by disclosing a document entitled "Assessment of Market Economy Treatment Claims by nine producers in the PRC"

41. First, the EU's claim that "information that was submitted in those claim forms as confidential […] remained confidential throughout the investigation" is blatantly contrary to the facts on the record. Indeed, a significant amount of information provided on a confidential basis was reproduced in the document entitled MET assessment and thus was not kept confidential as requested by the exporting producers. Second, regarding the labeling "LIMITED" on the top of the MET Disclosure Document, the EU submits that it refers to its status as an "internal working document". According to the EU, "the internal working document ceases to be a "Limited" document once it is sent out to interested parties as an MET Disclosure Document". This is a rather surprising explanation. Indeed, as noted in the original Questionnaire for MET/IT as well as on the MET Disclosure Document, the word "*limited*" means not only that it is a document for internal use only in the sense that it is protected in accordance with Article 4 of Council Regulation (EC) No 1049/2001 regarding public access to the EP, Council and Commission documents, but also that it is a *confidential* document pursuant to Article 19 of the Basic AD Regulation and Article 6 of the AD Agreement.

ANNEX F-2

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

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

1. China argues that "whether China is a market economy country or not is totally irrelevant for this dispute". The European Union strongly disagrees. If anything the uncontested fact that China is a non-market economy country is the only reason we are here today discussing this "as such" claim. The international rules disciplining the imposition of anti-dumping measures primarily aim at addressing the actual source of price discrimination, i.e., a supplier which introduces a product into the commerce of another country at less than its normal value. This presupposes the existence of market economy conditions, including a degree of independency of the supplier concerned in setting its prices, terms and conditions in the ordinary course of trade. If that is the case, the supplier's dumping behaviour and the product in question can be subject to anti-dumping duties in accordance with the Anti-Dumping Agreement. However, in a situation where market economy conditions are absent, it is by definition difficult to determine the mere existence of dumping. This was recognised by the GATT Contracting Parties when introducing the Ad Note to Article VI of the GATT 1947 in 1955; and was further incorporated into Article 2.7 of the Anti-Dumping Agreement. Moreover, where market economy conditions are not present, it is difficult to apply the anti-dumping rules to address the actual source of price discrimination effectively. Indeed, in a non-market economy country, the means of production and the economy, including international trade, are under strict control by the State. All imports from non-market economy countries are therefore considered to emanate from a single producer, the State. In view of the State's control over international trade, it would not be relevant to specify exporting companies separately since they collectively constituted one single supplier or exporting entity, i.e., the State. It is the EU's contention that the Anti-Dumping Agreement (as well as its predecessors) allows for the imposition of anti-dumping duties on a country-wide basis against imports from non-market economy countries, precisely in order to address the actual source of price discrimination, i.e., the State.

2. As for the scope of the measure at issue, the European Union has explained in detail that Article 9(5) of Council Regulation No 384/96 on its face refers strictu sensu to the imposition of anti-dumping duties. More precisely, Article 9(5) amounts to a threshold question at the beginning of the investigation: in view of the specific particularities of non-market economy countries, can the applicant company be considered as a supplier acting independently from the State (in which case that IT supplier is considered responsible for any dumping found and its imports are subject to an individual anti-dumping duty)? Or, is the applicant company controlled by the State (in which case that non-IT supplier is considered to be a related export branch of the actual producer and the source of the alleged price discrimination, and its imports are subject to the country-wide duty rate)? China's contradictory attempts to bring other issues, such as the individual determination of dumping margins or how the level of duties is established, within the scope of Article 9(5) should be rejected. A Member cannot identify a specific measure, bring an "as such" claim against it and pretend that any consequence or subsequent step derived from the determination provided by that measure is part of it; and definitively not so when other unchallenged provisions deal specifically with those other issues.

