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CHINA — MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN

CHINA — MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM THE EUROPEAN UNION

REPORTS OF THE PANELS

Note by the Secretariat:

The Panels issue these Reports in the form of a single document constituting two separate Panel Reports: WT/DS454/R; and WT/DS460/R. Each Panel Report relates to one of the two complaints in these disputes. The cover page; preliminary pages; descriptive part; Sections 1-6, 7.1-7.2, and 7.5-7.11; and the Annexes are common to both Panel Reports. The page header throughout the document bears two document symbols, WT/DS454/R and WT/DS460/R, with the following exceptions: Section 8.1 on pages 105-106, which bears the document symbol for and relates to the Panel Report WT/DS454/R; and Sections 7.3-7.4, and 8.2 on pages 24-44 and 107-109, which bear the document symbol for and relate to Panel Report WT/DS460/R.

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CASES CITED IN THESE REPORTS

Short title	Full case title and citation
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R - WT/DS395/AB/R - WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
EC – Fasteners (China)	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, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Korea – Alcoholic Beverages	Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, p. 44
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701

Short title	Full case title and citation
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business confidential information
BCI Procedures	Additional working procedures of the Panels concerning business confidential information
Complainants	Japan and the European Union
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Final Determination notice	MOFCOM Notice No. 72 [2012]
GAAP	Generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
HP-SSST	High-performance stainless steel seamless tubes
Kobe	Kobe Special Tube Co., Ltd.
MOFCOM	Ministry of Commerce of the People's Republic of China
China	People's Republic of China
Preliminary Determination notice	MOFCOM Notice No. 21 [2012]
SMI	Sumitomo Metal Industries, Ltd.
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaints by Japan and the European Union

1.1. On 20 December 2012, Japan requested consultations[1] with China pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994, and Articles 17.2 and 17.3 of the Anti-Dumping Agreement with respect to the measures and claims set out below. On 13 June 2013, the European Union requested consultations[2] with China pursuant to the same, above-mentioned provisions and with respect to the measures and claims set out below. In both complaints, the consultations concerned China's measures imposing anti-dumping duties on certain HP-SSST from Japan and the European Union respectively, as set forth in MOFCOM's Preliminary Determination notice, and MOFCOM's Final Determination notice, including any and all annexes and any amendments thereof.[3]

1.2. Consultations were held between Japan and China on 31 January and 1 February 2013, and between the European Union and China on 17 and 18 July 2013. These consultations failed to resolve the disputes.

1.2 Panel establishment and composition

1.3. On 11 April 2013 and 16 August 2013 respectively, Japan and the European Union each requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement with standard terms of reference.[4] At its meetings on 24 May 2013 and 30 August 2013, the DSB established two panels pursuant to, respectively, the request of Japan in document WT/DS454/4 and the request of the European Union in document WT/DS460/4, in accordance with Article 6 of the DSU.[5]

1.4. The Panels' terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS454/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[6]
>
> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS460/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[7]

1.5. With respect to WT/DS454, on 17 July 2013, Japan requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 29 July 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Miguel Rodríguez Mendoza
Members:	Ms Stephanie Sin Far Lee
	Mr Gustav Francois Brink

1.6. With respect to WT/DS460, following the agreement of the parties, the Panel was composed with the same persons on 11 September 2013. Following consultations with the parties, the Panels

[1] See WT/DS454/1.
[2] See WT/DS460/1.
[3] See WT/DS454/1 and WT/DS460/1.
[4] WT/DS454/4 and WT/DS460/4.
[5] WT/DS454/5, WT/DS460/5/Rev.1, WT/DSB/M/332, and WT/DSB/M/336.
[6] WT/DS454/5.
[7] WT/DS460/5/Rev.1.

in the two disputes decided to harmonize their timetables to the greatest extent possible, in accordance with Article 9.3 of the DSU.[8]

1.7. India, Korea, the Russian Federation, the Kingdom of Saudi Arabia, Turkey and the United States reserved their rights to participate in the Panel proceedings as third parties in both disputes. In addition, the European Union reserved its rights to participate as a third party in the Panel proceedings in WT/DS454, and Japan reserved its rights to participate as a third party in the Panel proceedings in WT/DS460.

1.3 Panel proceedings

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Joint Working Procedures[9] and timetable on 27 September 2013. The Panel introduced modifications to its Joint Working Procedures and timetable on 22 May 2014.[10]

1.9. The Panel held a first substantive meeting with the parties on 25-26 February 2014. A session with the third parties took place on 26 February 2014. The Panel held a second substantive meeting with the parties on 20-21 May 2014. On 18 July 2014, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 19 September 2014. The Panel issued its Final Report to the parties on 7 November 2014.

1.3.2 Working procedures on Business Confidential Information (BCI)

1.10. After consultation with the parties, the Panel adopted additional working procedures concerning BCI on 27 September 2013.[11] The Panel introduced modifications to its additional working procedures concerning BCI on 22 May 2014.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. These disputes concern China's measures imposing anti-dumping duties on certain HP-SSST, as set forth in MOFCOM's Preliminary Determination, and MOFCOM's Final Determination, including any and all annexes and any amendments thereof.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Japan

3.1. Japan requests the Panel to find that:

a. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Specifically:

[8] For the reader's convenience, the Panels in WT/DS454 and WT/DS460 are herein collectively referred to as the "Panel".

[9] See the Panel's Joint Working Procedures in Annex A-1.

[10] China requested the Panel to amend paragraph 10 of the Joint Working Procedures, so that parties have more time to object to the accuracy of translations provided to the Panel. (China's first written submission, paras. 802-807.) The European Union considered China's request unnecessary. The European Union noted that paragraph 10 does not contain an absolute rule as it uses the term "should". Nevertheless, the European Union accepted that paragraph 10 could be amended albeit not in the precise manner proposed by China. (European Union's opening statement at the first meeting of the Panel, paras. 25-32; and second written submission, para. 30.) China agreed with the European Union's counterproposal, to the extent that it "would result in the rule not being interpreted as absolute". (China's response to Panel question No. 5, para. 32.) Japan did not comment on this matter. In light of the foregoing, we have amended paragraph 10 as proposed by the European Union.

[11] Additional working procedures of the Panel concerning BCI in Annex A-2.

i. China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement;

ii. China's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

iii. China's demonstration of the alleged causal relationship between the imports under investigation and the alleged injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and

iv. China's attribution of the domestic industry's injury to imports under investigation is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement;

b. China's treatment of certain information supplied by the applicants as confidential is inconsistent with Article 6.5 of the Anti-Dumping Agreement;

c. China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require applicants to furnish adequate non-confidential summaries of information treated as confidential or explanations as to why summarization was not possible;

d. China's reliance on facts available to calculate the dumping margin for all Japanese companies other than SMI and Kobe is inconsistent with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement;

e. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:

i. the determination of the existence of dumping and the calculation of dumping margins for SMI and Kobe, including relevant data and calculation methodologies;

ii. the determination and the calculation of the dumping margins for all Japanese companies other than SMI and Kobe; and

iii. China's determinations of injury and causation, including the import prices and domestic prices used therein;

f. China's application of provisional measures for a period exceeding four months is inconsistent with Article 7.4 of the Anti-Dumping Agreement;

g. China acted inconsistently with Article 12.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report China's findings and conclusions on all material issues of fact and law in connection with:

i. the determination and the calculation of dumping margins for all Japanese companies other than SMI and Kobe; and

ii. the determinations of injury and causation, including the import prices and domestic prices used therein;

h. China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by failing to include in its Final Determination notice or a separate report all relevant information on matters of fact and law and reasons in connection with:

i. the determination and the calculation of the dumping margins for all Japanese companies other than SMI and Kobe; and

ii. the determinations of injury and causation, including the import prices and domestic prices used therein; and

i. As a consequence of the inconsistencies described above, China's anti-dumping measures on HP-SSST from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

3.2. Pursuant to Article 19.1 of the DSU, Japan requests the Panel to recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement.[12]

3.3. Japan also requests that the Panel make findings with respect to each of Japan's claims under the GATT 1994 and the Anti-Dumping Agreement, including each claim under Article 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy as to any of Japan's claims, so as to secure a prompt resolution of this dispute.[13]

3.2 European Union

3.4. The European Union requests the Panel to find that:

a. China's determination of certain SG&A amount is inconsistent with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement;

b. China acted inconsistently with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement by failing to establish the existence of margins of dumping on the basis of a fair comparison between the export price and the normal value;

c. China's volume and price effect analyses in connection with MOFCOM's injury determination are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement;

d. China's impact analysis in connection with MOFCOM's injury determination is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

e. China's determination of causal link is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement;

f. China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement by failing to disclose to interested parties all information that is relevant to the presentation of their cases and that is used by the authorities in an anti-dumping investigation;

g. China's treatment of certain information supplied by the applicants as confidential is inconsistent with Article 6.5 of the Anti-Dumping Agreement;

h. China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require applicants to furnish adequate non-confidential summaries of information treated as confidential or explanations as to why furnishing such summaries was not possible;

i. China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement by refusing to take into account information relevant for the determination of the margins of dumping provided during the on-the-spot investigation;

j. China acted inconsistently with Article 6.8 and Paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement by failing to take into account certain information pertaining to the determination of the margins of dumping;

k. China's reliance on facts available to determine the margin of dumping for all European Union companies other than those for which individual margins of dumping were determined is inconsistent with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement;

[12] Japan's first written submission, para. 325; and second written submission, para. 136.

[13] Japan's opening statement at the first meeting of the Panel, para. 107; second written submission, para. 62; and opening statement at the second meeting of the Panel, para. 70.

l. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform the interested parties of the essential facts under consideration which form the basis for the decision to impose definitive anti-dumping measures;

m. China's application of provisional measures for a period exceeding four months is inconsistent with Article 7.4 of the Anti-Dumping Agreement;

n. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to provide in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, as well as all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures; and

o. As a consequence of the inconsistencies described above, China's anti-dumping measures on HP-SSST from the European Union are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

3.5. Pursuant to Article 19.1 of the DSU, the European Union requests the Panel to recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect, including that China refund the duties collected with respect to the period in which the provisional measure was applied inconsistently with Article 7.4 of the Anti-Dumping Agreement.[14]

3.6. The European Union also requests the Panel to exercise its right, pursuant to Article 13.1 of the DSU, to seek information from China equivalent to full disclosure that should have been made during the underlying proceedings.[15]

3.3 China

3.7. China requests the Panel to find that certain of the European Union's claims under Article 2 of the Anti-Dumping Agreement fall outside the Panel's terms of reference. In addition, China requests the Panel to reject Japan's and the European Union's claims in these disputes.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Joint Working Procedures adopted by the Panel (see list of Annexes on page 3).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Korea, the Kingdom of Saudi Arabia, Turkey and the United States are reflected in their integrated executive summaries or third-party statements, provided in accordance with paragraph 19 of the Joint Working Procedures adopted by the Panel (see list of Annexes on page 3). India and the Russian Federation did not submit third-party written submissions or statements to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. The Panel issued its Interim Reports to the parties on 19 September 2014. On 3 October 2014, the parties submitted written requests for review of precise aspects of the Interim Reports. On 10 October 2014, the parties submitted comments on the other parties' requests for review. None of the parties asked the Panel to hold an interim review meeting.

[14] European Union's first written submission, para. 339; and second written submission, paras. 180 and 184.

[15] European Union's first written submission, paras. 331-336.

6.2. The Panel explains below its response to issues raised by the parties in the context of interim review. The Panel has also corrected a number of typographical errors identified by the parties, and is grateful for their assistance in this regard.

6.3. Due to changes as a result of our review, the numbering of the footnotes in the Final Reports has changed from the Interim Reports. The text below refers to the footnote numbers in the Interim Reports, with the corresponding footnote numbers in the Final Reports provided in parentheses for ease of reference. There is no change to the paragraph numbering of the Panel's findings.

6.4. Before turning to the parties' requests for interim review, we address a procedural issue raised by China concerning the fact that Japan, which brought the DS454 proceeding, requested review in respect of the Panel's evaluation of claims also brought by the European Union in the DS460 proceeding.

6.2 Procedural issue raised by China concerning Japan's requests for interim review in respect of claims also raised in the DS460 proceeding

6.5. China objects[16] to Japan being allowed to make requests for interim review in respect of the Panel's Report in DS454 that would also affect the Panel's Report in respect of DS460. China observes in this regard that Japan is a third party in the DS460 proceeding, and that third parties do not have the right to request interim review.

6.6. We are not persuaded by China's arguments. China's approach would undermine Paragraph 1 of the Panels' Working Procedures, which specifies that:

> The Panels shall, to the greatest extent possible, conduct a single panel process, with a single record, resulting in separate reports contained in a single document, taking into account the rights of all Members concerned, and in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired.

6.7. Paragraph 1 of the Working Procedures is designed to simplify the drafting of their reports, whereas China's position would complicate that task by requiring a panel to issue separate findings in respect of claims brought by both complainants when they accept to modify their findings on the basis of a request for interim review raised by only one of the complainants. China's position is inconsistent with the single panel process envisaged in Paragraph 1 of the Working Procedures. In our view, the Panels' approach should be governed by the overarching requirement in Paragraph 1 of the Working Procedures not to impair the rights of the parties or third parties. We note in this regard that China neither states nor demonstrates that its rights have been impaired by the way that the Panel has conducted Interim Review. In addition, we observe that the European Union has in any event supported Japan's requests and comments in respect of the Interim Reports.[17]

6.3 Requests for interim review by Japan

6.3.1 Paragraph 7.105: potential for subject imports to have price effects

6.8. Japan objects to the Panel suggesting that Japan had argued that an investigating authority need only consider the potential for subject imports to have price effects. Japan asserts that an investigating authority must consider whether subject imports had actual price effects. Japan asks the Panel to amend paragraph 7.105 (and other parts) of its Interim Reports accordingly.

6.9. In order to avoid any risk of misrepresenting Japan's argument, we have made the changes requested by Japan. In addition to amending paragraph 7.105, we have also amended the heading to Section 7.5.1.3.2, footnote 252 (of the Final Reports), and paragraphs 7.121, 7.130, 7.138, 7.144, 8.2(a)(i) and 8.7(b)(i).

[16] Paras. 6-7 of China's comments on Japan's request for Interim Review.
[17] See the European Union's comments on the other parties' requests for Interim Review, page 1.

6.3.2 Paragraph 7.114: price comparability

6.10. Japan submits that record evidence with respect to pricing, which Japan relied on in the context of other issues, also demonstrates the lack of price comparability between imported and domestic Product C. Japan asks the Panel to refer to this additional evidence in support of its findings.

6.11. China objects to Japan's request. China asserts that Japan did not rely on the relevant evidence in respect of the claim at issue.

6.12. We reject Japan's request. Japan did not rely on the relevant evidence when advancing its claims before the Panel. In addition, the Panel's findings are adequately supported by the reasoning provided.

6.3.3 Paragraph 7.130: competitive relationship

6.13. Japan asks the Panel to address its argument concerning the competitive relationship between subject imports and domestic like products. Japan suggests that this argument is relevant irrespective of whether the price undercutting analysis necessarily involves the examination of whether the dumped imports had an effect of placing downward pressure on domestic prices. Japan refers to paragraph 23 of its second written submission and paragraph 9 of its oral statement at the second substantive meeting to argue that its competitive relationship argument relates to comparability and the making of price comparisons, irrespective of the *effect* issue.

6.14. China asks the Panel to reject Japan's request, on the basis that the Panel's position is clear, and that Japan essentially requests the Panel to assess legal and factual questions that are not at stake in the present dispute.

6.15. The relevant section of the Interim Reports is concerned with the complainants' *effect* argument. Paragraph 23 of Japan's second written submission was also drafted in that context. We note in this regard that the preceding paragraph relates expressly to China's argument that an investigating authority is not required to establish that a price differential is an effect of dumped imports. Similarly, paragraph 9 of Japan's oral statement at the second substantive meeting states in relevant part that "[w]ithout such a competitive relationship, there can be no proper finding that the dumped imports had an effect of placing downward pressure on domestic prices". Japan's argument, therefore, was not made irrespective of the *effect* issue, as suggested by Japan. Since the Panel rejects the notion that an investigating authority need consider the *effect* of subject imports in the context of price undercutting, there is no need for the Panel to address the complainants' argument that such *effect* cannot not exist absent a competitive relationship between imported and domestic like products. We reject Japan's request accordingly.

6.3.4 Paragraph 7.132: clarification

6.16. Japan has proposed a minor modification to clarify the nature of the argument being made by the complainants. Japan proposes to replace "deny" with "explain".

6.17. China agrees with Japan's proposal to delete "deny", but suggests the use of the word "assert" instead.

6.18. We have clarified the argument being made, as requested by Japan. We have done so by using the term "assert", as suggested by China.

6.3.5 Paragraphs 7.132 and 7.137, footnotes 239 and 246 (footnotes 254 and 262 of the Final Reports): translation

6.19. Japan observes that the Panel failed to note Japan's objection to China's translation of part of MOFCOM's Final Determination. Japan notes that it had used "noticeable", whereas China had proposed the use of "significant" instead. Japan asks the Panel to amend footnotes 239 and 246 accordingly.

6.20. We have amended footnotes 254 and 262 – and paragraphs 7.132 and 7.137 – of the Final Reports to address the concern raised by Japan. We have done so by including both the terms "significant" and "noticeable" in square brackets. There is no need for the Panel to choose between these terms, since the precise term used does not impact on the Panels' evaluation of the substantive matter at hand.

6.3.6 Paragraphs 7.136-7.143: scope of MOFCOM's price undercutting determination

6.21. Japan suggests that the Panel has misunderstood the scope of the price undercutting finding made by MOFCOM. Japan asserts that MOFCOM's finding is ambiguous, and may be interpreted in a different manner. Japan also asks the Panel to rule that MOFCOM's determination is deficient because of such alleged ambiguity.

6.22. China objects to Japan's request. China considers that Japan is essentially requesting the Panel to reach beyond what is necessary to resolve the dispute and to make certain findings assuming that the facts of the case would be different.

6.23. We see no need for the Panel to amend its findings. First, while we observe at paragraph 7.137 that MOFCOM "might have expressed itself more clearly", our understanding of the scope of MOFCOM's finding is reasonable in light of the language used by MOFCOM. Second, the specific part of MOFCOM's finding referred to by Japan (i.e. the sentence immediately preceding the one cited by the Panel) does not refer to price undercutting *per se*. That sentence, therefore, should not determine our understanding of the scope of MOFCOM's price undercutting finding.

6.3.7 Paragraph 7.140: use of indefinite article

6.24. Japan suggests that the Panel's analysis of the use of the indefinite article "a" preceding "like product" in the second sentence of Article 3.2 is "absurd", since it means that only a trivial volume of subject imports sold at undercutting prices would be sufficient to establish price effects under Articles 3.1 and 3.2.

6.25. China asks the Panel to reject Japan's request. China suggests that Japan is merely seeking to re-argue points that it made in its submissions to the Panel.

6.26. We are not persuaded by Japan's arguments. We consider that each case would need to be examined on its facts, and that in any event establishment of price effects for the purpose of Articles 3.1 and 3.2 is not sufficient, by itself, to establish causation under Article 3.5. Further, we consider that Japan's suggestion that the Panel's analysis is "absurd" is not an appropriate basis for requesting interim review.

6.3.8 Paragraph 7.141, footnote: request for deletion

6.27. Japan asks the Panel to delete a footnote in paragraph 7.141, on the basis that it is unclear, and in any event not necessary to support the Panel's reasoning.

6.28. We accept that the relevant footnote is not necessary, and have deleted it accordingly.

6.3.9 Paragraphs 7.145 and 7.170: the number of claims pursued by Japan

6.29. Japan submits that the Panel has failed to acknowledge or address a fourth Article 3.4 claim by Japan concerning MOFCOM's alleged failure to examine whether subject imports provided explanatory force for the state of the domestic industry.

6.30. China objects to Japan's request, on the basis that the claim was addressed in the Panel's findings.

6.31. We consider that the relevant claim falls outside the Panel's terms of reference. The Panel's terms of reference are determined by Japan's Request for Establishment. Section 1.b of Japan's Request for Establishment provides in relevant part:

> China's analysis of the impact of the dumped imports on the domestic industry: (i) failed to make an objective examination, based on positive evidence, of the impact of subject imports on the domestic industry based on the volume of such imports and their effect on prices; (ii) failed to evaluate the magnitude of the margin of dumping; and (iii) failed to objectively determine the relative importance and weight to be attached to relevant economic factors and indices, and improperly disregarded the majority of those factors and indices indicating that the domestic industry did not suffer material injury. Accordingly, China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[18]

There is no reference in Japan's Request for Establishment to any claim concerning MOFCOM's alleged failure to examine whether subject imports provided explanatory force for the state of the domestic industry. We have reflected our analysis in footnote 274 of the Final Reports.

6.3.10 Paragraph 7.163: Article 3.4 implementing Article 3.1

6.32. Japan asks the Panel to delete the phrase "To the extent that" from the final sentence of paragraph 7.163. Japan asserts that this phrase is unnecessary, since it is clear that Article 3.4 implements the requirement in Article 3.1 pertaining to "the consequent impact" of dumped imports on the domestic industry.

6.33. China objects to Japan's request, on the basis that the relevant provision contains multiple obligations.

6.34. We uphold Japan's request. We have replaced the relevant phrase by the word "as".

6.3.11 Paragraphs 7.166-7.168: interplay between positive and negative injury factors

6.35. Japan disagrees with the Panel's finding that Japan failed to establish a *prima facie* case in support of its claim. First, Japan asserts that, contrary to the Panel's finding, Japan did demonstrate the inadequacy of specific elements of MOFCOM's analysis. Japan's assertion is based on comments it made in its second written submission in respect of China's reply to Panel question No. 34. Second, Japan suggests that the Panel's position is that provided an investigating authority supplies some explanation concerning the interplay between positive and negative factors, any Article 3.4 claim would fail.

6.36. China suggests that Japan is seeking to re-argue points that it made during its submissions.

6.37. Regarding Japan's first concern, we note that Panel question No. 34 was not concerned with MOFCOM's assessment of the relationship between positive and negative injury factors. Accordingly, there is no basis to conclude that Japan's comments in respect of China's reply to Panel question No. 34 constitute a *prima facie* case in support of the claim at issue.

6.38. Regarding Japan's second point, the Panel manifestly did not find that any Article 3.4 claim would fail provided an investigating authority supplies some explanation concerning the interplay between positive and negative factors. The Panel's findings simply address in relevant part the complainants' argument that the Final Determination was "silent" on the interplay between the positive and negative injury factors, and their argument that MOFCOM failed to provide any explanation "whatsoever" regarding the weighing of those factors. While Japan also refers to the finding by the panel in *Thailand – H-Beams* that the investigating authority must provide a "compelling explanation" of the interplay between positive and negative injury factors, we recall that, even under the "compelling explanation" standard, the burden of proof is on the complainant. As explained by the Panel, the complainants did not meet this burden.

6.3.12 Section 7.5.3 heading: inclusion of a reference to Article 3.1

6.39. Japan asks the Panel to include a reference to Article 3.1 of the Anti-Dumping Agreement in the heading of Section 7.5.3.

[18] Document WT/DS454/4, pages 1 and 2.

6.40. Since the Panel's findings also cover Article 3.1, we have made the amendment requested by Japan.

6.3.13 Paragraphs 7.173, 7.189, 7.192, and 7.205: independent Article 3.5 claims

6.41. Japan disagrees with the Panel's conclusion that Japan did not make independent Article 3.5 claims based on alleged flaws in MOFCOM's price effects and volume analyses. Japan explains that the purpose of the approach it adopted in its first written submission was to argue both that: (i) any instances where the Panel agrees with violations of Articles 3.2 and 3.4 result in consequent violations of Article 3.5; and (ii) any instances where the Panel rejects violations of Articles 3.2 and 3.4 result in independent violations of Article 3.5.

6.42. China objects to Japan's request. China suggests that Japan has failed to respond to the Panel's reasoning.

6.43. We observe that, despite Japan's explanation of the way it intended its first written submission to be read, this is not what its first written submission actually says. Furthermore, while Japan refers to its reply to Panel question No. 88, we recall that the Panel addressed Japan's reply to this question at paragraph 7.192 of its findings. The Panel concluded that the complainants' replies to that question failed either to identify any relevant independent Article 3.5 claims in their written submissions, or to identify arguments explaining how the alleged flaws in MOFCOM's price effects and impact analyses result in independent violations of Article 3.5. There is nothing in Japan's request for interim review to suggest that the Panel's assessment of those replies is inaccurate.

6.3.14 Paragraph 7.182: expansion of Panel's reasoning

6.44. Japan asks the Panel to include an additional element in its assessment of MOFCOM's reliance on the market shares of subject imports. In particular, Japan asks the Panel to include a reference to the fact that the sales and market share of domestic Grade A increased.

6.45. China objects to Japan's request. China does not consider the relevant facts as contrary to MOFCOM's conclusion.

6.46. We uphold Japan's request, and have amended our findings accordingly.

6.3.15 Paragraph 7.184: inclusion of citation

6.47. Japan asks the Panel to include a citation to Appellate Body case law concerning the rejection of *ex post* rationalization. Japan notes that such citation has been provided elsewhere by the Panel.

6.48. We have included the citation identified by Japan in footnote 331 of the Final Reports.

6.3.16 Paragraphs 7.202-7.203

6.49. Japan asks the Panel to delete the phrase "it is not meaningful" from paragraph 7.202. Japan also asks the Panel to address certain fact-based arguments made by Japan concerning MOFCOM's non-attribution analysis.

6.50. China objects to Japan's request, on the basis that the original wording more accurately reflects the Panel's rationale for not engaging in an analysis of all aspects. China also suggests that it would be inappropriate for the Panel to address all of Japan's non-attribution arguments, since this would not be a meaningful exercise.

6.51. We consider that Japan's first request should be accommodated by using the words "it is not necessary" instead of "it is not meaningful". Regarding judicial economy, we maintain our view that, in light of the fundamental flaw in MOFCOM's analysis, it is not necessary to address every aspect of the parties' non-attribution arguments in detail.

6.3.17 Paragraphs 7.208 and 7.221: scope of arguments

6.52. Japan asks the Panel to include Japan's argument that MOFCOM violated Article 6.8 and Annex II by failing to use the "best information available" and "special circumspection" in applying the highest margin of dumping as the all others rate. Japan also asks the Panel to address that argument in its findings.

6.53. China objects to Japan's requests. China asserts that Japan failed to set out these arguments in its first written submission.

6.54. We reject Japan's request. The relevant argument was first raised by Japan in paragraphs 76-81 of its second written submission. Japan asserted that its argument raised a "fundamental point". As explained in footnote 328 of the Interim Reports (footnote 347 of the Final Reports), Japan was required by paragraph 7 of the Panel's Working Procedures to set out its case and arguments in its first written submission. This provision serves an important due process purpose. While a complainant may need to raise new arguments in its second written submission in order to respond to arguments made by the other party, this was not the context in which Japan raised its "fundamental point" in its second written submission.

6.3.18 Paragraph 7.259: correction of scope of findings

6.55. Japan identifies an error in the Panel's description of its treatment of Japan's Article 6.9 claim. Japan suggests that this should result in parts of paragraph 7.259 being deleted.

6.56. China objects to the point raised by Japan. China denies that there is any error in the Panel's findings.

6.57. We have made the changes proposed by Japan, to avoid any possibility of error in the Panel's findings.

6.3.19 Paragraph 7.260: expansion of quote

6.58. Japan asks the Panel to avoid uncertainty by including an additional part in its quotation of paragraph 102 of Japan's second written submission.

6.59. We have included the additional language requested by Japan.

6.3.20 Paragraphs 7.277 and 7.281: judicial economy

6.60. Japan asks the Panel to reconsider its exercise of judicial economy in respect of Japan's Article 12.2 and 12.2.2 claims, on the basis that the obligations in these provisions differ from the obligations in Article 3.2.

6.61. China considers that the Panel's exercise of judicial economy is appropriate.

6.62. We maintain our exercise of judicial economy. As indicated in the Panel's reasoning, MOFCOM will in any event need to revise its Final Determination in order to implement the Panel's finding under Article 3.2.

6.3.21 Paragraph 7.298, footnote 455 (footnote 475 of the Final Reports): cross-referencing between DS454 and DS460

6.63. Japan notes that footnote 455 (footnote 475 of the Final Reports) cross-references footnote 166 (footnote 174 of the Final Reports), and that the latter relates only to the DS460 Report. For the avoidance of any doubt that the relevant footnote is pertinent to the DS454 Report, Japan suggests that the Panel repeat the entirety of the text of that footnote in footnote 455.

6.64. China agrees with Japan's requests.

6.65. We have amended footnote 475 of the final Reports in the manner requested by Japan.

6.3.22 Paragraph 7.336: consequential claims

6.66. Japan notes an inconsistency between the Panel's exercise of judicial economy in paragraph 7.336 and the summary of its conclusions in paras. 8.1 and 8.6. Japan asks the Panel to amend paragraph 7.336, and make the appropriate findings instead of exercising judicial economy.

6.67. China objects to Japan's request, in the sense that China asks[19] the Panel to make its conclusions in paragraphs 8.1 and 8.6 consistent with its findings in paragraph 7.336, and therefore continue to exercise judicial economy.

6.68. We have amended paragraph 7.336 in order to ensure consistency with Section 8 of the Final Reports.

6.3.23 Paragraphs 8.2 and 8.7: scope of conclusions

6.69. Japan notes that the Panel has failed to include certain claims in its conclusions, and asks the Panel to adjust its conclusions accordingly.

6.70. China objects to Japan's request to the extent that it also concerns the Panel's conclusions in respect of a claim brought by the European Union in the DS460 proceeding.

6.71. As explained above, we do not consider that China's objection is consistent with the Paragraph 1 of the Panel's Working Procedures. We have included the additional elements proposed by Japan.

6.4 Requests for interim review by the European Union

6.4.1 Paragraph 7.114: price comparability

6.72. The European Union requests the addition of a reference to record evidence about prices regarding the lack of comparability between domestic and imported Grade C products.

6.73. China objects to the European Union's request, on the ground that it is not sufficiently specific. China also asserts that the European Union did not rely on the relevant evidence in respect of the claim at issue.

6.74. We reject the European Union's request. We note that the same request was made by Japan. Like Japan, the European Union did not rely on the relevant evidence when advancing its claims before the Panel. In addition, the Panel's findings are adequately supported by the reasoning provided.

6.4.2 Paragraphs 7.132 and 7.137, footnotes 239 and 246 (footnotes 254 and 262 of the Final Reports): translation

6.75. The European Union observes that the Panel failed to note its objection to China's translation of part of MOFCOM's Final Determination. The European Union asks the Panel to amend footnotes 239 and 246 of the Interim Reports accordingly.

6.76. We note that the same request was made by Japan. As explained in respect of Japan's request, we have amended footnotes 254 and 262 – and paragraphs 7.132 and 7.137 – of the Final Reports to address this issue.

[19] See the discussion of China's request for review of paras. 8.1, 8.3, 8.6, and 8.8 below.

6.4.3 Paragraphs 7.226, 7.235, and 7.262: clarification of argument

6.77. The European Union asks the Panel to clarify that the European Union's argument described in the second sentence of paragraph 7.226 – concerning the disclosure of a spread sheet by the investigating authority - relates to Article 6.4, rather than Article 6.9.

6.78. China states that it has no objection to the Panel clarifying that the relevant argument relates to Article 6.9 (whereas we observe that the European Union's request states that the argument actually relates to Article 6.4).

6.79. We are not persuaded that the relevant argument should necessarily be understood to relate to Article 6.4, as opposed to Article 6.9. The argument is made in paragraph 111 of the European Union's first written submission. That paragraph is found in a section whose heading refers to alleged inconsistencies with both Articles 6.4 and 6.9. The first sentence of paragraph 111 contains a reference to Article 6.4. The relevant argument is contained in the second sentence. While the proximity to the first sentence of paragraph 111 might suggest that the argument set forth in the second sentence relates to Article 6.4, the third sentence of paragraph 111 then refers to an Appellate Body Report concerning Article 6.9. In addition, the second sentence of paragraph 111 (in which the relevant argument is set forth) refers to the "disclosure" of a spread sheet by the investigating authority. The term "disclos[e]" is found in Article 6.9, not Article 6.4. In these circumstances, there is no basis to conclude that the Panel should necessarily understand the relevant argument to relate to Article 6.4, rather than Article 6.9. The European Union does not explain why this should be the case.

6.5 Requests for interim review by China

6.5.1 Footnote 16: overlap between the complainants' claims and arguments

6.80. China suggests that footnote 16 does not reflect the extent to which the complainants' claims and arguments differ, and proposes amended text.

6.81. In order to avoid any uncertainty, we have deleted the relevant footnote from the Final Reports.

6.5.2 Paragraph 7.27: BCI Procedures

6.82. China objects to the Panel's statement that "[f]or purposes of Article 17.7, China's interpretation effectively results in equating the term 'provided' with 'disclosed'". China agrees with the Panel that the term "provided" has a different meaning from the term "disclosed". China asks the Panel to delete this sentence, so as to prevent any suggestion that China took the position that the term "provided" could be equated with "disclosing".

6.83. In order to avoid any misunderstanding of China's position, we have deleted the relevant sentence.

6.5.3 Paragraphs 7.39, 7.45, and 7.110: scope of China's arguments

6.84. China asks the Panel to include additional elements in its summary of China's main arguments.

6.85. We accept China's request with respect to paragraphs 7.39 and 7.110. However, we reject China's request relating to paragraph 7.45. First, this paragraph introduces the Panel's evaluation by setting out the main issue before it. Introducing a detailed explanation of one of China's arguments would not necessarily help to identify the main issue in dispute. Second, the argument China would like the Panel to include in paragraph 7.45 is already explained and addressed in footnote 108 of the Final Reports. Third, by including a detailed summary of this argument in paragraph 7.39, we see no need to include another detailed summary of it – beyond what is already included in the above-mentioned footnote 108.

6.5.4 Footnote 88 (footnote 94 of the Final Reports): information obtained during consultations

6.86. China asks the Panel to first cite to the European Union's first written submission, instead of China's opening statement at the first meeting of the Panel, because the European Union was the first party to refer to information obtained during the consultations.

6.87. We have amended footnote 94 of our Final Reports accordingly.

6.5.5 Paragraphs 7.59 and 7.60: facts before MOFCOM

6.88. China asks the Panel to amend its summary of China's argument to include that China considers that MOFCOM relied on the facts that were before it during the investigation.

6.89. We have amended our Reports accordingly.

6.5.6 Footnote 128 (footnote 136 of the Final Reports): table 6-3

6.90. China disagrees with the Panel's interpretation of China's position in this footnote. China contends that its statement did not directly concern whether MOFCOM's determination complied with Article 2.2.2 of the Anti-Dumping Agreement. Rather, according to China, its statement rebutted the argument put forward by the European Union in support of its claim that MOFCOM did not verify the SG&A data in table 6.3.

