European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China:

Recourse to Article 21.5 of the DSU by China

(AB-2015-7 / DS397)

Third Participant Submission
of the United States of America

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SERVICE LIST

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EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
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US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

I. INTRODUCTION

1. The United States makes this third party submission to provide the Appellate Body with its view of the proper legal interpretation of certain provisions of the Agreement on Implementation of Article VI of the *General Agreement on Tariffs and Trade 1994* (the "AD Agreement") that are relevant to the issue on appeal in *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (*EC – Fasteners 21.5*) (DS397). The United States thanks the Appellate Body for the opportunity to provide comments in this dispute.

II. THE PANEL'S ANALYSIS REGARDING PROCEDURAL AND TRANSPARENCY REQUIREMENTS UNDER ARTICLE 6 OF THE AD AGREEMENT

A. Article 6.5

2. The Panel found that the EU acted inconsistently with Article 6.5 because the EU Commission failed to objectively assess whether certain information submitted by Pooja Forge was "confidential by nature" or whether there was otherwise a "good cause" for the EU Commission to accord confidential treatment to the information. In particular, the Panel found that the EU Commission unduly relied on Pooja's Forges "bald assertion" that the information at issue was deserving of confidential treatment. The EU argues that the Panel's findings are in error because the record before demonstrated that the EU Commission did, in fact, objectively assess Pooja's Forge's request for confidential treatment.

3. Article 6.5 of the AD Agreement concerns the confidentiality of information provided by parties to the investigating authority during the relevant antidumping proceeding. It provides:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. *Such information shall not be disclosed without specific permission of the party submitting it*. (emphasis added)

4. The last sentence of Article 6.5 makes clear that, once an investigating authority accepts information as confidential, the investigating authority must not disclose such information without the specific permission of the party submitting it.

5. The United States takes no position on whether the facts presented support a conclusion that the EU improperly treated information as confidential without a demonstration of good cause. The United States, however, considers that the Panel's findings on this issue appear to impose obligations on the part of the investigating authority that are not required under Article 6.5 of the AD Agreement. Specifically, to the extent the Panel found that EU Commission acted

inconsistently with Article 6.5 by failing to state its specific reasoning as to why good cause had been demonstrated with respect to requests for confidential treatment, this finding is in error. [1]

6. Pursuant to Article 6.5, and as past reports have clarified, an investigating authority "must objectively assess the 'good cause' alleged for confidential treatment."[2] However, Article 6.5 does not obligate the investigating authority to provide a separate or detailed explanation whenever the authority accepts a claim of confidential treatment. Further, nothing in the standard of review employed in trade remedy disputes leads to an unwritten obligation for an authority to provide such explanations. Indeed, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body noted that the level of explanation required for the operation of the standard of review turns on the substantive provision at issue.[3]

7. In many trade remedy proceedings, the merits underlying the grant of confidential treatment will be plain on the face of the record of a proceeding. For example, the authority may set up a procedure in which parties requesting confidential treatment may certify that specific information is confidential because it is not publicly available and the release will cause harm to the submitter. Where a party submits such a request, for example, involving sensitive information such as costs, or prices given to specific customers, the good cause for confidential treatment is plainly evident. In such situations, it would be a major departure from the text of the AD Agreement to require a separate and detailed explanation whenever an authority accepts a plainly reasonable request for confidential treatment.

8. In sum, Article 6.5 does not provide – and the Appellate Body has not otherwise found – that an "objective assessment" for good cause requires that the investigating authority must explain its conclusions as to why good cause has been demonstrated. To the extent the Panel has read Article 6.5 to impose such a requirement, the Panel's interpretation is without grounds. As such, the United States considers that the Panel appears to have misinterpreted Article 6.5 by finding an obligation that is not supported by the text of that provision.

B. Article 6.5.1

9. In light of its finding that the EU acted inconsistently with Article 6.5, the Panel declined to make findings with respect to China's claims under Article 6.5.1 of the AD Agreement. In the event that the Appellate Body reverses the Panel's finding that the EU acted inconsistently with Article 6.5 of the AD Agreement, China requests that the Appellate Body find that the EU breached its obligations under Article 6.5.1 by failing to ensure that Pooja Forge provided a non-confidential summary of the information at issue.