3. The European Union has also shown that China's claims are based on a wrong interpretation of the covered agreements. First, Article 9.2 of the Anti-Dumping Agreement permits the imposition of anti-dumping duties on a country-wide basis also in the particular case of imports from non-market economy countries. Indeed, absent market economy conditions, the State is considered the actual supplier and the "source" of the alleged price discrimination, and any "amounts" collected from the State or its export branches (i.e., non-IT suppliers) are "appropriate". Second, the possibility to impose anti-dumping duties on a country-wide basis also follows the general principle or preference contained in Article 6.10 of the Anti-Dumping Agreement to calculate dumping margins on an individual basis, and confirms that sampling is not the only situation where this preference does not need to be followed. Third, in any event, the third sentence of Article 9.2 of the Anti-Dumping Agreement also permits the imposition of duties on a country-wide basis when there are several suppliers and it is "impracticable" to specify individual anti-dumping duties per supplier. Regardless of the dictionary you take, the notion of "impracticable" implies "something which is not feasible in practice", "something which cannot be done for practical reasons", or something that is not "able to be effected, accomplished or done". In other words, suppliers cannot be specified by name and duties cannot be imposed on an individual basis because of "practical" reasons (i.e., it would render those duties ineffective, not feasible or not suited for being used for a particular purpose, i.e., offsetting or preventing dumping from the actual supplier, the State). The context of similar terms in other parts of the Anti-Dumping Agreement and in other covered agreements (notably the DSU), and other provisions, such as Article 6.10, together with the object and purpose of the provisions of the Anti-Dumping Agreement and the Anti-Dumping Agreement as a whole, fully support this conclusion. The negotiating history of Article 8 of the Kennedy Round Anti-Dumping Code, which China omits, further confirms that the imposition of anti-dumping duties on a country-wide basis is permitted, provided that subsequent refunds could be granted.

4. Article 9(5) of Council Regulation No 384/96 mirrors the language of Article 9.2 of the Anti-Dumping Agreement as far as possible, and establishes a mechanism, in a situation where market economy conditions are absent, to allow for the imposition of anti-dumping duties which accurately addresses the actual source of dumping in each case (i.e., either the independent MET/IT supplier, or the State and its export branches). Needless to say, if in the context of a request for a refund an importer can show that the supplier subject to the country-wide duty rate acts independently from the State, a refund would be granted (to the extent that the dumping margin has been eliminated or reduced). Article 9(5) is also in line with China's Protocol of Accession, which recognises China as a non-market economy and provides that, in the absence of "market economy conditions" investigating authorities may 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 for the purpose of determining the existence of dumping 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 on a strict comparison with domestic prices or costs in China".

5. China's claim under Article I:1 of the GATT 1994 should also be dismissed. China argues that a conflict only exists where "obligations" (as opposed to "rights") in the different agreements cannot be complied with simultaneously. In the EU's view, this interpretation of conflict is very narrow. The Anti-Dumping Agreement delimits the situations where those measures can be imposed. Since the decision to impose anti-dumping duties is a "right" granted to the Member concerned, every decision to do so would amount to a violation of the MFN principle. This cannot be the case. Finally, China argues that Article 9(5) of Council Regulation No 384/96 discriminates against non-market economy countries. In this respect, China ignores that the European Union also applies country-wide anti-dumping duties on imports from market economy countries in situations where it is impracticable to specify individual duties; and that there is a substantive difference between imports from market and

non-market economy countries: the role of the State is different. Consequently, to the extent that the Panel needs to examine this claim, the Panel should reject it in its entirety.

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

6. This claim made with respect to Council Regulation No 91/2009 is the same as the "as such" claim made in connection to Article 9(5), and the Panel should address it accordingly. In any event, since all the applicant companies obtained IT in the Fasteners investigation, the European Union considers that the measure at issue (i.e., Council Regulation No 91/2009) did not cause any nullification or impairment to China.

III. STANDING OF THE EU DOMESTIC INDUSTRY

7. As regards China's claim on the standing determination, the European Union considers that this claim is outside the Panel's terms of reference. On substance: China's claims, in addition to misstating the EU's argument, seem to be based on a confusion as to the methodology used by the EU authorities in examining standing in the Fasteners investigation. Contrary to China's assertions, the EU authorities checked the EU total production figure and verified the support/opposition to the application before the initiation of the investigation in accordance with Article 5.4 of the Anti-Dumping Agreement. China also claims that the EU producers expressly supporting the application accounted for less than 25% of total production of the like product produced by the domestic industry. In this respect, the European Union observes that China confuses the percentage of total production of the complainants (26.7%) with the percentage of domestic producers expressly supporting the application (37%). China ignores that 37% is not close to 25% and struggles to argue that the percentage of total production of the complainants (26.7%) is close to 25% by means of several assertions. The European Union considers that China's assertions are irrelevant since the figure of domestic producers expressly supporting the application is 37%.