6.91. The Panel has not interpreted China's position in this footnote. Instead, the Panel quoted China's argument directly from China's response to Panel question No. 22(a), paragraph 74, and paragraph 52 of its second written submission. Further, this discussion took place in the context of the European Union's Article 2.2.2 claim. As explained in paragraph 7.65 of the Panel Report, the issue before the Panel, concerning Article 2.2.2 of the Anti-Dumping Agreement, was whether table 6-3, which China submits was the basis for the SG&A amounts used in MOFCOM's calculation of normal value, can be said to be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product". Thus, whether or not table 6-3 was verified may be relevant in addressing this claim. In fact, in footnote 134 of the Final Reports, the Panel noted that "nothing in the Panel record indicates that MOFCOM verified table 6.3". Nevertheless, it was unclear how China's statement would excuse China from complying with the Article 2.2.2 requirements or justify MOFCOM's failure to meet such requirements. This is exactly what the last sentence of footnote 128 of the Interim Reports (footnote 136 of the Final Reports) states. Nevertheless, we have included text at the beginning of footnote 136 of the Final Reports for clarification.

6.5.7 Paragraph 7.95: MOFCOM's dumping determination

6.92. China asks the Panel to further develop the summary of China's argument in the section summarizing China's main arguments.

6.93. We have amended paragraph 7.95 accordingly.

6.5.8 Paragraph 7.112: headings of sub-sections in the complainants' submissions

6.94. China disagrees with the relevance attached by the Panel to the titles of the relevant sub-sections of the complainants' submissions. China asks the Panel to clarify that the relevant sub-sections are not limited to the claim at issue.

6.95. Japan submits that China's request is unnecessary, and should be rejected by the Panel. Japan asserts that the fact that Japan made two claims within the relevant sub-section of its written submission does not detract from the fact that one of those claims relates to the claim at issue.

6.96. We consider that it is appropriate for the Panel to refer to the headings of the relevant sub-sections of the complainants' submissions to understand the scope of a particular claim, even if those sub-headings also cover other claims. We therefore reject China's request.

6.5.9 Paragraph 7.113: clarification of China's arguments

6.97. China suggests that the Panel has misrepresented the position taken by China regarding the effect of quantitative differences on comparability.

6.98. We do not consider that the Panel has misrepresented China's position. Notably, China does not ask the Panel to delete the phrase "[t]here is no disagreement between the parties regarding the potential for a large difference in the volume of imports and domestic sales to affect price comparability". However, in order to avoid any risk of misunderstanding, we have amended the relevant part of paragraph 7.113.

6.99. China has also suggested the inclusion of additional argumentation from paragraph 132 of its second written submission, and its reply to Panel question No. 33. Rather than including such arguments in the Panel's evaluation, we have included them in the description of China's arguments at paragraph 7.110.

6.5.10 Paragraphs 7.120, 7.134, 7.135, 7.157, 7.183, 7.210, 7.230, 7.287, footnotes 436, 437, 440, 459, 461 (footnotes 456, 457, 460, 479 and 481 of the Final Reports): clarification of China's position

6.100. China asks the Panel to include additional argumentation in the Panel's summary of the main arguments made by China. For the most part, we have acceded to China's requests.

6.101. In respect of paragraph 7.135, Japan objects to China's formulation of the additional argument at issue. Japan asserts that China's formulation does not properly reflect the findings in MOFCOM's Final Determination. In order to accommodate Japan's request, we have used language making it clear that the additional argument concerns China's understanding of the scope of MOFCOM's findings.

6.5.11 Paragraph 7.171: inclusion of a cite to Final Determination

6.102. China asks the Panel to include a citation to the Final Determination.

6.103. We have included the relevant citation in footnote 306 of the Final Reports.

6.5.12 Paragraphs 7.180-7.188 and 7.192: market shares of subject imports

6.104. China disagrees with the Panel's reliance on elements relating to the price effects and impact analyses when addressing the claim in respect of MOFCOM's reliance on market shares in its causation analysis. China asserts that it has been unable to identify any arguments by the complainants referring to those items in such context. China asserts that the complainants' claims with respect to market share relate to only "two elements", namely: (i) whether the market share retained by subject imports may be relevant for the causation analysis; and (ii) whether a causation finding may be made absent a significant increase in subject import volume. In the event that the Panel rejects China's request, China asks that the Panel should at least amend footnote 325 of the Interim Reports (footnote 344 of the Final Reports) to clarify that China objects to the scope of the claim as addressed by the Panel. China also asks the Panel to amend the wording of paragraph 7.181, to avoid any suggestion that the Panel is "agreeing" with arguments that the complainants did not make. China further observes that the Panel should only refer to arguments made by Japan in this context.

6.105. Japan asserts that it should be evident from several aspects of its submissions that Japan's causation claim as it related to market share was broader than the two elements identified by China. Japan refers to a series of extracts from its written submissions and oral statements in support.

6.106. We are not persuaded that we should amend our findings in the precise manner requested by China. In respect of MOFCOM's findings on the market share of subject imports, both

complainants referred to the relevance of market share data in the context of price effects.[20] The Panel's reasoning picks up on this point, and addresses the issue of whether or not MOFCOM showed that the market shares of subject imports "enabled those imports, through price effects, to cause injury to the domestic industry". While the Panel's reasoning may be more detailed than the arguments of the complainants, the basis for the Panel's reasoning nevertheless lies in the complainants' submissions.

6.107. Regarding footnote 325 of the Interim Reports (footnote 344 of the Final Reports), the matter raised by China relates to interim review, and should therefore only be addressed in Section 6 of the Panel's Final Reports. It should not feature in Section 7, which concerns the Panel's findings.

6.108. Concerning the word "agree" in paragraph 7.181, we have replaced the phrase "agree with the complainants" by the word "consider".

6.5.13 Paragraph 7.297 and 7.298: MOFCOM's statement and relevant appendices

6.109. China submits that it does not consider that it adopted a narrower approach, as suggested in paragraph 7.297; rather China merely clarified its position. Thus, China proposes certain amendments to paragraphs 7.297 and 7.298.

6.110. Japan considers that the Panel should not delete the final sentence of paragraph 7.298 as proposed by China, but rather rephrase it.

6.111. We have amended paragraph 7.297 of the Final Reports according to China's request. We have rephrased the relevant part of paragraph 7.298 of the Final Reports in accordance with Japan's suggestion.

6.5.14 Footnotes 482, 495, and 501 (footnotes 502, 515 and 521 of the Final Reports): non-confidential summaries

6.112. China understands the Panel to refer to the lack of an explicit statement by China as to whether the relevant information should have been included in the non-confidential summary. In addition, China notes that it has generally taken the position that "the non-confidential summaries of the four appendices at issue are sufficiently detailed to provide a 'reasonable understanding' of the substance of the information submitted in confidence".[21] Thus, China asks the Panel to amend these footnotes accordingly.

6.113. We have amended footnotes 502, 515 and 521 of the Final Reports, as requested by China.

6.5.15 Paragraphs 8.1, 8.3, 8.6, and 8.8: consequential claims

6.114. As noted above in respect of Japan's request for interim review of paragraph 7.336, China asks the Panel to record the exercise of judicial economy in respect of certain consequential claims in the summary of its conclusions set forth in Section 8.

6.115. As explained above in respect of Japan's request, we have amended paragraph 7.336 to reflect Section 8 (as requested by Japan), rather than the other way round (as requested by China).

[20] At paras. 199 and 200 of its first written submission, for example, Japan stated that its arguments concerning MOFCOM's reliance on the market share of subject imports should be coupled with its arguments concerning the alleged errors in MOFCOM's price effects and impact analyses. At paras. 120-123 of its oral statement at the first substantive meeting, for example, the European Union asserts that causation must relate to the specific effects of dumping that were the subject of the analysis under Articles 3.2 and 3.4. The European Union observes that, by referring to "large quantities" and a "large market share", MOFCOM does not base its determination of causation on the outcomes of the inquiries under Article 3.2 and 3.4. The European Union refers expressly to MOFCOM's failure to find cross-grade price effects in this context.

[21] China's first written submission, para. 763.

7 FINDINGS

7.1. These disputes concern China's measures imposing anti-dumping duties on certain imports of HP-SSST from Japan and the European Union in the context of the investigation at issue. The complainants' claims pertain to various procedural and substantive provisions of the Anti-Dumping Agreement and, consequently, to Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. China asks the Panel to reject the complainants' claims.

7.2. We shall begin by examining certain requests relating to (i) the Panel's Joint Working Procedures, and (ii) the Panel's terms of reference. Thereafter, we shall turn to the claims relating to MOFCOM's dumping and injury determinations. Finally, we shall examine the remaining, mostly procedural claims. Before examining the issues before us, though, we recall a number of general principles regarding treaty interpretation, standard of review and burden of proof in WTO dispute settlement proceedings.

7.1 General principles regarding treaty interpretation, the applicable standard of review and burden of proof

7.1.1 Treaty Interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.

7.1.2 Standard of Review

7.4. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. (emphasis added)

7.5. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.[22]

7.6. The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[23] At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[24]

7.7. Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; and

[22] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[23] Ibid. para. 187.
[24] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93.

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.1.3 Burden of Proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[25] Therefore, as the complaining parties, Japan and the European Union bear the burden of demonstrating that the Chinese measures are inconsistent with the WTO agreements invoked by the complainants. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[26] Finally, it is generally for each party asserting a fact to provide proof thereof.[27]

7.2 BCI Procedures

7.9. The European Union takes issue with two aspects of the BCI Procedures originally adopted by the Panel, namely (i) the designation of BCI, and (ii) the requirement to provide authorizing letters from entities participating in the underlying anti-dumping proceedings. The European Union requests that the Panel amend the BCI Procedures accordingly. While Japan generally agrees with the European Union's requests, China asks the Panel to reject the European Union's requests.

7.2.1 Relevant provisions of the BCI Procedures

7.10. Paragraphs 1 and 2 of the BCI Procedures originally provided:

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panels. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which could seriously prejudice an essential interest of the person or entity that supplied the information to the Party. *In this regard, BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes.* However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. *The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue in these disputes, the party shall also provide, with a copy to the other parties, an authorizing letter from the entity.* That letter shall authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue. (emphasis added)

[25] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[26] Appellate Body Report, *EC – Hormones*, para. 104.
[27] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

7.2.2 Main arguments of the parties

7.2.2.1 European Union

7.11. The European Union claims that the provisions in the BCI Procedures concerning (i) designation of BCI, and (ii) authorizing letters from entities participating in the underlying anti-dumping proceedings are WTO-inconsistent.[28]

7.12. The European Union objects to the Panel automatically classifying as BCI information that was submitted as confidential in the underlying anti-dumping proceedings, because the designation of confidential information cannot be delegated, in absolute terms, to non-WTO entities or persons. The European Union recalls that, pursuant to Article 18.2 of the DSU, in dispute settlement, Members shall treat as confidential information submitted by another Member which the latter has designated as confidential. In addition, the European Union submits that, in case of disagreement, WTO adjudicators should ultimately decide on BCI designation, on the basis of objective criteria, without delegating this decision to any other entity or person.[29] The European Union requests that the relevant sentence in paragraph 1 of the BCI Procedures be modified to read: "In this regard, parties and third parties are encouraged to designate as BCI information that was previously submitted to China's Ministry of Commerce ('MOFCOM') as BCI in the anti-dumping investigation at issue in these disputes".[30] The European Union also requests that the following final sentence be added to this paragraph: "In case of disagreement, the Panels shall decide on BCI designation".[31]

7.13. The European Union also objects to the requirement that a party must seek and provide prior written authorization from the entity that submitted the confidential information in the underlying anti-dumping proceedings when submitting such information to the Panel. Regardless of whether the BCI designation was appropriate or not, the European Union contends that a particular firm could simply withhold authorization and effectively limit the information that may be submitted in WTO dispute settlement. According to the European Union, this is particularly relevant when, as in these disputes, a Member challenges another Member to disclose certain information that was originally submitted by private firms in the underlying anti-dumping proceedings.[32] The European Union also contends that Article 17.7 of the Anti-Dumping Agreement makes clear that a Member is not required to obtain authorization before providing confidential information to panels.[33] The European Union requests that paragraph 2 of the BCI Procedures be deleted or modified by replacing the verb "shall" with "may" in both sentences.[34] Finally, to the extent the Panel is concerned about protecting the WTO from any consequences of disclosure, the European Union suggests that the following sentence be added: "Each party and third party shall be solely responsible for ensuring its own compliance with any applicable confidentiality rules and solely responsible for the confidentiality designation it makes when submitting information to the Panel, and any consequences thereof".[35]

7.2.2.2 Japan

7.14. Japan generally agrees with the European Union's requests to modify paragraphs 1 and 2 of the BCI Procedures. Japan recalls that it is Members that have the right to designate information

[28] European Union's first written submission, paras. 46-48; opening statement at the first meeting of the Panel, paras. 3 and 14; second written submission, paras. 6 and 25; and opening statement at the second meeting of the Panel, para. 3.

[29] European Union's first written submission, paras. 48, 59-60, and 65-67; opening statement at the first meeting of the Panel, paras. 5 and 7; response to Panel question No. 1, para. 3; and opening statement at the second meeting of the Panel, paras. 3, 5, and 7.

[30] European Union's first written submission, para. 68.

[31] European Union's first written submission, para. 68.

[32] European Union's first written submission, paras. 48 and 70-72; opening statement at the first meeting of the Panel, paras. 14, 16, 18-19, and 21-22; second written submission, para. 25; and opening statement at the second meeting of the Panel, para. 13.

[33] European Union's first written submission, para. 76. The European Union recalls that, pursuant to Article 17.7 of the Anti-Dumping Agreement, "confidential information provided to a panel shall not be disclosed without formal authorization from the person, body or authority providing such information". The European Union contends that the "person providing" the information to a panel is *the submitting WTO Member*, since firms have no standing in DSU proceedings. European Union's first written submission, para. 76.

[34] European Union's first written submission, para. 73.

[35] European Union's first written submission, para. 74.

as confidential in DSU proceedings. According to Japan, "a panel may not give total deference (or an absolute delegation) for the resolution of the issue of the designation of BCI to some other party, such as the firm submitting the information in the underlying proceeding or even the investigating authority".[36] With respect to paragraph 2 of the BCI Procedures, to the extent it effectively takes out of the hands of the submitting Member and the Panel the question of what may be submitted in DSU proceedings, Japan agrees with the European Union. Japan notes that a firm that submitted information in the underlying domestic proceeding could withhold authorization by simply refusing the issuance of an authorizing letter.[37]

7.2.2.3 China

7.15. China notes that, after consulting with the parties, the Panel adopted additional protection for certain confidential information, while at the same time balancing the interests of all WTO Members by requiring the submission of non-confidential versions of any written submission containing BCI.[38] China contends that the challenged aspects of the BCI Procedures add to rather than detract from the protection provided by the DSU, as they do not deprive Members of the possibility to designate information as confidential under Article 18.2 of the DSU. China also submits that the additional protection in the BCI Procedures for information previously submitted to MOFCOM as BCI is in line with the confidentiality requirements set forth in Article 6.5 of the Anti-Dumping Agreement.[39] Specifically with regard to paragraph 2 of the BCI Procedures, China submits that "an authorizing letter is a necessary instrument to ensure compliance by the investigating authority with its obligations under Article 6.5 of the Anti-Dumping Agreement".[40] China contends that it is not uncommon to require the presentation of such an authorizing letter in WTO dispute settlement proceedings concerning trade remedies, and this requirement, to China's knowledge, has never been found to be WTO-inconsistent.[41]

7.2.3 Main arguments of third parties

7.2.3.1 United States

7.16. The United States submits that it is sympathetic to the concern that it could be difficult for Members and panels to evaluate compliance with obligations under the Anti-Dumping Agreement where a Member fails to meet its transparency obligations. However, the United States submits that "the correct course of action is *not* for the Panel to request China to submit to the Panel information which MOFCOM treated as confidential during the antidumping proceedings without permission of the party that submitted the information to MOFCOM".[42] The United States contends that such course of action would implicate Article 6.5 of the Anti-Dumping Agreement, which requires investigating authorities to *not* disclose information accepted as confidential during anti-dumping proceedings without permission of the party that submitted such information. The United States notes that Article 6.5 does not contain any exception for WTO proceedings.[43] The United States observes that if a Member has failed to meet its Anti-Dumping Agreement transparency obligations, complaining Members may, as in these disputes, bring claims under such transparency obligations. Should a panel find a breach of these obligations, the responding party

[36] Japan's response to Panel question No. 1(a), paras. 2-3.

[37] Japan also submits that, because paragraph 2 of the BCI Procedures does not refer to the acceptance by the investigating authority of information as confidential, "the parties appear to be required to obtain an authorization letter from the entity that originally submitted the information, as long as it submitted (or self-designated) that information as confidential in the underlying investigation", regardless of whether the investigating authority treated such information as confidential. Japan's response to Panel question No. 3, paras. 10-11.

[38] China's first written submission, para. 772.

[39] China's first written submission, para. 774; and response to Panel question No. 3, paras. 15-16.

[40] China's response to Panel question No. 3, para. 13. See also China's response to Panel question No. 4, para. 23; second written submission, para. 310 ("[T]he mere fact that an anti-dumping proceeding has resulted in a WTO dispute does not eliminate the confidentiality obligation imposed on an investigating authority with respect to the information that was granted confidential treatment upon the showing of 'good cause'."); and response to Panel questions after the second meeting with the Panel, paras. 4-5.

[41] China's response to Panel question No. 3, para. 14; and response to Panel questions after the second meeting with the Panel, para. 3.

[42] United States' third-party submission, paras. 65-66.

[43] United States' third-party submission, paras. 66-67. See also United States' third-party responses to Panel questions No. 1, paras. 2-3 and 5; and No. 2, para. 8.

would then be required to bring its measures into compliance with those transparency obligations.[44]

7.2.4 Evaluation by the Panel

7.17. There are two main issues before the Panel: (i) whether the Panel may delegate, in absolute terms, the BCI designation to non-WTO entities; and (ii) whether disputing parties should be required to provide an authorizing letter from the entity that submitted confidential information in the underlying anti-dumping proceedings, when providing such information to the Panel. We address below each of these issues.

7.2.4.1 BCI designation

7.18. The European Union takes issue with the "absolute" delegation of BCI designation to entities participating in the underlying anti-dumping proceedings. The sentence at issue in paragraph 1 of the BCI Procedures originally provided in relevant part: "BCI shall include information that was previously *submitted to* … MOFCOM … as BCI in the anti-dumping investigation at issue in these disputes". (emphasis added) We agree with the European Union that the original wording of this sentence suggests that BCI designation is determined by the party submitting information to MOFCOM.[45] Thus, we have amended this sentence to read as follows in relevant part: "BCI shall include information that was previously *treated by* … MOFCOM … as BCI in the anti-dumping investigation at issue in these disputes".[46] (emphasis added)

7.19. However, the European Union submits that it is for the submitting Member, in the first place, to designate information as confidential. Thus, the European Union considers that its concerns would not be addressed if the designation of BCI were dependent on the investigating authority's determination to treat information as confidential in the underlying anti-dumping proceedings.[47]

7.20. We agree with China that the BCI Procedures do not detract from the ability of Members to designate information as confidential under Article 18.2 of the DSU. It is clear that the designation of confidential information in anti-dumping proceedings, as provided for in Article 6.5 of the Anti-Dumping Agreement, is distinct from the designation of BCI for purposes of DSU proceedings. However, we consider that these designations are closely related because in disputes under the Anti-Dumping Agreement the Panel is not the initial trier of facts. Rather, according to the proper standard of review, the Panel must review whether the investigating authority's establishment of the facts was proper, and whether its evaluation of those facts was unbiased and objective.[48] The Panel's review must be based on the record developed by the investigating authority. The Panel may not have regard to new information that was not on the authority's record.

7.21. In our view, Article 17.7 of the Anti-Dumping Agreement reflects this relationship when it provides that "[c]onfidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information". We note that this provision is included as a special or additional rule and procedure in Appendix 2 of the DSU, which prevail over the rules and procedures in the DSU to the extent that there is a difference between these two sets of provisions.[49] We understand that, in the context of a dispute brought

[44] United States' third-party submission, para. 71.

[45] See European Union's first written submission, para. 66; and opening statement at the first meeting of the Panel, para. 5.

[46] We note that China does not oppose this amendment. See China's response to Panel question No. 1, paras. 3-5.

[47] European Union's response to Panel question No. 1(a) and (b), paras. 2-4; and opening statement at the second meeting of the Panel, para. 5. Japan also considers that the European Union's concerns would not be addressed in the situation described above. See para. 7.24. below for Japan's argument.

[48] Article 17.6(i) of the Anti-Dumping Agreement.

[49] Article 1.2 and Appendix 2 of the DSU. See also Appellate Body Report, *Guatemala – Cement I*, para. 66 ("We see the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*. The special or additional provisions listed in Appendix 2 of the DSU are designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement, while Article 1 of the DSU seeks to establish an integrated and comprehensive dispute settlement system for all of the covered agreements of the *WTO Agreement* as a whole. It is,

under the Anti-Dumping Agreement, the phrase "confidential information" in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7. This understanding is supported by the terms of Article 17.7 of the Anti-Dumping Agreement and Article 18.2 of the DSU. Article 17.7 refers to confidential information provided by a "person, body or authority"; whereas Article 18.2 refers to confidential information provided by a "Member". In other words, Article 17.7 envisages that confidential information on the authority's record – obtained from a "person, body or authority" - may be provided to a panel, and imposes on the panel a non-disclosure obligation[50] similar to that imposed on the authority by the last sentence of Article 6.5. Considering that a panel's review is limited to the authority's record, in practice the designation under Article 18.2 of the DSU should generally not arise in a case brought under the Anti-Dumping Agreement, since the issue of designation of the information on the authority's record is already addressed by Articles 6.5 and 17.7 of the Anti-Dumping Agreement.

7.22. The European Union submits that "[s]hould [the European Union] choose to un-designate information from [its] own firms (for example because, with the passage of time, it is no longer sensitive or has come into the public domain) [the European Union] fail[s] to see what interest any other party or third party might have in objecting to such course of action".[51] We are not persuaded by the European Union's argument. First, we recall that paragraph 1 of the BCI Procedures provides that "these procedures do not apply to information that is available in the public domain". Second, if the information from the European Union's firms "is no longer sensitive", we agree with the European Union and also fail to see the "interest any other party or third party might have in objecting to [the 'un-designation']". In our view, the hypothetical scenario raised by the European Union should not result in any disagreement between the parties. Indeed, if the information is no longer sensitive, even the entity that initially provided the information would agree. The situation envisaged by the European Union would then fall within the scope of paragraph 1 of the BCI Procedures, which provides that "these procedures do not apply to any BCI if the person who provided the information in the course of the … investigation agrees in writing to make the information publicly available". This safeguard is important, for a WTO Member is not necessarily best placed to determine whether or not information submitted on a confidential basis in the context of an anti-dumping proceeding remains sensitive. Indeed, the relevant Member may not even be aware of the specific reasons why confidentiality was requested in the first place.[52]

7.23. Furthermore, we fail to see the concern relating to designation by WTO Members, as raised by the European Union in the present case, because China, as a party to these disputes, has designated all information treated as confidential in the underlying anti-dumping proceedings as

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therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU.")

[50] As there shall be no *ex parte* communications with a panel (see Article 18.1 of the DSU), we note that "[c]onfidential information provided to the panel" is also necessarily provided to all parties in dispute. In our view, as Article 17.7 does not limit this non-disclosure obligation only to the panel, such obligation also applies to all parties in dispute receiving "[c]onfidential information provided to the panel".

[51] European Union's response to Panel question No. 2, para. 7.

[52] We note that the European Union relies on the Appellate Body Report in *EC and certain member States – Large Civil Aircraft* to state that the question of designation should be subject to objective criteria and, in case of disagreement about designation, it is for the Panel to ultimately decide without delegating, in absolute terms, the final decision to anyone else. (European Union's first written submission, paras. 65-66, quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 15-16; response to Panel questions No. 1(a) and (b), para. 2, and No. 4, paras. 19-20; second written submission, paras. 6, 14, and 22; and opening statement at the second meeting of the Panel, paras. 3 and 5.) It is unclear to us, and the European Union has not explained, how the Appellate Body's understanding relates to a dispute under the Anti-Dumping Agreement, where, unlike in *EC and certain member States – Large Civil Aircraft*, the Panel is not a first trier of facts. In any event, we consider that, in adopting the definition in paragraph 1 of the BCI Procedures, the Panel has set out clear and objective criteria concerning the type of information that may require additional protection, consistently with the Appellate Body's understanding in *EC and certain member States – Large Civil Aircraft*. With respect to the possible disagreement, as stated above, we understand that the hypothetical scenario raised by the European Union should not result in any disagreement between the parties. In addition, the European Union has not explained how another type of "disagreement about designation" under the BCI Procedures could occur when information was *properly* treated as confidential in the underlying anti-dumping proceedings.

BCI for purposes of these DSU proceedings.[53] This constitutes designation by a WTO Member, as proposed by the European Union.

7.24. The European Union also submits that "[i]f … information is automatically to be designated as BCI in the present proceedings, then that would seriously risk to pre-judge one of the very issues that is supposed to be in dispute".[54] Similarly, Japan contends that to "categorically include within the definition of BCI any information accepted by the investigating authority as confidential in an underlying proceeding would be problematic, because this would presume or prejudge the propriety of the BCI designation by the investigating authority in a dispute like the present one in which the WTO consistency of the confidential treatment of information by the investigating authority is itself in dispute".[55] The European Union and Japan appear to conflate the question of proper BCI designation in the present DSU proceedings with the question of proper treatment of confidential information in the underlying anti-dumping proceedings.[56] Designating information as BCI in the present proceedings allows the Panel, the parties and third parties to receive and examine such information, while controlling its disclosure to any person not authorized under the BCI Procedures. We agree with China[57] that this has no bearing on the Panel's assessment of whether MOFCOM treated information as confidential in the underlying anti-dumping proceedings consistently with the provisions of the Anti-Dumping Agreement. In fact, contrary to the apparent suggestion by the complainants, we consider that the BCI Procedures assist the Panel in accessing all necessary information for a proper and objective examination of the claims, in the present disputes, relating to the treatment of confidential information in the underlying anti-dumping proceedings.

7.25. In light of the foregoing, we have decided not to modify paragraph 1 of the BCI Procedures in the manner proposed by the European Union. We have amended paragraph 1 of the BCI Procedures only in the manner explained above in paragraph 7.18.

7.2.4.2 Authorizing letter

7.26. With respect to paragraph 2 of the BCI Procedures, the European Union takes issue with the requirement for parties to provide an authorizing letter from the entity that submitted confidential information in the underlying anti-dumping proceedings, when submitting such information to the Panel.

7.27. With respect to WTO dispute settlement, Article 17.7 of the Anti-Dumping Agreement sets forth that "[c]onfidential information *provided* to the panel shall not be *disclosed* without formal authorization from the person, body or authority providing such information". (emphasis added) With respect to anti-dumping proceedings, Article 6.5 of the Anti-Dumping Agreement uses the same terms, setting forth that "[a]ny information which is by nature confidential …, or which is *provided* on a confidential basis … shall … be treated as such by the authorities. Such information shall not be *disclosed* without specific permission …". (emphasis added) China argues that the authorizing letter is necessary to ensure compliance by the investigating authority with its obligations under Article 6.5, including when information is "disclosed" to the Panel in the context of a dispute under the Anti-Dumping Agreement.[58] In China's view, "when … information is

[53] China's response to Panel question No. 2(a), para. 11. We also note China's view that "[b]y making the designation of BCI dependent on the investigating authority's determination to treat information as confidential in the underlying anti-dumping proceedings, the designation of BCI is essentially left to the Member seeking such designation". China's response to Panel question No. 1(a), para. 5.

[54] European Union's first written submission, para. 67. See also European Union's response to Panel question No. 2, para. 8; second written submission, paras. 22-23; and opening statement at the second meeting of the Panel, para. 10.

[55] Japan's response to Panel question No. 1(a), para. 2. See also Japan's response to Panel question No. 2, para. 9.

[56] Elsewhere the European Union appears to take a different view, stating that "Article 6.5 of the Anti-Dumping Agreement does not govern the question of designation in DSU proceedings. It governs the question of designation in municipal anti-dumping proceedings". European Union's response to Panel question No. 1(a) and (b), para. 5. See also European Union's response to Panel question No. 3, paras. 9-10; and second written submission, paras. 11 and 15.

[57] See China's second written submission, para. 309.

[58] China's response to Panel question No. 3, para. 13. See also China's response to Panel question No. 4, para. 23; and response to Panel questions after the second meeting with the Panel, paras. 4-5.

'disclosed' to the panel under Article 6.5, it is 'provided' to the panel under Article 17.7".[59] However, in our view, the use of different terms – i.e. "provided" and "disclosed" – in the same sentence in Article 17.7 strongly suggests that they have different meanings.

7.28. In addition, we consider there is a clear relationship between Articles 6.5 and 17.7. While the former provision regulates when confidential information may be disclosed by investigating authorities, the latter provision regulates when such information may be disclosed by a panel. As stated above, panels are not the initial triers of facts. Rather, panels review an investigating authority's establishment and evaluation of facts. Thus, it would seem logical that a panel should be subject to similar non-disclosure obligations when reviewing the investigating authority's assessment of the body of information, including confidential information, available on the record of the anti-dumping proceedings.[60] In our view, this indicates that the "provision" of confidential information to the panel in the context of a dispute under the Anti-Dumping Agreement does not amount to its "disclosure" under Article 6.5.[61] Accordingly, we do not consider that a Member "providing" confidential information to a panel under Article 17.7 of the Anti-Dumping Agreement would cause its investigating authority to violate its obligation under Article 6.5 not to "disclose" that information.

7.29. In light of the foregoing, we have decided to accommodate the European Union's request to delete paragraph 2 of the original version of the BCI Procedures.[62]

[59] China's response to Panel question No. 4, paras. 25-30. According to China, removing the requirement for an authorizing letter is likely to result in systemic issues, creating strong disincentives for parties to disclose confidential information to investigating authorities. China's response to Panel question No. 3, paras. 13 and 17.

[60] As noted above, parties in dispute are also subject to the same non-disclosure obligation as a panel. See footnote 50 above.

[61] Taking this view, we need not address China's submission that the "mere fact that an anti-dumping proceeding has resulted in a WTO dispute does not eliminate the confidentiality obligation imposed on an investigating authority with respect to the information that was granted confidential treatment upon the showing of 'good cause'". (China's second written submission, para. 310. See also China's response to Panel questions after the second meeting with the Panel, para. 4.)

[62] We recall that, on 22 May 2014, the Panel (i) invited parties to submit any additional BCI, together with an explanation of how such BCI supports any claims or arguments made to the Panel, and (ii) provided two weeks for other parties to comment on such explanation. In this context, the European Union submitted additional BCI to the Panel on 6 June 2014.

7.3 Panel's terms of reference

7.30. China submits that certain claims under Article 2 of the Anti-Dumping Agreement[63] advanced by the European Union in its first written submission fall outside the Panel's terms of reference.[64] China's request is based on Article 6.2 of the DSU.

7.31. In its request for the establishment of a panel[65], the European Union alleged a violation of:

> Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement because China did not determine the amounts for administrative, selling and general costs and for profits on the basis of records and actual data by the exporters or producers under investigation. In particular, the amounts for administrative, selling and general costs and for profits as constructed by China do not reflect the records and the actual data of the exporters or producers under investigation.

7.32. In its first written submission, the European Union claims that China acted inconsistently with the following provisions of the Anti-Dumping Agreement:

> Article 2.2 because the unrepresentative and rejected data used by MOFCOM did not permit a proper comparison, and the SG&A amount was not reasonable[66];
>
> Article 2.2.1 because MOFCOM used free samples, which by definition are not sales in the ordinary course of trade[67];
>
> Article 2.2.1.1 because MOFCOM used unrepresentative and rejected data which (i) did not correspond to the records kept by SMST, (ii) were not in accordance with GAAP, (iii) did not reasonably reflect the costs associated with the product under consideration, and (iv) had been historically utilized by SMST[68]; and
>
> Article 2.2.2 because MOFCOM failed to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.[69]

7.3.1 Relevant WTO provisions

7.33. Article 6.2 of the DSU provides:

> The request for the establishment of a panel shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.34. Article 2.2 of the Anti-Dumping Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when

[63] China also submits that, although the European Union's references to paragraph 1 of Annex I to the Anti-Dumping Agreement appear unintentional, to the extent the European Union actually intended to make a claim under this provision, such claim would be outside the Panel's terms of reference. (China's first written submission, para. 192.) The European Union clarifies that it does not make a claim under this provision. (European Union's response to China's requests for preliminary rulings, para. 53.) In light of the European Union's clarification, we need not address this issue.

[64] The Panel's terms of reference for this dispute are set out in paragraph 2 of document WT/DS460/5/Rev.1, following the standard terms of reference in Article 7.1 of the DSU.

[65] Document WT/DS460/4 (referred to hereafter as "panel request").

[66] European Union's first written submission, para. 174.

[67] European Union's first written submission, paras. 167 and 173.

[68] European Union's first written submission, para. 172.

[69] European Union's first written submission, para. 170.

exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (footnote omitted)

7.35. Article 2.2.1 of the Anti-Dumping Agreement provides:

Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time. (footnotes omitted)

7.36. Article 2.2.1.1 of the Anti-Dumping Agreement provides:

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations. (footnote omitted)

7.37. Article 2.2.2 of the Anti-Dumping Agreement provides in relevant part:

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

7.3.2 Main arguments of the parties

7.3.2.1 China

7.38. China submits that certain of the claims in the European Union's first written submission concerning Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement fall outside the Panel's terms of reference because the European Union's panel request failed to comply with the requirements of Article 6.2 of the DSU in respect of those claims.

7.39. China understands the European Union to have presented two sets of claims in its first written submission: (i) main claims under Article 2.2.2, and (ii) "additional/support claims" under Articles 2.2, 2.2.1, and 2.2.1.1 in support of its main claims. With regard to the European Union's main claims, China accepts that the European Union's claim under Article 2.2.2 that the SG&A amount was not based on actual data falls within the Panel's terms of reference.[70] However, China contends that the European Union's panel request does not include a claim under Article 2.2.2 that the SG&A amount did not pertain to production and sales in the ordinary course

[70] China's first written submission, paras. 51-53 and 71; second written submission, para. 5; and opening statement at the second meeting of the Panel, para. 51.

of trade.[71] With regard to the European Union's "additional claims", China accepts that the European Union's claim under Article 2.2.1.1 that data used did not correspond to the records kept by SMST falls within the Panel's terms of reference.[72] However, China contends that all remaining "additional claims" under Articles 2.2, 2.2.1, and 2.2.1.1 were not included in the European Union's panel request.[73] China submits that such non-inclusion is not a matter of a lack of any clarity or precision in the European Union's request for establishment of a panel. Rather, China asserts that the European Union clearly specified the claims included in its request for establishment. According to China, the European Union expressly limited its claims under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement to the claims that the SG&A amounts "do not reflect the records and the actual data". China contends that the use of the term "in particular" clearly defined the claims raised by the European Union.[74]

7.3.2.2 European Union

7.40. The European Union submits that its panel request complies with the requirements of Article 6.2 of the DSU in respect of the claims at issue.