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[1] See, Panel Report, *EC – Fasteners (China) Article 21.5*, para. 7.45 ("We asked the European Union to explain to the Panel, on the basis of the record of the investigation at issue, the manner in which any confidentiality requirement by Pooja Forge was assessed by the Commission.").
[2] *EC – Fasteners (China) (AB*), para 539.
[3] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165 (noting the "evidence [reviewed by the panel] was on the record of the investigation and it was not put before the Panel in support of a new reasoning or rationale").

10. Article 6.5.1 states:

> The authorities shall require *interested parties* providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided. (emphasis added.)

11. The first sentence of Article 6.5.1 makes clear that the requirement to "furnish non-confidential summaries" applies *only* to information submitted by "interested parties." The United States thus agrees with China that – to the extent Pooja Forge is an interested party – the EU Commission was obligated to ensure that the Chinese producers were provided with (1) a non-confidential summary of the information provided to the Commission by Pooja Forge or (2) a statement explaining what "exceptional circumstances" made it "not possible" to summarize such information.[4] However, as correctly noted by the Panel, Pooja Forge is not an "interested party" for purposes of Article 6.5.1.[5] Accordingly, Pooja Forge was not subject to obligations contained in that provision.

12. The phrase "interested parties" is expressly defined in Article 6.11 of the AD Agreement. The definition set forth in Article 6.11 applies to the AD Agreement as a whole, including therefore to Article 6.5.1.

13. Specifically, Article 6.11 states:

> For the purposes of this Agreement, "interested parties" shall include:
>
> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
>
> (ii) the government of the exporting Member; and
>
> (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

14. Pooja Forge does not fall under any of the "interested party" categories listed in Article 6.11. That is, Pooja Forge is (i) not an exporter or foreign producer of the product subject to investigation, (ii) not the government of the exporting Member (i.e., China), and (iii) does not reside in the territory of the importing Member (i.e., in the EU). Moreover, in its submission to

[5] *See, Panel Report, EC-Fasteners (Article 21.5),* para. 7.119.

the Panel, China made no attempt to establish that Pooja Forge met the definition of "interested party" as defined in Article 6.11. Nor has China attempted to make such a showing in its Appellant Submission. The United States thus disagrees with China's argument that the EU Commission was obligated, by virtue of Article 6.5.1, to provide the Chinese producers with non-confidential summaries of information submitted to the Commission by Pooja Forge.

15. Nonetheless, even if the information provided by the Indian producer could not be disclosed in full, this does not mean that the EU Commission could conduct an investigation in a manner that completely denied the respondents any opportunity to participate meaningfully in the investigation or to defend their interests as contemplated in Article 6.2 of the AD Agreement. The United States recalls that it was the choice of the EU Commission to rely on confidential information from a party that was not an "interested party" under Article 6.11. If the EU decided to rely on such information, and if access to such information was necessary for the respondents to participate meaningfully or defend their interests in the investigation, the United States understands Article 6.2 (discussed below) to require that an authority adopt some sort of mechanism that would allow the respondents an opportunity to do so. For example, perhaps the Commission could have provided its own summary of the information obtained from the Indian producer, or could have disclosed the information under a narrowly-drawn protective order.[8]

C. Articles 6.4 and 6.2

16. The Panel found that the EU Commission breached its obligations under Article 6.4 of the AD Agreement by failing to provide the Chinese producers with timely opportunities to see the list of products sold by Pooja Forge that the EU Commission used in the calculation of normal value. Specifically, the Panel found that this information was (1) not confidential within the meaning of Article 6.5; (2) was relevant to the presentation of the Chinese producers' cases; and (3) was used by the Commission. The Panel also found that the EU, by virtue of its breach of Article 6.4, was consequently in breach of its obligation under Article 6.2 to provide the Chinese producers with a "full opportunity" to defend their interests. The EU argues that all of the Panel's findings on this score are in error.