IV. DEFINITION OF THE DOMESTIC INDUSTRY

8. From China SWS it can be observed that the main, if not only, claim that China is actively pursuing in this context concerns the alleged violation of Article 4.1 for the reason of the fact that the EU authorities imposed a 15 days deadline on domestic producers to come forward and express their interest in cooperating in the investigation such that they would be part of the "domestic industry". The mere fact that China's focus is now entirely on this claim is revealing of the weakness of China's claims in respect of the definition of the domestic industry in general. First, the EU recalls that this 15 days-claim was not the subject of consultations between the parties and is thus outside the terms of reference of the Panel. China cannot deny that this claim is nowhere to be found in the Request for Consultations. Even China will acknowledge that this matter was not discussed in the course of the consultations. Any finding of the Panel on this matter would exceed the Panel's mandate and would amount to a legal error. On the merits, China's claim is obviously flawed for the reasons expressed in previous submissions. The use of a deadline for purposes of defining the domestic industry is reasonable and acceptable.

9. China's second claim in respect of the domestic industry definition: In previous submissions, the EU has already explained at length why China's claim that 27% of production does not constitute a major proportion of total domestic production in this case is based on a flawed interpretation of Article 4.1, and is premised on the erroneous assumption that there exists a preference for a definition based on 100% of domestic production. Much as China would have liked to see the text worded differently, it is simply not so that the "major proportion" option is available only if there exists a "practical impossibility" to obtain the requested information from all producers of the like product. China erroneously seems to suggest that there existed any obligation on the EU authorities to

demonstrate that 27% was a "major proportion" in the specific circumstances of this case. No such obligation exists. Since the Anti-Dumping Agreement does not require an a priori explanation but merely requires that the substantive obligation is met, China's claim of a violation in this case must fail. Third, the EU has explained before that China's claim that the domestic industry was not defined in relation to the period of investigation is flawed. China's SWS merely repeats the same erroneous arguments and fails to rebut the basic fact that the determination of the major proportion was made based on the last full year of the period of investigation for purposes of the injury determination for which statistics were available. Fourth, in its SWS China has effectively made a new claim that the EU made an injury determination with respect to a sample of producers that was not representative. China realised the fundamental weakness of the claim it had actually made and changed its claim hoping for a better result; but even the limited procedural rules of the WTO dispute settlement process do not allow for this type of claim-shopping at these final stages of the proceedings. In any case, China's claim is flawed, both in respect of the law and in respect of the facts as the sample was representative of the domestic industry including both small and large producers and representing producers of the various types of products produced. Fifth, in respect of China's claim relating to the alleged need to exclude related producers, the EU notes that China has not event attempted to rebut the essence of the EU's argument.

V. SELECTION OF THE PRODUCT CONCERNED

10. The context of Articles 6.10 and 2.4 and Appellate Body jurisprudence confirm the text of Article 2.1: the product concerned may include different types or models. When defining the product concerned as "fasteners" and then distinguishing between different models or types (standard and special) to ensure comparability, the EU authorities compared "apples to apples".

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

11. The essence of China's claim has now shifted to the requirement to make "adjustments for differences in physical characteristics affecting price comparability". However, neither in the course of the proceedings, nor in its FWS or in the SWS has China indicated why certain of these PCN factors require such adjustments. The erroneous premise of China's claim is that since certain factors are part of the PCN, adjustments are required for each and every one of these factors. That is simply incorrect as the PCNs are merely a tool for gathering information. Importantly, Chinese interested parties presented arguments on the importance of strength class, even though strength was part of the PCN. China's logic that none of the interested parties argued in favour of adjustments for the PCN factors because they assumed that these factors would in any case be taken care of through the use of PCN models is thus contradicted by the actual behaviour of Chinese interested parties in the investigation. In addition, we recall that the evidence on the record showed that the cost of quality control on the side of the Indian producer was higher and that therefore an adjustment in favour of the Chinese interested parties had to be made.

12. In its SWS, China is introducing a number of new, essentially procedural claims that the EU authorities should have informed the interested parties of the method used for making the comparison. In addition to the fact that no such obligation exists in the Anti-Dumping Agreement and that no such claim was included in China's Panel Request, the EU wishes to note that the EU authorities did of course request all necessary information, and did inform the interested parties that commented on this issue that the comparison was not made on the basis of the PCN method.