7.41. With regard to Article 2.2.2 of the Anti-Dumping Agreement, the European Union submits three main arguments.[75] First, the European Union contends that certain contextual elements permitted China to fully understand the nature of the problem raised by the European Union in its panel request before receiving the European Union's first written submission. The European Union initially notes that China itself demonstrated that MOFCOM acted inconsistently with China's WTO obligations, since "China expressly acknowledges … that it was relying on data that was not actual and that it had already rejected as unrepresentative and unreliable".[76] Moreover, the European Union contends that the defending Member's disclosure of the legal and factual basis for its measure "sets the parameters for what the complaining Member may have to do in order to fulfil the standard set out in Article 6.2 of the DSU".[77] Finally, the European Union argues that "the sufficiency of a panel request must be assessed in the light of the discussion between the

[71] China's first written submission, paras. 54-55; response to Panel question No. 10, paras. 35 and 38; second written submission, paras. 4, 6-7, 18, and 27; and opening statement at the second meeting of the Panel, paras. 51 and 55-56. China argues that Article 2.2.2 contains multiple obligations. According to China, the "actual data" requirement in Article 2.2.2 is distinct from the requirement relating to data pertaining to sales and production in the ordinary course of trade, which is contained in the same provision. China's first written submission, para. 67; opening statement at the first meeting of the Panel, paras. 19-21; response to Panel question No. 7, paras. 33-34; second written submission, para. 21; opening statement at the second meeting of the Panel, paras. 52-55; and comments on the European Union's response to Panel question No. 81, para. 22.

[72] China's first written submission, paras. 52, 55, and 71; second written submission, para. 5; and opening statement at the second meeting of the Panel, para. 51.

[73] China's first written submission, paras. 54-55; second written submission, para. 57; and opening statement at the second meeting of the Panel, para. 51.

[74] China's first written submission, para. 65; China's opening statement at the first meeting of the Panel, para. 19; China's second written submission, paras. 4-7; and China' comments on the European Union's reply to Panel question No. 81, para. 21.

[75] In its response to China's request for preliminary rulings, the European Union also makes a number of substantive arguments against China's claims under Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement. The relationship between the European Union's substantive arguments and the narrow procedural issue raised by China relating to whether the European Union's panel request complies with the requirements of Article 6.2 of the DSU is unclear.

[76] European Union's response to China's requests for preliminary rulings, para. 28.

[77] European Union's response to China's requests for preliminary rulings, para. 34. See also European Union's opening statement at the second meeting of the Panel, para. 75. The European Union contends that, "as a matter of law, the sufficiency of a panel request must be assessed in the light of the sufficiency of the measure at issue and the disclosure afforded to the interested Member". European Union's response to China's requests for preliminary rulings, para. 33. See also European Union's response to Panel question No. 81, para. 19. The European Union submits that the only point reasonably clear to the European Union was that China could not have based itself on the actual data in table 6-5, and thus must have acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement. The European Union submits that this is how the European Union's panel request was framed. European Union's response to China's requests for preliminary rulings, paras. 35 and 37.

investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue".[78]

7.42. Second, the European Union submits that complaining Members are entitled to refer in their panel requests "to provisions of a covered agreement, in effect incorporating them by reference, without writing them out *verbatim* in the Panel Request".[79] Thus, the European Union's reference to "actual data" in its panel request does not limit the request only to this part of the single sentence in Article 2.2.2.[80]

7.43. Third, the European Union contends that Article 2.2.2 contains one single obligation. The European Union argues that the terms "shall", "this basis", "be based on", and "pertaining to" support the European Union's understanding.[81] The European Union "does not generally consider that it makes much sense to attempt to deconstruct complex, interlinked, compound rules into different parts and characterise some … as an obligation, and … other … as a condition or separate qualifier".[82]

7.44. Turning to the European Union's "additional claims" under Articles 2.2, 2.2.1 and 2.2.1.1, the European Union submits that these provisions are clearly referenced in its panel request. The European Union recalls that panel requests need not set out the text of the provisions *verbatim*, particularly when the defending Member has failed to properly disclose the reasons for the measure at issue.[83] In addition, the European Union submits that these provisions contain a single operative phrase with mandatory language, apparently suggesting that they contain each one single obligation.[84] Finally, with regard to "China's attempt to split the terms of Article 2.2.1.1", the European Union contends that the reference to a particular obligation in Article 2.2.1.1 must be also understood as a reference to any related conditions included in this provision.[85]

7.3.3 Evaluation by the Panel

7.45. The main issue before the Panel is whether the European Union's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in respect of each of the claims at issue made by the European Union in its first written submission.[86] This issue arises principally because China and the European Union disagree on whether Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement each contain single or multiple obligations. Therefore, we now examine each of these provisions separately below to determine whether they contain single or multiple obligations.

7.46. Article 2.2 of the Anti-Dumping Agreement identifies the circumstances where an investigating authority may be entitled to determine the margin of dumping through a comparison between export price and (i) the export price of the like product exported to a third country, or (ii) the constructed normal value.[87] We agree with China that this provision contains multiple obligations. The European Union emphasizes that "Article 2.2 contains a single operative phrase with mandatory language ('shall be determined')".[88] In our view, the fact of whether or not a particular provision contains a "single operative phrase with mandatory language" is not necessarily determinative of whether such provision contains one or more distinct legal obligations.

[78] European Union's response to China's requests for preliminary rulings, para. 41. See also European Union's response to China's requests for preliminary rulings, para. 32; and response to Panel question No. 81, para. 20.

[79] European Union's response to China's requests for preliminary rulings, para. 31.

[80] European Union's response to China's requests for preliminary rulings, paras. 31-32; response to Panel question No. 81, para. 18; and opening statement at the second meeting of the Panel, paras. 73 and 75.

[81] European Union's response to Panel questions No. 6, paras. 24-35; and No. 7, paras. 43-44.

[82] European Union's response to Panel question No. 6, paras. 24-25. See also European Union's response to Panel questions No. 7, para. 42; and No. 81, para. 17.

[83] European Union's response to China's requests for preliminary rulings, para. 50.

[84] European Union's response to Panel question No. 6, paras. 39-41. The European Union submits that "[i]t is not because there is a complex interlinked rule that includes some qualifiers or conditions that one needs to discover multiple obligations". (European Union's response to Panel question No. 6, para. 39.)

[85] European Union's response to China's requests for preliminary rulings, para. 51. The European Union "rejects China's attempts to deconstruct the single interlinked complex rule in that provision by isolating one of the relevant conditions". (European Union's response to Panel question No. 6, para. 41.)

[86] Article 6.2 of the DSU.

[87] Panel Report, *EC – Salmon (Norway)*, para. 7.528.

[88] European Union's response to Panel question No. 6, para. 39.

Indeed, we note that elsewhere, where the European Union explains its claim and arguments under Article 2.2, even the European Union appears to suggest that Article 2.2 contains multiple obligations.[89]

7.47. While the Appellate Body has explained that when "a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged"[90], the Appellate Body has also indicated that "compliance with the requirements of Article 6.2 [of the DSU] must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[91] Thus, the mere fact that the European Union referred to a particular provision in its panel request, allegedly without specifying the particular obligation being challenged, does not necessarily mean that the European Union's panel request fails to meet the requirements of Article 6.2 of the DSU. This is because the relevant WTO obligations may nevertheless be identifiable from a careful reading of the panel request as a whole.[92] Accordingly, we examine whether a careful reading of the European Union's panel request, including any narrative explanation contained therein[93], permits a sufficiently clear identification of the legal basis regarding each of the Article 2 claims pursued in the European Union's first written submission.[94]

[89] The European Union states that Article 2.2 "supports the view that the data used by an investigating authority must 'permit a proper comparison', and that the amount for administrative, selling and general costs must be 'reasonable'. The unrepresentative and rejected data used by China did not permit a proper comparison because it did not result in the proper establishment of normal value. Furthermore, it was not reasonable, because it did not reasonably reflect the costs associated with the production and sale of the product under consideration, in the ordinary course of trade". (European Union's first written submission, para. 174; and response to Panel question No. 8, para. 47.)

[90] Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598.

[91] Appellate Body Report, *US – Carbon Steel*, para. 127.

[92] With similar understanding, see the preliminary ruling of the panel in *US – Countervailing and Anti-Dumping Measures (China)*, para. 3.35, document WT/DS449/4 dated 7 June 2013.

[93] We note in this regard that, in applying Article 6.2 of the DSU, the panel in *Mexico – Anti-Dumping Measures on Rice* considered the listing of the relevant WTO provisions in the panel request at issue together with the narrative which accompanied that listing. (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.30.)

[94] We note that the European Union and China refer to information allegedly exchanged during consultations (see European Union's first written submission, para. 171; China's opening statement at the first meeting of the Panel, para. 22; China's response to Panel request No. 10, para. 39; China's second written submission, paras. 12-16; opening statement at the second meeting of the Panel, para. 57; China's comments on the European Union's response to Panel question No. 81, paras. 24-26; and European Union's response to Panel questions Nos. 10, para. 70; and 81, para. 21; second written submission, para. 102; and opening statement at the second meeting of the Panel, paras. 74-75). The Panel was not privy to those consultations, and is therefore unable to refer to their substance for present purposes. (See also Appellate Body, *US – Upland Cotton*, para. 287, quoting Panel Report, *Korea – Alcoholic Beverages*, para. 10.19.) Thus, we need not address the European Union's objection to the BCI designation of this information. (European Union's opening statement at the second meeting of the Panel, para. 11.) We also note that the European Union submits that "the sufficiency of a panel request must be assessed in the light of the discussion between the investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue". (European Union's response to China's requests for preliminary rulings, para. 41.) However, we consider that it cannot be assumed that the range of issues raised by interested parties during the administrative proceedings will be the same as the claims brought by the European Union in this dispute. In addition, while the defending Member will be aware of the issues raised by interested parties during the administrative proceedings, other Members, including the complaining Member, may not, particularly if they were not themselves parties to the proceedings. Thus, we consider that the underlying administrative proceedings cannot normally, in and of themselves, be determinative in assessing the sufficiency of the European Union's panel request. (In this regard, see Appellate Body Report, *Thailand – H-Beams*, para. 94.) Finally, we note that the European Union contends that, "as a matter of law, the sufficiency of a panel request must be assessed in the light of the sufficiency of the measure at issue and the disclosure afforded to the interested Member". (European Union's response to China's requests for preliminary rulings, para. 33.) We are unable to understand, and the European Union has not explained, how the measure at issue (and its disclosure) prevented the European Union from having sufficient information to prepare its panel request, but nevertheless allowed the European Union to raise a number of specific claims and arguments in its first written submission. (See also China's comments on the European Union's response to Panel question No. 81, para. 23.) Furthermore, it is unclear to us why, "as a matter of law", the sufficiency of a panel request should relate to the sufficiency of the measure at issue (and its disclosure).

7.48. With respect to the European Union's Article 2.2 claim, we do not consider that the narrative explanation contained in the European Union's panel request refers to this claim. We are unable to see, and the European Union has not explained, how this narrative explanation specifies which of the multiple obligations contained in Article 2.2 is being challenged.[95] Thus, we find that the European Union's panel request does not comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present [any] problem clearly" in respect of the European Union's Article 2.2 claim. Consequently, we conclude that the Article 2.2 arguments in the European Union's submissions[96] relate to a claim that is not within the Panel's terms of reference.

7.49. With regard to the European Union's Article 2.2.1 claim, we observe that Article 2.2.1 of the Anti-Dumping Agreement describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade, setting forth the *only* circumstances under which sales of the like product may be disregarded.[97] We consider that Article 2.2.1 contains one single obligation relating to when sales of the like product may be treated as not being in the ordinary course of trade.[98] In our view, a reference to Article 2.2.1 is sufficient to clearly present a problem pertaining to the treatment of below-cost sales. Thus, it puts the responding party on notice that the treatment of below-cost sales, i.e. sales "below per unit … costs of production plus administrative, selling and general costs", of the like product outside the ordinary course of trade will be an issue in dispute. China accepts that "[w]here a provision contains only a single obligation, a simple reference to the provision may be a sufficient summary of the legal basis of the complaint".[99] Thus, we find that, the European Union's panel request complies with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present [a] problem clearly" in respect of the European Union's Article 2.2.1 claim. Consequently, we conclude that the Article 2.2.1 arguments in the European Union's submissions[100] relate to a claim that is within the Panel's terms of reference.

7.50. Article 2.2.1.1 of the Anti-Dumping Agreement concerns the calculation of costs of production for the purpose of constructing normal value, and for the purpose of determining whether below-cost sales may be treated as not being made in the ordinary course of trade.[101] This provision contains three sentences. In our view, the wording of each sentence makes it clear that this provision contains multiple legal obligations. The first sentence provides that "cost shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The second sentence provides that "[a]uthorities shall consider all available evidence on the proper allocation of cost". The third and final sentence provides that "cost shall be adjusted appropriately" for those non-recurring cost and start-up costs. We note that the narrative explanation contained in the European Union's panel request states that "China did not determine

[95] The European Union submits that "there is no dispute between the parties that the disagreement in this case relates to the determination of administrative, selling and general costs, a matter with respect to which one can only discern one rule in Article 2.2: the amount must be 'reasonable'. Consequently, … the [European Union] submits that its Panel Request identified the issue, also with respect to Article 2.2, with sufficient particularity". (European Union's response to Panel question No. 6, para. 39.) We are unable to reconcile this statement with the European Union's explanation of its claim and argument under Article 2.2, where the European Union appears to refer to two distinct obligations. (See footnote 89 above.) In our view, the latter explanation suggests that, in theory, there is more than one disagreement between China and the European Union. Finally, it is unclear to us, and the European Union has not explained, how the alleged clarity with regard to the "disagreements" between the parties explains whether or not the European Union's panel request complies with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" pertaining to the European Union's Article 2.2 claim.

[96] European Union's first written submission, para. 174; and response to Panel question No. 8, para. 47.

[97] Panel Report, *EC – Salmon (Norway)*, para. 7.231; and Appellate Body Reports, *US – Continued Zeroing*, footnote 636; and *US – Softwood Lumber V*, para. 100.

[98] We also note that China has not demonstrated to us how multiple obligations can be read into Article 2.2.1 of the Anti-Dumping Agreement. See China's first written submission, paras. 66-67; and opening statement at the first meeting of the Panel, para. 21.

[99] China's opening statement at the first meeting of the Panel, para. 19. Although we do not consider this to be determinative in our analysis of Article 2.2.1, we note that, unlike with respect to Articles 2.2, 2.2.1.1, and 2.2.2, China only refers to one obligation in Article 2.2.1 when summarizing the European Union's claims. ("[T]hat although 'by definition free samples are below cost', MOFCOM failed to disregard 'sales made below cost as being not made in the ordinary course of trade', contrary to what is required by Article 2.2.1". China's first written submission, paras. 54 and 66.)

[100] European Union's first written submission, para. 173; and response to Panel question No. 8, para. 48.

[101] Panel Report, *EC – Salmon (Norway)*, paras. 7.252 and 7.482.

the amounts for administrative, selling and general costs and for profits on the basis of records … by the exporters or producers under investigation". We also note that China accepts that the European Union's claim under Article 2.2.1.1 relating to the obligation that "cost shall normally be calculated on the basis of records kept by the exporters" is within the Panel's terms of reference.[102] However, we are not persuaded that the European Union's panel request as a whole, including the narrative explanation contained therein, clearly presents any problem pertaining to the remaining obligations contained in Article 2.2.1.1. In our view, the European Union's panel request is not sufficient to bring these remaining obligations within the Panel's terms of reference.[103] Thus, we find that the European Union's panel request does not comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present [a] problem clearly" pertaining to these remaining Article 2.2.1.1 obligations. Consequently, we conclude that the Article 2.2.1.1 arguments in the European Union's submissions referring to such obligations[104] relate to claims that are not within the Panel's terms of reference.

7.51. Article 2.2.2 of the Anti-Dumping Agreement sets forth how the amounts for SG&A and profits are to be calculated for purposes of a constructed normal value.[105] This provision provides that SG&A amounts "shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product".[106] We note that the narrative explanation contained in the European Union's panel request states that "China did not determine the amounts for administrative, selling and general costs and for profits on the basis of … actual data by the exporters or producers under investigation". We also note that China accepts that the European Union's claim under Article 2.2.2 relating to "actual data" is within the Panel's terms of reference.[107] We recall that the European Union's panel request includes a reference to Article 2.2.1 of the Anti-Dumping Agreement. With regard to the latter provision, we have concluded above that a reference to Article 2.2.1 puts the responding party on notice that below-cost sales, i.e. sales "below per unit … costs of production plus administrative, selling and general costs", of the like product outside the ordinary course of trade will be an issue in dispute. Although the narrative explanation contained in the European Union's panel request does not refer to "administrative, selling and general costs … pertaining to production and sales in the ordinary course of trade of the like product", in our view, a reasonably informed reader would understand from the reference to Article 2.2.1 that the European Union also takes issue, in its panel request, with whether or not SG&A amounts are based on data pertaining to the production and sales in the ordinary course of trade.[108] Thus, we find that the European Union's panel request complies with

[102] China's first written submission, paras. 52, 55, and 71; second written submission, para. 5; and opening statement at the second meeting of the Panel, para. 51.

[103] We note that, with respect to Article 2.2.1.1, the European Union simply "rejects China's attempt to deconstruct the single interlinked complex rule in that provision by isolating one of the relevant conditions". (European Union's response to Panel question No. 6, para. 41. See also European Union's response to China's requests for preliminary rulings, para. 51.) As explained above, the wording of Article 2.2.1.1 strongly suggests that this provision contains different obligations. We consider that the European Union has not explained how each sentence in Article 2.2.1.1 may be nevertheless understood to refer to the same legal obligation.

[104] See European Union's first written submission, para. 172; and response to Panel question No. 8, para. 49.

[105] Appellate Body Report, *EC – Bed Linen*, para. 67.

[106] See Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97 ("Examining the text of the chapeau of Article 2.2.2, we observe that this provision imposes a general obligation ('shall') on an investigating authority to use 'actual data pertaining to production and sales in the ordinary course of trade' when determining amounts for SG&A and profits.")

[107] China's first written submission, paras. 52, 65, 67, and 77; second written submission, para. 5; and opening statement at the second meeting of the Panel, para. 51.

[108] Taking the view explained above, we need not address the European Union's and China's arguments relating to whether Article 2.2.2 of the Anti-Dumping Agreement contains multiple obligations. China also submits that the European Union's panel request is "expressly limited, by the use of the words 'in particular', to the obligation[] for the SG&A to … be based on actual data". (China's opening statement at the first meeting of the Panel, para. 19; see also China's first written submission, para. 65; second written submission, para. 6; and comments on the European Union's response to Panel question No. 81, para. 21.) We do not agree with China that the expression "in particular" limits the coverage of the European Union's panel request to only what comes after it. As noted above, we must consider the European Union's panel request *as a whole* to assess compliance with the requirements of Article 6.2 of the DSU. Moreover, we note that the relevant part of the European Union's panel request contains two sentences, both of which refer to "the amounts for administrative, selling and general costs and for profits" and the alleged disconnection from "the records and the actual data by the exporters or producers under investigation". However, the second sentence, which starts with the expression "[i]n particular", refers to such amounts "as constructed by China". Thus, we understand

the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present [a] problem clearly" pertaining to the European Union's Article 2.2.2 claim. Consequently, we conclude that the Article 2.2.2 arguments relating to "actual data pertaining to production and sales in the ordinary course of trade" in the European Union's submissions relate to claims that are within the Panel's terms of reference.

7.4 MOFCOM's dumping determination

7.52. The European Union makes a number of claims in respect of MOFCOM's dumping determination for SMST, one of the European Union exporters/producers. These claims concern (i) the use of SG&A amounts for Grade B; (ii) the fair comparison concerning Grade C; and (iii) the alleged double-counting of certain administrative expenses concerning Grade B.

7.4.1 The use of SG&A amounts for Grade B

7.53. The European Union claims that China acted inconsistently with Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement because "China did not determine the amount for [SG&A] on the basis of records and actual data kept by the exporter or producer under investigation (SMST) or in a manner that reasonably reflects the costs associated with the production and sale of [Grade B]".[109] China asks the Panel to reject the European Union's claims.

7.4.1.1 Relevant WTO provisions

7.54. Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement are set forth above.[110]

7.4.1.2 Main arguments of the parties

7.4.1.2.1 European Union

7.55. The European Union claims that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.[111] The European Union submits that the data from table 6-3 of SMST's questionnaire response, which was used by China to construct normal value, was not "actual data pertaining to production and sales in the ordinary course of trade". This is because, the European Union argues, table 6-3 (i) included SG&A amounts derived from *planned* rates – i.e. hypothetical projected administrative expense – and not the *actual* expense;[112] and (ii) was based on abnormally high cost of production, as it included two free sample product transactions, which are unrepresentative and cannot be used to construct normal value.[113]

7.56. The European Union also claims that China acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because "it is the representative and duly verified data in [Table 6-5 of SMST's Questionnaire Response] that corresponds to the records kept by SMST, and that is in accordance with GAAP and reasonably reflects the costs associated with the production and sale of the product under consideration".[114]

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that the expression "in particular" serves to highlight that the European Union's claims under the provisions at issue will focus on the manner in which China constructed such amounts.

[109] European Union's first written submission, para. 160. See also European Union's first written submission, para. 175; response to China's requests for preliminary rulings, para. 3; second written submission, para. 88; and opening statement at the second meeting of the Panel, para. 68.

[110] See paras. 7.35. -7.37. above.

[111] European Union's first written submission, paras. 170 and 175; response to Panel questions No. 8, paras. 45-46; and No. 20, para. 89; and opening statement at the second meeting of the Panel, para. 68.

[112] European Union's first written submission, paras. 164-166; second written submission, para. 88; and opening statement at the second meeting of the Panel, para. 72.

[113] European Union's first written submission, paras. 167-169 and 171; second written submission, para. 88; response to Panel question No. 81, para. 22; and opening statement at the second meeting of the Panel, para. 71.

[114] European Union's first written submission, para. 172; and response to Panel question No. 8, para. 49. See also European Union's first written submission, para. 175; and responses to Panel questions No. 8, para. 45; and No. 81, para. 22.

7.57. Finally, the European Union claims that China acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement. The European Union submits that this provision "expressly provides for the treatment of sales made below cost as being not made in the ordinary course of trade …, and further indicates that they should be disregarded. By definition, free samples are below cost, and thus not sales in the ordinary course of trade".[115]

7.4.1.2.2 China

7.58. China submits that MOFCOM determined the SG&A amount on the basis of actual data reported by SMST for Grade B sold in the European Union, which according to China was included in table 6-3 of SMST's Questionnaire Response. China also submits that there was no evidence that such data were neither actual nor based on SMST's records.[116]

7.59. China contends that, on the basis of the facts before MOFCOM during the investigation[117], the costs of production included in table 6-3 are actual data. According to China, since the SG&A amounts at issue were based on costs of production in table 6-3, it is clear that the SG&A amounts used by MOFCOM were based on "actual data".[118] China considers that it is irrelevant whether or not the coefficients used to determine the SG&A amounts are also actual data, because the SG&A amounts at issue were "based on" actual data, i.e. actual costs of production, and Article 2.2.2 does not require the SG&A amount to be actual data in itself. In any event, China contends that the coefficients themselves also constitute "actual data", because "[t]he coefficients were used by SMST in its daily operations and are data that pertained to acts, existed in fact, are real, and were in existence at the time".[119]

7.60. Moreover, China submits that, on the basis of the facts before MOFCOM during the investigation[120], the data used by MOFCOM were based on SMST's records. China contends that it was reasonable for MOFCOM to conclude that the source of the SG&A amount was SMST's records because SMST stated that "[t]he figures reported in Table 6-3 were taken from cost calculations for the individual orders of subject merchandise produced during the POI".[121]

7.4.1.3 Main arguments of third parties

7.4.1.3.1 Kingdom of Saudi Arabia

7.61. Saudi Arabia submits that Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation on investigating authorities to use an exporter's records when such records (i) are in accordance with GAAP, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration.[122] Saudi Arabia contends that the "second condition is met where there is a sufficiently close relationship between the recorded cost and the actual cost to the company for the production and sale of the product at issue".[123]

7.4.1.3.2 United States

7.62. With respect to the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement, the United States contends that the Anti-Dumping Agreement does not require an investigating authority to treat all sample sales as outside the ordinary course of trade.

[115] European Union's first written submission, para. 173; and response to Panel question No. 8, para. 48 (footnote omitted). See also European Union's first written submission, para. 175; and response to Panel question No. 8, para. 45.
[116] China's first written submission, paras. 80, 98, 102, 104, 114, and 126.
[117] China's first written submission, paras. 100-103.
[118] China's first written submission, para. 123; response to Panel question No. 22, para. 71; and No. 22(b)(ii), para. 76; second written submission, para. 33; and opening statement at the second meeting of the Panel, paras. 60-61.
[119] China's second written submission, paras. 34-35. See also China's response to Panel question No. 22, paras. 69-70; and No. 22(b)(ii), paras. 76-77; and opening statement at the second meeting of the Panel, para. 61.
[120] China's first written submission, paras. 100-103.
[121] China's first written submission, paras. 124-126; opening statement at the second meeting of the Panel, para. 62; and SMST dumping questionnaire response, Exhibit CHN-5, p. 16; Exhibit EU-10, p. 5.
[122] Saudi Arabia's third-party statement, paras. 2-4.
[123] Saudi Arabia's third-party statement, para. 4.

According to the United States, an authority must instead evaluate the record evidence to determine whether it supports finding that the sample sale was concluded on terms and conditions that are incompatible with normal commercial practice for sales of the like product, in the market in question, at the relevant time.[124] The United States understands that "China acted inconsistently with Article 2.2.2 of the [Anti-Dumping] Agreement to the extent that MOFCOM relied on information for sales outside the ordinary course of trade when information on sales in the ordinary course of trade were available".[125]

7.63. With respect to the European Union's claim under Article 2.2.1.1 of the Anti-Dumping Agreement, the United States submits that if the evidence establishes that the records of the exporter or producer under investigation were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the products under consideration, "MOFCOM would have been obligated to use those records … or … provide a reason supported by the record evidence to depart from the 'normal' methodology provided for in Article 2.2.1.1".[126]

7.4.1.4 Evaluation by the Panel

7.64. The disagreement between the European Union and China concerns the SG&A amounts used by MOFCOM in its calculation of normal value for Grade B produced and sold by SMST. As Article 2.2.2 of the Anti-Dumping Agreement sets forth how the amounts for SG&A are to be calculated for purposes of a constructed normal value, we start our assessment with this provision.

7.65. Concerning Article 2.2.2 of the Anti-Dumping Agreement, the issue before the Panel is whether table 6-3, which China submits was the basis for the SG&A amounts used in MOFCOM's calculation of normal value[127], can be said to be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product". It is undisputed that the SG&A amounts in table 6-3 consist of the cost of production multiplied by certain coefficients. These coefficients are the planned internal rates used by SMST in preparing price/cost allocations for orders.[128]

7.66. We note that it appears that there was a disagreement between MOFCOM and SMST with respect to the source of data to determine the SG&A amount. While the European Union submits that SMST understood that MOFCOM should have been using the SG&A amount based on actual data from table 6-5[129], China submits that MOFCOM understood that it made clear in its disclosures that it was using the data contained in table 6-3.[130] Irrespective of these

[124] United States' third-party submission, para. 47; and United States' third-party statement, para. 16.

[125] United States' third-party submission, para. 48. See also United States' third-party statement, para. 16.

[126] United States' third-party submission, para. 51. See also United States' third-party statement, para. 18.

[127] See China's response to Panel question No. 22(b)(i), para. 75.

[128] SMST supplemental dumping questionnaire response, Exhibit CHN-10, internal page 4; and Exhibit EU-14; SMST dumping questionnaire response, Exhibit EU-10, internal page 69. See also European Union's first written submission, footnote 174; and China's response to Panel questions No. 22, para. 70; No. 22(b)(ii), para. 76; No. 22(b)(iii), para. 78; second written submission, para. 29; and opening statement at the second meeting of the Panel, para. 59.

[129] European Union's response to Panel question No. 18(b), para. 84 ("From MOFCOM's preliminary disclosure, SMST and its Chinese counsel understood that MOFCOM was not satisfied with the explanation of the calculation method of SG&A in Table 6-3 and therefore was using the 'actual' SG&A, which SMST understood as the actual reported figures in Tables 6-6 through 6-8 (as summarized in Table 6-5).") and para. 86 ("With receipt of the final disclosure SMST could only surmise that MOFCOM had not used or had incorrectly used the actual data in Tables 6-5 to 6-8. Even today, MOFCOM has still not provided a disclosure reconciling the specific numbers used in the calculation with what appears in the measure at issue, so even today neither SMST nor the EU can be sure what China has done"); European Union's response to China's requests for preliminary rulings, para. 21; and second written submission, para. 106 and footnote 126. See also SMST comments on preliminary dumping disclosure (BCI), Exhibit EU-19, pp. 2-3 ("the SG&A rate … used by BOFT in calculating the constructed value for [Grade B] is not supported by any information on the record of this proceeding and BOFT has not explained how it calculated this rate. Rather than using this unsupported SG&A rate, BOFT should have used the … SG&A rate reported in Table 6-5 for EU sales").

[130] China's first written submission, paras. 80, 82, 84, 86, 105-106, 108-109, 111 ("The comments by SMST … obviously did not allow MOFCOM to understand that SMST intended to claim that the data reported as *actual data* in Table 6-3 for EU sales were not actual"), 120-121; and second written submission, para. 48 ("SMST was able (or at the very least should have been able) to understand that the amounts in table 6-3 were used in line with MOFCOM's statement in the questionnaire response and MOFCOM's consistent practice.

understandings, we observe that it is undisputed that SMST requested MOFCOM, and MOFCOM accepted, not to use in the constructed normal value calculations the cost of production in table 6-3 for Grade B sales in the European Union, because such cost of production was distorted due to the inclusion of the two free sample transactions.[131] Despite MOFCOM's decision to disregard the cost of production data in table 6-3 for Grade B sales in the European Union, MOFCOM nevertheless used the SGA amounts in table 6-3, even though they had been derived by applying certain coefficients to that disregarded cost of production data. We note China's argument that the "SG&A data affected by the disregarded cost of production could have been corrected by [the relevant] coefficients" used in the calculation of the SG&A amounts.[132] Although China has submitted that (i) MOFCOM requested SMST to explain its SG&A methodology and the sources of the coefficients at issue, and (ii) SMST failed to do so[133], we do not consider that an unbiased and objective investigating authority could have assumed the corrective potential of the relevant coefficients without any supporting analysis or evidence.[134] We agree with the European Union that any such assumption would have been "speculative".[135] In our view, by using SGA data based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value, MOFCOM failed to fulfil the requirements of Article 2.2.2[136], namely that the SG&A amounts "be based on actual data pertaining to production and sales in the ordinary course of trade of the like product".[137] In light of the foregoing, we uphold the European Union's claim that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

7.67. Having upheld the European Union's claim under Article 2.2.2, we exercise judicial economy with respect to the European Union's claims under Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement.[138]

SMST should have realized that the specific SG&A rate used corresponded exactly to the figure it had itself reported in table 6.3"). See also China's opening statement at the second meeting of the Panel, para. 63; SMST preliminary dumping disclosure, Exhibit CHN-12 (BCI), internal pages 2-3; preliminary determination, Exhibits JPN-7 and EU-18, internal page 27; SMST final dumping disclosure, Exhibit EU-25 (BCI), internal page 3; and final determination, Exhibits JPN-2 and EU-30, internal page 38.

[131] SMST dumping questionnaire response (BCI), Exhibit CHN-5, p. 17; SMST preliminary dumping disclosure, Exhibit CHN-12 (BCI), internal pages 2-3; preliminary determination, Exhibits JPN-7 and EU-18, internal page 27; final determination, Exhibits JPN-2 and EU-30, internal page 38; European Union's first written submission, para. 168; and China's first written submission, paras. 98, 107, and 116; response to Panel question No. 22(b)(iii), para. 78; and second written submission, para. 42.

[132] China's response to Panel question No. 22(b)(iii), para. 79. See also China's response to Panel question No. 24, para. 86 ("the SG&A data were not necessarily 'particular', since the coefficients could well have taken into account the inflated nature of the costs").

[133] China's response to Panel question No. 24, para. 86; and SMST preliminary dumping disclosure, Exhibit CHN-12 (BCI), internal pages 2-3.

[134] We note that nothing in the Panel record indicates that MOFCOM verified table 6-3. (See SMST verification disclosure (BCI), Exhibit EU-23; China's first written submission, para. 113; response to Panel question No. 22(a), para. 73; and European Union's response to Panel question No. 21, para. 92; and second written submission, para. 107.)

[135] European Union's second written submission, paras. 110 and 114.

[136] Addressing whether MOFCOM had verified the information in table 6-3 pertaining to SG&A as actual data, China submits that "[a]n investigating authority only needs to satisfy itself of the accuracy of the information supplied, pursuant to Article 6.6 of the Anti-Dumping Agreement" and that "[n]o claim was made under this provision". (China's response to Panel question No. 22(a), para. 74; and second written submission, para. 52.) We are unable to see how this statement would excuse China from complying with the requirements set forth in Article 2.2.2 of the Anti-Dumping Agreement, or justify MOFCOM's failure to meet such requirements.

[137] Taking this view, we need not address the disagreement between the European Union and China concerning the correct translation into English of SMST's request to exclude the cost of production in table 6-3 for Grade B sales in the European Union, and the issue of whether such request also referred to SG&A amounts in table 6-3. (See China's first written submission, para. 112; response to Panel question No. 23, paras. 81-84; and second written submission, para. 42; and European Union's second written submission, paras. 111-112.) Similarly, we need not address whether or not SMST's reported coefficients, i.e. the planned internal rates used by SMST in preparing price/cost allocations for orders, are "actual data" for purposes of Article 2.2.2 (see China's first written submission, paras. 102, 104 and 113-116; response to Panel question No. 22, paras. 70-72; and second written submission, paras. 34-35 and 44; and European Union's response to Panel question No. 21, paras. 90-94; and second written submission, paras. 103-104).

[138] We note that the European Union agrees with the exercise of judicial economy in these circumstances. See European Union's response to Panel question No. 81, para. 23.

7.4.2 Fair comparison: SMST's sales of Grade C

7.68. The European Union claims that China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value for Grade C.[139] China asks the Panel to reject the European Union's claim.

7.4.2.1 Relevant WTO provision

7.69. Article 2.4 of the Anti-Dumping Agreement provides in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. 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. … 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. (footnote omitted)

7.4.2.2 Main arguments of the parties

7.4.2.2.1 European Union

7.70. The European Union contends that, when calculating the normal value for Grade C, MOFCOM failed to account for differences in physical characteristics between certain goods sold in the European Union and goods exported to China. The European Union submits that, as explained by SMST, "[l]arge differences in tube outer diameter … affected price comparability" because "[t]hin diameter tube requires more extensive rolling/drawing, resulting in higher costs of production and prices", and "[t]hin diameter tubes also cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves".[140] The European Union argues that it was not appropriate for China to include certain sales of thinner tubes, which were designed and produced for secondary systems, in calculating the normal value for Grade C, because such sales are not comparable, without adjustment, to the Grade C primary boiler tube exported to China.[141] By doing so, the European Union submits that China's comparison of export prices and domestic prices included different product mixes. The European Union contends that China failed to take any steps to control for differences in physical characteristic affecting price comparability, or make the necessary adjustments in order to ensure a fair comparison.[142]

7.4.2.2.2 China

7.71. China submits that, in order to minimize the need for adjustments, "MOFCOM requested [SMST] … to list its own product types … [and] used these product types to carry out the comparison under Article 2.4 [of the Anti-Dumping Agreement]".[143] China contends that SMST initially stated, through its questionnaire responses and supporting documents, that there were no physical differences affecting price comparability between Grade C exported to China and Grade C

[139] European Union's first written submission, paras. 176 and 186; opening statement at the first meeting of the Panel, para. 33; second written submission, para. 115; and opening statement at the second meeting of the Panel, para. 76.