17. Article 6.2 provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a

[8] *See*, AD Agreement, note 17.

> meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

18. Article 6.4 provides:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

19. The EU argues that the Panel's findings with respect to Article 6.2 and 6.4 are in error because (1) the information at issue was not "relevant"; (2) the Commission did not "use" the information for purposes of making the dumping determination; and (3) the information was "confidential" within the meaning of Article 6.5

1. Finding that the Information was "Relevant" Within the Meaning of Article 6.4

20. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. The United States thus agrees with the Appellate Body decision in in *EC – Pipe Fittings*, where the Appellate Body recognized that the relevancy of information covered by Article 6.4 is to be determined from the perspective of the interested parties, not the investigating authority.[9] Accordingly, Article 6.4 generally requires that an investigating authority give interested parties access to *all* non-confidential information submitted during an investigation that an interested party could view as relevant to the presentation of their positions or the outcome of the investigation. Failure to provide such access is not only inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, interested parties are necessarily denied "a full opportunity for the defense of their interests."[10]

21. Thus, while the United States takes no position on whether the information at issue was, in fact, relevant for purposes of Article 6.4, the United States considers that Panel was correct in assigning significant weight to the fact the Chinese viewed the information at issue as "relevant" – as evidenced by their request for such information. By the same token, the United States considers that the Panel was correct to generally discount of the EU's *own* assessment that the information was "irrelevant" to the presentation of the Chinese producers cases."[11]

[9] *See EC – Pipe Fittings (AB)*, para. 146.
[10] *See EC – Pipe Fittings (AB*), para. 149.
[11] *See* European Union's Appellant Submission, para. 271.

2. Finding that the Information was "Used" in the Anti-dumping Investigation

22. The United States agrees with the EU's statement that the mere fact that information "relates" to a particular issue before the investigation authority does not necessarily mean that such information is "used" by the investigation authority within the meaning of Article 6.4[12]. The United States, however, disagrees with the EU's suggestion that that information is not "used" for purposes of Article 6.4 unless such information is specifically mentioned in either a qualitative discussion set out by the authority, or is specifically included in a quantitative calculation performed by the authority.[13]

23. Rather, the specific reasoning set out in a determination, or the data employed in a specific calculation, reflects final results, and do not necessarily specify each piece of potentially relevant evidence that an authority may have examined in the course of an investigation. And it is this more-inclusive set of evidence that the United States considers to be included within the scope of the Article 6.4 phrase "that is used by the authorities in an anti-dumping investigation." Simply put, there is no support for the EU's contention that the obligations of Article 6.4 extend to only the narrow subset of information specifically employed in the final methodology selected by the authority for calculating the margin of dumping.

3. Finding that the Information was "Confidential"

24. As stated above, the United States takes no position on whether the information at issue was properly accorded confidential treatment under Article 6.5. To the extent that confidential treatment was not properly accorded, the United States is of the view that the EU Commission was obligated, under Article 6.4, to make such information available to Chinese exporters during the review investigation, and in a timely fashion. On the other hand, if the information from the Indian producer was properly accorded confidential treatment under Article 6.5, Article 6.4 would not require disclosure of such information.

25. Nonetheless, as noted above, even if the information provided by Pooja Forge producer could not be disclosed in full, this does not mean that the EU Commission could conduct an investigation in a manner that completely denied the respondents any opportunity to participate meaningfully in the investigation or to defend their interests as contemplated in Article 6.2 of the AD Agreement.

[12] *See* European Union's Appellant Submission, para. 281.
[13] *See* European Union's Appellant Submission, para. 286. ("In reality, the information about the list and characteristics of Pooja Forge's products the Chines producers were asking for did *not* concern directly the dumping calculations.")

D. Article 6.1.2

26. China appeals that Panel's finding that the EU did not breach Article 6.1.2 of the AD Agreement by failing to make the information submitted by Pooja Forge available to Chinese producers.