VII. PRICE UNDERCUTTING

13. China's claim that the EU authorities violated the obligation to consider whether there existed a significant price undercutting is not properly before the Panel as it was not part of the request for consultations.

14. On the merits, the EU has already explained in previous submissions why China's allegations are baseless. Even absent any clear guidelines concerning the methodology to follow for the price undercutting analysis and the broad discretionary power that this implies, it stands from the record that the comparison that was made by the EU authorities using almost full PCNs was a reasonable and unbiased method for conducting this price comparison.

VIII. VOLUME OF DUMPED IMPORTS

15. China argues that the EU authorities' volume analysis was inconsistent with Articles 3.1 and 3.2 simply because the EU authorities failed to exclude the volume of two marginal exporters that were found not to be dumping. China's SWS does not add anything to the discussion but makes painfully clear the formalistic approach adopted by China that "the simple fact that the examination included non-dumped imports makes the examination necessarily inconsistent with Articles 3.1 and 3.2 of the AD Agreement". Since the increase in the volume of dumped imports is not a condition for the imposition of duties, since the Anti-Dumping Agreement does not even require a finding of whether the volume increased, but merely requires an authority to take this aspect into consideration in the overall assessment of injury which in its totality is to be based on positive evidence and an objective examination, the EU submits that this formalistic approach is simply not warranted in this context.

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

16. First, in its SWS, China merely repeats the erroneous argument that the EU authorities violated their WTO obligations because certain macroeconomic injury factors were examined using data from all producers of the domestic industry and other factors were based on information received from the sampled companies only. Second, China's prolonged debate about the alleged failure to examine the factor profitability in an objective manner is further painful proof of China's erroneous focus. China disagrees with the conclusion reached by the EU authorities, and suggests that the Panel does the same. But that is not the Panel's task. The Panel's task is to examine whether a reasoned and reasonable explanation was provided of how the facts support the determination made. Third, in its SWS China reiterates its earlier argument that "a finding of material injury … cannot solely be based on one negative factor" and that "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". The Anti-Dumping Agreement does not preclude a finding of injury on one negative factor alone, depending on how this factor interrelates with the other factors. The EU authorities did not make their finding based solely on one negative factor. It is also not so that the EU authorities "found that all factors showed a positive trend" and this second premise of China's argument is thus also in error. The suggestion that the EU authorities "should have concluded that the EU industry had not suffered material injury" is not the question before you and is thus not pertinent. The relevant question not addressed by China is, first, whether the EU evaluated all injury factors of Article 3.4 – yes it did, and even China does not argue otherwise; and, second, whether the evaluation of the various factors was reasonable and reasoned. Fourth, China SWS reiterates the erroneous allegation that European Union improperly concluded that the injury consisted of the displacement from one market segment to another. As explained in earlier submissions, the EU authorities did not make such a finding of market displacement, but related its injury finding to fasteners as a whole.

X. CAUSATION AND NON-ATTRIBUTION

17. In its SWS, China introduces an entirely new set of claims that is nowhere to be found in its Panel Request or in its FWS – that the EU failed to demonstrate the existence of a causal link since a "mere coincidence does not establish a causal link" and that the EU failed to adduce evidence of why the domestic producers decided to produce more special fasteners. These new claims of China are thus outside the Panel's terms of reference, and any finding on these new claims would be a violation of Article 11 of the DSU.

18. In any case, WTO case law, for example in the safeguards context, has made it clear that coincidence in movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation. In addition, and as explained in the EU's FWS, the EU authorities provided a reasoned and reasonable explanation of the existence of a causal link between the dumped imports and the injury found to exist. In respect of the non-attribution analysis, China's SWS merely repeats China's earlier made assertions that certain factors were not sufficiently separated and distinguished even though these allegations are clearly contradicted by the facts on the record. In respect of the factor export performance, the EU recalls, first, that this factor was not found to be a factor causing injury; after all export performance was good. In addition, the impact of this factor cannot have been significant given the lack of importance of export sales when compared with domestic sales.