[140] European Union's first written submission, para. 177. (See translation correction in Exhibit EU-33, p. 17.) See also European Union's opening statement at the first meeting of the Panel, para. 33; second written submission, para. 115; opening statement at the second meeting of the Panel, paras. 77-78; and response to Panel question No. 79, paras. 8-9.

[141] European Union's first written submission, para. 178.

[142] European Union's first written submission, paras. 176 and 186; opening statement at the first meeting of the Panel, para. 33; and second written submission, para. 115.

[143] China's opening statement at the second meeting of the Panel, paras. 64 and 69-70.

sold domestically by SMST.[144] China submits that subsequently, when SMST referred to physical differences, it did not attempt to "quantify the price difference or to provide any evidence in support of its claim", and "provided no explanation concerning the manifest contradiction between the newly introduced claim based on physical differences and the very clear and detailed answers in its questionnaire response, in which it stated, and repeated several times, exactly the opposite".[145] China submits that, while SMST made several contradictory and incoherent statements, SMST never lodged any *substantiated* request in relation to a fair comparison concerning the relevant sales.[146]

7.4.2.3 Main arguments of third parties

7.4.2.3.1 Korea

7.72. Korea contends that the burden under Article 2.4 of the Anti-Dumping Agreement to ensure a fair comparison does not shift to an exporter only because such exporter failed to claim that there is a price difference between the products being compared under this provision.[147] Korea notes that the parties in this dispute agree that SMST claimed that there were differences in physical characteristics between certain products sold in the European Union and products exported to China. Korea considers that "[i]f such a factual claim was raised at the time of the investigation, through which an investigating authority could have thrown suspicion on the issue of fair comparison, the investigating authority should have evaluated further to determine whether the product it ha[d] chosen for the comparison was appropriate, and if it did not, the investigating authority's obligation … under Article 2.4 … could not be deemed to have been released".[148]

7.4.2.3.2 Kingdom of Saudi Arabia

7.73. Saudi Arabia submits that the adjusted values that form the basis for a determination of dumping should depart as little as possible from actual prices in the markets at issue.[149] In addition, Saudi Arabia contends that "normal value" must be specific to the exported product and its unique product and pricing characteristics.[150] Saudi Arabia also submits that the comparison in Article 2.4 refers to two interrelated values, and does not permit an investigating authority to ignore any similarity or difference that might affect "comparability".[151]

7.4.2.3.3 United States

7.74. The United States submits that a fair comparison, under Article 2.4 of the Anti-Dumping Agreement, requires an investigating authority to strive to compare similar products as well as transactions. Where the product under consideration consists of two or more significantly diverse product models, the United States contends that an investigating authority "must conduct an exercise such as a model matching", whereby certain imported and domestic like products are matched "to assure accurate price comparisons within but not across relevant product categories".[152] The United States submits that "because model matching ensures that only sales of products with similar physical characteristics are compared to each other or necessary adjustments for the differences are made, some sort of model matching exercise is an essential component of establishing a fair comparison between the export price and normal value".[153]

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[144] China's first written submission, paras. 131-155, 178, and 182; response to Panel question No. 13, para. 48; second written submission, paras. 66-68; and opening statement at the second meeting of the Panel, para. 65. See also SMST dumping questionnaire response (BCI), Exhibit CHN-5, pp. 6 and 9.

[145] China's first written submission, para. 162. See also China's first written submission, paras. 165, 167, 179, 184, and 187; second written submission, paras. 69-70 and 81; and opening statement at the second meeting of the Panel, para. 76.

[146] China's first written submission, paras. 167 and 179; opening statement at the second meeting of the Panel, para. 65; and comments on the European Union's response to Panel question No. 80, para. 13.

[147] Korea's third-party statement, para. 8.

[148] Korea's third-party statement, para. 9.

[149] Saudi Arabia's third-party statement, para. 6.

[150] Saudi Arabia's third-party statement, para. 7.

[151] Saudi Arabia's third-party statement, paras. 8-9.

[152] United States' third-party submission, para. 55.

[153] United States' third-party submission, para. 55.

7.75. The United States also submits that a failure to make due allowance for differences in physical characteristics that affect price comparability would be a breach of the obligation contained in Article 2.4 of the Anti-Dumping Agreement.[154] The United States contends that "[i]f an investigating authority sought … information [on differences in physical characteristics that may affect price comparability], but an exporter or producer merely identified differences in physical characteristics … without claiming that those differences affected price, then the investigating authority need not independently undertake an analysis of the differences in physical characteristics to determine whether they affected price comparability".[155]

7.4.2.4 Evaluation by the Panel

7.76. The main issue before the Panel is whether or not SMST actually made a request for due allowance concerning physical differences affecting price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement.

7.77. Article 2.4 provides that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in … physical characteristics". The Appellate Body in *EC – Fasteners* stated that "[d]ifferences between products … would not always affect price comparability and require adjustments by the authorities".[156] The Appellate Body considered that the investigating authority may be unduly burdened if it were required "to assess each difference in order to determine whether adjustment is needed in every case, even without a request by the interested party".[157] Yet, the Appellate Body concluded that "it is the investigating authority's duty to review the requested adjustments in order to determine whether any physical differences identified before it are differences that affect price comparability within the meaning of Article 2.4".[158]

7.78. Concerning the methodology in Article 2.4, there is no guidance in this provision as to how due allowance for differences affecting price comparability is to be made.[159] The Panel in *EC – Fasteners* explained that "most investigating authorities either make comparisons of transaction prices for groups of goods within the like product that share common characteristics, or by making an adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared".[160] In that same case, the Appellate Body later considered that:

> For example, the authority may choose to make comparisons of transaction prices for a number of groups of goods within the like product that share common characteristics, thus minimizing the need for adjustments, or it may choose to make adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared.[161]

7.79. Turning to the facts before the Panel, we note that SMST's Questionnaire Response did not request any adjustments for differences in physical characteristics.[162] Nevertheless, it is undisputed that, in its comments on MOFCOM's preliminary dumping disclosure, SMST stated that

[154] United States' third-party submission, para. 56. See also United States' third-party statement, para. 20.
[155] United States' third-party response to Panel question No. 5, para. 15.
[156] Appellate Body Report, *EC – Fasteners*, para. 517.
[157] Appellate Body Report, *EC – Fasteners*, para. 517.
[158] Appellate Body Report, *EC – Fasteners*, para. 519.
[159] Panel Reports, *EC – Fasteners*, para. 7.297; and *EC – Tube or Pipe Fittings*, para. 7.178. See also European Union's first written submission, para. 181; and China's second written submission, paras. 61-62.
[160] Panel Report, *EC – Fasteners*, para. 7.297. (footnote omitted)
[161] Appellate Body Report, *EC – Fasteners*, para. 490. The panel in *EC – Fasteners* had a similar understanding: "It is clear to us that investigating authorities may find the first method more practical in certain cases, since it may minimize, or even eliminate, the need to make adjustments for each difference that affect price comparability, which may be a difficult task. However, the authorities are free to follow the second approach and make adjustments for each difference in physical characteristics that affects price comparability". (footnote omitted) (Panel Report, *EC – Fasteners*, para. 7.297)
[162] SMST dumping questionnaire response (BCI), Exhibit CHN-5, pp. 6, 9, and 10.

MOFCOM should not have included certain sales because they involved very thin tubes that are not used in primary boiler systems.[163] SMST submitted that:

> These thin tubes cannot be used in the primary boiler system designed to transport steam. Rather, they are used in secondary system such as measuring temperatures or controlling [valves]. Also, because of their very thin dimensions, they require more extensive rolling/drawing resulting in higher costs of production. The price of these thin tubes can therefore not be properly compared to the price of the DMV 310N [i.e. Grade C] tubes exported to China.[164]

7.80. It is also undisputed that, during verification, (i) SMST provided a diagram showing that tubes in certain European Union sales were thinner than those sold in China and that there were certain differences in the production process between comparatively thinner and thicker tubes;[165] and (ii) MOFCOM's officials marked such document, at the verification site, with hand-written text that translates as: "Why SMST-I's [certain] domestic transactions … cannot be included in the domestic sales and compared with the export sales? Because the small tube of H310N is used for the connection of boiler's control system".[166]

7.81. With respect to Grade C, MOFCOM stated in the SMST final dumping disclosure that:

> [SMST] presented evidence in the course of the verification in order to prove that the product [in certain sales] that should be allegedly excluded has a difference with [SMST]'s products exported to China in terms of processing technology, etc. However, since no evidence proves that aforementioned products do not meet the specific description of the investigated products provided for in the initiation notice, the investigating authority decides to maintain, in the final determination, its decision in the preliminary determination not to exclude the aforementioned … relatively small amount transactions when determining the normal value of this grade.[167]

7.82. In its comments on the final dumping disclosure, SMST stated that:

> In calculating normal value for [Grade C], BOFT included [certain] EU sales of merchandise that were not comparable to the merchandise sold for export to China. … Large differences in tube outer diameter affected price comparability. Thin diameter tube requires more extensive rolling/drawing, resulting in higher costs of production and prices. Thin diameter tubes also cannot be used in the primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves and therefore are sold in much smaller quantities than normal boiler tube. This also affects price comparability.
>
> It is therefore not appropriate for BOFT to continue to include [certain sales] in calculating normal value for DMV 310N [i.e. Grade C] …
>
> This issue was thoroughly reviewed at verification. At verification, the BOFT officials reviewed technical information concerning boiler construction, as well as technical specifications and invoices for [certain] transactions. … The information confirmed the difference between primary and secondary boiler systems and showed that the secondary system tube sold … had a price per metric ton that was [higher than] the thicker DMV 310N primary boiler tube sold in the EU and Chinese markets.

[163] See SMST's comments on preliminary dumping disclosure (BCI), Exhibit EU-19, p. 3, para. 5; China's first written submission, para. 160; and European Union's first written submission, para. 177; and second written submission, para. 115.

[164] SMST's comments on preliminary dumping disclosure (BCI), Exhibit EU-19, p. 3, para. 5.

[165] See SMST-Germany verification exhibit 10 (BCI), Exhibit EU-21, p. 2; China's first written submission, paras. 165 and 183; response to Panel question No. 14(a), para. 49; and second written submission, para. 81; and European Union's first written submission, para. 178.

[166] European Union's first written submission, footnote 194; and China's response to Panel question No. 15(c), para. 57.

[167] SMST final dumping disclosure (BCI), Exhibit EU-25, p. 3, with translations from Exhibits CHN-16, pp. 23-24, and EU-33, p. 9.

> The only reason given by BOFT in its disclosure before the final determination for continuing to include the secondary system tube in its normal value calculation was that SMST 'did not prove that these products do not meet the scope description of the subject merchandise in the initiation notice.' It is however not an issue of whether secondary system tube is included within the scope of subject merchandise but rather whether secondary system tube can properly be compared to primary boiler tube under Article 2.4 of the WTO Antidumping Agreement.
>
> Article 2.4 … requires that a 'fair comparison shall be made between the export price and the normal value' and that 'due allowance' shall be made for any 'differences which affect price comparability,' including differences in 'physical characteristics.' As discussed above the verified record evidence in this case demonstrates that major differences in outer dimensions affect the price comparability of secondary system tube and primary boiler tube, with the unit prices of secondary system tube being [higher than] primary boiler tube. Given the fact that there were sufficient home market sales of DMV 310N primary boiler tube for comparison with the DMV 310N primary boiler tube exported to China, BOFT should have excluded the secondary system tube sold [in the EU market] in its calculation of normal value for DMV 310N.[168]

7.83. In light of the foregoing, we consider that SMST did request an adjustment, under Article 2.4[169], to reflect physical differences affecting price comparability.[170] Although SMST had initially reported in its questionnaire response that there were no differences affecting price comparability, it should have been clear to MOFCOM that SMST changed its position in this regard during the course of the investigation. In its comments on MOFCOM's final dumping disclosure, SMST clearly referred to differences affecting price comparability, and the obligation on MOFCOM to ensure a fair price comparison pursuant to Article 2.4. In these circumstances, we consider that an objective and impartial investigating authority would not have "assessed the physical differences and the information provided by SMST in this respect in the framework of exclusion from the scope of products under consideration", as MOFCOM did.[171] At a minimum, an objective and impartial investigating authority would have acknowledged the fact that an adjustment was being sought, and considered whether that adjustment was warranted, and if the necessary information had been provided.

7.84. China contends that MOFCOM should not have understood SMST to have requested any adjustment to differences in physical characteristics because SMST did not present a *substantiated* request to that effect. China submits that SMST did not attempt to quantify or explain the price

[168] SMST comments on final dumping disclosure (BCI), Exhibit EU-28, pp. 2-4, with translation correction in Exhibit EU-33, p. 18. In its final determination, MOFCOM upheld its practice in the preliminary determination, on the basis that there was no evidence to prove that the transactions at issue involved products that are not covered by the specific description of the productions under investigation in the initiation notice. (See final determination, Exhibits JPN-2 and EU-30, internal page 38.)

[169] China submits that (i) "[i]n SMST's Comments on Preliminary Disclosure and Comments on Final Disclosure, SMST raised the issue of tubes of thinner diameter with more production processes, but merely referred to Article 2.4 of the Anti-Dumping Agreement to support its exclusion claim, rather than making a request for due allowance" (China's response to Panel question No. 15(b), para. 56); and (ii) "SMST did not request any adjustment or an amendment to the product types used for the comparison (product types that [SMST] had put forward itself and had used to report its transactions)". (China's response to Panel question No. 17(a), para. 66.) As to whether China's understanding is accurate, we consider that SMST's comments on the preliminary disclosure and on the final disclosure speak for themselves.

[170] China emphasizes the contradiction between SMST's earlier statements and SMST's comments on the preliminary disclosure and on the final disclosure. (See, e.g., China's first written submission, paras. 9, 162, 165, 179, and 184; response to Panel question No. 15(b), para. 54; second written submission, para. 84; opening statement at the second meeting of the Panel, paras. 70-71, 74, and 76; and comments on the European Union's response to Panel question No. 80, para. 12.) We do not consider that an interested party is barred from making different statements throughout anti-dumping proceedings, particularly when reacting to subsequent developments and disclosures, and when such newer statements are substantiated with proper evidence. We understand that this is an intrinsic element of what has been described as the "dialog" between an investigating authority and interested parties. (With respect to this "dialog", see Appellate Body Report, *EC – Fasteners*, para. 489, and Panel Report, *Egypt – Steel Rebar*, para. 7.352.)

[171] China's response to Panel question No. 17(a), para. 65.

difference or provide any evidence suggesting that such differences had an impact on prices or costs.[172]

7.85. We note that China accepts that, during verification, MOFCOM received a diagram from SMST showing that certain tubes sold in the European Union were thinner than those sold in China, and that there were certain differences in the production process between comparatively thinner and thicker tubes.[173] China has not shown that MOFCOM rejected SMST's request for want of it being "substantiated". We recall that it is well established that a Member may not offer, during WTO dispute settlement, a new rationale for its investigating authority's determinations.[174] MOFCOM's determinations must be evaluated in light of the rationale provided by MOFCOM during the underlying anti-dumping proceedings. Thus, we find that China's arguments relating to such lack of a "substantiated" request constitute *ex post* rationalization, which we are bound not to consider when examining the European Union's claim at issue.

7.86. In light of the foregoing, we uphold the European Union's claim that China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to address SMST's adjustment request under this provision with a view to determining the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value for Grade C.

7.4.3 Alleged failure to take into account certain information provided during verification

7.87. The European Union claims that China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement because MOFCOM refused to take into account certain information provided by SMST during the verification "[o]n the ground that the company did not raise this point before the onsite verification started, the Investigation Authority decided to deny the above request".[175] The European Union further claims that China acted inconsistently with Article 6.8 and Paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement by failing to comply with the requirements to apply "facts available".[176] China asks the Panel to reject the European Union's claims.

7.4.3.1 Relevant WTO provisions

7.88. Article 6.7 of the Anti-Dumping Agreement provides:

> In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9,

[172] China's first written submission, paras. 162, 165, 167, 179, 184-185, and 187; responses to Panel questions No. 14(a), paras. 49-50; No. 15(b), para. 56; and No. 15(c), para. 57; No. 16, paras. 58-63; No. 17, paras. 64-66; second written submission, paras. 63, 69-70, 79, and 81-83 ("[SMST] did not even attempt to demonstrate that [the physical] differences affect price comparability. The European Union cannot point to a single piece of evidence submitted by SMST to demonstrate an impact on price comparability (which … is a consideration separate from different prices)"); opening statement at the second meeting of the Panel, paras. 65-67 and 76; and comments on the European Union's response to Panel questions No. 79, paras. 7-8; and No. 80, paras. 11, 13, 15, and 17-20.

[173] China's first written submission, paras. 165 and 183; response to Panel question No. 14(a), para. 49; and second written submission, para. 81. See also SMST-Germany verification exhibit 10 (BCI), Exhibit EU-21, p. 2

[174] See e.g. Appellate Body Report, *US – Tyres (China)*, para. 329 ("[D]uring panel proceedings a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination").

[175] Final determination, Exhibits JPN-2 and EU-30, internal pages 38-39. See also SMST final dumping disclosure (BCI), Exhibit EU-25, p. 4.

[176] European Union's first written submission, paras. 98 and 109; second written submission, para. 46; opening statement at the second meeting of the Panel, para. 36; and response to Panel question No. 82, para. 24.

to the firms to which they pertain and may make such results available to the applicants.

7.89. Paragraph 7 of Annex I to the Anti-Dumping Agreement provides:

> As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

7.90. Article 6.8 of the Anti-Dumping Agreement provides:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

7.91. Paragraph 3 of Annex II to the Anti-Dumping Agreement provides:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

7.92. Paragraph 6 of Annex II to the Anti-Dumping Agreement provides:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7.4.3.2 Main arguments of the parties

7.4.3.2.1 European Union

7.93. The European Union contends that, in the context of calculating SMST's margin of dumping for Grade B, (i) SMST submitted to the investigating authorities that certain financial expenses had been inadvertently double-counted in the SMST dumping questionnaire response, and (ii) SMST adduced corrected information that was duly verified. The European Union claims that China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement by refusing to take into account the corrected information provided during the verification.[177] The European Union takes issue with the fact that "[t]he *only* reason provided by China in the SMST Final Disclosure and in the Final Determination for refusing to take the corrected information into account was that SMST did not raise this point before the verification started".[178]

[177] European Union's first written submission, paras. 98-99 and 109.

[178] European Union's second written submission, para. 46. See also European Union's first written submission, paras. 99-100; responses to Panel questions No. 26, para. 96; No. 27, para. 97; and No. 82,

7.94. In addition, the European Union claims that China acted inconsistently with Article 6.8 and Paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of SMST's margin of dumping which was (i) verifiable; (ii) appropriately submitted so that it could have been used in the investigation without undue difficulties, and (iii) supplied in a timely fashion.[179] The European Union contends that "the question of what information an investigating authority must rely on is closely linked to the related question of the circumstances in which an investigating authority may rely on *other* information, which is essentially what China did in this case when it relied on the erroneous and uncorrected data relating to financial expenses".[180] The European Union submits that it "makes the same claim with respect to the information contained in" certain of SMST's questionnaire responses and verification exhibits.[181]

7.4.3.2.2 China

7.95. China contends that there was no double-counting in the dumping margin determination and that, accordingly, the claims lack any factual basis and that the alleged procedural violation did not and could not have had any adverse impact on the European Union, as there is no case of nullification or impairment of the European Union's rights.[182] In addition, China argues that Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement do not mandate investigating authorities to accept all information presented during a verification visit.[183] China submits that these provisions grant an investigating authority the right to conduct an on-the-spot verification in the territory of the exporting Member under certain circumstances. China contends that such provisions do not, by contrast, impose any obligation to conduct any verification or accept all information. According to China, the fact that the purpose of a verification visit is to "verify information provided or to obtain further details" does not imply that an investigating authority is compelled to verify information provided or to obtain further details.[184] Moreover, China submits that Article 6.8 and Annex II of the Anti-Dumping Agreement are irrelevant to the matter at issue because MOFCOM did not make any determinations on the basis of "facts available".[185] Finally, China submits that European Union's claims concerning the SMST's questionnaire responses and verification exhibits are difficult to understand and fall short of making a *prima facie* case.[186]

7.4.3.3 Main arguments of third parties

7.4.3.3.1 Turkey

7.96. Turkey submits that "there should be no legal responsibility on side of the authority to accept or consider any newly prepared information [submitted at verification] which profoundly alters the basis of dumping calculation, namely normal value, export price and cost of production, or explanations that extensively modify the answers in the questionnaire".[187]

7.4.3.3.2 United States

7.97. The United States agrees with the European Union that an investigating authority is "not entitled to reject information on the sole ground that such information was proffered at

para. 24; second written submission, para. 49; and opening statement at the second meeting of the Panel, para. 37. See also SMST final dumping disclosure (BCI), Exhibit EU-25, p. 4; SMST comments on final dumping disclosure (BCI), Exhibit EU-28, p. 2; and final determination, Exhibits JPN-2 and EU-30, internal pages 38-39.

[179] European Union's first written submission, paras. 98 and 109; second written submission, para. 46; and response to Panel question No. 82, para. 24.

[180] European Union's first written submission, para. 103.

[181] European Union's first written submission, para. 108.

[182] China's first written submission, paras. 207-209; and response to Panel question No. 27, para. 89.

[183] China's first written submission, paras. 218-222; response to Panel question No. 26, para. 88; second written submission, para. 88; comments on the European Union's response to Panel question No. 82, para. 28; and opening statement at the second meeting of the Panel, para. 44.

[184] China's first written submission, paras. 216-222.

[185] China's first written submission, para. 227; second written submission, para. 89; and opening statement at the second meeting of the Panel, para. 46.

[186] China's first written submission, paras. 197 and 229-231.

[187] Turkey's response to Panel question No. 6.

verification".[188] Nevertheless, the United States submits that on-the-spot investigations are not opportunities for interested parties to submit a significant amount of new information.[189] According to the United States, "if a firm always could provide substantial corrections once it realized what specific information an investigating authority was verifying during an on-the-spot investigation, the effectiveness of the on-the-spot investigation would be undermined … [T]he flexibility to accept clerical corrections should not be construed such that the firm could be less motivated to prepare carefully its data submissions".[190] Finally, the United States submits that Article 6.8 and Annex II of the Anti-Dumping Agreement provide relevant context to the consideration of what information must be accepted by the investigating authority.[191]

7.4.3.4 Evaluation by the Panel

7.98. Although the European Union refers to an actual occurrence of double-counting, we understand that the European Union is rather concerned with the potential for double-counting that results from the fact that financial expenses of the headquarters were included in both table 6-6 and table 6-8.[192] We note that table 6-8 was not used by MOFCOM in its SG&A determination for Grade B in the initial investigation, because MOFCOM relied instead on table 6-3.[193] However, we understand that the European Union is concerned that, when implementing the Panel's possible findings regarding its Article 2 claims against the SGA determined by MOFCOM for Grade B, MOFCOM will rely on table 6-8, which could then result in double-counting of the relevant financial expenses, since they could be imported into the SGA amount from both table 6-6 and table 6-8. For this reason, the European Union seeks a finding by the Panel that MOFCOM committed a *procedural* error in failing to allow SMST to rectify certain information only on the basis that SMST did not raise this matter before the verification started.[194] Thus, with respect to the European Union's first set of claims, the issue before the Panel is whether MOFCOM acted inconsistently with Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's rectification only on the basis that SMST did not raise this matter before the verification started.[195]

[188] United States' third-party submission, para. 12.

[189] United States' third-party submission, para. 7; and response to Panel question No. 6, para. 17.

[190] United States' third-party submission, para. 11.

[191] United States' third-party submission, para. 9. See also United States' response to Panel question No. 6, para. 16.

[192] European Union's responses to Panel questions No. 27, paras. 97-98; and No. 28, para. 99; and second written submission, para. 47. See also China's first written submission, para. 209 ("This amount corresponds to the data in Table 6-6 … and ordinarily already includes the financial expenses of the headquarters. … [A]mount reported for financial expenses of the headquarters in Table 6-8").

[193] China's first written submission, paras. 207-208; and response to Panel question No. 27, para. 90.

[194] European Union's first written submission, para. 100 ("[T]he specific matter in dispute and placed before this Panel by the European Union is a *procedural* issue. The procedural issue is whether or not China acted inconsistently with the Anti-Dumping Agreement when, in the measure at issue, it refused to take the corrected information into account *only* on … the *narrow* procedural ground that SMST did not raise this point before the verification started."); response to Panel questions No. 26, para. 96; No. 27, para. 97; No. 29, para. 102; and No. 82, para. 24; second written submission, paras. 46 and 48-49; opening statement at the second meeting of the Panel, para. 37; and comments on China's response to Panel question No. 83, para. 3.

[195] We note that the European Union and China disagree on whether double counting of certain financial expenses has occurred. (See European Union's first written submission, para. 99; response to Panel questions No. 27, para. 97; No. 28, para. 99; and No. 29, paras. 101-102; and comments on China's response to Panel question No. 83, para. 3; and China's first written submission, para. 209; second written submission, paras. 86 and 91; opening statement at the second meeting of the Panel, paras. 44 and 49-50; and responses to Panel questions No. 27, para. 89; and No. 83, para. 7 ("[T]he absence of double-counting of financial expenses is not limited to table 6-5. There is equally no double-counting of financial expenses in any other table, given that none of the tables include the same financial expenses twice.") In light of the issue before the Panel, we need not address the question of whether financial expenses of the headquarters were double-counted.

7.99. We note that SMST's rectification request relates to tables 6-6 and 6-8.[196] It is undisputed that the detailed information concerning SG&A in tables 6-6 and 6-8 is summarized in table 6-5.[197] In our view, there is therefore a clear and direct connection between the information in tables 6-6 and 6-8, on the one hand, and the information in table 6-5, on the other hand. We also note that in MOFCOM's notification to SMST prior to verification, MOFCOM requested SMST to prepare documents relating *inter alia* to table 6-5.[198] Thus, in our view, SMST's rectification request (concerning tables 6-6 and 6-8) has a clear and direct connection to the information (concerning table 6-5) expressly requested by MOFCOM to be verified during the on-the-spot investigation. Recalling that Paragraph 7 of Annex I of the Anti-Dumping Agreement provides that "the main purpose of the on-the-spot investigation is to verify information", we consider that an investigating authority would normally welcome the rectification of information in these circumstances. On this basis, we consider that MOFCOM acted contrary to the main purpose of the on-the-spot investigation when it expressly requested SMST to prepare documents relating to table 6-5, but later rejected information which was potentially relevant to such table on the sole ground that SMST did not raise this matter before the verification started.

7.100. We agree with China that Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement "contain no obligation for an investigating authority to accept all information presented to it during the verification visit".[199] As indicated by the United States, an authority does not necessarily have to accept new information during verification.[200] Nor does it have to accept voluminous amounts of corrected information. Late in the investigation, such information probably could not be used without undue difficulties by the authority. However, we understand that the present case simply concerns the rectification of one piece of information: the financial expenses of the headquarters. There seems to be no valid reason why MOFCOM did not accept the rectified information from SMST, particularly since MOFCOM appears to have understood the matter explained by SMST concerning the financial expenses at issue (as evidenced by the verification disclosure[201]).

7.101. In light of the foregoing, we uphold the European Union's procedural claim that China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's rectification at issue only on the basis that it was not provided prior to verification.

7.102. Turning to the European Union's claims under Article 6.8 and Paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement, the European Union suggests that MOFCOM applied "facts available" when MOFCOM "relied on the erroneous and uncorrected data relating to financial expenses".[202] However, China submits that "MOFCOM did not make any determinations on the basis of 'facts available'" and that "the situation at hand simply does not fall within the scope of the Article 6.8 and Annex II of the Anti-Dumping Agreement".[203] The European Union has pointed to no evidence on the Panel record to demonstrate otherwise. In addition, we note that China submits that "MOFCOM did not rely on the SG&A reported in table 6-5 [rather] MOFCOM used the … SG&A data provided by SMST in table 6-3".[204] We recall our conclusion above that it appears there was a disagreement between MOFCOM and SMST concerning the use of tables 6-3 and 6-5 with regard to the proper SG&A amount for MOFCOM's constructed normal value.[205] Thus, we fail to see how this may be considered as a determination on the basis of "facts available". In our view, MOFCOM based its determination on evidence contained in the records, which at that time

[196] See SMST verification disclosure (BCI), Exhibit EU-23, p. 3; and SMST comments on final dumping disclosure (BCI), Exhibit EU-28, p. 2.

[197] China's first written submission, paras. 198 and 209; responses to Panel questions No. 27, para. 89; and No. 83, paras. 9-12; and second written submission, para. 91; and European Union's responses to Panel questions No. 27, para. 97; No. 29, para. 101; and second written submission, para. 50.

[198] SMST verification notification, Exhibit CHN-11, p. 3. See also China's first written submission, para. 202.

[199] China's first written submission, para. 218.

[200] United States' third-party submission, paras. 7 and 12.

[201] SMST verification disclosure, Exhibit EU-23, p. 3. (SMST "provided the relevant materials supporting that certain financial expenses were double counted".)

[202] European Union's first written submission, para. 103.

[203] China's first written submission, paras. 227-228.

[204] China's response to Panel question No. 27, para. 90. See also China's first written submission, para. 207.

[205] See para. 7.66. above.

MOFCOM considered were the correct facts submitted by SMST.[206] As MOFCOM did not apply "facts available" in making the determination at issue, we see no factual basis for the European Union's claims under Article 6.8 and Paragraphs 3 and 6 of Annex II. Thus, we reject these claims accordingly.[207]

[206] However, we recall our conclusion above that MOFCOM made an improper assumption in its determination. See para. 7.66. above.

[207] The European Union also submits that it "makes the same claim with respect to the information contained in" certain of SMST's questionnaire responses and verification exhibits. (European Union's first written submission, para. 108.) China submits that it is difficult to comprehend the European Union's claim, and that this vague "discussion" falls short of making a *prima face* case. (China's first written submission, paras. 229-231.) We note that the European Union has not further explained its claim at issue. Thus, we are unable to understand the European Union's claim with respect to these measures. Thus, we reject these claims accordingly.

7.5 MOFCOM's determination that subject imports caused material injury to the domestic industry

7.103. The complainants, Japan and the European Union, make a number of claims concerning MOFCOM's determination that dumped imports from Japan and the European Union caused material injury to the domestic industry. First, they claim that MOFCOM's consideration of the price effects of subject imports is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Second, they claim that MOFCOM's assessment of the impact of the dumped imports on the state of the domestic industry is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Third, they claim that MOFCOM's determination that there is a causal link between dumped imports and material injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[208]

7.104. China asks the Panel to reject each of the complainants' claims.

7.5.1 Whether MOFCOM's consideration of the price effects of subject imports is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.5.1.1 Introduction

7.105. The complainants submit that MOFCOM's consideration of price undercutting in respect of subject imports is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. First, the complainants contend that MOFCOM's analysis of the price effects of Grade C subject imports is analytically and factually flawed. The complainants contend in this regard that MOFCOM improperly compared the price of Grade C subject imports with the price of Grade C domestic products, despite significant differences between the quantities of imported and domestic product sold. The complainants also assert that MOFCOM improperly found price undercutting simply on the basis that the price of Grade C subject imports was less than the price of domestic Grade C products, without any consideration of evidence suggesting that Grade C subject imports did not have any price undercutting *effect* on Grade C domestic products. Second, the complainants submit that MOFCOM improperly extended its finding of price undercutting in respect of Grades B and C to the like domestic product as a whole, including Grade A.

7.5.1.2 Relevant provisions

7.106. Article 3.1 of the Anti-Dumping Agreement provides:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

7.107. Article 3.2 of the Anti-Dumping Agreement provides:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

[208] In its reply to Panel question No. 78, the European Union submitted additional BCI concerning the volume and pricing of EU exports to China during the investigation period. The European Union asserted that the additional BCI "would be of assistance to it in pursuing its injury claims". Since the European Union did not explain which particular injury claims the additional BCI related to, or how that BCI would support those claims, the Panel did not rely on that additional BCI in making its findings.

7.5.1.3 Alleged flaws in MOFCOM's consideration of price undercutting in respect of Grade C

7.5.1.3.1 The difference between the volume of Grade C subject imports and the volume of domestic Grade C products

7.5.1.3.1.1 Main arguments of the parties

***Japan and the European Union*[209]**

7.108. The complainants submit that MOFCOM improperly compared the price of imported Grade C with the price of domestic Grade C for 2009 and 2010, despite its finding that there was a "huge difference in quantity" between the volumes of imported and domestic products during these years. The complainants contend that the significant difference meant that the relevant import and domestic prices were not comparable. They assert that the price comparison undertaken by MOFCOM therefore lacked objectivity and provided no basis for establishing the existence of price undercutting, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.109. The complainants observe that the Appellate Body in *China – GOES* stated that "an investigating authority's consideration under Article[] 3.2 … must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed considered such factors".[210] The complainants submit that MOFCOM failed to explain how it considered that these import and domestic prices could properly be considered comparable, despite the significant difference in quantity. The complainants contend that it was therefore impossible to verify how MOFCOM considered the existence of price undercutting in respect of Grade C, with the result that its consideration of that matter is inconsistent with Article 3.2 of the Anti-Dumping Agreement.

China

7.110. China contends that the methodology adopted by MOFCOM to take into account the quantity differences in respect of Grade C was clearly set out in the Final Determination and other documents. China submits that the complainants' claims thus lack any factual basis.[211] China further asserts that there is no legal basis in Articles 3.1 or 3.2 for any claim that MOFCOM failed to explain how it accounted for the relevant differences. China contends that there is no obligation to explain in Articles 3.1 or 3.2. China contends that the obligation to explain is rather found in procedural provisions of the Anti-Dumping Agreement, such as Article 12.2.2. China contends that the complainants' reliance on the finding of the Appellate Body in *China – GOES* is inapposite, since that finding only means that the fact that the authority has considered price effects needs to be reflected in the relevant documentation.[212] China explains that the complainants limit themselves to alleging that MOFCOM provided no explanation of the methodology followed, but notes that, in any event, MOFCOM had discretion regarding the methodology to follow in taking into account the quantitative difference, and asserts that MOFCOM applied its methodology in an objective way.[213] In addition, China maintains that MOFCOM ensured that Grade C subject import prices could properly be compared with Grade C domestic prices, without any risk of price distortions resulting from the relevant quantitative difference.[214] China contends that, under Article 3.2, the relevant element of a price effects consideration is the perception by the market[215], and that quantitative differences between the total import volume and the total domestic sales do

[209] The complainants' first written submissions are virtually identical in respect of their claims against MOFCOM's injury determination. Accordingly, we generally do not consider it necessary to distinguish between the complainants when summarizing their main arguments in support of these claims.