27. Article 6.1.2 provides:

> Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

28. The Panel noted that "there is no dispute between the parties that Pooja Forge, an analogue country producer, is not one of the entities listed in the first part of Article 6.11" of the AD Agreement.[14] Accordingly, the Panel found that Pooja Forge was not an "interested party" for purposes of Article 6.1.2.[15] As previously noted by the United States (*See* section II.B above), the definition of "interested party" set forth in Article 6.11 applies to the AD Agreement as a whole. The United States thus agrees with the Panel's finding that Pooja Forge is not an interested party for purposes of Article 6.1.2. [16]

29. The United States disagrees with China's argument that the manner in which the EU Commission interacted with Pooja Forge or any other entity during the course of the investigation alters the legal question under the WTO Agreement as to whether any particular entity qualifies, as a legal matter, as an "interested party" under Articles 6.1.2 and 6.11 of the AD Agreement. [17] Simply put, nothing in text of the AD Agreement supports the argument that a party that plays a "key role" in the investigation is thereby an interested party for purposes of Article 6.1.2.[18] Rather, as previously explained by the United States, Article 6.11 of the AD Agreement specifically defines which entities are or are not interested parties.[19] The United States thus agrees with the Panel's finding that requirements of Article 6.1.2 do not apply to Pooja Forge because Pooja Forge is not an "interested party" as defined in Article 6.11.

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[14] *See* Panel Report, *EC-Fasteners (Article 21.5)*, para. 7.118.
[15] *See* Panel Report, *EC-Fasteners (Article 21.5)*, paras. 7.116 – 7.123.
[16] Similarly, The Panel rejected China's factual argument that that the EU Commission had, in fact, decided to treat Pooja Forge as an interested party. ("Nowhere in the record is it indicated that the Commission decided to include Pooja Forge as an "interested party" in this investigation. We therefore find that Pooja Forge was not an "interested party" in this investigation and therefore the obligation set forth under Article 6.1.2 of the Agreement did not arise with respect to the evidence provided by this company. *See*, Panel Report, *EC-Fasteners (Article 21.5)*, para. 7.119.
[17] *See* China's Other Appellate Submission, para. 177.
[18] *See* China's Other Appellate Submission, para. 172.
[19] U.S. Third Party Submission, para. 30.

III. THE PANEL'S ANALYSIS REGARDING THE DETERMINATION OF DUMPING UNDER ARTICLE 2 OF THE AD AGREEMENT

30. The EU and China each appealed certain aspects of the Panel's findings with respect to Article 2 of the AD Agreement.

A. Article 2.4

31. The EU appeals the Panel's finding that the EU was in breach of Article 2.4 by failing to provide Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal value. China appeals the Panel's finding that the EU did not violate Article 2.4 by refusing Chinese producers' request for certain adjustments for (1) alleged differences in taxation; and (2) other factors that the purportedly affected price comparability (e.g., Chinese producers' "easier to access raw materials").

1. Finding that the EU violated Article 2.4 by Failing to Provide Chinese Producers with Sufficient Information Regarding the Information Used in Determining Normal Value

32. The Panel found that the EU violated Article 2.4 by failing to provide Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal value. The Panel reasoned that the EU thus deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments for purposes of ensuring a "fair comparison" within the meaning of Article 2.4[20] Specifically, although the Chinese producers knew the basis on which the Commission grouped the products, they did not know the specific product types of the Indian producer with which their own product types were being compared.[21]

33. Article 2.4 provides in relevant part that

> The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

The EU, however, argues that under Article 2.4, the Commission was *only* required to disclose the "*method* it [used] and *products types* [it] developed" to make a fair comparison between fasteners manufactured by Pooja Forge versus the Chinese producers.[22] Specifically, the EU contends that Article 2.4 does not require an investigating authority to disclose the "raw data provided by an interested party" or information "with respect to each product sold by an interested party."[23] On that basis, the EU maintains that the Panel erred in finding that the

[20] *See* Panel Report, *EC-Fasteners* (Article 21.5), para. 7.147 ("the Chinese producers could not…have had a meaningful opportunity to request adjustments.").
[21] *See* Panel Report, *EC-Fasteners* (Article 21.5), para. 7.144 (The Commission *did not* indicate "what particular model of Pooja Forge's products was being compared with what model sold by the Chinese producers.").
[22] EU's Appellant Submission, para. 313.
[23] EU's Appellant Submission, para. 314.