XI. CHINA'S PROCEDURAL CLAIMS UNDER ARTICLES 6 AND 12 OF THE ANTI-DUMPING AGREEMENT

19. Interpretation of Article 6.2: China's position rests on an erroneous legal premise and ignores case law that addresses precisely the distinction between Article 6.2 and 6.4. First, as examined by the European Union in its reply to Panel's Question 62, the Appellate Body has considered that Articles 6.1 and 6.2 together set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations. It is not legally correct that these rights would be laid down in the first sentence of Article 6.2 as China asserts. It is also not correct that Article 6.2 would contain two entirely different sets of rights and obligations. China also ignores the panel report in *Korea – Certain Paper* which addressed precisely this question.

20. Interpretation of Articles 6.4 and 6.9: The European Union cannot but express its astonishment about how China attempts to rewrite what formed the premise of its Article 6.4 and 6.9 claims in its FWS.

China's claim that "the EU's failure to disclose the identity of the complainants and supporters violates Article 6.5 of the AD Agreement"

21. First, the European Union is pleased to note that China admits that its claim does not in fact cover the volume and/or value of production. Second, China has itself demonstrated that interested parties were given access to the detailed production figures of the complainants on a company by company basis. If China seriously suggests that interested parties were in the possession of detailed information on the production of all Community producers in order to "check" the information, nothing prevented them from providing that information to the EU authorities in order to question the figures in Exhibit CHN-42. No suggestion that these figures would be incorrect was ever made. The identity of the complainants and supporters is therefore a non-issue from the point of view of the interested parties' rights of defence. Third, China continues to insist on the potential retaliation being "hypothetical" although it now acknowledges that "it is only if confidential treatment is refused that it is possible to know whether retaliation will actually take place or not". This is a crucial admission because China entirely ignores the fact that the mere threat of retaliation in itself has an adverse effect on a person or a company. What is required under Article 6.5 is "good cause" and the threat of

retaliation surely complies with this requirement. Fourth, China continues to insist that the disclosure of the identity of the sampled companies somehow "shows that the companies constituting the Community industry are either complainants or supporters". The European Union fails to see any logic in this argument. The identity of the complainants and the supporters is manifestly an entirely separate question from the identity of the sampled companies.

China's claim that "the EU's failure to disclose the identity of the complainants is inconsistent with Articles 6.4 and 6.2 of the AD Agreement"

22. These claims are consequential to China's claim under Article 6.5. To the extent the Panel would wish to dwell into these claims any further, the European Union trusts the Panel will address relevant questions to the Parties within the parameters of due process as clarified by Appellate Body jurisprudence.

China's claim that "the EU failed to give information concerning the "product types" used for the normal value calculation, thereby violating Articles 6.4 and 6.2 of the AD Agreement"

23. This claim is premised on the relevance of the detailed PCNs during the investigation. The European Union is of the view that the premise of China's claim is incorrect. Furthermore, China's claim ignores the fact that the information from the company in the analogue country was largely confidential. China has not challenged the treatment of the information as confidential and cannot therefore demonstrate that there could have been a breach of Articles 6.4 or 6.2.

China's claim that "the EU failed to provide information concerning the normal value calculation, thereby violating Articles 6.5, 6.2 and 6.4 of the AD Agreement"

24. The European Union does not entirely understand how this claim differs from the previous claim except that the title also cites Article 6.5 of the Anti-Dumping Agreement and that the factual scope appears more general. In any event, the European Union welcomes China's de facto admission that a claim under Article 6.5 has been advanced at most implicitly. It must go without saying that an implicit claim not coupled with proper argumentation and evidence cannot fulfil the most elementary requirements of a prima facie case. Furthermore, even if there were a claim under Article 6.5, it is still not clear whether a claim would be advanced under the chapeau of Article 6.5 or Article 6.5.1.

China's claim that "the EU failed to provide information concerning the fair comparison being made, including the adjustments for differences affecting price comparability, thereby violating Articles 6.2 and 6.4 of the AD Agreement"

25. China has not challenged the European Union under Article 6.5 of the Anti-Dumping Agreement. Since China in reality must accept that the detailed information on the costs of quality control of the company from the analogue country was properly protected as business confidential information and assuming arguendo that other conditions would be fulfilled, there could not be a violation of Article 6.4 or 6.2, since these two provisions explicitly acknowledge the need to protect confidentiality of information.