[210] Appellate Body Report, *China – GOES*, para. 131; Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.253. (emphasis omitted)

[211] China's first written submission, paras. 268-272.

[212] China's first written submission, para. 274.

[213] China's first written submission, para. 277. See also China's reply to Panel question No. 33, para. 104.

[214] China's reply to Panel question No. 33, para. 103.

[215] China's second written submission, para. 132.

not "have a perceived importance to customers" (while a quantitative difference may impact costs, which could mandate an adjustment in a dumping determination).[216]

7.5.1.3.1.2 Evaluation by the Panel

7.111. We begin by addressing China's argument that the complainants' claims lack any basis in law.[217] According to China, the complainants' claims concern the alleged failure by MOFCOM to explain its treatment of the difference in quantities, rather than the substance of how MOFCOM actually addressed that difference with a view to ensuring price comparability. China submits that there is no obligation to explain in Articles 3.1 or 3.2 of the Anti-Dumping Agreement.

7.112. We are not persuaded by China's understanding of the scope of the complainants' claims. We acknowledge that the complainants did refer in their first written submissions[218] to the Appellate Body's finding in *China – GOES* that "an investigating authority's consideration under Article[] 3.2 … must be reflected in relevant documentation …".[219] However, we do not understand the complainants' claim to principally concern merely whether or not MOFCOM adequately explained its treatment of the difference in quantity between imports and domestic sales of Grade C. Rather, we understand their claim to concern whether MOFCOM's determination in this regard was, as explained, consistent with the requirements of Article 3.2. We note that the heading of the relevant sub-section in the European Union's first written submission reads "China's analysis of price-undercutting with respect to Grade C is flawed".[220] The relevant heading in Japan's first written submission reads "MOFCOM's analysis of the price effects of imported Grade C is analytically and factually flawed".[221] At paragraph 85 of its oral statement at the Panel's first substantive meeting with the parties, the European Union asserted that the limited number of domestic Grade C transactions provided "an unreliable basis for any price undercutting conclusions". For its part, Japan asserted that "[w]ithout a meaningful quantity of both import and domestic sales for a given product, it is difficult to see how any objective price undercutting conclusion could be reached with respect to that product".[222] In its oral statement at the first substantive meeting, Japan stated that "the trivial quantity of domestic sales of [Grade] C in both 2009 and 2010 should indicate that those domestic sales may have been one-off outlier transactions made for any variety of reasons, and therefore not comparable with such a large quantity of imports sales of [Grade] C …".[223] In light of these considerations, we understand the complainants' claim to concern the substantive issue of comparability, to which we now turn.

7.113. Although investigating authorities have discretion in how they consider price effects in the context of Article 3.2, this discretion is not unlimited. Given the overarching requirements of Article 3.1, an investigating authority's price effects analysis must involve an "objective examination", and must be based on "positive evidence". This means *inter alia* that, whenever an investigating authority's consideration of the price effects of imports involves a comparison between imported and domestic prices, the authority must ensure that such prices are comparable.[224] In the words of the *China – GOES* panel, "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue".[225] China has not expressly denied this. China acknowledges that MOFCOM verified whether such quantitative difference might "preclude[] a meaningful price effect consideration".[226] In addition, MOFCOM referred to "the huge difference in quantity", and stated that such difference "should be taken into consideration when making [the] price comparison".[227] We similarly consider that significant differences in quantities are likely

[216] China's reply to Panel question No. 33, para. 105.
[217] China's first written submission, para. 273.
[218] Japan's first written submission, para. 132. The European Union's first written submission, para. 229.
[219] Appellate Body Report, *China – GOES*, para. 131. (emphasis omitted)
[220] European Union's first written submission, section VIII.B.1.
[221] Japan's first written submission, section V.A.1.b.i.
[222] Japan's oral statement at the first substantive meeting with the parties, para. 73.
[223] Japan's oral statement at the first substantive meeting with the parties, para. 73.
[224] Appellate Body Report, *China – GOES*, para. 200.
[225] Panel Report, *China – GOES*, para. 7.530, upheld in Appellate Body Report, *China – GOES*, para. 200.
[226] China's first written submission, para. 262.
[227] Final Determination, Exhibit JPN-02, page 51. Translation amended by Exhibit CHN-16. In the absence of any objection by the complainants to the amended translation proposed by China, we proceed on the basis of that amended translation.

to have an impact on comparability, and thus, if there are such differences, they must be looked into in considering price effects.[228]

7.114. China submits that MOFCOM properly ensured price comparability, notwithstanding the volume difference at issue, by ascertaining that "the difference was similar" in both 2009 and 2010".[229] According to China, this provided the basis for MOFCOM to proceed with its price comparison "without risking the distortion of any considerations by the quantitative differences".[230] In this regard, we note that MOFCOM did find that "there was a similar quantitative difference" between the volume of Grade C imports and the volume of Grade C domestic sales for both 2009 and 2010.[231] However, there is no explanation by MOFCOM of how this fact is relevant to ensuring price comparability in light of the differences in quantities. Nor is there any explanation of how this fact eliminates the risk of distortion, as suggested by China. The risk of a distorted price comparison results from the fact that there is a significant difference between the volumes of the products whose prices are being compared, which may have an effect on their prices. The fact that such a difference remains constant over a period of time does not address the possible distortion of the comparison. It simply means that if there is any distortion, it continues for that period. Accordingly, in the absence of additional explanation or clarification by MOFCOM, we are not persuaded that MOFCOM properly established that, notwithstanding the significant difference between the quantities of Grade C imports and the quantity of Grade C domestic sales, the prices of imports and domestic product were comparable for the purpose of considering price undercutting by imports of Grade C.

7.115. For the above reasons, we uphold the complainants' claims that MOFCOM's failure to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.5.1.3.2 Whether Grade C subject imports had any price undercutting effect on domestic Grade C products

7.5.1.3.2.1 Main arguments of the parties

Japan and the European Union

7.116. The complainants submit that a determination that price "undercutting" exists cannot be based solely on the existence of a mathematical difference between import and domestic prices. They submit that, pursuant to Article 3.2, an investigating authority must also consider whether any price difference enabled subject imports to have a price undercutting effect on domestic prices.

7.117. The complainants contend that their position is based on: the text of Article 3.2, including the phrase "the effect of the dumped imports on prices" and relevant definitions of the term "undercutting"; its context, including Articles 3.1 ("the effect of the dumped imports on prices in the domestic market for like products") and 3.5 ("the effects of dumping, as set forth in paragraphs 2 and 4"); the purpose of Article 3 (to ensure that anti-dumping measures are imposed only where dumped imports are found to be causing injury through a "logical progression" of inquiry); and previous panel and Appellate Body reports.[232] Concerning dictionary definitions of the term "undercut", the complainants suggest that the relevant definitions of "undercut" are: "[t]o supplant … by selling at lower prices" or "[t]o render unstable; to render less firm, to undermine".[233] According to the complainants, these definitions indicate that, for a proper price

[228] Contextual guidance on this matter is afforded by Article 2.4 of the Anti-Dumping Agreement, which provides that due allowance shall be made, on its merits, for "differences which affect price comparability, including differences in … quantities". We observe that the Appellate Body referred to Article 2.4 when confirming the panel's finding in *China – GOES* that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue" (Appellate Body Report, *China – GOES*, para. 200, footnote 331, referring to Panel Report, para. 7.530).

[229] China's reply to Panel question No. 33, para. 103.

[230] China's reply to Panel question No. 33, para. 103.

[231] Final Determination, Exhibit JPN-02, pp. 53 and 54.

[232] Japan's second written submission, paras. 17-28. European Union's oral statement at the first substantive meeting, paras. 57-84, and reply to Panel question No. 31.

[233] *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 18 March 2014.

"undercutting" finding to be made, the mere fact that the import price is lower than the domestic price does not suffice. They submit that an investigating authority must also show that dumped imports replaced domestic like products and thereby resulted in a loss of domestic sales volumes, or at least placed downward pressure on domestic prices. Concerning precedent, the complainants refer in particular to the finding by the Appellate Body in *China – GOES* that Article 3.2 requires the investigating authority to consider "domestic prices in conjunction with subject imports", or "the relationship between subject imports and prices of like domestic products", to determine whether dumped imports provide "explanatory force" for the occurrence of effects on the prices of the domestic like product.[234] The European Union relies on the Appellate Body's findings to argue that an investigating authority is required to consider whether a first variable – that is, a price differential *per se* – has explanatory force for the occurrence of a second variable – that is, price undercutting.

7.118. The complainants contend that there was no basis for MOFCOM to conclude that Grade C subject imports had a price undercutting effect on domestic Grade C products, because subject import prices remained higher than domestic prices until the latter increased by 112.80%. The complainants observe in this regard that, according to MOFCOM's own analysis, in 2010 the price of the domestic Grade C *increased* by 112.80% from 2009, while the price of the subject imports of the same grade *decreased* by 36.32%. The complainants assert that the dynamic relationship of the prices of *both* imported and domestic products shows that subject imports of Product C did not have a significant undercutting effect on the prices of the corresponding like domestic products. The complainants assert that MOFCOM failed to take account of the increase in domestic price of Grade C in its price undercutting consideration. The complainants also assert that the vast difference in import and domestic price levels and the inverse price movements suggest that the domestic sales of Grade C were not in competition with imports of Product C during the POI in the Chinese market. They refer to record evidence showing that domestic importers unanimously considered the subject imports and domestic like products not to be substitutable.[235] The complainants assert that, in these circumstances, there was no basis for MOFCOM to conclude that subject imports of Grade C drove down domestic Grade C prices, or otherwise caused any tangible decrease, or prevented any increase, in domestic Grade C prices.[236]

China

7.119. China considers that Article 3.2 allows an investigating authority to "presume conclusively" that there is price undercutting within the meaning of Article 3.2 whenever dumped import prices are below comparable domestic prices.[237] According to China, no additional "effect" consideration is required since price undercutting is in itself an effect. China asserts that the complainants only refer to one of the definitions of the term "undercut" given in the Oxford English Dictionary. China notes that the dictionary also defines the term "undercut" as meaning to "sell at lower prices than".[238] Further, China contends that if an investigating authority were required by Article 3.2 to show that a price differential had the effect of depressing or suppressing domestic prices, the Article 3.2 distinction between price undercutting on the one hand, and price depression and price suppression on the other, would be undermined.

7.120. China also submits that MOFCOM properly found, in the context of its like product determination, that Grade C imports and Grade C domestic products are substitutable, and do compete with one another.[239] China contends that MOFCOM properly found that domestically produced Grade C is "like" imported Grade C. In this respect, China considers that a likeness finding does not necessarily imply that all domestic products within the basket of "like products" are "like" all imported products. However, China considers that such finding does imply a "likeness" between the domestic product type that was explicitly found to be "like" the

[234] The European Union refers to Appellate Body Report, *China – GOES*, para. 138.
[235] *See* Minmetals Questionnaire Response, Exhibit JPN-13, questions 19, 22, 31; Shanghai Boiler Works Questionnaire Response, Exhibit JPN-14, questions 19, 22, 31; Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, questions 19, 22, 31; Shanghai Foreign Trade Questionnaire Response, Exhibit JPN-16, questions 19, 22, 31; Harbin Boiler Questionnaire Response, Exhibit JPN-17, questions 19, 22, 31.
[236] Japan's second written submission, para. 37, European Union's second written submission, para. 170.
[237] China's second written submission, para. 120.
[238] China's reply to Panel question No. 47, para. 158.
[239] China's second written submission, paras. 92-115.

corresponding product type of the product under consideration.[240] China asserts that such determination of likeness inevitably implies that there is a competitive relationship between imported Grade C and domestically produced Grade C[241], relying on the Appellate Body's findings in previous disputes.[242] China contends that because the complainants have not challenged MOFCOM's likeness determination under Article 2.6 of the Anti-Dumping Agreement, they are precluded from challenging the existence of competition between Grade C subject imports and Grade C domestic products in the context of Articles 3.1 and 3.2.

7.5.1.3.2.2 Evaluation by the Panel

7.121. The main issue raised by the complainants' claims is whether MOFCOM was precluded by Articles 3.1 and 3.2 of the Anti-Dumping Agreement from finding price undercutting purely on the basis that the price of imported Grade C was lower than the price of domestic Grade C, or whether MOFCOM was required by Article 3.2 to consider if Grade C subject imports had a price undercutting effect on the price of domestic Grade C, in the sense of placing downward pressure on those domestic prices by being sold at lower prices.

7.122. Article 3.1 of the Anti-Dumping Agreement sets forth an overarching requirement that a determination of injury shall involve *inter alia* an objective examination of "the effect of the dumped imports on prices in the domestic market for like products". In respect of price undercutting, Article 3.2 provides that "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member".

7.123. We note that the complainants rely on the Appellate Body's discussion of Article 3.2 in *China – GOES* to argue that dumped imports must be shown to have "explanatory force" for the price undercutting effect on domestic like products.[243] The complainants refer in particular to paragraphs 135 and 136 of the Appellate Body's report in this regard. Since we shall refer to those Appellate Body findings to guide us in our own interpretation of Article 3.2 of the Anti-Dumping Agreement, we reproduce them here:

> 135. The definition of the word "effect" is, *inter alia*, "something accomplished, caused, or produced; a result, a consequence". The definition of this word thus implies that an "effect" is "a result" of something else. Although the word "effect" could be used independently of the factors that produced it, this is not the case in Articles 3.2 and 15.2. Rather, these provisions postulate certain inquiries as to the "effect" of subject imports on domestic prices, and each inquiry links the subject imports with the prices of the like domestic products.
>
> 136. First, an investigating authority must consider "whether there has been a significant price undercutting *by the* [*dumped or subsidized*] *imports as compared with* the price of a like product of the importing Member". Thus, with regard to significant price undercutting, Articles 3.2 and 15.2 expressly establish a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two. Second, an investigating authority is required to consider "*whether the effect of such* [*dumped or subsidized*] *imports*" on the prices of the like domestic products is to depress or suppress such prices to a significant degree. By asking the question "*whether the effect of*" *the subject imports is* significant price depression or suppression, the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports. Moreover, the syntactic relation expressed by the terms "*to* depress prices" and "[*to*] prevent price increases" is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into

[240] China's first written submission, para. 302.
[241] China's second written submission, para. 94.
[242] China's first written submission, paras. 307-308.
[243] Japan's reply to Panel question No. 31, para. 19. European Union's oral statement at the first substantive meeting, paras. 67-77.

> the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.[244]

7.124. We understand the Appellate Body to have considered that, with regard to price effects generally, Article 3.2 of the Anti-Dumping Agreement is concerned with considering the relationship between subject imports and the price of like domestic products. In respect of price depression or price suppression, the Appellate Body explained that such a relationship is addressed when the investigating authority considers whether the first variable, subject imports, has "explanatory force" for the second variable, domestic prices. In respect of price undercutting, however, the Appellate Body observed that Article 3.2 establishes a "link" (i.e. relationship) between the price of subject imports and that of like domestic products by "requiring that a comparison be made between the two". The Appellate Body referred simply to a comparison between subject import prices and domestic prices. There is no suggestion by the Appellate Body that, in respect of price undercutting, one variable must be shown to have "explanatory force" for the second. Indeed, although the Appellate Body repeated the phrase "explanatory force" numerous times in its findings, at no time did it do so when addressing the requirements of Article 3.2 in respect of price undercutting. This is consistent with the Appellate Body's express statement that, because the two inquiries provided for in the second sentence of Article 3.2 are separated by the words "or" and "otherwise", "the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression or suppression".[245]

7.125. In our view, the Appellate Body's approach is entirely consistent with the text of Article 3.2. The second sentence of Article 3.2 begins "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities **shall consider whether there has been** a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member" (emphasis supplied). The text therefore suggests that the consideration of whether there "has been" a significant price undercutting provides the requisite insight "regard[ing] … the effect of the dumped imports on prices", that is, whether as a matter of fact, "undercutting" existed during the POI. The text of Article 3.2 envisages that the existence of price undercutting (i.e. whether there "has been" price undercutting) should be established on the basis of a comparison of subject import prices and domestic prices.

7.126. With regard to price depression and price suppression, by contrast, the text of Article 3.2 requires more than a simple comparison of the prices of two products. In this context, investigating authorities are required to consider whether one variable, namely subject imports, has "the effect of" depressing or suppressing a second variable, namely the domestic price ("whether **the effect of such imports** is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree") (emphasis supplied). As observed by the Appellate Body, "[b]y asking the question '*whether the effect of' the subject imports is* significant price depression or suppression, the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports".[246] It is this analysis that provides the relevant insight into the relationship between subject import and domestic prices, by revealing whether the first variable has "explanatory force for" the second variable. However, as noted above, the text of Article 3.2 does not require that authorities consider whether one variable has any particular effect on, or "explanatory force for", the second variable in the context of price undercutting. The relevant relationship between the prices of the two products with respect to price undercutting is the factual question of which is higher and which is lower. The Article 3.2 phrase "whether the effect of" applies only in respect of price depression or suppression. The text of Article 3.2 does not refer to "whether the effect of subject imports is price undercutting". Rather, it refers simply to whether or not "there has been" price undercutting. This is a simple factual issue - is there price undercutting or not? – which can be answered, as Article 3.2 suggests, by a comparison of prices for domestic and imported product. The text of Article 3.2 envisages that the existence of price undercutting itself provides the requisite insight into the effect of the dumped imports (and the relationship of subject import prices with domestic prices). It is such "effect[] of dumping as set

[244] Appellate Body Report, *China – GOES*, paras. 135 and 136. (emphasis original) (footnotes omitted)
[245] Appellate Body Report, *China – GOES*, para. 137.
[246] Emphasis in original.

forth in paragraph[] 2" – that is, the effect of any price undercutting found, which must then be considered, pursuant to the first sentence of Article 3.5 of the Anti-Dumping Agreement, in determining whether the requisite causal link exists.

7.127. We note that the complainants find support for their interpretation of Article 3.2 in the dictionary definition of the word "undercut" as meaning "to supplant … by selling at lower prices". According to Japan, this means that an investigating authority must show that dumped imports are having the effect of taking the place of domestic like products by selling at lower prices, or of depressing domestic prices. Japan contends that the word "undercut" may also mean: "To render unstable; to render less firm, to undermine".[247] According to Japan, this suggests that, even if subject imports are not replacing domestic like products and thereby resulting in a loss of domestic sales volumes, subject imports must still have the *effect* of rendering domestic prices less firm – that is, placing downward pressure on domestic prices – in order for a finding of "price undercutting" to be made. As a result, Japan asserts that an investigating authority must consider whether the effect of dumped imports was such that the observed differential between import and domestic prices may be considered to have given rise to an actual decrease or prevention of increase in prices in the domestic market for like products.[248] The European Union similarly relies on the dictionary definitions advanced by Japan to argue that subject imports of Grade C did not drive down domestic Grade C prices, or prevent any increase in those prices.[249]

7.128. We accept that the complainants have referred to recognized dictionary definitions of the term "undercut". However, other recognized dictionary definitions also exist. In particular, the term "undercut" is also defined, very simply, as to "sell at lower prices than".[250] In the context of Article 3.2, we see no reason why the term "undercut" should necessarily be interpreted in the particular manner proposed by the complainants. Since there is no reference to the notion of "supplanting" or "render[ing] unstable" in the text or context of Article 3.2, we see no reason why an investigating authority should not adopt a more simple definition, and simply consider whether subject imports "sell at lower prices than" comparable domestic products.

7.129. Furthermore, if an authority were required to show that price undercutting by imports had the effect of depressing or suppressing prices, as suggested by the complainants, this would duplicate the other price effects considerations provided for in Article 3.2. The fact that Article 3.2 identifies three distinct price effects, and distinguishes between price undercutting on the one hand, and price depression and price suppression on the other, suggests that there is no need to establish price depression or suppression when considering the existence of price undercutting, or indeed, vice versa. Moreover, we see nothing in the text of Article 3.2 that would suggest that the fact that import prices are lower than domestic prices may be disregarded unless the investigating authority determined that, as a consequence of such lower import prices, the domestic industry has lost sales, as suggested by the complainants' arguments.[251] While price undercutting by imports may lead to lost domestic sales, or price depression or price suppression, there is no requirement in Article 3.2 to demonstrate the existence of these other phenomena when considering the existence of price undercutting.

[247] *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 30 January 2014.
[248] Japan's second written submission, para. 21.
[249] European Union's second written submission, para. 170.
[250] Shorter Oxford English Dictionary.
[251] Regarding the notion of dumped imports having the effect of taking the place of domestic like products by selling at lower prices, we observe that Article 6.3(c) of the SCM Agreement refers separately to price undercutting, price depression, price suppression and "lost sales". This provision strongly suggests, therefore, that the phenomenon of lost sales is distinct from price undercutting. We also note Japan's argument that the issue of whether the price differential is an effect of subject import prices could require additional consideration of: "the competitive relationship between the dumped imports and the domestic like products, the degree of competition, exogenous factors that may explain the price differential, domestic prices in the hypothetical situation of fairly priced imports, the magnitude of the margins of dumping, and the extent of the price differential between the dumped imports and the domestic like products" (Japan's Replies to Panel questions Nos. 31 and 32, paras. 23-26 and 30). This is a highly detailed analysis that is not envisaged by the plain language of Article 3.2, which refers simply to a comparison of two price variables. While such an analysis may be necessary in considering the question of causal link, that is, whether any price undercutting found has the effect of causing injury, that inquiry is guided by Article 3.5, and not Article 3.2.

7.130. For the above reasons, we reject the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices.[252]

7.5.1.4 Whether MOFCOM improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole

7.5.1.4.1 Main arguments of the parties

Japan and the European Union

7.131. The complainants submit that MOFCOM erroneously extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A products. The complainants contend that MOFCOM thereby acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.132. The complainants[253] contend that, although MOFCOM only found price undercutting by subject imports of Grades B and C, MOFCOM made a more general determination that "[t]he imports of the subject products had a relatively [noticeable/significant] price undercutting effect on the price of domestic like products".[254] The complainants understand that MOFCOM's reference to "the price of domestic like products" means that MOFCOM determined that subject imports had a price undercutting effect on the domestic like product as a whole, including domestic Grade A. According to the complainants, MOFCOM's extension of its price undercutting findings with respect to Grades B and C to the domestic like product as a whole is erroneous, since MOFCOM found no price undercutting in respect of Grade A (because of an absence of Grade A subject imports). The complainants assert that MOFCOM could only have made such a general finding regarding the domestic like product as a whole if it had examined whether subject imports of Grades B and/or C had any price effect on domestic Grade A. The complainants observe that MOFCOM failed to undertake any such cross-grade analysis. The complainants assert that there was no record evidence suggesting that subject imports of Grades B and C had any price undercutting effect on the domestic Grade A.

7.133. The complainants also contend that MOFCOM's analysis runs counter to the Article 3.2 requirement that the investigating authority consider whether there has been a "significant" price undercutting.[255] The complainants assert that the majority of domestic production was of Grade A. According to the complainants, the fact that China found some price undercutting limited to a minority industry sector (Grades B and C) that does not actually compete with other sectors (Grade A) means that the price undercutting found to exist is not "significant" within the meaning of Article 3.2 of the Anti-Dumping Agreement.

China

7.134. China[256] denies that MOFCOM was under an obligation to make any finding of price undercutting in respect of the domestic like product as a whole, including domestic Grade A. China asserts that MOFCOM's methodology was not specifically directed at considering whether or not the price undercutting by all dumped imports – i.e. Grade B and C subject imports - concerned

[252] As a result, there is no need for us to consider the parties' arguments regarding the competitive relationship between subject imports and domestic products of that grade.

[253] Japan's first written submission, paras. 140-151. European Union's first written submission, paras. 235-246.

[254] Final Determination, Exhibit JPN-02, page 54. The square brackets indicate a disagreement between the parties as to the precise manner in which MOFCOM's determination should be translated. It is not necessary for us to resolve this disagreement for the purpose of evaluating the complainants' claims.

[255] Japan's first written submission, paras. 152 and 153. European Union's first written submission, paras. 247 and 248.

[256] China's first written submission, paras. 337-346. China asserts at para. 346 of its first written submission that Article 3.2 of the Anti-Dumping Agreement did not require MOFCOM to consider whether or not domestic prices of Grade A were being undercut, and that MOFCOM's consideration of the absence of price undercutting by the dumped imports of Grade A does not imply that the domestic prices of Grade A were not being undercut.

each and every single like product or, in other words, the like product as a whole.[257] China submits that no such finding was required by Article 3.2.[258] China contends that MOFCOM complied with Article 3.2 by comparing the prices of the product grades that were actually imported (i.e. Grades B and C) with the prices of the corresponding domestic product grade. China notes that Article 3.2 provides for the price of the imported product to be compared to the price of "*a* like product". China contends that the use of the indefinite article ("a") means that Article 3.2 does not require consideration of price undercutting in respect of the domestic like product as a whole.

7.135. In the event that the Panel were to find that Article 3.2 required MOFCOM to find price undercutting effects in respect of the domestic like product as a whole, China asserts that MOFCOM properly found price correlation between the three product grades at issue. In this respect, China asserts that in its findings concerning the scope of the product under investigation, MOFCOM found that the imports (mainly consisting of high-end Grades B and C) could also impact the domestic products (mainly consisting of low-end Grade A). China contends that MOFCOM's finding took into account the price correlation between the different grades (imported grades and domestically produced grades). China asserts that such finding of cross-grade price correlation was justified because the price correlation is a clear consequence of the ability of subject imports of the high-end grades (Grades B and C) to substitute for the low-end grade (Grade A).[259] China refers to evidence on the record in this regard.[260]

7.5.1.4.2 Evaluation by the Panel

7.136. The complainants submit that MOFCOM improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A, in a manner inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In our view, the complainants' claim is based on an erroneous understanding of the scope of the determination made by MOFCOM.

7.137. We observe that MOFCOM initially found that "the adjusted import prices of the subject products were higher than the sales prices of the domestic like products".[261] Because of price differences between the three grades of HP-SSST at issue, MOFCOM then conducted grade-by-grade price comparisons. MOFCOM found price undercutting in respect of Grades B and C. MOFCOM did not make any finding of price undercutting in respect of Grade A, because this product was only imported in 2008, in very small quantities. MOFCOM did not conduct any cross-grade price analysis. After finding price undercutting in respect of Grades B and C, MOFCOM determined that "[t]he imports of the subject products had a relatively [noticeable/significant] price undercutting effect on the price of domestic like products".[262] While MOFCOM might have expressed itself more clearly, we consider that, in the context of MOFCOM's determination, it is clear that MOFCOM was only referring to price undercutting in respect of certain grades of the domestic like product, namely Grades B and C. This is because MOFCOM's preceding analysis only found price undercutting in respect of those grades. We see no basis to conclude that MOFCOM also purported to find price undercutting in respect of Grade A, particularly since MOFCOM expressly ruled out any such finding on the basis of the limited volume of Grade A subject imports, and because of the absence of any cross-grade price analysis.[263]

7.138. It may be that the complainants' misunderstanding of the scope of MOFCOM's determination derives from their view that Article 3.2 required MOFCOM to "reach a price effects finding with respect to the product as a whole".[264] This view leads the complainants to assert that MOFCOM "erroneously applied its findings with respect to a *minority* sector of domestic production to the domestic HP-SSST industry as a whole, despite the fact that, according to MOFCOM's own conclusions, the *vast majority* of domestic production was not subject to price undercutting by

[257] China's oral statement at the second substantive meeting, para. 5.
[258] China's first written submission, para. 320.
[259] China's second written submission, paras. 141-142.
[260] China's second written submission, paras. 143 and 147-150, and China's reply to Panel question No. 92, paras. 16 and 18.
[261] Final Determination, Exhibit JPN-02, page 53.
[262] Final Determination, Exhibit JPN-02, page 54. The square brackets indicate a disagreement between the parties as to the precise manner in which MOFCOM's determination should be translated. It is not necessary for us to resolve this disagreement for the purpose of evaluating the complainants' claims.
[263] Final Determination, Exhibit JPN-02, page 53.
[264] Japan's first written submission, para. 146. European Union's first written submission, para. 241.

subject imports".[265] To the extent that the complainants' claim is concerned with MOFCOM's alleged extension of the Grade B and C price undercutting *effect* to the domestic like product as a whole[266], we have already explained that Articles 3.1 and 3.2 do not, in our view, require an investigating authority to consider whether subject imports had a price undercutting effect in the manner suggested by the complainants.

7.139. Nor do we consider that MOFCOM was required by Articles 3.1 and 3.2 to find price undercutting in respect of the domestic like product *as a whole*. In our view, when an investigating authority considers the existence of price undercutting for the purpose of Article 3.2, that authority need only consider the existence of price undercutting in respect of the subject imports at issue. Where those imports are of different grades, it is in our view appropriate to consider price undercutting with respect to the comparable domestic grades. Our view is consistent with the text of both Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Thus, Article 3.1 refers to the "effect of *the* dumped imports on prices in the domestic market for like products". While we consider that the reference to "the" dumped imports means the totality of such dumped imports, we observe that the definite article is not used before the phrase "like products". If Article 3.1 had been intended to require an analysis of the effect of (all) subject imports on the prices of the domestic like products as a whole, the drafters would have referred to the need to consider the effect of the subject imports on prices in the domestic market for "the" like products. They did not do so. The text refers simply to "prices in the domestic market for like products".

7.140. Furthermore, the second sentence of Article 3.2 refers to price undercutting being established on the basis of a comparison of subject import prices with "the price of *a* like product" of the importing Member. Article 3.2 therefore uses the indefinite article in respect of the domestic like product, and does not refer to any obligation to compare subject import prices with the prices of *all* domestic like products, or *the* domestic like product as a whole. By contrast, Article 3.2 (like Article 3.1) does envisage consideration of price undercutting in respect of "the" dumped imports as a whole.

7.141. We note the complainants'[267] argument that Article 3.1 refers to "the effect of the dumped imports on prices in *the* domestic market for like products".[268] According to them, the use of the definite article "the" in conjunction with "domestic market for like products" is necessarily a reference to the entire domestic market and therefore the like product as a whole. We disagree. We see nothing in Article 3.1 to suggest that the existence of price undercutting must be considered in respect of the entire range of the like product in the domestic market of the importing Member. Rather, Article 3.1 admits of an interpretation whereby an authority considers the effect of subject import prices on prices for *certain goods* within the like product in the domestic market. The reference to "the" domestic market simply means that prices in the domestic market should be used, rather than those in any other market. We note in this context that there can be one domestic like product, or more than one domestic like product, corresponding to the imports subject to an anti-dumping investigation. Thus, while the text leaves open the possibility of more than one like product, it does not, in our view, establish that price undercutting must be found with respect to the entire range of goods making up the domestic like product(s).[269]

7.142. Regarding the complainants' argument that MOFCOM improperly found the relevant price undercutting to be "significant", given that the majority[270] of domestic production (of Grade A products) was unaffected by such price undercutting, we note that this argument is again

[265] Japan's first written submission, para. 149. European Union's first written submission, para. 244.

[266] See, for example, Japan's oral statement at the first substantive meeting, paras. 51 and 52.

[267] Japan's second written submission, para. 26. European Union's oral statement at the first substantive meeting, para. 99.

[268] Emphasis added.

[269] Of course, if price undercutting is found with respect to only part of the domestic like product, this would have to be taken into account in determining whether the dumped imports are, through the undercutting, causing injury, pursuant to Article 3.5.

[270] The complainants estimate that only about 20% of domestic production concerned Grade B or C products, with the remaining +/-80% concerning Grade A products (Japan's first written submission, para. 148, European Union's first written submission, para. 243). China challenges the accuracy of Japan's estimates, but does not provide the actual numbers. We do not consider it necessary to examine this discrepancy in any detail, since China in any event acknowledges that "the majority" of domestic HP-SSST production related to Grade A (China's comments on Japan's reply to Panel question No. 84, para. 31).

premised on the complainants' flawed understanding that MOFCOM was required by Article 3.2 to establish that subject imports had a price undercutting effect in respect of the domestic like product *as a whole*, including domestic Grade A. Furthermore, we observe that the panel in *United States – Upland Cotton*[271] found that "it is the degree of price suppression or depression itself that must be 'significant' (i.e. important, notable or consequential)", and that "it may be relevant to look at the degree of the price suppression or depression *in the context of the prices that have been affected* – that is, at the *degree* of significance of suppression or depression".[272] We agree with this finding, and consider that the significance of price undercutting by subject imports of Grades B and C should be assessed in relation to the price of domestically produced Grades B and C, and not in relation to other factors such as the proportion of domestic production for which no price undercutting was found. Furthermore, we recall that price undercutting must be established on the basis of a comparison of the prices of comparable goods. As a result, there may well be domestic product models or grades for which no price undercutting is established. This fact is merely a consequence of only comparing the prices of comparable goods and should not preclude a finding of "significant" price undercutting.[273]

7.143. In light of the above, we reject the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by improperly extending its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A.

7.5.1.5 Conclusion

7.144. We uphold the complainants' claims that MOFCOM's failure to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. We reject the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C. We also reject the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by improperly extending its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A.

7.5.2 Whether MOFCOM's assessment of the impact of dumped imports on the state of the domestic industry is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.5.2.1 Introduction

7.145. The complainants submit that MOFCOM's evaluation of the impact of subject imports on the state of the domestic industry falls short of an objective examination, based on positive evidence. The complainants pursue three claims. First, they claim that MOFCOM improperly considered the impact of subject imports on the domestic industry as a whole, in respect of all three product grades, even though it had only found price effects in respect of Grades B and C. The complainants submit that MOFCOM should rather have undertaken a segmented impact analysis, focusing on those segments of the domestic industry producing Grades B and C. Second, the complainants claim that MOFCOM failed to evaluate the magnitude of the margin of dumping. Third, they claim that MOFCOM disregarded the relevant economic factors and indices showing that the domestic industry was not injured.[274]

7.146. China asks the Panel to reject the complainants' claims.

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[271] Panel Report, *United States – Upland Cotton*, para. 7.1325.

[272] Panel Report, *United States – Upland Cotton*, para. 7.1328, emphasis supplied.

[273] Of course, as noted above, this fact may become relevant in the consideration of causation of injury, pursuant to Article 3.5 of the Anti-Dumping Agreement.

[274] At para. 159 of its first written submission, Japan also includes a fourth claim that MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry. We decline to make any findings in respect of this additional claim, since it was not included in Japan's Request for Establishment (Document WT/DS454/4), and therefore falls outside the Panel's terms of reference.