Commission violated Article 2.4 by failing to disclose specific data on the characteristics of the Pooja Forge's products that were used in determining normal value.

34. The United States understands Article 2.4 as generally obligating an investigating authority to solicit information regarding what differences in physical characteristics affect price comparability. An investigating authority must exercise transparency with respect to the products used in the determination of normal value, the considered physical differences between those products, and how those differences informed the investigating authority's determination of price comparability and ultimately normal value. This transparency obligation is found in the provisions of Article 6 of the AD Agreement, and is reinforced by the last sentence of Article 2.4 (*i.e.*, "The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties").

35. As articulated by the Appellate Body, Article 2.4 requires that an investigating authority "tell the parties *what information the authority will need* in order to ensure a fair comparison." (emphasis added). The Appellate Body has further clarified that "at a *minimum*", Article 2.4 requires and investigating authority to disclose the "method the authority will use to categorize the products for purposes of price comparison," and "what constituted product types".[24] The United States takes no position on the factual question of whether – in this case – the Chinese producers needed to know detailed information about *Pooja's Forges* product types in order to ensure a fair comparison for purposes of Article 2.4, or whether – as argued by the EU – that information on the EU Commission's comparison methodology was otherwise sufficient to apprise the producers of what they needed to know to ensure a fair comparison.

36. However, even if the EU is correct in arguing that Article 2.4 *itself* did not obligate that the EU Commission disclose the product information submitted by Pooja Forge[25], the United States considers that the Commission was nonetheless required to disclose such information pursuant to Article 6.4 and 6.2. As the United States explained at Section II.C.3 above, Articles 6.4 and 6.2 generally require that an investigating authority give interested parties access to *all* non-confidential information submitted during an investigation that an interested party could view as relevant to the presentation of their positions or the outcome of the investigation.

2. Finding that the EU Did Not Breach Article 2.4 by Rejecting Chinese Producers' Request for Adjustments Due to Differences in Taxation and Other Differences Affecting Price Comparability

37. The Panel rejected China's claim that the EU violated Article 2.4 by failing to account for differences between China and India with respect to tax treatment of certain inputs into fasteners. The Panel also rejected China's argument that the EU should have made certain adjustments to account for differences between Pooja Forge and the Chinese producers pertaining to their respective "access to raw materials", "use of self-generated electricity", levels of "efficiency and productivity."[26] In particular, the Panel found that China failed to substantiate that the cited

[24] *EC – Fasteners (AB)*, paras. 489-490. (emphasis added).
[25] *See* EU's Appellant Submission, para. 314.
[26] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.220.

differences affected the price comparability of Pooja Forge's fasteners and those made by the Chinese producers. Moreover, the Panel found that the costs incurred and prices charged by the Chinese producers "do not reflect the dynamics of a market economy"; accordingly, the EU Commission was therefore under no obligation to make adjustments in light of these non-market factors.[27] In that regard, the Panel agreed with the EU that making such adjustments would have been illogical and would have "rendered the use of the analogue country methodology meaningless."[28]

38. Article 2.4 provides in relevant part that

> A fair comparison shall be made between the export price and the normal value…Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

39. By its plain terms, Article 2.4 sets forth the obligation of an investigating authority to make a "fair comparison" between the export price and the normal value. In the investigation at issue, the export price (of course) was the price at which the Chinese fasteners were sold on the EU market, whereas the basis of normal value – under the EU's analogue country methodology – were domestic sales in India by Pooja Forge. As noted, China argues that the EU Commission should have made adjustments to reflect differences in production and other *costs* between China and the analogue country (India). Cost differences, however, do not themselves affect "price comparability" between sales of two sets of products. Rather, the existence of cost differences go to the issue of whether or not the Indian domestic sales were an appropriate surrogate for normal value. Thus, the issue raised by China is simply not addressed by Article 2.4 of the AD Agreement.