China's claim that "by failing to provide information concerning the product types, the normal value determination and the comparison including the adjustments that were made, the EU violated Article 6.9 of the AD Agreement"

26. China essentially assimilates the obligations in Articles 6.2, 6.4 and 6.5 with those under Article 6.9. However, Article 6.9 does not deal with the "very same issue" as Article 6.2, 6.4 and 6.5. This is precisely what many panels have considered incorrect and what China itself argues in its reply to Panel's Question 62. Furthermore, China is relying on the disclosure documents as evidence both

under Articles 6.4 and 6.9 and those documents were surely in China's possession at the time of the consultations. If anything, one could perhaps contemplate that an Article 6.4 claim could develop from an Article 6.9 claim but the reverse seems entirely unconvincing. In the view of the European Union, China is trying to rectify an omission, which, however, is now too late. On substance China adds nothing to its "claim" that stays at the level of a pure assertion.

China's claim that "the EU was in breach of Article 6.5 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"

27. With regard to China's claims in relation to the two Community procedures' non-confidential version of the questionnaire responses, China's arguments have already been anticipated in the reply by the European Union to Panel's Question 72. Should the Panel require any further evidence, the European Union is prepared to dwell into the hundreds of pages of information in the non-confidential file that relate only to these two companies and that China has ignored when presenting its case. However, in the view of the European Union it is first for the complainant to demonstrate that the factual premise of its claims is correct. With regard to the "claim" in relation to the non-confidential version of the questionnaire response of the producer in the analogue country, the Panel has only been presented with two sentences in China SWS and China's Reply to Question 71 from the Panel. In view of paragraph 16 of the Panel's working procedures, the European Union is of the view that it is systemically important that the Panel should not go any further because China had its opportunity to try to make its case but it failed to even try. In any event, the China's submissions are internally inconsistent on this point.

China's claim that "the EU was in breach of Articles 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"

28. This claim is purely consequential and dependent on the above claim based on Article 6.5. The premise of China's argumentation is an alleged incorrect treatment of certain information as confidential. Therefore, there is no need to address this claim in any further detail.

China's claims that "by failing to make PRODCOM 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, the EU violated Article 6.5 of the AD Agreement" and that "by failing to make PRODCOM 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, the EU violated Articles 6.2 and 6.4 of the AD Agreement"

29. In its SWS China has reformulated its claims and arguments significantly. Furthermore, the European Union has never argued that limited annex C 1-2 could "not be considered as information", or rather would not contain information. The point the European Union has very explicitly made is that interested parties have been given access to the relevant EUROSTAT information, including the fact that the source of information was EUROSTAT. It is the ability to see information that matters not that it is provided through a given specific document. With regard to the alleged differences between limited annex C 1-2 and unlimited annex C 1-1, it is remarkable to see how China blows this entirely out of proportion. The unlimited annex contained all the relevant information for interested parties to defend their interests.

China's claim that "through its findings on the domestic industry, the EU violated several due process rights, including Articles 6.2, 6.4 and 6.9 of the AD Agreement"

30. The title of this "claim" or "claims" is a prime example of the broad brushed way in which China has acted in this dispute. China does not even bother citing the legal basis of its claims in an exhaustive way. This is simply not serious and the European Union will treat these claims accordingly.

China's claim that "the EU violated Article 12.2.2 of the AD Agreement by failing to indicate all relevant information concerning its IT determinations"

31. Once again for the record, IT was granted because the suppliers met the five criteria listed in Article 9(5) of Council Regulation No 384/96. This was explained in Council Regulation No 91/2009.

China's claim that "the EU violated Article 6.5 of the AD Agreement by disclosing a document entitled 'Assessment of Market Economy Treatment Claims by nine producers in the PRC' "

32. China continues to plead that some of the information in the MET disclosure document would be confidential and that such information would have been explicitly submitted as confidential by the companies addressed in the document. Yet, China provides no evidence at all that this would be true.

China's claim that "the EU violated Article 6.1.1 of the AD Agreement by limiting the time period for the submission of market economy treatment and/or individual treatment questionnaire responses to 15 days as of the date of publication of the Notice of Initiation"

33. China has failed to provide the MET claim form as evidence in accordance with paragraphs 16 of the Panel's working procedures. To the extent the Panel would decide not to enforce paragraph 16 of its working procedures, the European Union notes that China SWS provides nothing more than mere speculation as to how granting more time to submit the MET claim might or might not have affected the conduct of the investigation.