7.5.2.2 Relevant provisions

7.147. The text of Article 3.1 is set forth above. Article 3.4 provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.5.2.3 Whether MOFCOM should have undertaken a segmented analysis of the impact of dumped imports

7.5.2.3.1 Main arguments of the parties

7.5.2.3.1.1 Japan and the European Union

7.148. The complainants submit that MOFCOM's Article 3.4 impact analysis was at odds with and did not follow from its Article 3.2 volume and price effects analyses. This is because MOFCOM assessed the impact of subject imports as a whole on the domestic industry as a whole, even though it had found no significant increase in the volume of subject imports, and had allegedly found price effects with respect to Grades B and C only.[275] The complainants assert that, having found no significant increase in volume whatsoever and price undercutting effects with respect to only Grades B and C, to ensure a logical progression of inquiry, MOFCOM should have proceeded to analyse the impact of subject imports only on the segment of the domestic industry producing Grades B and C. While the complainants acknowledge that the impact of dumped imports should be examined on the domestic industry as a whole, they suggest that such examination should be premised on the fact that the segments of the domestic industry producing certain like products with respect to which no volume or price effects have been found could not have been impacted by the dumped imports. The complainants refer in this regard to the finding by the Appellate Body in *China – GOES* that Article 3.4 "contemplate[s] that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination".[276] They also note the Appellate Body's finding that Article 3.4 is concerned not just with the state of the domestic industry in isolation, but rather with "the relationship between subject imports and the state of the domestic industry" – that is, with "the explanatory force of subject imports for the state of the domestic industry".[277] The complainants contend that the domestic industry segments producing Grade A products should have been excluded from the Article 3.4 impact analysis. According to Japan, MOFCOM's earlier conclusions with respect to volume and price effects could not plausibly have indicated that the segment of the domestic industry producing Grade A could be impacted by subject imports.[278]

7.5.2.3.1.2 China

7.149. China denies that MOFCOM was required to conduct a segmented analysis of the impact of subject imports on the domestic industry. According to China, it is legally erroneous to require an investigating authority, which has carried out its price effects consideration on a per grade basis, to also carry out a segmented impact analysis or to explain how it viewed the industry-wide impact data in light of the logic of the grade-based consideration of the price effects. China contends that any difference between the nature of the price undercutting analysis undertaken by MOFCOM, and the nature of the impact analysis, was dictated by the requirements of Articles 3.2 and 3.4. China asserts in this regard that MOFCOM was required by Article 3.2 to carry out its price effects analysis on a per grade basis, in order to ensure comparability. China states, though, that MOFCOM was required by Article 3.4 to assess the impact of subject imports on the domestic industry "as a whole". China also notes that the two domestic producers making up the domestic

[275] Japan's first written submission, para. 159. European Union's first written submission, para. 253.
[276] Appellate Body Report, *China – GOES*, para. 149. (emphasis in original)
[277] Appellate Body Report, *China – GOES*, para. 149.
[278] Japan's first written submission, para. 167.

industry are both producers of all three grades of the like product, such that it is not possible to distinguish any part of the domestic industry that is producing only Grade A.

7.5.2.3.2 Main arguments of third parties

7.5.2.3.2.1 Kingdom of Saudi Arabia

7.150. Saudi Arabia considers that an investigating authority's determination under Article 3 of the Anti-Dumping Agreement must establish a logical progression of analysis among its "essential components" in order to constitute the requisite "objective examination" of "positive evidence". Saudi Arabia asserts that the sequential analysis contemplated by Article 3 and its repeated emphasis on the "same imports" establish that the injury components are "closely interrelated"[279] and work together to produce a "logical" conclusion about whether subject imports caused material injury to the domestic industry. Saudi Arabia contends that although an investigating authority enjoys discretion as to the methodologies employed to determine injury under Article 3, its examination of the impact of subject imports on the domestic industry under Article 3.4 will constitute an "objective examination" only where it logically progresses from the assessment of those imports' volume effects and price effects under Article 3.2. Saudi Arabia submits that the inquiry under Article 3.4 complements and conforms to the analyses carried out under Article 3.2 in order to produce the ultimate conclusion on causation under Article 3.5. According to Saudi Arabia, this analysis necessarily involves a linkage between the identified volume and price effects and the state of the domestic industry.

7.5.2.3.2.2 Turkey

7.151. Turkey queries whether the "logical progression" proposed by the complainants involves a legal obligation that requires an investigating authority to terminate its injury and causation analysis once it concludes that there is no absolute/relative increase in the volume of dumped imports and/or no price undercutting, depression or suppression caused by dumped imports. Turkey considers that, pursuant to Article 3.5 of the Anti-Dumping Agreement, the essence of causality should be the negative effects of dumped imports on the domestic industry, through the act of dumping, as set forth in paragraphs 2 and 4 of Article 3. The examination should include all relevant evidence before the authorities including those that weaken the causality between dumped imports and injury incurred by the domestic industry. Furthermore the investigating authority is also obliged to focus on known factors other than the influence of dumped imports to identify whether these factors erode the link between dumping and injury. Turkey suggests that the legal mechanics of Article 3.5 require the authority to undertake a full examination of different parts of the injury analysis, without keeping any relevant information out of the scope.

7.5.2.3.3 Evaluation by the Panel

7.152. The complainants' claims regarding the scope of MOFCOM's impact analysis are premised on their interpretation of Article 3.2 of the Anti-Dumping Agreement. The complainants contend that the Article 3.4 impact analysis must "logically progress" from the Article 3.2 price effects analysis, and that MOFCOM's finding of price undercutting effects with respect to only Grades B and C required it to analyse the impact of subject imports only on the segments of the domestic industry producing Grades B and C. The complainants contend that this is because MOFCOM's conclusions on price effects indicate that the segment of the domestic industry producing Grade A could not be impacted by subject imports.[280] As indicated above, we do not consider that Article 3.2 requires an investigating authority to consider the price undercutting *effect* of subject imports on the domestic like product. Thus, in finding price undercutting in respect of Grades B and C, MOFCOM was not required by Article 3.2 to consider the *effect* of subject Grade B and C imports on domestic Grade A. Accordingly, MOFCOM's failure to make this consideration did not require it to conclude, when conducting its Article 3.4 impact analysis, that the segment of the domestic industry producing Grade A products could not be impacted by subject imports.[281]

[279] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

[280] Japan's first written submission, para. 167. European Union's first written submission, para. 253.

[281] We do not mean to suggest that the scope of MOFCOM's price effects conclusions is of no relevance to the remainder of MOFCOM's injury analysis. As previously noted, a limited finding of price undercutting will have obvious implications for an authority's assessment of whether dumped imports caused material injury to

7.153. Furthermore, we note that "the examination of the impact of the dumped imports on the domestic industry" provided for in Article 3.4 "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the **industry**" (emphasis supplied). In our view, the complainants' approach to Article 3.4, and its focus on particular segments of the domestic industry, is overly focused on the causal connotations of the term "impact", and overlooks the obligation in Article 3.4 to evaluate the state of the domestic **industry**, as defined by Article 4.1 of the Anti-Dumping Agreement.[282] In the present case, MOFCOM defined the domestic industry as comprising two domestic producers accounting for a major proportion of total domestic production of the domestic product like the subject imports. The evaluation of the state of the domestic industry envisaged by Article 3.4 must therefore consider the state of those two producers, with respect to their production of all types of HP-SSST. We see no basis in either Article 3.4 or Article 4.1 for limiting this evaluation to the state of those two domestic producers with respect to their production of only Grades B and C.

7.154. The complainants acknowledge that the Article 3.4 impact inquiry must generally be conducted with respect to the domestic industry as a whole.[283] However, the complainants observe the statement by the Appellate Body in *China – GOES* that the various provisions of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[284] According to the complainants, this means that the impact analysis with respect to the domestic industry as a whole must proceed on the premise that the segments of the domestic industry producing goods within the scope of the like product with respect to which no volume or price effects have been found have not been impacted by the dumped imports.[285] In a similar vein, the European Union argues that MOFCOM had "no reasonable basis to undertake an impact analysis with respect to the entire domestic industry".[286] We do not accept these arguments, for it is unclear to us how a determination of injury in respect of the domestic industry as a whole – including an evaluation of the state of that industry as a whole - may be premised, from the outset, on the exclusion of a given segment of that industry.

7.155. Nor are we persuaded by the argument that the complainants' claim is supported by the findings of the Appellate Body in *China – GOES*. As indicated above, we consider that our interpretation of Article 3.2 is entirely consistent with the findings of the Appellate Body in that case. And we consider that our interpretation of Article 3.4 is entirely consistent with our approach to Article 3.2. This is an important consideration because, as confirmed by the Appellate Body in *China – GOES*, "the relationship between subject imports and the state of the domestic industry" envisaged by Article 3.4 "is analytically akin to the type of link contemplated by the term 'the effect of' under Article[] 3.2…". Since the Article 3.4 analysis is "analytically akin" to the Article 3.2 analysis, and since the Article 3.2 analysis in respect of price undercutting does not require the effect analysis proposed by the complainants, there is no reason why any such effect analysis should determine the nature of the Article 3.4 impact analysis undertaken following a finding of price undercutting. This would certainly not be a "logical progression" of the sort suggested by the complainants on the basis of the Appellate Body's findings in *China – GOES*. The Appellate Body's findings do not exclude that, in the context of price undercutting, the appropriate "relationship between subject imports and the state of the domestic industry" exists when the state of the domestic industry shows injury, and the subject imports are sold at prices that undercut certain like products produced and sold by that industry. Whether that relationship is sufficient to support a finding that subject imports caused injury to the domestic industry is a matter for consideration under Article 3.5, with due regard to all of the factors and considerations set forth in that provision.

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the domestic industry. However, this is an assessment to be made pursuant to Article 3.5, rather than 3.4, of the Anti-Dumping Agreement.

[282] We are aware that the Appellate Body stated in *China – GOES* that the Article 3.4 impact inquiry is not simply an inquiry about the state of the domestic industry, and that Article 3.4 "contemplate[s] that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination" (Appellate Body Report, *China – GOES*, para. 149 (emphasis in original)). However, this does not mean that the need to examine the state of the domestic industry, as a whole, should be entirely overlooked.

[283] Japan's second written submission, para. 7. European Union's first written submission, para. 254.

[284] Appellate Body Report, *China – GOES*, para. 128.

[285] Japan's second written submission, para. 8.

[286] European Union's oral statement at the first substantive meeting, para. 109. The European Union also suggests that most of the inconsistencies addressed by the European Union in this case can be described as a breach of the "logical progression of inquiry" referred to by the Appellate Body in *China – GOES* (European Union's second written submission, para. 138).

7.5.2.4 Whether MOFCOM properly evaluated the magnitude of the margin of dumping

7.5.2.4.1 Main arguments of the parties

7.5.2.4.1.1 Japan and the European Union

7.156. The complainants submit that China failed to evaluate the role played by the magnitude of the margin of dumping.[287] They contend that MOFCOM merely referred to the margin of dumping, without evaluating the significance of the margin of dumping for the impact of subject imports on the domestic industry.

7.5.2.4.1.2 China

7.157. China submits that it is factually incorrect for the complainants to state that MOFCOM "simply referred to the dumping margins in the sub-section entitled 'Dumping Margin' at page 41 of its Final Determination, as well as in the section entitled 'Final Conclusions' at pages 79 and 80 of the same document".[288] China observes that, in the section of the Final Determination addressing injury, MOFCOM considered that "the dumping margins of the subject products from the EU and Japan are both above 2%".[289] China further submits that no analysis of the magnitude of the dumping margin is required beyond the analysis of such margin as set out in those other provisions, similar to the type of evaluation required in relation to "factors affecting domestic prices".[290] In this respect, China relies on the fact that factors affecting domestic prices and the magnitude of the margin of dumping are possible causes of an industry's condition, rather than descriptors of the state of the industry (as with all other factors listed in Article 3.4). Moreover, China asserts that other provisions of the Anti-Dumping Agreement also address these two factors.[291]

7.5.2.4.2 Main arguments of third parties

7.5.2.4.2.1 United States

7.158. The United States notes that Articles 3.1 and 3.4 do not require an authority to evaluate the significance of dumping margins. Moreover, neither Article 3.1 nor Article 3.4 requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way. The United States asserts that it is also unclear what further evaluation of the dumping margins the European Union and Japan consider MOFCOM should have performed pursuant to Article 3.4.[292]

7.5.2.4.3 Evaluation by the Panel

7.159. Pursuant to Article 3.4 of the Anti-Dumping Agreement, investigating authorities are required to evaluate of all relevant economic factors and indices having a bearing on the state of the industry, including the magnitude of the margin of dumping. China does not deny that MOFCOM was required to undertake that evaluation. China argues rather that MOFCOM did evaluate the magnitude of the margin of dumping, as evidenced by various references to the amount of the margin of dumping in MOFCOM's Final Determination.

7.160. We note that MOFCOM's Final Determination contains several references to the magnitude of the margin of dumping, as asserted by China. However, we do not consider that such references constitute an evaluation of the magnitude of the margin of dumping, as required by Article 3.4. MOFCOM's Final Determination merely lists the margins at issue, but does not assess in any way the relevance of the margins of dumping in the determination, or indicate what weight it attributed to the margins of dumping in the injury assessment. We agree with the panel in *China – X-ray*

[287] Japan's first written submission, paras. 170–174; and European Union's first written submission, paras. 260–265.
[288] Japan's first written submission, para. 171; and European Union's first written submission, para. 260.
[289] Final Determination, Exhibit JPN–2, Exhibit EU–30, pp. 41–42.
[290] China's second written submission, paras. 184-185, referring to para. 7.62 of Panel Report, *Egypt – Steel Rebar*.
[291] China's first written submission, paras. 430-436.
[292] United States' third party submission, paras. 57-58.

Equipment that a mere listing of the margins of dumping does not constitute evaluation within the meaning of Article 3.4.[293]

7.161. China submits that MOFCOM provided more than a mere listing of the margins of dumping because, in addressing the cumulative assessment of injury, MOFCOM noted that "the dumping margins of the subject products from the EU and Japan are both above 2%".[294] According to China, this provides "sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry".[295] We disagree. MOFCOM's simple assertion that the margins of dumping are more than *de minimis* provides no basis on which we can conclude that MOFCOM actually evaluated the magnitude of those margins in the context of its Article 3.4 analysis.

7.162. We also reject China's argument that no analysis of the margin of dumping is required beyond that set out in substantive provisions governing the determination of the margin of dumping. The text of Article 3.4 is clear in requiring an evaluation of the magnitude of the margin of dumping in the assessment of the impact of dumped imports on the domestic industry. Accordingly, that evaluation must be undertaken as a substantive matter, and not merely paid lip service by referring to the margins determined. Whether the margin of dumping was determined in a manner consistent with, for example, Article 2 of the Anti-Dumping Agreement, is irrelevant to the question of whether or not the evaluation required by Article 3.4 has been undertaken.

7.163. We therefore uphold the complainants' claims that MOFCOM failed to evaluate the magnitude of the margin of dumping, contrary to Article 3.4 of the Anti-Dumping Agreement. As Article 3.4 implements the requirement in Article 3.1 pertaining to "the consequent impact" of dumped imports on the domestic industry, we also uphold the complainants' claims under that provision.

7.5.2.5 Whether MOFCOM properly weighed positive and negative injury factors

7.5.2.5.1 Main arguments of the parties

7.5.2.5.1.1 Japan and the European Union

7.164. The complainants submit that MOFCOM improperly disregarded the economic factors and indices which showed that the domestic industry was not injured.[296] In particular, they claim that MOFCOM "did not provide any explanation whatsoever regarding the weight attributed to any given factor, nor of the inferences it drew from those factors and indices that were positive for the domestic industry".[297] According to them, the Final Determination is "silent" as to why MOFCOM "disregarded the relevance of the majority of the factors and indices having a positive bearing on the state of the domestic industry".[298]

7.5.2.5.1.2 China

7.165. China considers that Japan and the European Union fail to make a *prima facie* case concerning MOFCOM's weighing of the positive and negative injury factors, because they fail to discuss any particular indicators that were "improperly disregarded".[299] China submits that MOFCOM's Final Determination in any event evaluated each of the requisite injury factors, with the exception of capacity utilization.[300] China asserts that MOFCOM explained that this factor could not be effectively evaluated because of difficulties in allocating capacity to the product at issue. With respect to the positive factors, China submits that MOFCOM properly weighed these factors against other negative factors, and in light of other positive factors. China notes in this regard that MOFCOM explained that the increase in salary per head had to be seen in light of the general

[293] Panel Report, *China – X-Ray Equipment*, para. 7.184.
[294] Final Determination, Exhibit JPN–2, Exhibit EU–30, pp. 41–42.
[295] Panel Report, *China – X-Ray Equipment*, para. 7.183. (footnote omitted)
[296] Japan's first written submission, paras. 175–184; and European Union's first written submission, paras. 266– 276.
[297] Japan's first written submission, para. 179; and European Union's first written submission, para. 270.
[298] Japan's first written submission, para. 183; and European Union's first written submission, para. 274.
[299] China's first written submission, para. 437.
[300] China's first written submission, paras. 447-451.

background of rising labour costs in China. In relation to the increase in domestic sales, MOFCOM stated that this was "outstripped by price cuts". MOFCOM also considered that job creation and labour productivity were a result of a synchronous increase in capacity and output of the domestic industry. China contends that the Final Determination thus provides a solid reflection of MOFCOM's reasoned evaluation of the weight and relevance of the positive and negative factors, also in relation to the other factors.

7.5.2.5.2 Evaluation by the Panel

7.166. We are not persuaded by the complainants' argument that MOFCOM failed to provide any explanation "whatsoever" regarding the weight attributed to any given factor, or of the inferences it drew from those factors and indices that were positive for the domestic industry. Nor do we accept their argument that MOFCOM's Final Determination is "silent" as to why MOFCOM disregarded the relevance of the majority of the factors and indices having a positive bearing on the state of the domestic industry. MOFCOM explains its consideration of the various positive and negative injury factors in the following terms:

> The Investigation Authority is of the view that available evidence suggests from 2008 to 2010, domestic sales and market share of the domestic industry of like products have both increased. The capacity and output of the domestic industry of like products have increased synchronously. Driven by capacity and output growth, job creation and labor productivity of the domestic industry of like products also increased. Against the general backdrop of rising labor costs domestically, salary per head in the domestic industry of like products showed an upward trend. However, EOP inventories of the domestic industry of like products was rising year on year whereas the domestic sales price of domestic like products dropped by 31.05% on an annualized basis. Despite a year-on-year increase of 22.43% in domestic sales, such increase was outstripped by price cuts. As a result, domestic sales revenue for 2009 was down 61.07% from 2008. The number for 2010 was up 83.41% on 2009. From 2008 to 2010, revenue decline on an annualized basis was 15.50%. The differential between domestic sales price and cost of goods per unit narrowed further. Unit operating margin decreased 56.39% annually. As a consequence, pretax profits and net cash flow from operating activities of the domestic industry of like products both dropped, 67.47% and 47.78% respectively on an annualized basis. Shrinking pretax profits resulted in lower ROI for the domestic industry of like products. ROI for 2010 was 29.70 percentage points lower than that of 2008. Due to continued profitability erosion and deteriorating operating conditions of the domestic industry of like products, capital investment in capacity expansion by the domestic industry had been suspended or blocked.
>
> In the first six months of 2011, profitability levels of the domestic industry of like products continued to go down and operating conditions further worsened. Despite recoveries of varying degree in the domestic industry on indicators such as domestic sales, market share, capacity, output, labor productivity, salary per head and net cash flow from operating activities, EOP inventories nonetheless increased by 23.49% compared with the same period of 2010. Domestic sales price of domestic like products was 8.90% lower than the same period of 2010. As a direct result, sales revenue dropped by 0.38% year on-year. The differential between domestic sales price and cost of goods per unit continued to narrow. Unit operating margin decreased 52.50% compared with the same period of 2010. As a consequence, pretax profits of the domestic industry of like products dropped by 72.19% compared with the same period of 2010. Shrinking pretax profits resulted in a drop of 2.58 percentage points in ROI for the domestic industry of like products.
>
> Based on the above, the Investigation Authority concludes the domestic industry is materially injured.[301]

7.167. Although brief, MOFCOM's determination does discuss the interplay between the positive and negative injury factors. Thus, while MOFCOM acknowledges that factors such as domestic sales, market share, capacity, output and employment indicate that the domestic industry has grown, it also observes that sales revenue has declined as a result of the fall in domestic prices.

[301] Final Determination, Exhibit JPN-02, p. 63.

MOFCOM finds that this, in turn, has resulted in a decline in profitability, as sales revenue has not kept pace with cost increases. MOFCOM's Final Determination is therefore not "silent" on the interplay between positive and negative injury factors. Nor does MOFCOM fail to provide any explanation "whatsoever" regarding its weighing of negative and positive injury factors.

7.168. As complainants, the onus is on Japan and the European Union to establish that MOFCOM's analysis and explanation is inconsistent with Article 3.4. The complainants fail in this regard, because they fail to demonstrate the inadequacy of the specific elements of analysis and explanation set out in MOFCOM's Final Determination, relying instead on generalities. Thus, they fail to establish that MOFCOM's explanation is not a reasoned analysis of the facts, or that MOFCOM erred in its consideration of the interplay of the positive factors in relation to the decline in sales revenue and profitability. The complainants also fail to establish that MOFCOM's assessment is insufficient, or inadequately reasoned in light of the facts. For this reason, we find that the complainants fail to establish a *prima facie* case in support of their claim.

7.169. We note the complainants' argument that MOFCOM's dismissal of certain positive factors is "contradicted" by MOFCOM's findings in other parts of its Final Determination.[302] The complainants observe in this regard that, in assessing non-attribution factors for the purpose of Article 3.5, MOFCOM referred to the rapid increase in the sales volume of domestic products in concluding that the decline in domestic demand for HP-SSST products did not "materially injure[]" the domestic industry in terms of volume.[303] The complainants contend that MOFCOM failed to attach appropriate weight to this positive indicator when assessing the state of the domestic industry pursuant to Article 3.4.[304] In its Final Determination, MOFCOM noted the increase in domestic sales, but continued by referring to the decrease in sales price and pre-tax profit. The complainants have not explained why MOFCOM could not, in considering the impact of imports under Article 3.4, discount the increase in domestic sales given that the increase was accompanied by a decline in sales price and profit. The mere fact that the increase in domestic sales is referred to by MOFCOM in different contexts, and in a manner that ultimately supports a determination that injury is caused by subject imports, does not necessarily mean that MOFCOM's reference to that factor in those different contexts is contradictory, or otherwise flawed. It is simply a reflection of the substance of MOFCOM's analysis. In the absence of any meaningful critique by the complainants of the substance of that analysis, the alleged contradiction provides no basis for drawing conclusions regarding the consistency of MOFCOM's impact analysis with Article 3.4 of the Anti-Dumping Agreement.

7.5.2.6 Conclusion

7.170. For the above reasons, we uphold the complainants' claims that MOFCOM failed to evaluate the magnitude of the margins of dumping, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. We reject the complainants' claims that MOFCOM was required by Articles 3.1 and 3.4 to undertake a segmented impact analysis. We also reject the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.4 by failing to properly weigh the positive and negative injury factors.

7.5.3 Whether MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.5.3.1 Introduction

7.171. MOFCOM determined that "the large quantities of imports of the subject products … dumped into China at low prices" caused material injury to the domestic industry.[305] The determination was based on the price effects of the subject imports. MOFCOM did not find that subject imports had any volume effects on the domestic industry, in light of the fact that the absolute volume of subject imports declined during the period of investigation.[306] However, MOFCOM did find that the market share of subject imports as a whole "remained high at

[302] Japan's first written submission, para. 183. European Union's first written submission, para. 274.
[303] Final Determination, Exhibit EU-30, p. 68.
[304] See complainants' replies to Panel question No. 56.
[305] Final Determination, Exhibit JPN-02, p. 67.
[306] China's first written submission, paras. 516-518; Final Determination, Exhibit JPN-02, p. 65.

around 50%".[307] MOFCOM also found that the market share held by subject imports of both Grade B and C was around 90%.[308] MOFCOM considered this market share relevant in assessing the price undercutting effect of subject imports. After considering the market share data and pricing information, MOFCOM found that "the imports of the subject products had a relatively big impact on the price of the domestic like products".[309]

7.172. MOFCOM's causation determination was also based on its findings of price undercutting, and its assessment of the impact of subject imports on the state of the domestic industry.[310] We have addressed the complainants' specific challenges under Articles 3.2 and 3.4 to those aspects of MOFCOM's analysis above. MOFCOM also considered whether any injury was caused by other known factors, including a decline in apparent consumption and an expansion in domestic production capacity, and concluded that any injury caused by these factors did not break the causal link between subject imports and material injury to the domestic industry.[311]

7.173. The complainants make three claims concerning MOFCOM's causation determination. First, they claim that MOFCOM's reliance on the market share of subject imports in its causation analysis is inconsistent with Article 3.5. Second, the complainants also make consequential claims in respect of MOFCOM's reliance on its price effects and impact analyses in determining causation. They submit that because, in their view, those analyses are inconsistent with Articles 3.2 and 3.4 respectively, MOFCOM's subsequent reliance on those analyses and conclusions in the context of its causation determination is inconsistent with Article 3.5. Third, the complainants challenge MOFCOM's non-attribution analysis in respect of the decrease in apparent consumption, and the increase in domestic production capacity.

7.174. China asks the Panel to reject Japan's claims.

7.5.3.2 Relevant provisions

7.175. Article 3.1 of the Anti-Dumping Agreement is set forth above. Article 3.5 of the Anti-Dumping Agreement provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.5.3.3 MOFCOM's reliance on the market share of subject imports

7.5.3.3.1 Main arguments of the parties

7.5.3.3.1.1 Japan and the European Union

7.176. The complainants challenge MOFCOM's reliance on the market share of subject imports in finding a causal link between subject imports and material injury to the domestic industry. The complainants note that MOFCOM found that the absolute volume of subject imports decreased by a considerable amount during the period of investigation. They also note that the market share of

[307] Final Determination, Exhibit JPN-02, p. 65.
[308] Final Determination, Exhibit JPN-02, p. 66.
[309] Final Determination, Exhibit JPN-02, p. 66. (Translation amended by Exhibit CHN-16, and accepted by the complainants in Exhibits JPN-29 and EU-32.)
[310] Final determination, Exhibit JPN-02, p. 66.
[311] Final Determination, Exhibit JPN-02, pp. 67-77.

subject imports as a whole decreased during the period of investigation. The complainants submit that the fact that the market share of imported products under investigation was still relatively large at the end of the period of investigation is "irrelevant"[312] for an objective examination under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and accordingly for a causation determination under Article 3.5. The complainants contend that Article 3.2 requires an investigating authority to consider "whether there has been a significant increase in dumped imports". They assert that the text of Article 3.2 does not envisage consideration of the market share retained by subject imports at the end of the period of investigation.

7.177. The complainants acknowledge that the absence of a significant increase in the volume of subject imports does not necessarily preclude a finding of causation. However, they contend that the consideration of whether imports increased significantly cannot be stripped of all significance by overlooking the fact that, despite dumping and price undercutting, there was a considerable decrease in the volume and market share of subject imports of HP-SSST. The complainants argue that the decrease in imports to China of HP-SSST tends to exclude the possibility that such imports caused injury to the domestic industry.[313]

7.5.3.3.1.2 China

7.178. China submits that a distinction must be made between MOFCOM's conclusion that there was no significant increase in the volume of the dumped imports under Article 3.2 of the Anti-Dumping Agreement, and MOFCOM's reliance on the fact that dumped imports retained a high market share in a finding of causal link under Article 3.5. China asserts that, consistent with its conclusion under Article 3.2 that there was no significant increase in the volume of subject imports, MOFCOM did not rely on any volume effects of subject imports for the purpose of its causation determination. China contends that MOFCOM's reference to the market share of subject imports should not be understood as a finding that the volume of imports, *in itself*, had an impact on the domestic industry, nor that the material injury suffered by the domestic industry was caused by the volume of subject imports *in itself*. According to China, MOFCOM simply referred to the market share of subject imports in order to fully assess the price effects of subject imports, concluding that "the imports of the subject products had a relatively big impact on the price of the domestic like products".[314] China submits that this approach is consistent with the finding by the panel in *EC – Tube or Pipe Fittings* that "[t]he interaction of two variables would essentially determine the extent of impact of price undercutting on the domestic industry: the quantity of sales at undercutting prices; and the margin of undercutting of such sales".[315]

7.5.3.3.2 Main arguments of third parties

7.5.3.3.2.1 United States

7.179. The United States disagrees with the complainants to the extent that they suggest that an authority may not attach significance to the fact that imports "retain" a significant share of the market over the period. The United States notes that although Article 3.2 does specify that an authority "shall consider whether there has been a significant increase in dumped imports", either on an absolute or relative basis, Article 3.2 does not expressly or implicitly prevent an authority from considering in its analysis the fact that imports have a significant market share level. The United States asserts that in a situation in which significant volumes of subject imports are having a significant adverse impact on domestic prices, the existence of significant import volumes or market share is obviously one item of "relevant evidence" that an authority may want to consider in its analysis under Article 3.5.[316]

[312] Japan's first written submission, para. 201. European Union's first written submission, para. 292.
[313] Japan's first written submission, paras. 202 and 203. European Union's first written submission, paras. 293 and 295.
[314] Final Determination, Exhibit JPN–2, Exhibit EU–30, as amended by Translation Exhibit, Exhibit CHN–16 (BCI), p. 66.
[315] Panel Report, *EC – Tube or Pipe Fittings,* para. 7.277.
[316] United States' third party submission, paras. 59 and 60.

7.5.3.3.3 Evaluation by the Panel

7.180. As a general matter, we are not persuaded that it is erroneous for an investigating authority to take the market share of subject imports into consideration in its Article 3.5 causation analysis, even if the volume of those imports has not increased in absolute terms. Article 3.5 provides that causation "shall be based on an examination of all relevant evidence before the authorities". We agree with China that the market share of subject imports sold at undercutting prices may be relevant in considering the overall price effects of those imports in an Article 3.5 causation analysis. In addition, we note that the Appellate Body has confirmed that while "significant increases in imports have to be 'considered' by investigating authorities under Article 3.2, (…) the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury" within the meaning of Article 3.5.[317] If a significant increase in the volume of imports is not necessary in order to find causation, we see no reason why the relative significance of the volume of imports, that is, its market share, may not be a relevant consideration in the assessment of causation.

7.181. However, having regard to the facts of the present case, we consider that MOFCOM's reliance on the market shares of subject imports did not establish a sufficient basis for a determination that "the imports of the subject products had a relatively big impact on the price of the domestic like products"[318], and a consequent finding of causation consistent with Article 3.5. We note that although MOFCOM relied on the fact that the market share of subject imports "remained high at around 50%"[319], MOFCOM failed to account for the fact that the market share of subject imports had actually dropped from around 90% in 2008 and 2009 to around 50% in 2010 and H1 2011, and that domestic market shares increased correspondingly.[320] While an investigating authority might properly determine, given the necessary facts, that high market shares exacerbate the price effects of dumped imports, an objective and impartial investigating authority would also consider whether the fact that import market shares are declining significantly indicates that the price effects are in fact somewhat attenuated.

7.182. Furthermore, after referring to the 50% market share for the subject imports as a whole, MOFCOM observed that subject imports of Grades B and C both held market shares of around 90%. MOFCOM then found that "the imports of the subject products had a relatively big impact on the price of the domestic like products".[321] We note that the market share of imported Grade B fluctuated, rising from 89.48% in 2008 to 96.65% in 2009, falling to 90.49% in 2010, and rising to 97.63% in the first half of 2011.[322] The market share of imported Grade C was 100% in 2008, 99.94% in 2009, 99.10% in 2010, and 90.69% in the first half of 2011, which shows a decrease of almost 10 percentage points during the POI.[323] The majority[324] of domestic sales, however, were of Grade A. The market share held by Grade A subject imports in 2008 was only 1.45%.[325] There were no Grade A subject imports thereafter. Nor was there any finding of price undercutting in respect of Grade A subject imports. Furthermore, although subject imports and domestic sales were concentrated in different segments of the HP-SSST market, MOFCOM made no finding of cross-grade price effects, whereby price undercutting by subject imports of Grades B and C might be shown to affect the price of domestic sales of Grade A. In these circumstances, we would expect an objective and impartial investigating authority to have examined and explained how the 90% market shares of Grade B and C subject imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, notwithstanding the fact that the bulk of domestic production was of Grade A, the sales and market share of domestic Grade A increased, the negligible market share of subject imports of Grade A and the absence of cross-grade price effects, and despite the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating

[317] *EC – Tube or Pipe Fittings* (AB), footnote 114.
[318] Final Determination, Exhibit JPN-02, p. 66. (Translation amended by Exhibit CHN-16, and accepted by the complainants in Exhibits JPN-29 and EU-32.)
[319] Final Determination, Exhibit JPN-02, p. 65.
[320] *See* Final Determination, Exhibit JPN-2, pp. 43-49.
[321] Final Determination, Exhibit JPN-02, page 66. (Translation amended by Exhibit CHN-16, and accepted by the complainants in Exhibits JPN-29 and EU-32.)
[322] Final Determination, Exhibit JPN-2, p. 44.
[323] Final Determination, Exhibit JPN-2, p. 44.
[324] China concedes that the "majority" of domestic production concerned Grade A products. See footnote 270 above.
[325] MOFCOM's Final Determination, Exhibit JPN-02, p. 65.

market share of Grade B imports. MOFCOM failed to provide any such explanation. In the absence of any such examination or analysis, it remains unclear how the market shares of imports of Grade B and C HP-SSST are relevant in assessing whether subject imports caused injury to a domestic industry producing primarily Grade A HP-SSST.

7.183. China argues[326] that, although MOFCOM made no finding of cross-grade price effects, it expressly found that "the price changes of the three [grades] are to a certain extent correlated with one another".[327] China states that this finding was based on the fact that higher-grade Grade B and C can, "as a matter of logic", substitute for lower-grade Grade A products. China asserts that because of such substitutability, a price decrease in high-end HP-SSST (Grades B and C) produces price pressure on the low-end HP-SSST (Grade A), which need to maintain a certain price differential with the high-end HP-SSST. China contends that MOFCOM's finding of price correlation was supported by the Petitioners' assertion that "a large margin decrease of the prices of [Grade B] and [Grade C] products, both high-end products, will certainly drive down the price of [Grade A] products, so that a certain price difference among the three can be maintained".[328] According to China, the correlation between prices of Grade A, on the one hand, and Grade B and C, on the other hand, is a normal feature for a single product consisting of high-end and low-end grades. China contends that, as a result of MOFCOM's finding that the three grades constitute a "single product" with correlation between their prices, the finding of price undercutting in respect of imports of Grades B and C necessarily implies that this price undercutting had an effect on the domestic industry as a whole, including domestic Grade A. China describes this conclusion as a corollary to MOFCOM's findings concerning product scope, also taking into account MOFCOM's like product findings.[329]

7.184. We are unable to accept China's argument regarding the existence of cross-grade price correlation as sufficient to demonstrate cross-grade price effects. Even assuming, as China contends, that such correlation is a normal feature for a single product consisting of high-end and low-end grades, there is no meaningful analysis in MOFCOM's Final Determination of whether or how this feature manifests itself in the specific circumstances of the product at issue, being HP-SSST. After recording the Applicants' argument that price correlation exists, MOFCOM simply states that "the price changes of the three [grades] are to a certain extent correlated with one another".[330] There is no discussion of the basis on which MOFCOM makes that finding, nor any evaluation of the Applicants' argument. This implies that MOFCOM simply accepted the Applicants' argument, without any consideration of the accuracy thereof. China seems to suggest that there was no need for MOFCOM to evaluate this matter, since its finding of price correlation follows "as a matter of logic" from the fact that higher-grade products may substitute for lower-grade products. However, there is no evidence of any consideration of whether there is, in fact, such substitutability of lower and higher-end HP-SSST by MOFCOM. For us, this demonstrates that China's substitutability argument is, therefore, *ex post* rationalization rather than an element of MOFCOM's analysis, and thus of no import for our determination.[331] China also asserts that evidence of substitutability was provided by a Japanese exporter, SMI.[332] However, there is no reference to this evidence in MOFCOM's Final Determination. In addition, even if evidence of some form of substitutability did exist and was presented to MOFCOM, in the absence of any analysis by MOFCOM of the extent to which higher-grade (Grades B and C) imports are actually used in domestic Grade A applications, such evidence cannot be considered to show that the alleged substitutability demonstrates price correlation.[333] Nor is there any consideration by MOFCOM of how this unspecified degree of substitutability, and resultant price correlation, might enable Grade B and C subject imports to cause injury to the domestic industry's Grade A operations.