40. Although China has not identified any cognizable issue under Article 2.4, the United States has the following comment on China's concern with the use of Indian prices as a basis for normal value. Of course, the reason the EU resorted to India as an analogue country is that the costs in China are distorted because China is a nonmarket economy. Accordingly, any calculation of the "true" costs in China – that is, the costs that would have been incurred if China were a market economy – are not knowable. In short, it appears that China cannot – with any degree of accuracy – establish that costs in China would be lower (or for that matter higher) than the costs incurred by the Indian producer. In light of this, the United States agrees that it would have been illogical for the EU Commission to take account of the cost factors cited by China in determining normal value. Indeed, as the EU argues, doing so could have "rendered the use of the analogue country methodology meaningless."[29]

[27] Panel Report, *EC-Fasteners* (Article 21.5), paras. 7.217-7.218.
[28] Panel Report, *EC-Fasteners* (Article 21.5), paras. 7.249.
[29] *See* Panel Report, *EC-Fasteners* (Article 21.5), para. 7.249.

B. Article 2.4.2

41. The EU appeals the Panel's finding that EU violated Article 2.4.2 because, in calculating the dumping margin, the EU Commission excluded Chinese export transactions for which there was no match in models sold by Pooja Forge. The Panel noted that, under the AD Agreement, "dumping is defined in relation to *a product as a whole* as defined by the investigating authority," "not parts thereof."[30] The Panel thus reasoned that, "a margin of dumping that excludes certain export transactions cannot be said to have been calculated for the investigated product as a whole."[31] The Panel also noted the Appellate Body's statement that "once an [investigating authority] defines the like product for purposes of an investigation, *all export sales of products types that fall within the like product definition have to be taken into consideration in calculating dumping margins*."[32] The Panel found that the EU Commission therefore breached its obligations under Article 2.4.2 "by ignoring exports of certain models of by the Chinese producers on the grounds that they did not match any of the models sold by Pooja Forge." [33]

42. To the extent there were "certain exported models which [did] not match any of the models on the normal value side of the comparison," the Panel reasoned that the [EU Commission] could not simply exclude exports of such models from its dumping calculation"[34]—rather, Article 2.4.2 requires that "[an investigating authority] take non-matching models into account by making the necessary adjustments to eliminate the effect of facts that affect price comparability."[35]

43. For its part, the EU argues that the Panel findings are in error because the obligation under Article 2.4.2 extends only to "comparable" transactions. Accordingly, the EU maintains that it was therefore permitted to exclude non-matching (and thus presumable *non*-comparable) transactions from its dumping calculation. The EU further argues that it excluded such transactions because, as a practical matter, including them would have resulted in inaccuracies in the

44. The United States, agrees with the Panel's finding that the Commission cannot rely on Article 2.4.2 to justify its decision to simply *ignore* certain Chinese fastener models on the grounds that they did not match any of the models sold by Pooja Forge in the Indian analogue market. As an initial matter, if as the Panel found, the Commission defined a single like product that covered all different models of fasteners, then it is unclear on what basis the Commission concluded that it could not compare the export sales to sales in the analogue market. Furthermore, the United States notes that the AD Agreement explicitly provides for situations where there are mismatches in products types on the export and normal value sides. First, to the extent that physical differences affect price comparability, Article 2.4 permits an investigating authority may take non-matching models into account by making "necessary adjustments to

[30] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.264. (emphasis added)
[31] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.265.
[32] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.267. (emphasis added)
[33] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.270.
[34] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.272.
[35] Panel Report, *EC-Fasteners* (Article 21.5), para. 7.272.

eliminate" the elements "that affect price comparability."[36] Alternatively, Article 2.2 sets out the basic rules covering the situation where a "proper comparison" cannot be made between export price and the price of the like product in a comparison market, in which case an investigating authority may construct the export price on the basis of costs of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Accordingly, the United States does not understand on what basis the EU contends that the omitted exports sales could not have been compared either to a normal value based on analog prices as adjusted for physical differences, or to a constructed value based on costs of production for the product in the analog country.

IV. CONCLUSION

45. The United States thanks the Appellate Body for providing an opportunity to comment on the issues in this proceeding, and hopes that its comments will prove to be useful.