ANNEX F-3

CLOSING STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel,

China would like to thank you and the Secretariat again for your patience and close attention in hearing our arguments during the last two days and your hard work in this case.

Mr. Chairman, distinguished Members of the Panel, China's decision to resort to the WTO dispute settlement mechanism to challenge EU anti-dumping measures was not taken lightly. China, however, felt obliged to do so because of the manifestly illegal character of the measures at issue and the significant economic impact they have on China.

The first measure at issue, namely Article 9(5) of the Basic AD Regulation, is clearly inconsistent with several provisions of the AD Agreement and has no legal basis whatsoever in China's Protocol of Accession. The EU, which is among the WTO members which have initiated the largest number of anti-dumping investigations against China, applies this WTO-inconsistent measure in all its anti-dumping investigations against China. Article 9(5) is plainly discriminatory against China and constitutes a nullification and impairment of China's benefits under the WTO Agreements. In addition, Article 9(5) has a very significant practical impact since it has led to the illegal imposition of high anti-dumping duties on a large number of Chinese exporting producers.

As regards the second measure at issue, Council Regulation (EC) No. 91/2009, China has proven that numerous determinations made by the EU are incompatible with the EU's WTO obligations. The substantive claims relating to the determination of IT, standing, domestic industry, like product, fair comparison, price undercutting, volume of dumped imports, injury and causation are all crucial to the way the EU handles anti-dumping investigations against China. The same holds true for the due process claims showing that the EU investigating authorities violated several provisions of Articles 6 and 12 throughout the anti-dumping investigation that led to the measure at issue.

Over the past few months, the parties have had ample opportunities to submit their evidence, develop their arguments and discuss in detail the numerous issues raised in this dispute in their written submissions, their replies to the Panel's questions and during the substantive meetings with the Panel. China believes that this process has allowed the parties to develop and clarify the numerous factual and legal aspects of this dispute. China is convinced that in case certain issues remain unclear, the panel will not hesitate to request further information and clarifications from the parties by means of the written questions. Needless to say, China stands ready to respond to any such requests at the best of its ability.

Thank you.

ANNEX F-4

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

Mr Chairman, distinguished Members of the Panel,

1. First of all, the European Union would like to thank you and the Secretariat again for the work already done. Now is decision and drafting time for you. We acknowledge that the task in front of you is not an easy one. Indeed, as we have highlighted, China's claims as originally stated it its Consultations and Panel Requests have considerably changed in the course of these proceedings and we are no longer sure as to whether China seriously (more than *pro forma*) maintains all of its claims at this stage. Moreover, China's disregard of the essential rules of procedure, as stated in the DSU and the Panel's Working Procedures and even the Chairman's precise instructions when filing new exhibits show very little concern for essential principles of due process. We also once more warn the Panel about China's misquotation of our arguments as well as the numerous cross-references to China's own submissions in a futile attempt to show that the relevant facts or arguments have been shown or explained therein (which often is not the case).[1] We of course trust that the Panel will read our and China's submissions accordingly and thoroughly, and will duly comply with the objective assessment standard of review as required by Article 11 of the DSU. In this respect, we can only offer our willingness to assist the Panel in further clarifying any fact or argument we have made.

2. This being said, we would just like to make some brief comments on China's opening oral statement of yesterday.

3. On China's as such claims against Article 9(5) of Council Regulation No 384/96, we would like to mention the following points. First, Article 6.2 DSU requires the complaining Member to plainly connect the specific measure at issue with the specific claim, explaining how and why the measure at issue violates the WTO Agreements.[2] Absent that connection, the Member concerned (and in this case the EU) is left wondering how the measure as described by the complaining Member in its Panel Request can be the source of the alleged nullification or impairment. When a Member only has three weeks to prepare its FWS, and tries to respond to all the issues raised by the complaining Member, the efforts made by the respondent party to engage in good faith to resolve the dispute[3] by attempting to provide a full response to all the issues raised by the complaining Member's FWS should not be penalised.

4. Second, we observe that China does not contest the fact that a proposal to repeal Council Regulation No 384/96 (i.e., the measure at issue as described by China's Panel Request) was published in April 2009, well before China requested consultations and the establishment of the Panel.[4] Again, we consider that the Panel should only examine the specific measure at issue, rather than other measures (such as Council Regulation No 1225/2009) or issues which are outside the Panel's terms of reference.