[326] China's first written submission, para. 501.
[327] Final Determination, Exhibit JPN-02, p. 48.
[328] Final Determination, Exhibit JPN–2, Exhibit EU–30, p. 48.
[329] China's first written submission, para. 504; China's second written submission, para. 214.
[330] Final Determination, Exhibit JPN-02, p. 48.
[331] See e.g. Appellate Body Report, *US – Tyres (China)*, para. 329 ("[D]uring panel proceedings a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination").
[332] China's reply to Panel question No. 92, para. 18, and China's second written submission, para. 143.
[333] The extent of substitutability should not be taken for granted for, according to Japan, Grade B is about double the price of Grade A, and Grade C is about triple the price of Grade A (Japan's oral statement at the second substantive meeting, para. 35, citing page 26 of the Petition (Exhibit JPN-03), and page 55 of MOFCOM's Final Determination (Exhibit JPN-02)). China has not disputed Japan's description of the inter-grade price differentials.

7.185. Furthermore, we emphasise that MOFCOM only found that prices of the different grades were to a "certain extent" correlated with one another.[334] This leaves open the important issue of the degree of impact that movements in the prices of imported Grades B and C might have had on the price of domestic Grade A. MOFCOM makes no assessment of whether the effect would be minimal, or sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts that they did. MOFCOM's reference to the market shares of subject imports sheds no light on this issue.

7.186. In addition, it would appear that MOFCOM failed to account for record evidence that trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices. This is particularly apparent in respect of domestic Grade C, the price of which increased by 112.80% from 2009-2010, without any corresponding movement in prices for subject imports of Grades B and C, which actually fell over that period. In addition, the price of domestic Grade A increased by 9.35% from 2010 to H1 2011, whereas the price of imported Grade B fell by 10.63% during that period. An objective and impartial investigating authority would not have found price correlation without at least addressing, and explaining, such contrary price movements.[335]

7.187. It would also appear that MOFCOM assumed that the alleged cross-grade price correlation would result in Grade B and C subject import prices driving down domestic prices for Grade A, rather than vice-versa. This is a particularly important consideration given that the domestic industry's production was primarily of Grade A. In this regard, we note China's reliance on the Petitioners' argument that "[a] large margin decrease of the prices of [Grades B and C] … will certainly drive down the price of [Grade A] products, so that a certain price difference among the three can be maintained".[336] However, there is nothing in the Final Determination to suggest that MOFCOM ever explored this issue meaningfully. In finding a "certain extent" of price correlation, MOFCOM made no finding that the prices of imported Grades B and C had pushed down the price of domestic Grade A. Thus, MOFCOM never considered, and certainly failed to exclude, the equally logical possibility that Grade B and C subject import prices declined in response to the decline in domestic Grade A prices in 2009 and 2010, in order to maintain the price differential between the various grades.[337]

7.188. For all of the above reasons, we consider that MOFCOM's reference to the market shares held by subject imports is not sufficient to establish that subject imports, through price undercutting, had "a relatively big impact on the price of the domestic like products", and therefore caused injury to the domestic industry through their price effects. We consider that MOFCOM's reliance on the market shares of subject imports was central to its determination that subject imports, through their price effects, caused injury to the domestic industry. Given the flaws in MOFCOM's analysis of those market shares in that context, we find that MOFCOM's determination of causation is inconsistent with Article 3.5 of the Anti-Dumping Agreement.[338]

[334] Final Determination, Exhibit JPN-02, p. 48.

[335] China submits at para. 155 of its second written submission that "[t]he fact that prices of certain products are correlated does not imply that they have identical movements. Rather, it implies that the movement of prices of certain goods will affect the movement of prices of other goods, irrespective of whether these were moving in the same direction". China provides no explanation in support of this statement. Nor does China indicate where MOFCOM undertook any meaningful consideration of how the movement of prices of one grade of HP-SSST affected the movement of prices of other grades of HP-SSST.

[336] Final Determination, p. 48.

[337] MOFCOM's conclusion that "the domestic industry was practically unable to sell domestically" (Final Determination, Exhibit JPN-02, p. 66) follows MOFCOM's analysis of price undercutting in respect of Grades B and C, and therefore does not relate to domestic sales of Grade A being affected by subject import pricing. This is confirmed in China's reply to Panel question No. 36 (para. 124), where China explains that, in making the above-mentioned finding, MOFCOM determined that "the domestic industry's ability to sell Grade B and C was hampered by unfair competition from, imports". MOFCOM's conclusion therefore does not suggest that domestic Grade A operations were affected by subject imports of Grades B and C.

[338] In this regard, we recall the Appellate Body's finding in *Japan – DRAMs (Korea)* that "there may be cases in which certain intermediate findings may be so central to the ultimate conclusion of an investigating authority that an error at an intermediate state of reasoning may invalidate the final conclusion" (paras. 131-135). See also, Panel Report, *China – GOES*, paras. 7.450-7.542 and Appellate Body Report, *China – GOES*, paras. 219-220.

7.5.3.4 Consequential Article 3.5 claims concerning MOFCOM's reliance on its Article 3.2 and 3.4 analyses of the price effects and impact of subject imports

7.5.3.4.1 Main arguments of the parties

7.5.3.4.1.1 Japan and the European Union

7.189. The complainants have made consequential Article 3.5 claims based on alleged inconsistencies in MOFCOM's Article 3.2 price effects and Article 3.4 impact analyses. The complainants recall their claims that MOFCOM's price effects and impact analyses are respectively inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement. They submit that, as a consequence, MOFCOM's reliance on those price effects and impact analyses to determine causation is inconsistent with Article 3.5 of the Anti-Dumping Agreement. The complainants rely in this regard on the finding of the panel in *China – X-Ray Equipment* that, because the investigating authority's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, "the flaws in the price effects analysis *also* undermine[d] … the conclusion on the causal link between the subject imports and the injury suffered by the industry".[339]

7.5.3.4.1.2 China

7.190. China asks the Panel to reject the complainants' claims. China submits that MOFCOM properly linked its Article 3.2 price effects consideration and its Article 3.4 impact analysis in making its causation determination.[340] China contends that because MOFCOM's price effects and impact analyses are not inconsistent with Articles 3.2 and 3.4, MOFCOM's reliance on those analyses for the purpose of determining causation is not inconsistent with Article 3.5.[341]

7.5.3.4.2 Evaluation by the Panel

7.191. We recall our findings that certain aspects of MOFCOM's price effects analysis are inconsistent with Article 3.2 of the Anti-Dumping Agreement, and that one aspect of its impact analysis is inconsistent with Article 3.4 of the Anti-Dumping Agreement. We find that MOFCOM's reliance on the WTO-inconsistent aspects of its price effects and impact analyses in determining that subject imports caused material injury to the domestic industry undermines MOFCOM's analysis of causation, and therefore renders MOFCOM's causation determination inconsistent with Article 3.5 of the Anti-Dumping Agreement.[342]

7.192. We have not upheld all aspects of the complainants' Article 3.2 and 3.4 claims. Those aspects of the claims that we have rejected clearly cannot form the basis for any consequential Article 3.5 claims. While many of the issues raised by the complainants in the context of their Article 3.2 and 3.4 claims could, in our view, form the basis for independent claims under Article 3.5, the complainants did not originally dispute China's position[343] that no such independent Article 3.5 claims based on MOFCOM's price effects and impact analyses had been pursued by the complainants.[344] To avoid uncertainty, we asked the complainants to address China's understanding of the scope of their claims.[345] We also asked China to explain the basis for its view.[346] In their replies to the Panel's question, and their comments on China's reply, the complainants neither identify any relevant independent Article 3.5 claims set out in their written submissions[347], nor identify arguments explaining how alleged flaws in MOFCOM's price effects and impact analyses result in independent violations of Article 3.5, as distinct from violations of Articles 3.2 or 3.4. Accordingly, we conclude that the complainants have not advanced any

[339] Panel Report, *China – X-Ray Equipment*, para. 7.239.
[340] China's first written submission, para. 498.
[341] China's first written submission, para. 489.
[342] We note that this finding is consistent with that made in Panel Report, *China – X-Ray Equipment*, para. 7.239.
[343] China's first written submission, paras. 489 and 490.
[344] China did not dispute that the complainants made independent Article 3.5 claims in respect of MOFCOM's reliance on market shares (addressed above at Section 7.5.3.3), and MOFCOM's non-attribution analysis (addressed in the next section of our findings).
[345] Panel question No. 88.
[346] Panel question No. 94.
[347] We note that, pursuant to Paragraph 7 of the Panel's Working Procedures, the complainants were required to set out their case and arguments in their first written submissions to the Panel.

independent Article 3.5 claims, other than those concerning MOFCOM's reliance on market shares, and MOFCOM's non-attribution analysis, concerning MOFCOM's price effects and impact analyses.

7.5.3.5 Whether MOFCOM properly ensured that the injury caused by certain known factors was not attributed to subject imports

7.193. Pursuant to the third sentence of Article 3.5, investigating authorities are required, as part of their causation analysis, to examine all "known factors" other than dumped imports which are causing injury to the domestic industry. Where such other known factors are causing injury, the investigating authority must ensure that the injurious effects of these factors are not "attributed" to the dumped imports.

7.194. The complainants claim that MOFCOM failed to properly ensure that injury caused by two known "other factors", the decline in apparent consumption, and the increase in domestic production capacity, was not attributed to subject imports. China asks us to reject the complainants' claim.

7.5.3.5.1 Main arguments of the parties

7.5.3.5.1.1 Japan and the European Union

7.195. The complainants submit that MOFCOM conducted its non-attribution analysis regarding the decline in domestic demand and expansion of domestic production capacity with respect to all grades of HP-SSST taken together, without considering any possibility that these other factors may have influenced different segments of the market differently. They contend that MOFCOM did this despite the facts on the record demonstrating that imported and domestic HP-SSST were concentrated in different segments of the market (i.e., imported products were concentrated almost entirely in Grades B and C, while domestic HP-SSST was concentrated overwhelmingly in Grade A), and despite the absence of any cross-grade price effects of subject imports of Grade B and C on domestic grade A.[348] The complainants also contend that MOFCOM's non-attribution analysis, which considered whether injury caused by other factors broke the causal link between subject imports and injury to the domestic industry, would necessarily be flawed if its initial determination of the causal link between subject imports and material injury to the domestic industry were itself flawed.[349]

7.196. Concerning the decline in apparent consumption, the complainants contend that despite acknowledging that a decline in apparent consumption could negatively affect the volume and price of domestic sales[350], MOFCOM simply concluded that "the price undercutting effect of the imports of subject products [was] the reason for the drop in price of domestic like products".[351] They assert that a sudden drop in domestic demand for a good on a given market causes the market price of such a good to decrease accordingly.

7.197. Concerning the increase in the domestic industry's production capacity, the complainants[352] note MOFCOM's statement that "capacity expansion can lead to output increase and supply increase in the domestic market, thus intensifying competition and indirectly affecting such operational metrics as price, sales volume, sales revenue and pre-tax profit".[353] The complainants contend that, having acknowledged the possibility that an increase in capacity can cause injury, MOFCOM improperly went on to find that the increase in production capacity did not break the causal link between dumped imports and material injury. The complainants challenge MOFCOM's finding that, despite the increase in production capacity, "there was no case of oversupply" because the output of like domestic products "was much less than apparent consumption among domestic producers" and "remained far below demand". They contend that

[348] Japan's second written submission, para. 59. European Union's oral statement at the first substantive meeting, para. 126.
[349] Japan and European Union's comments on China's reply to Panel question No. 95.
[350] Final Determination, p. 68.
[351] Final Determination, Exhibit EU-30, p. 70.
[352] Japan's first written submission, paras. 225-233. European Union's first written submission, paras. 316-324. Japan's second written submission, para. 59. European Union's oral statement at the first substantive meeting, para. 130.
[353] Final Determination, Exhibit JPN-2, p. 74.

MOFCOM failed to take account of imports in its consideration of supply and demand in the domestic market as a whole. The complainants also contend that MOFCOM erroneously compared domestic production - the vast majority of which was of Grade A - to domestic demand for all HP-SSST, rather than domestic demand for Grade A only. The complainants assert that MOFCOM's analysis should have been grade-specific, because of the lack of competition between the grades. They observe that, although demand for Grade A increased, the price of domestic Grade A fell. They suggest that this was because of oversupply of Grade A, resulting from the expansion in capacity.

7.5.3.5.1.2 China

7.198. Regarding apparent consumption, China notes the complainants' assertion that a sudden drop in domestic demand of a good on a given market causes the market price of such a good to decrease accordingly. China asserts, though, that MOFCOM only found that apparent consumption of Grades B and C declined. MOFCOM found that apparent consumption of Grade A increased significantly. China queries why, if domestic prices for Grades B and C dropped due to reduced apparent consumption, prices for Grade A dropped at the same rate, despite apparent consumption of Grade A increasing by 74.07% during the POI.[354] China contends that MOFCOM properly found that, although reduced apparent consumption had a certain effect on the domestic prices, it could not explain the drop in domestic prices that actually occurred – including the decline in the price for Grade A. According to China, therefore, MOFCOM properly found that the effects of the reduced apparent consumption are not sufficient to break the causal link between the dumped imports and the material injury.

7.199. Regarding the increase in domestic capacity, China contends that MOFCOM was entitled to consider potential oversupply on the basis of domestic supply only, since there was no evidence to suggest that imports might occur at non-dumped prices. China submits that MOFCOM was not required to assess supply in the abstract, on the basis that imports might occur at non-dumped prices. China asserts that MOFCOM's analysis was rather based on its concrete finding that, during the POI, all imports were dumped. China also disagrees with the complainants' suggestion that MOFCOM should have compared domestic production of Grade A with Chinese demand for Grade A only. China contends that the domestic industry was able to manufacture and sell all three grades[355], which constituted a single product. China also contends that the fact that, during most of the POI, growth in domestic output was nearly double the increase in production capacity, is crucial to MOFCOM's conclusion that the increased domestic capacity had no material effects on domestic prices.[356]

7.5.3.5.2 Evaluation by the Panel

7.200. It is well established that, in order to ensure that any injury caused by other factors is not attributed to dumped imports, Article 3.5 requires investigating authorities to "separate and distinguish" the injurious effects of the dumped imports from the injurious effects of known other factors causing injury at the same time.[357] MOFCOM sought to comply with this obligation by considering whether certain other factors broke the causal link between subject imports and the material injury to the domestic industry it had found. As a matter of law, we consider that such methodology provides an appropriate basis for ensuring non-attribution. Indeed, this "break the causal link" methodology has been accepted in other WTO dispute settlement proceedings.[358] In the factual circumstances of the present case, however, we consider that MOFCOM's application of this methodology was fundamentally flawed, and therefore its determination is inconsistent with the requirements of Article 3.5.

7.201. Before it becomes relevant or necessary for an investigating authority to separate and distinguish the injury caused by other factors from the injury caused by subject imports, the investigating authority must first properly establish that the dumped imports have caused material injury, and the "nature and extent"[359] of the injury caused by subject imports and the injury

[354] China's first written submission, para. 550.
[355] Final Determination, Exhibit JPN–2, Exhibit EU–30, p. 27.
[356] Final Determination, Exhibit JPN–2, Exhibit EU–30, p. 74.
[357] See, for example, Appellate Body Report, *US – Hot Rolled Steel*, para. 226.
[358] See, for example, Panel Report, *EU – Footwear (China)*, para. 7.483.
[359] Appellate Body report, *US – Hot-Rolled Steel*, para. 226.

caused by the other factor(s). As discussed in detail above, we have concluded that MOFCOM failed to properly establish the causal link between subject imports and material injury to the domestic industry in this case. In these circumstances, MOFCOM's assessment of the "nature and extent" of the injury caused by subject imports was necessarily flawed. Thus, having failed to properly establish the causal link between subject imports and material injury to the domestic industry, MOFCOM could not have meaningfully assessed whether or not injury caused by other factors was sufficient to break that wrongly-determined causal link.

7.202. In light of the fundamental flaw in MOFCOM's causation determination, it is not necessary for us to address every aspect of the parties' non-attribution arguments in detail. We do observe, however, that MOFCOM's analyses of the injurious effects of both the decline in apparent consumption and the increase in domestic production capacity failed to address the fact that subject imports were comprised almost exclusively of Grades B and C, while the domestic industry's operations were focused on Grade A. Those analyses also failed to account for the fact that MOFCOM had not established that subject imports of Grades B and C had injurious price effects on domestic Grade A. In these circumstances, and bearing in mind the standard of review set forth in Article 17.6(i) of the Anti-Dumping Agreement, we would expect an investigating authority to have considered the possibility that other known causes of injury might affect the different grades produced and sold by the domestic industry differently. We would also expect an investigating authority to have considered whether injury suffered by the domestic industry affected its Grade A operations disproportionately to its overall HP-SSST operations, whether this disproportionate effect might have been caused by factors other than subject imports, and whether these other factors might also account for injury suffered in respect of Grade B and C operations.[360]

7.203. By way of example, we note that MOFCOM's analysis regarding the decline in apparent consumption is based in part on the fact that the domestic price for Grade A fell at the same rate as the price of Grades B and C[361], even though apparent consumption of Grade A increased. China explains that MOFCOM determined that "the decrease in prices of Grade A can only be explained by the dumped imports"[362], and that "MOFCOM could properly consider that injury to Grade A was caused by dumped imports of Grade B and Grade C, which can substitute Grade A".[363] However, since MOFCOM did not find that subject imports of Grades B and C had price effects on domestic Grade A products, and since there was no basis for MOFCOM to find cross-grade substitution or price correlation[364], MOFCOM had no basis for determining that subject imports (of Grades B and C) had any effect on the price of domestic Grade A. In these circumstances, there was no basis for MOFCOM to rely on the fact that the domestic Grade A price had fallen at the same rate as domestic Grade B and C prices as a basis to reject the decline in apparent consumption as a potential cause of injury.

7.204. For the above reasons, we find that MOFCOM's examination of the injury caused by the decrease in apparent consumption and the increase in production capacity is flawed and not objective. MOFCOM's non-attribution analysis of these factors is therefore insufficient, and its determination inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.5.3.6 Conclusion

7.205. For the above reasons, we uphold the complainants' claims that MOFCOM's reliance on the market share of subject imports in its causation analysis is inconsistent with Articles 3.1 and 3.5. We also uphold the complainants' consequential claims that because MOFCOM's price effects and

[360] We found, in the context of the complainants' Article 3.4 claims, that MOFCOM was not required to undertake a segmented impact analysis. This does not mean, however, that MOFCOM's Article 3.5 causation determination should not reflect the conclusions of its grade-specific price effects analysis, and might indeed be more meaningful and robust as a result.

[361] China's first written submission, para. 550. We note that China does not refer to any finding by MOFCOM that the domestic prices for Grades A, B and C all dropped by the same "pace". This raises questions, given the very substantial increase in the domestic price of Grade C. However, it was not necessary for us to pursue these questions in order to resolve the claims before us.

[362] China's second written submission, para. 234.

[363] China's second written submission, para. 236.

[364] China relies on alleged cross-grade price correlation to argue cross-grade substitutability (China's second written submission, para. 142). We have already rejected China's price correlation arguments at paras. 7.183. - 7.187.

impact analyses are inconsistent with Articles 3.2 and 3.4 respectively, MOFCOM's subsequent reliance on those analyses and conclusions in the context of its causation determination is inconsistent with Article 3.5. We also uphold the complainants' claims that MOFCOM's non-attribution analysis in respect of the decrease in apparent consumption and the increase in domestic production capacity is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.6 Use of facts available for the all others rate

7.6.1 Introduction

7.206. MOFCOM applied all others rates that were based on the highest margins of dumping for the cooperating European and Japanese exporters. The all others rate for European companies was based on the margin of dumping established for SMST. The all others rate for Japanese exporters was based on the margin of dumping established for Kobe. Japan and the European Union challenge the all others rates for Japanese and European exporters respectively, claiming that the requirements of Article 6.8 and Annex II:1 of the Anti-Dumping Agreement were not complied with. China asks the Panel to reject their claims.

7.6.2 Main arguments of the parties

7.6.2.1 Japan and the European Union

7.207. The complainants contend that MOFCOM failed to fulfil the requirements of Article 6.8 and Annex II:1 in applying facts available to determine the all others rates. They submit that MOFCOM could not properly have determined that unknown exporters had failed to provide necessary information, in the sense of Article 6.8, since MOFCOM had failed to "specify in detail the information required" of unknown exporters, or "ensure" that unknown exporters were "aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available", consistent with Annex II:1. According to the complainants[365], the Appellate Body in *Mexico – Rice* explained that an exporter must be given the opportunity to provide information required by an investigating authority before the investigating authority could resort to facts available that could be adverse to the exporter's interests. The complainants assert that this Appellate Body finding was relied on by the panel in *China – GOES*, where the panel found that the investigating authority had improperly applied facts available because the authority failed to inform interested parties of the necessary information required of them.

7.208. In addition, Japan asserts that even if MOFCOM could be understood to have requested certain quantity and value information in its Notice of Initiation, the application of facts available to determine the all others rate was much broader in scope. The European Union raises two additional, consequential claims regarding MOFCOM's use of facts available to determine the all others rate. First, the European Union contends that alleged flaws in MOFCOM's determination of a margin of dumping for SMST (which was used as the basis for the all others rate) render the application of such determination, through the facts available mechanism, inconsistent with Article 6.8. Second, the European Union contends that MOFCOM violated Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement as a result of "any possible substantive consequences" for the SMST margin "of any and all of the above procedural claims insofar as they relate to dumping".[366]

7.6.2.2 China

7.209. In respect of the complainants' principal claims, China refers to the findings of the panel in *China – Broiler Products* to argue that the reference to the use of facts available for non-cooperating exporters in MOFCOM's Notice of Initiation was sufficient for the purposes of Article 6.8 and Annex II:1. China also asserts that the facts of the present case are different from those in *China – GOES* because, in addition to its Notice of Initiation, MOFCOM also posted the

[365] Japan's first written submission, para. 306.
[366] European Union's first written submission, para. 187.

exporters' questionnaire on its website. According to China, therefore, exporters had ample notice of the information that they were required to submit, and of the consequences for not doing so.

7.210. Regarding the additional claim pursued by Japan, China notes that the failure by unknown producers/exporters to register and provide information requested in the Notice of Initiation implied that MOFCOM had no basis on which to determine their margin of dumping, and that MOFCOM was thus justified in determining this margin on the basis of facts available. Moreover, China denies that MOFCOM applied facts available more broadly than the scope of the information requested in the Notice of Initiation. China contends that MOFCOM applied facts available in respect of the information requested in the exporters' questionnaire, which was published on the website address provided in the Notice of Initiation.

7.211. China also asks the Panel to reject the European Union's consequential claim regarding alleged inconsistencies with Article 2 of the Anti-Dumping Agreement. China in any event denies that the application of a dumping rate that is inconsistent with Article 2 as facts available would necessarily violate Article 6.8 and Annex II. China submits that this is a matter that should be assessed under paragraph 7 of Annex II, the only provision dealing with the substantive quality of the "facts available" that are relied upon. China notes that no such claim has been brought by the European Union. Concerning the European Union's second consequential claim regarding the potential substantive consequences of procedural violations in respect of SMST's margin, China argues that it is unclear as to which possible consequences should allegedly form the basis of this consequential claim.

7.6.3 Main arguments of third parties

7.6.3.1 United States

7.212. The United States considers that China acted inconsistently with Article 6.8 and Annex II:1 of the Anti-Dumping Agreement by applying facts available to the extent that MOFCOM had no evidence that any interested party "refused access to" or otherwise "did not provide" information that was "necessary" to the antidumping investigation, or otherwise "significantly impeded" the antidumping investigation. [367]

7.6.4 Evaluation by the Panel

7.6.4.1 The complainants' principal claims

7.213. We are unable to accept the complainants' principal Article 6.8 claims since, taking into account the totality of the facts, we consider that MOFCOM had sufficient basis to determine that unknown exporters had failed to provide necessary information it had sought to obtain.

7.214. We note the complainants' reliance on the findings of the panel in *China – GOES*. We observe in particular that panel's finding that "given that the unknown exporters were not notified of the "necessary information" required of them, the Panel cannot conclude that they refused access to or failed to provide the information".[368]

7.215. China, on the other hand, relies on the findings of the panel in *China – Broiler Products*. Although that case involved facts similar to those in *China – GOES*, the panel did not follow the analysis of the *China – GOES* panel, and reached a different conclusion. The panel observed that requiring an authority to establish that unknown exporters had actually failed to cooperate with the investigation "would make it difficult, if not impossible, for a Member to determine an appropriate anti-dumping duty rate for certain unknown producers/exporters and thus apply anti-dumping measures with respect to their imports".[369] The panel also observed that MOFCOM had posted the Notice of Initiation and Registration Form - which requested information from interested parties, including producers/exporters, in order to register to participate in the proceedings, and included a warning that facts available could be resorted to in the case of failure to register - on its website. The panel concluded that "MOFCOM reasonably considered that the

[367] United States' third party submission, para. 31.
[368] Panel Report, *China – GOES*, para. 7.387.
[369] Panel Report, *China – Broiler Products*, para. 7.305.

failure to register meant that an interested party failed to 'otherwise … provide … necessary information' within the meaning of Article 6.8".[370]

7.216. There are similarities between the facts of the present case and the facts in the two above-mentioned proceedings. Most notably, in all three cases MOFCOM published a Notice of Initiation calling on interested parties to register for the investigation. The Notice specified that:

> If any interested party fails to register for responding to the investigation within the time limit, MOFCOM shall have the right to reject the relevant materials submitted by the interested party and make determinations on the basis of the available materials when that determination is made.[371]

7.217. There is also a significant difference between the facts of the present case and the facts of *China – GOES* and *China – Broiler Products*. This difference concerns the fact that, in the present case, MOFCOM published the exporter questionnaire on its website, at a web address set forth in the Notice of Initiation.[372] The questionnaire informed exporters of the information that was required of them. The questionnaire also specified that:

> If your company fails to provide the response to this questionnaire according to the requirements in this questionnaire within the prescribed time limit, or fails to provide the complete and accurate response, or does not allow the Bureau of Fair Trade for Imports & Exports of MOFCOM to verify the provided information and materials, pursuant to the provisions of the *Antidumping Regulations of the People's Republic of China*, the Bureau of Fair Trade for Imports & Exports of MOFCOM may make its determinations on the facts already known and best information available.[373]

7.218. We consider that the publication of MOFCOM's questionnaire on its website[374] is an important factor, since it informed all exporters – even those unknown to MOFCOM – of the necessary information that MOFCOM required them to provide. It also indicated that facts available would be used in the event that they failed to provide that information. In other words, unknown exporters were on notice of what information was required of them, and of what the consequences would be if they failed to provide that information. Thus, in our view, this action by MOFCOM satisfied the requirement of Annex II:1 to "specify in detail the information required" of foreign producers and exporters, including those not known to MOFCOM, sufficiently to allow MOFCOM to conclude that the failure of such foreign producers or exporters to come forward constituted a failure to provide necessary information within the meaning of Article 6.8, and thus that the facts available could be used in making determinations with respect to such entities.[375] In light of this additional, and important, factual element, we consider that there is no basis for a finding that "unknown exporters were not notified of the 'necessary information' required of them"[376], and therefore that the use of facts available was not justified.

7.219. We note Japan's argument[377] that MOFCOM provided no official public notice that the questionnaire would be available on its website. However, we agree with the panel in *China – Broiler Products* that neither Article 6.8 nor Annex II of the Anti-Dumping Agreement specifies what form the investigating authority's request for information should take.[378] We also agree with

[370] Panel Report, *China – Broiler Products*, para. 7.306. (footnote omitted)

[371] Initiation Notice, Exhibit JPN–10, Exhibit EU–2, p. 2. At footnote 564 of its first written submission, China objects to the translation of these exhibits by the complainants. According to China, the wording "and make determinations on the basis of the available materials when that determination is made" is missing. Since the complainants do not respond to China's objection, we proceed on the basis of the English translation proposed by China.

[372] China asserts that the Notice of Initiation provides that "[t]he registration Form for Dumping Investigation may be downloaded from the Notice Section on the website of [MOFCOM] (http:gpj.mofcom.gov.cn)" (China's first written submission, footnote 564). The complainants do not dispute China's version of the Notice of Initiation.

[373] Blank Dumping Questionnaire, Exhibit CHN–4.

[374] We note that the complainants do not contest that the questionnaire was published on MOFCOM's website.

[375] We consider that our position is broadly consistent with the recent findings made by the panel in *China – Autos (US)* (Panel Report, *China – Autos (US)*, paras. 7.121-7.140).

[376] Panel Report, *China – GOES*, para. 7.387.

[377] Japan's second written submission, paras. 69-71.

[378] Panel Report, *China – Broiler Products*, para. 7.301.

the finding by the panel in *China – Autos (US)* that an investigating authority need not "publicly notify the dumping questionnaire in order to satisfy the requirements of Article 6.8 and paragraph 1 of Annex II".[379] There may be more effective means through which MOFCOM could have informed interested parties that its questionnaire would be published on its website. However, the publication of MOFCOM's web address in the Notice of Initiation, and the subsequent positing of its questionnaire at that address, meant that it was not unduly difficult for interested parties that had not registered with MOFCOM to ascertain the information being sought by MOFCOM.

7.220. For these reasons, we reject the complainants' claims that MOFCOM failed to comply with the requirements of Article 6.8 and Annex II:1 when it applied facts available to determine the all others rates.

7.6.4.2 Additional claims pursued by the complainants

7.221. While Japan claims that MOFCOM applied facts available more broadly than the scope of the limited information sought in the Notice of Initiation, it has not argued that MOFCOM applied facts available more broadly than the scope of the information requested in the exporters' questionnaire. In light of our finding that MOFCOM informed exporters of the information required of them by posting the exporters' questionnaire on its website, there is no basis for Japan's claim.

7.222. The European Union has made two consequential claims. The first relates to its substantive Article 2 claim regarding the margin of dumping determined in respect of SMST. The European Union contends that any substantive inconsistency regarding this margin will necessarily contaminate any all others rate based on that margin, rendering the all others rate inconsistent with Article 6.8. We recall that we have upheld the European Union's claims that MOFCOM's determination of a margin of dumping for SMST is inconsistent with Articles 2.2.2 and 2.4 of the Anti-Dumping Agreement. We agree with the European Union that any all others rate determined on the basis of the margin established for SMST as facts available therefore lacks an appropriate factual foundation, contrary to Article 6.8 of the Anti-Dumping Agreement.[380] Since the requirement that the use of facts available be based on an appropriate factual foundation derives from Article 6.8, there is no need for the European Union to have pursued a claim under Annex II:7, as suggested by China.

7.223. Second, the European Union claims that China violated Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement by applying SMST's margin of dumping as the all others rate as a result of "any possible substantive consequences of any and all of the above procedural claims insofar as they relate to dumping".[381] In response to China's argument that it is unclear as to which possible consequences form the basis of this consequential claim, the European Union states that "it is in the nature of a procedural claim that one does not know what the substantive consequences may eventually be of remedying the procedural defect".[382] We consider that the European Union has failed to establish a *prima facie* case in respect of this claim. At a minimum, the European Union should have reviewed its procedural claims, and explained which alleged inconsistencies resulted in a violation of Article 6.8 and Annex II:1, and how. The European Union has failed to do so, and we decline to make out a case on its behalf. Furthermore, in its second written submission the European Union asserts[383] that "what the substantive consequences may or may not be is not a matter for these panel proceedings, but rather, in the first place, for the implementing Member, subject to review in compliance proceedings". We agree. China will need to consider the substantive consequences of any procedural violations as it implements any recommendation of the DSB in respect of such violations. If the complainants consider that China fails to address any substantive issues raised by the procedural violations, they would be able to raise those substantive issues in Article 21.5 compliance proceedings. In referring to potential review in compliance proceedings, the European Union appears to acknowledge that there is no

[379] Panel Report, *China – Autos (US)*, para. 7.139.
[380] The text of Article 6.8 refers to "*facts* available". Accordingly, even when applying facts available, an investigating authority's determination must have a factual foundation (Panel Report, *China – GOES*, para. 7.296).
[381] European Union's first written submission, para. 187.
[382] European Union's oral statement at the first meeting of the Panels, para. 47.
[383] European Union's second written submission, para. 135.

basis for any findings by the Panel regarding the substantive consequences of procedural violations in the present proceeding.

7.6.4.3 Conclusion

7.224. We reject the complainants' principal claims under Article 6.8 and Annex II:1 that MOFCOM failed to properly apply facts available because it had failed to inform unknown exporters of the information required of them. We also reject Japan's supplemental claim regarding the scope of the facts available applied by MOFCOM. We uphold the European Union's claim that, as a consequence of SMST's margin of dumping not having been determined consistent with Articles 2.2.2 and 2.4 of the Anti-Dumping Agreement, the use of SMST's margin of dumping as facts available to establish the all others rate for exporters from the European Union is inconsistent with Article 6.8 of the Anti-Dumping Agreement. We reject the European Union's claim regarding the substantive consequences of procedural violations in respect of SMST's margin of dumping.

7.7 Essential facts

7.225. The complainants submit that MOFCOM failed to comply with the Article 6.9 obligation to disclose essential facts regarding its dumping and injury determinations, and its determination of the all others rates. The European Union also makes a claim under Article 6.4 in respect of MOFCOM's determination of the all others rate on the same grounds.

7.7.1 Main arguments of the parties

7.7.1.1 Japan and the European Union

7.226. Regarding the dumping determination, the complainants contend that MOFCOM failed to disclose essential facts, specifically: (i) the specific cost and sales data applied for the calculation of normal value and export prices underlying the margin calculations; (ii) adjustments to this data, for instance, to take account of taxes and freight; and (iii) information on the calculation methodology, namely the formulae used in calculations, the data applied in these formulae, and information on how MOFCOM applied these data in calculations for normal value, export price and production costs. The complainants assert that MOFCOM failed to disclose any of this information. The European Union submits that "[i]t is particularly difficult to understand why, if a firm provides a spread sheet with certain data destined to be used to calculate a dumping margin, it should not receive disclosure of what is in essence the same spread sheet, duly completed with the data actually relied on by the investigating authority".[384] The European Union further submits that MOFCOM's alleged failure to disclose the essential facts for its dumping determination also violates Article 6.4.