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[1] E.g., China's Opening Oral Statement, Second Meeting with the Panel, para. 45 (footnote 46) and para. 96 (footnote 102).

[2] EU SWS, para. 11.

[3] DSU, Article 3.10.

[4] EU SWS, para. 28.

5. Third, we note that China does not contest that the Panel should examine the scope of Article 9(5) on its face.[5] The meaning and content of Article 9(5) shows that it addresses a threshold issue which relates to the imposition of anti-dumping duties. It serves identifying the actual source of the alleged price discrimination, either the MET/IT supplier or the State (China Inc.) as the relevant supplier. Once that determination has been made, other relevant rules are applied. Indeed, pursuant to Articles 2(7) and 18 of Council Regulation No 384/96, a dumping margin is calculated for MET/IT suppliers by comparing their export prices with their own or an analogue country normal values, to the extent that the information is available, whereas the dumping margin for the State as the relevant producer in a NME is calculated on the same basis. Following Article 9(4), such dumping margins serve as a maximum ceiling for the proper duty rate. In case of sampling, the provisions of Articles 9(6) and 17 apply. China's description of the content of Article 9(5), as including other issues such as the individual determination of dumping margins or the level of AD duties is thus wrong and dangerous.[6] We trust that the Panel will make an appropriate assessment of the scope of the measure at issue and will not examine any consequence, result or subsequent separate determination which may or may not be connected to the specific meaning and content of the measure specified by China in its Panel Request.

6. Fourth, as regards China's claims, we believe we have shown that Article 6.10 ADA contains a preference for the individual determination of dumping margins and that sampling is not the only scenario where an IA can choose not to follow that preference or general rule.[7] Contrary to what China asserts[8], the negotiating history of Articles 6.10 and 9.4 that we provided you[9] indicates this. The examples taken from the EU experience and other hypothetical examples show that there are other situations where the general rule or preference does not need to be followed, and there can be more where the supplier or company concerned would be subject to the residual duty. We also believe that *Korea – Certain Paper* and *EC – Salmon* are relevant in the present dispute since both cases show that the close relationship between companies with a group entitles the IA to determine one single dumping margin for the whole group. In that respect, the situation in NMEs can be considered analogous, since the State as the actual producer is the source of the alleged price discrimination. That is the reason why in our view the manner in which the EU calculates dumping margins for a group and its related companies in MEs and the manner in which the dumping margin is calculated for the State and its related export branches in NMEs is the same. China attempts to confuse this matter by making mere assertions, unsupported by any evidence on the record about our practice (such as "more than 80% of all exports" or "in most cases").[10]

7. Finally, we have shown that Article 9(5) is consistent with Article 9.2 ADA. China seems to take issue with the fact that the terms "actual source of the price discrimination" are not treaty terms.[11] However, even China cites the AB Report which states that the notion of dumping relates to the supplier's pricing behaviour, and ignores that the State in NMEs can be considered as a "producer" and thus as the source of the price discrimination. In this respect, the imposition of AD duties on a country-wide basis seek to address that source accordingly, an any amount subsequently collected will be proper, keeping also in mind the possibility for requesting refunds.

8. As regards Council Regulation No 91/2009, we believe we have shown that China's claims should be disregarded in full. In a nutshell, the EU authorities properly determined the standing before the initiation of the investigation; correctly defined the domestic industry by reference to those

[5] EU SWS, para. 15.
[6] EU SWS, paras 20 – 22.
[7] EU SWS, paras 36 – 44.
[8] China's Opening Oral Statement, Second Meeting with the Panel, para. 29.
[9] Exhibit EU-3.
[10] China's Opening Oral Statement, Second Meeting with the Panel, paras 50 and 51.
[11] China's Opening Oral Statement, Second Meeting with the Panel, para. 53.

amounting to a major proportion and willing to cooperate with the IAs; compare "apples to apples" in the dumping and price undercutting analysis; properly examined the injury and causation; and fully respect the rights of interested parties when having access to file, disclosing the essential facts, etc.

Mr Chairman, members of the Panel, we thank you again for your attention and remain at your disposal for answering any further questions you may have.