7.227. Regarding the injury determination, the complainants contend that MOFCOM failed to disclose, specifically: (i) complete information about the import prices it used in its price effects analysis for Grades A and C; (ii) any domestic prices; (iii) the percentage change in the domestic price of Grade C in the first half of 2011 as compared with the first half of 2010; (iv) the margins of overselling for Grade A in 2008 and the HP-SSST product as a whole (to the extent that there were relevant domestic sales); (v) the margin of overselling or underselling for Grade C in the first half of 2011; and (vi) the margin of underselling for Grade B for the years 2008, 2009 and 2010.[385]

7.228. Regarding the all others rates, the complainants claim that MOFCOM violated Article 6.9 by failing to disclose (i) the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate, (ii) the particular facts that were used to determine the all others rates, and (iii) the justification for using the highest dumping margin found for a cooperating exporter as the all others rate.[386] The European Union also claims a violation of Article 6.4 on the same grounds.

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[384] European Union's first written submission, para. 111.

[385] The complainants assert that MOFCOM disclosed only a range of underselling (i.e., -3% to -28%) for those years, without specifying the particular margin of underselling for any given year.

[386] Japan's first written submission, paras. 307 and 308. European Union's first written submission, paras. 124 and 125.

7.7.1.2 China

7.229. China asks the Panel to reject the complainants' claims. China submits that MOFCOM disclosed all "essential facts", and provided sufficient non-confidential summaries in respect of those "essential facts" for which it was bound by confidentiality obligations.

7.230. China submits that the complainants fail to make a *prima facie* case, as they only rely on general allegations that are not substantiated in any way by means of a specific reference to the disclosure documents. According to China, the European Union's failure to provide the disclosure document with respect to Tubacex as an exhibit implies that no *prima facie* case was made. China further contends that MOFCOM disclosed all essential facts pertaining to its dumping determinations in its preliminary and final dumping disclosures. In particular, China submits that MOFCOM explained when it accepted data reported by the respondents, and when it resorted to constructed normal values or export prices. Concerning production costs, SG&A and profits, China asserts that MOFCOM explained when it accepted the data submitted by the exporting producers, and when it resorted to other data. China also asserts that MOFCOM indicated when adjustments requested by respondents were upheld, and the amount of adjustments made in other cases. China also contends that MOFCOM provided the necessary information for respondents to understand the margin calculation methodology. In addition, China contends that the margin calculation methodology is part of MOFCOM's reasoning, and therefore falls outside the scope of Article 6.9, which only applies in respect of "facts".[387] China also submits that MOFCOM generally disclosed all relevant information supporting its injury and causation determinations. China contends, though, that MOFCOM was not required to disclose some of the information identified by the complainants because of its obligation (under Article 6.5) to protect confidentiality and that, in this case, China in any event provided a sufficient non-confidential summary. China further contends that the findings of the panel and Appellate Body in *China – GOES* confirm that the relationship between the prices of the subject imports and the domestic prices is what is to be disclosed.[388]

7.231. China asks the Panel to reject the complainants' claims concerning the disclosure of essential facts in respect of the all others rates. China submits that MOFCOM properly disclosed that facts available were applied in respect of the all others rates because of unknown exporters' failure to respond to the Notice of Initiation, to register with MOFCOM, or to respond to MOFCOM questionnaire for exporters. China submits that MOFCOM properly disclosed that the all others rates would be determined on the basis of the highest dumping margin determined for European and Japanese exporters respectively. China denies that MOFCOM's justification for applying the highest rates from cooperating exporters as the all others rates is an "essential fact" within the meaning of Article 6.9. With regard to the additional Article 6.4 claim pursued by the European Union, China denies that Article 6.4 imposes any active disclosure obligation on investigating authorities. China contends that, in order to pursue a claim under Article 6.4, the European Union should have shown that MOFCOM had denied an interested party's request to see information used by the authorities.

7.7.2 Main arguments of third parties

7.7.2.1 United States

7.232. The United States[389] asserts that the calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The United States contends that the calculations and underlying data are facts that are "absolutely indispensable" to the determination of the existence and magnitude of dumping.[390] The United States asserts that, without such information, no

[387] China's first written submission, paras. 665-677; China's second written submission, paras. 268-280.
[388] China's first written submission, paras. 682-687; China's second written submission, paras. 281-285; China's reply to Panel questions Nos. 72 and 75-77, paras. 186-188 and 189-197; China's reply to Panel question No. 96, paras. 27-29.
[389] United States' third party submission, paras. 18-24.
[390] The United States refers in this regard to Panel Report, *EC – Salmon*, para. 7.805 (noting that the ordinary meaning of "essential" includes "of or pertaining to a thing's essence" and "absolutely indispensable or necessary").

affirmative determination could be made and no definitive duties could be imposed. The United States considers that if the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests. The United States submits that the fact that a party has provided information to the investigating authority does not mean that the exporter knows with certainty which of that information will be used and in what capacity. The United States also asserts that MOFCOM should have disclosed the essential facts forming the basis for the calculation of the all others rate. The United States also considers that MOFCOM should have disclosed to the interested parties information related to domestic prices, import prices, and the comparison of these prices.[391]

7.7.3 Evaluation by the Panel

7.233. We begin by addressing the complainants' Article 6.9 claims in respect of MOFCOM's dumping determination. We shall then turn to the Article 6.9 claims in respect of MOFCOM's injury determination. Thereafter, we address the complainants' Article 6.9 and 6.4 claims in respect of MOFCOM's determination of the all others rates.[392]

7.7.3.1 MOFCOM's dumping determination

7.7.3.1.1 Data underlying MOFCOM's determination of dumping

7.234. The complainants' claims concerning MOFCOM's alleged failure to disclose the data underlying its dumping determinations are based on the fact that MOFCOM provided a narrative description of the cost and sales data, and adjustments, on which its findings would be based, rather than disclosing the actual data.[393] The complainants consider that MOFCOM's choice to provide a narrative description, rather than actual data, is insufficient for the purposes of Article 6.9. Japan asserts in this regard that "MOFCOM's disclosure documents included only brief narrative descriptions of how the dumping margins were calculated, without any disclosure of the underlying cost or sales data that was used, how particular adjustments were applied to the cost or sales data, and the calculation methodology applied to all of these data to determine dumping margins".[394]

7.235. Previous WTO dispute settlement proceedings have established that the basic data underlying an investigating authority's dumping determination constitute "essential facts" within the meaning of Article 6.9.[395] We agree. In addition, the panel in *China – Broiler Products* found that a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the respondent.[396] We agree. In cases where the relevant essential facts are already in the possession of the respondents, we do not consider that Article 6.9 requires investigating authorities to prepare disclosures containing the entirety of the essential facts under consideration. In particular, we do

[391] United States' third party submission, paras. 32-34.

[392] The European Union requests the Panel to exercise its right, under Article 13.1 of the DSU, to seek information from China "equivalent to the full disclosure that should have been made, that is, of all the essential facts, having particular regard to the concerns raised by the European Union and Japan, and given the BCI procedures in place". (European Union's first written submission, paras. 331 and 336.) China notes that Article 13.1 of the DSU is generally used by panels to obtain expert advice and to accept *amicus curiae* briefs. Exceptionally, panels have used this provision to request information from Members that are party to a dispute. China submits that there will be sufficient information available to the Panel to conduct an objective assessment of the matter pursuant to Article 11 of the DSU. (China's first written submission, paras. 782 and 787.) We consider that the parties have provided sufficient and relevant information for the Panel's assessment of the claims and matter before it. Thus, we need not exercise our right under Article 13.1 of the DSU to seek further information from the parties. Accordingly, we reject the European Union's request. We also note that the European Union objects to the BCI designation of certain information submitted by China in connection with MOFCOM's disclosure of essential facts. In its objection, the European Union states that "as we further explain below, this material must not be designated BCI but must be complete[ly] expunged from the Panel record". (European Union's opening statement at the second meeting of the Panel, para. 11.) As we were unable to find, and the European Union does not identify, where it further explains its objections with respect to the information at issue, we have no basis to properly consider the European Union's objections. We also note that the designation of this information as BCI did not hamper us in making our findings.

[393] Japan's first written submission, para. 290. European Union's first written submission, para. 115.

[394] Japan's second written submission, para. 90.

[395] See, for example, Panel report, *China – X-Ray Equipment*, para. 7.402.

[396] Panel Report, *China – Broiler Products*, para. 7.95.

not consider that the authority need necessarily disclose a spread sheet "duly completed with the data actually relied on by the investigating authority", as suggested by the European Union.[397] While this would be one way of complying with Article 6.9, a narrative description would also suffice in the appropriate circumstances, provided that such description does not leave uncertainty as to the essential facts under consideration.

7.236. MOFCOM made both preliminary and final dumping disclosures to the Japanese and European exporters at issue. The narrative in those disclosures described the sales data under consideration, the basis for determining normal value and export price, and the adjustments made thereto. MOFCOM specified when it used data or made adjustments requested by the exporters. In addition, MOFCOM disclosed actual data when it departed from the data submitted by the exporters.[398] Other than observing that MOFCOM failed to provide actual data that was already in the respondents' possession, the complainants have not identified any flaws in MOFCOM's narrative description, or otherwise explained how such description would not have been sufficient for the relevant exporters to defend its interests. In these circumstances, there is no basis for us to find that the narrative descriptions provided by MOFCOM do not satisfy the requirements of Article 6.9 of the Anti-Dumping Agreement.

7.7.3.1.2 Calculation methodology

7.237. Regarding the complainants' claims that MOFCOM was required by Article 6.9 to disclose its dumping margin calculation methodology, we note that the Article 6.9 disclosure obligation only applies in respect of essential "facts". The ordinary meaning of the term "fact" is "[a] thing known for certain to have occurred or to be true".[399] The word "methodology" is defined as "[a] body of methods used in a particular branch of study or activity".[400] These definitions tend to suggest that a dumping calculation "methodology" should not be treated as a "fact". However, pursuant to Article 31.1 of the *Vienna Convention*, treaty terms must also be interpreted in their context, and in the light of their object and purpose. In this regard, we note the immediate context provided by the second sentence of Article 6.9, which provides that the disclosure of essential facts "should take place in sufficient time for the parties to defend their interests". This provision indicates that the terms of the first sentence of Article 6.9 should be interpreted in a manner that allows interested parties to defend their interests. We therefore agree with the finding by the panel in *EC – Salmon (Norway)* that "the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to … comment on or make arguments as to the proper interpretation of those facts".[401]

7.238. We are not persuaded that disclosure of the data underlying a dumping determination would enable an interested party to properly defend its interests – through, for example, commenting on the proper interpretation of those facts - unless that interested party were also informed of the methodology applied by the investigating authority to determine the margin of dumping. Since the application of different methodologies to the same data would likely give rise to different results, merely disclosing the underlying data under consideration, without also disclosing the methodology under consideration, would be of little use in clarifying the factual basis of the investigating authority's determinations. We note that this was the approach adopted by the panel in *China – Broiler Products*, which found that:

> a proper disclosure of the comparison would require not only identification of the home market and export sales being used, but also the formula being applied to compare them. What formula was applied is an essential element of a comparison of normal value to export price and is just as fundamental to an understanding of the establishment of the margin of dumping as the data reflecting the individual sales. The disclosure of the formulas applied is necessary to enable the respondent to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, provide additional information or

[397] European Union's first written submission, para. 111.

[398] For example, MOFCOM explained in detail the data that it used to determine the cost of producing certain steel billets when constructing normal value in respect of SMI (see Exhibits JPN-18 and 20).

[399] New Shorter Oxford English Dictionary, 1993, 4th Edition, p. 903 (Exhibit CHN-5).

[400] New Shorter Oxford English Dictionary, 1993, 4th Edition, p. 1759 (Exhibit CHN-4).

[401] Panel Report, *EC – Salmon (Norway)*, para. 7.805, cited with approval in Appellate Body Report, *China – GOES*, footnote 390.

> correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts. Without these formulas, a respondent would have an insufficient understanding of what the authority has done with its information and how that information was being used to determine the dumping margin.[402]

7.239. We agree with the approach adopted by the panel in *China – Broiler Products*, and adopt it as our own. Accordingly, we consider that, in disclosing the essential facts underlying its dumping determination, MOFCOM should also have disclosed the calculation methodology used to calculate the margin of dumping on the basis of those essential facts. By failing to disclose that methodology, MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

7.7.3.2 Essential facts concerning MOFCOM's injury determination

7.240. We recall that the purpose of the Article 6.9 disclosure obligation is to allow interested parties to understand the factual basis for the decision whether to apply definitive measures in order to be able to defend their interests, before a final determination is actually made. MOFCOM's injury determination was based on its conclusions regarding the price effects of subject imports, based on findings of price undercutting in respect of Grade B and C subject imports. Accordingly, we consider that MOFCOM was required by Article 6.9 to disclose to interested parties the actual price comparisons on which those findings of price undercutting and price effects were based, and all of the underlying data considered by MOFCOM in making those findings. This approach is consistent with the finding of the Appellate Body in *China – GOES* that all "essential facts relating to the price comparisons"[403] should be disclosed.[404] Our approach is also consistent with the finding by the panel in *China – X-ray Equipment* that Article 6.9 requires the disclosure of "the entire body of facts essential to [the investigating authority's] analysis of the price effects of the dumped imports".[405] With these considerations in mind, we now turn to the detail of Japan's Article 6.9 claims in respect of MOFCOM's injury determination.

7.7.3.2.1 Import price data

7.241. Turning first to the complainants' claims in respect of Grade A and C import price data, we consider, for the reasons set forth in the preceding paragraph, that the import price data considered by MOFCOM was part of the body of facts essential to MOFCOM's price effects analysis. We do not understand China to deny that import price data constitute essential facts falling within the scope of Article 6.9. China rather asserts that MOFCOM was prevented from disclosing such data by virtue of the confidentiality requirements of Article 6.5. We recall in this regard that the Appellate Body confirmed in *China – GOES* that the Article 6.5 obligation to protect confidentiality does not excuse a total failure of disclosure, in the sense that a non-confidential summary of the relevant essential facts should be disclosed instead. We agree with that finding, and adopt it as our own.

7.242. Regarding Grade A, MOFCOM failed to disclose any import price data whatsoever, even though a small quantity of such products were imported in 2008. MOFCOM stated that this price data was confidential, since imports came from only one exporter.[406] As indicated above, we do not consider that the confidentiality of an essential fact justifies the total absence of any disclosure in respect thereof. Rather than disclosing nothing about Grade A import prices, MOFCOM should have disclosed a meaningful non-confidential summary thereof. Japan suggests that MOFCOM might, for example, have disclosed a meaningful non-confidential price range. We do not disagree, although we are not suggesting that any particular form of non-confidential disclosure is required. MOFCOM's failure to disclose any essential facts in respect of Grade A import prices for 2008 is inconsistent with the requirements of Article 6.9.

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[402] Panel Report, *China – Broiler Products*, para. 7.91. (footnotes omitted)

[403] Appellate Body Report, *China – GOES*, para. 247. By referring to essential facts "relating to" the relevant price comparisons, the Appellate Body necessarily envisages that Article 6.9 requires more than the mere disclosure of the price comparisons themselves. We therefore reject the more restrictive understanding of the Appellate Body's findings proposed by China in its reply to Panel question No. 96.

[404] This is also consistent with our finding that the data underlying MOFCOM's dumping determination must be disclosed.

[405] Panel Report, *China – X-ray Equipment*, para. 7.409.

[406] Injury Disclosure, Exhibit JPN-23, Section 3, second sub-section D.

7.243. Regarding Grade C, China asserts that MOFCOM properly treated the relevant import price data as confidential because only two foreign producers exported that product during the POI. China contends that MOFCOM complied with Article 6.9 by disclosing a meaningful non-confidential summary thereof, in the form of the relative change in their adjusted annual weighted average price. A similar argument was addressed by the panel in *China – X-Ray Equipment*. That panel found that "by simply informing interested parties of the trends in subject import and domestic prices, MOFCOM provided little basis for interested parties to defend their interests".[407] We agree with that panel's finding. We do not consider that MOFCOM's disclosure of the change in adjusted annual weighted average prices provides any meaningful basis for interested parties to defend their interests. MOFCOM's disclosure in respect of Grade C import prices is therefore inconsistent with Article 6.9.

7.7.3.2.2 Domestic prices

7.244. For the reasons explained above[408], we consider that the domestic price data considered by MOFCOM was part of the body of facts essential to MOFCOM's price effects analysis, and should therefore have been disclosed by MOFCOM pursuant to Article 6.9 of the Anti-Dumping Agreement.

7.245. China asserts that domestic prices do not constitute "essential facts" to be disclosed pursuant to Article 6.9 in respect of those grades and time periods for which either (i) the absence of domestic sales or imports meant that no price comparisons could be made, or (ii) no price undercutting was found. China further asserts that the domestic price information was provided by only two producers, and therefore treated by MOFCOM as confidential. China contends that MOFCOM complied with Article 6.9 by disclosing, where necessary, meaningful non-confidential summaries of this information, in the form of year-on-year price differences expressed in percentages.[409]

7.246. We are not persuaded by China's argument that certain domestic price information falls outside the scope of Article 6.9 because either no price comparisons were made, or because no price underselling was found. The body of essential facts to be disclosed under Article 6.9 concerns the facts "under consideration" by the investigating authority in determining whether (or not) to apply measures. It is not comprised solely of the facts that support the final determination to apply measures. In this regard, we note the finding by the Appellate Body in *China – GOES* that Article 6.9 "refer[s] to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome".[410] We agree with this finding, and are guided by it in rejecting China's argument. Even though certain domestic price information was not ultimately used in price comparisons, or comparisons based on that price information did not reveal price undercutting, the domestic price information was still "under consideration" by the authority, and should therefore have been disclosed to interested parties.

7.247. Regarding China's argument that MOFCOM complied with Article 6.9 by disclosing non-confidential year-on-year price differences expressed in percentages[411], we have already found that simple price trend information does not provide a meaningful basis for interested parties to defend their interests. Accordingly, MOFCOM's disclosure of such information does not satisfy the disclosure obligation specified in the second sentence of Article 6.9.

7.7.3.2.3 Price comparisons

7.248. Concerning price comparisons, the complainants claim that MOFCOM failed to disclose (i) the margins of overselling for Grade A in 2008 and the HP-SSST product as a whole (to the extent that there were relevant domestic sales); (ii) the margin of overselling or underselling for Grade C in the first half of 2011; and (iii) the margin of underselling for Grade B for the years 2008, 2009 and 2010. The complainants challenge MOFCOM's disclosure of only a range of underselling (i.e., -3% to -28%) for Grade B for those years, without specifying the particular margin of underselling for any given year.

[407] Panel Report, *China – X-ray Equipment*, para. 7.409.
[408] See para. 7.240. above.
[409] China's second written submission, para. 283.
[410] Appellate Body Report, *China – GOES*, para. 240.
[411] Injury Disclosure, Exhibit JPN-23, Section 4.

7.249. We consider that the price comparisons made by MOFCOM were part of the body of facts essential to MOFCOM's price effects analysis, and should therefore have been disclosed by MOFCOM pursuant to Article 6.9 of the Anti-Dumping Agreement. We note in this regard that the Appellate Body stated in *China – GOES* that the essential facts to be disclosed "include the price comparisons between subject imports and the like domestic products".[412] We recall our earlier finding that the mere fact that a price comparison showed price overselling does not mean that it need not be disclosed pursuant to Article 6.9.[413]

7.250. Concerning the complainants' claim that MOFCOM failed to disclose the margin of overselling or underselling for Grade C in the first half of 2011, China has explained in these proceedings that there were either no imports or no domestic sales during this period, such that no price comparison could be made.[414] While this means that there was effectively no price comparison for MOFCOM to disclose pursuant to Article 6.9, the fact that interested parties were not aware of this during MOFCOM's investigation confirms our view that MOFCOM should have disclosed all of the domestic and import price data under its consideration, properly summarized so as to avoid disclosing confidential information where necessary.

7.251. Regarding the margin of price overselling or underselling in respect of Grade A for 2008, and for the product as a whole, China advances no specific defence. We note China's assertion that MOFCOM found that the Grade A import price was higher than the domestic sales price in 2008.[415] We also note MOFCOM's finding that "the adjusted import prices of the subject products were higher than the sales prices of the domestic like products"[416] as a whole. These price comparisons should have been disclosed to interested parties, but were not. We therefore uphold the complainants' claims in respect of these comparisons.

7.252. Regarding MOFCOM's disclosure that the range of underselling for Grade B for the years 2008, 2009 and 2010 varied from 3-28%, the complainants do not dispute that MOFCOM was entitled to disclose merely a range of underselling in order to protect the confidentiality of the actual margins of underselling. However, they argue that the disclosure of a single range to cover underselling over a period of three years was not sufficient to enable interested parties to defend their interests, as required by Article 6.9. We agree. In particular, disclosure of a single range provides no indication as to whether the margin of underselling increased or decreased during that three-year period. Nor does it disclose the year in which the margin of underselling was greatest, even though this may be relevant to the issue of causation. In order to allow interested parties to properly defend their interests, MOFCOM should have provided a more nuanced disclosure, perhaps of non-confidential ranges for each of the years at issue, as it did for the first half of 2011, which would have provided a meaningful understanding of the essential facts and enabled the parties to defend their interests. MOFCOM's failure to do so is inconsistent with Article 6.9 of the Anti-Dumping Agreement.

7.253. For the above reasons, we uphold the complainants' claims in respect of MOFCOM's failure to disclose the relevant margins of overselling or underselling for Grade A for 2008 and for the product as a whole, and its failure to disclose the annual ranges of underselling for Grade B for the years 2008, 2009, and 2010. We reject the complainants' claims regarding MOFCOM's failure to disclose the margin of overselling or underselling in respect of Grade C for the first half of 2011.

7.7.3.3 Essential facts concerning the all others rates

7.254. The complainants' Article 6.9 claims are focused on the alleged shortcomings of MOFCOM's Final Dumping Disclosures to the complainants' respective diplomatic representations in China.[417] In the Final Dumping Disclosure to Japan's Embassy, MOFCOM stated:

[412] Appellate Body Report, *China – GOES*, para. 247.
[413] See para. 7.246. above.
[414] China's first written submission, para. 686 (where Grade C H1 2011 is identified as a grade/period "where no price comparison was made in the absence of domestic sales or imports").
[415] China's first written submission, para. 682.
[416] Final Determination, Exhibit JPN-02, p. 53.
[417] This is the disclosure referred to in footnote 420 of Japan's first written submission, and para. 125 of the European Union's first written submission. There is no suggestion by the complainants that the relevant essential facts were not disclosed to "unknown" interested parties (to whom the all others rate would apply), who would not have received a copy of the Final Dumping Disclosures to Japan and the European Union.

> for those Japanese companies that did not respond or submit the questionnaire response, the Investigation Authority decides to base its determinations on dumping and dumping margin on facts already known or best information available, and apply the highest dumping margin found for the Japanese respondents to such companies.[418]

7.255. In the Final Dumping Disclosure to the European Union, MOFCOM stated:

> As regards other EU companies that did not respond to the questionnaire, the Investigation Authority decided to use known facts or best information available to determine the relevant dumping and dumping margin and to use the highest dumping margin among the dumping margins of the EU responding companies.[419]

7.256. Regarding the question of whether MOFCOM properly disclosed the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate, we note that the above extracts from MOFCOM's Final Dumping Disclosures expressly state that facts available were used in respect of companies that did not respond or submit questionnaire responses. We consider that, in the context of the use of facts available, the obvious implication of this statement is that MOFCOM considered the use of facts available warranted by virtue of the failure of unknown exporters to provide the necessary information set forth in the exporter questionnaire.

7.257. The complainants[420] rely on the finding of the panel in *China – GOES* to argue that, because MOFCOM failed to comply with Article 6.8 by determining that the relevant entities had either failed to provide necessary information or significantly impede the investigation, MOFCOM was not able to disclose, pursuant to Article 6.9, that the factual basis for applying facts available was failure to provide necessary information or significant impediment of the investigation. In other words, the complainants' Article 6.9 claims are very closely tied to, if not dependent on, their Article 6.8 claims. As we explained when rejecting the complainants' Article 6.8 claims[421], the facts of the present case are different from those in *China – GOES*, and our conclusion is also different. In our view, the finding by the panel in *China – GOES* in respect of Article 6.9 is a consequence of it having upheld the United States' claim under Article 6.8. However, in the present case, we have concluded that MOFCOM did not violate Article 6.8 in concluding that unknown exporters failed to provide necessary information, and therefore in resorting to the use of facts available. In these circumstances, we reject the complainants' Article 6.9 claims that MOFCOM failed to disclose the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate.

7.258. Concerning the question of whether MOFCOM properly disclosed the particular facts that were used to determine the all others rates, we note that the Final Dumping Disclosures clearly indicate that the all others rates would be based on the highest margin of dumping for cooperating exporters. In our view, such disclosure is sufficient for the purpose of Article 6.9. Unlike the situation in *China – GOES*, where the panel found the large disparity between the all others rate and the rates determined for respondents left uncertainty as to how the all others rate had been determined "based on transaction information of the respondents", in the present case, there is no disparity between the all others rates and the rates of the cooperating respondents with the highest margins of dumping, and thus no lack of clarity. In these circumstances, MOFCOM's disclosure that the all others rates would be based on the highest margins determined for cooperating respondents is sufficient for the purpose of Article 6.9.

7.259. Japan also claims that MOFCOM's alleged failure to disclose all essential facts pertaining to Kobe, the Japanese exporter with the highest margin of dumping, also invalidated MOFCOM's disclosure with respect to the all others rate for unknown Japanese exporters, which was based on Kobe's rate.[422] However, as a matter of law, we recall that the purpose of Article 6.9 disclosure is to allow interested parties to defend their interests. The interests of an entity subject to an all

[418] Exhibit JPN-22, Section III.1.C.
[419] Exhibit EU-27, Section III.1.C.
[420] Japan's second written submission, paras. 98-100. European Union's first written submission, para. 125.
[421] See Section 7.6.4.1
[422] Japan's second written submission, para. 101.

others rate based on facts available, or of the exporting Member in respect of an all others rate based on facts available, are not necessarily the same as those of cooperating respondents participating in the investigation, whose margin is established on the basis of their own data. Such respondents may wish to challenge the investigating authority's determination of their margin of dumping, and the Article 6.9 disclosure obligation ensures that the essential facts underlying that determination are disclosed to them in order to enable them to do so. This issue does not arise in respect of exporters that have not cooperated and are not participating in the investigation, and whose rate will be based on facts available pursuant to Article 6.8. The primary interest of such exporters is to ensure that the requirements of Article 6.8 (including in particular the need for a factual foundation) are complied with. If the authority discloses that the all others rate for non-cooperating exporters will be based on facts available in the form of the highest margin for cooperating exporters, and if the final determination states what that highest rate is, the interests of the relevant interested parties are effectively addressed.

7.260. Regarding MOFCOM's failure to disclose the justification for using the highest dumping margins found for cooperating exporters as the all others rates, we agree with China's argument[423] that such justification, or reasoning, need not be disclosed as an essential "fact" pursuant to Article 6.9. Japan[424] asserts that "[a]n investigating authority must use the 'best information available' and 'special circumspection', and may not resort to 'adverse inferences'. The facts underpinning MOFCOM's determination that the highest dumping margin for an investigated respondent was the 'best information available' for determining the all others rate are therefore 'essential' or 'material' facts necessary to understand MOFCOM's decision to impose final anti-dumping measures on unknown Japanese exporters".[425] We disagree, and consider that Japan's argument is really aimed at MOFCOM's qualitative assessment of *why* the highest margin of dumping established for cooperating exporters was the best information available to use as the all others rate. Such qualitative assessment is not a "fact" within the meaning of Article 6.9.[426]

7.261. For the above reasons, we reject the complainants' Article 6.9 claims that MOFCOM failed to disclose certain essential facts regarding the all others rate.

7.262. Regarding the Article 6.4 claim pursued by the European Union, we observe that Article 6.4 requires investigating authorities "whenever practicable [to] provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential (…), and that is used by the authorities in an anti-dumping investigation…". The panel in *EC – Fasteners (China)* held that Article 6.4 "does not obligate the investigating authorities to actively disclose information to interested parties", and that "a violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential".[427] We agree with these findings, and adopt them as our own. Since the European Union has not even asserted, much less demonstrated, that MOFCOM denied any request by any interested party to see information used by MOFCOM, we reject the European Union's Article 6.4 claim.

7.8 Public notice

7.263. The complainants contend that MOFCOM failed to ensure that its public notice of the Final Determination complied with the public notice requirements set forth in Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. They claim that MOFCOM failed to include in its public notice "all relevant information on the matters of fact or law and reasons which have led to the imposition of

[423] China's first written submission, para. 626.

[424] The European Union failed to respond to this argument by China in either its oral statement at the first substantive meeting, or its second written submission.

[425] Japan's second written submission, para. 102.

[426] As explained above in Section 7.7.3.1.2 , in respect of the complainants' Article 6.9 claims concerning MOFCOM's dumping calculation methodology, a somewhat broad interpretation of the term "fact" may be required in certain circumstances. However, even in such circumstances, Article 6.9 only requires the disclosure of elements that are essential to understanding the factual basis for the investigating authority's determination. Understanding the reasons why MOFCOM elected to base the all others rate on the highest margin calculated for a cooperating exporter would extend beyond an understanding of the factual basis for that rate.

[427] Panel Report, *EC – Fasteners (China)*, para. 7.480.

final measures". Their claims pertain to information concerning MOFCOM's injury determination, and MOFCOM's determination of the all others rates.

7.264. China asks the Panel to reject the complainants' claims.

7.8.1 Main arguments of the parties

7.8.1.1 Japan and the European Union

7.265. In respect of MOFCOM's injury determination, the complainants contend that MOFCOM failed to include two types of "key factual information" in its public notice.[428] First, they refer to the "pricing information underlying [MOFCOM's] price undercutting analysis". Second, they refer to details of how MOFCOM accommodated the "quantitative differences" between the volume of subject imports of Grade C and the volume of domestic sales of Grade C in its price undercutting analysis.[429]

7.266. In respect of the all others rates, the complainants submit that MOFCOM's public notice is inconsistent with Articles 12.2 and 12.2.2 because it fails to include (i) the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rates, (ii) the facts that were used to determine the all others rates, and (iii) facts or reasoning behind why it was appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rate.[430]

7.8.1.2 China

7.267. Regarding the injury determination, China claims that, for reasons similar to those explained in relation to the complainants' Article 6.9 essential facts claims, MOFCOM's Final Determination included all relevant information on matters of fact where appropriate, in the form of non-confidential summaries.[431] Regarding the "quantitative differences" in respect of Grade C, China contends that the treatment of such "quantitative differences" was a methodological matter falling within MOFCOM's discretion that, although it did not need to be included in the public notice, was clearly explained by MOFCOM.

7.268. Regarding the all others rates, China submits that the Final Determination addresses the efforts MOFCOM made to notify all interested parties and to inform them all of the consequences of not registering as respondents and/or of not submitting questionnaire responses[432], before specifying that MOFCOM resorts to facts available for "those EU and Japanese companies that did not respond or submit the questionnaire response".[433] China also contends that the Final Determination explains that the all others rate used for Japanese exporters is the margin of dumping established for Kobe, and the all others rate used for European exporters is the margin of dumping established for SMST.[434]

7.8.2 Main arguments of third parties

7.8.2.1 United States

7.269. The United States asserts that the factual and legal bases for the investigative authority to resort to facts available with respect to all other exporters that it did not examine constitute material issues of fact and law considered. The United States suggests that these issues go to the very heart of the determination of what margin to apply to unexamined exporters, and should therefore have been included in the public notice pursuant to Article 12.2. The United States submits that Article 12.2.2 required MOFCOM include in its public notice "all relevant information"

[428] Japan's first written submission, para. 257. European Union's first written submission, para. 152.
[429] Japan's first written submission, paras. 259 and 262. European Union's first written submission, paras. 154 and 157.
[430] Japan's first written submission, paras. 102-103. European Union's first written submission, para. 73. Japan's second written submission, para. 103. European Union's second written submission, para. 73.
[431] China's first written submission, para. 693; China's second written submission, para. 281.
[432] Final Determination, Exhibit JPN–02, Exhibit EU–30, pp. 35, 40.
[433] Final Determination, Exhibit JPN–02, Exhibit EU–30, p. 41.
[434] Final Determination, Exhibit JPN–02, Exhibit EU–30, p. 41.

on the relevant facts underlying its determination that recourse to facts available was warranted in the calculations of the all others rates.[435] The United States also asserts that any facts related to the price comparisons of the subject imports and domestic products are relevant information on the matters of fact that China should have disclosed in MOFCOM's Final Determination.[436]

7.8.3 Evaluation by the Panel

7.8.3.1 General interpretive approach

7.270. Articles 12.2 and 12.2.2 have been interpreted by panels and the Appellate Body in a number of prior cases. In *China – X-ray Equipment*, the panel provided the following overview of the relevant case law:

> In interpreting the scope of the obligation set forth in the first sentence of Article 12.2.2, we note that the text of Article 12.2.2 refers to Article 12.2.1. Accordingly, the information described in Article 12.2.1 must be included in public notices issued pursuant to Article 12.2.2. We consider that it is also appropriate to have regard to the contextual guidance afforded by Article 12.2, which applies to public notices of both preliminary and final determinations. Article 12.2 provides that such public notices shall set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In considering the contextual guidance afforded by Article 12.2, we have regard to the followings findings made by the panels in *EU – Footwear (China)* and *EC – Tube or Pipe Fittings*:
>
> > The chapeau of Article 12.2.2, Article 12.2, requires the publication of "findings and conclusions on all issues of fact and law considered material *by the investigating authorities*" (emphasis added). In our view, this is relevant context for a proper understanding of Article 12.2.2, and thus informs our understanding of what must be included in a public notice under that provision. China suggests that whether information and reasons for the acceptance or rejection of arguments must be provided in such a notice should be judged from the perspective of the interested parties. We do not agree. We consider that while an investigating authority must make innumerable decisions during the course of an anti-dumping investigation, with respect to procedural matters, investigating methods, factual considerations, and legal analysis, which may be of importance to individual interested parties, not all of these are "material" within the meaning of Article 12.2.2. In our view, what is "material" in this respect refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping duty. We note in this regard the views of the panel in *EC – Tube or Pipe Fittings*:
> >
> > > Article 12.2 provides that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material" by the investigating authority. The ordinary meaning of the term of "material" is "important, essential, relevant".
> > >
> > > We understand a "material" issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies

[435] United States' third party submission, paras. 37 and 38.
[436] United States' third party submission, para. 41.

> those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. … contextual considerations also support this interpretation since, the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions.
>
> We cannot conclude that every single decision of an investigating authority in the course of an investigation can be considered as having "led to" the imposition of the final measures, such that it must be described, together with the "information" relevant to the decision, in the published notice of the final determination. Not every question or issue which arises during an investigation, and which is resolved by the investigating authority, is necessarily considered material by the investigating authorities, and may be said to have "led to" the imposition of the anti-dumping duty, even though it may be of interest or significant to one or more interested parties. In our view, the notions of "material" and "relevant" in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process. Other provisions of the Dumping Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.[437]

We are in broad agreement with these findings. Consistent therewith, we consider that the first sentence of Article 12.2.2 requires an investigating authority to include in its public notice a description of its findings and conclusions on the issues of fact and law that it considered material[438] to its decision to impose final measures. That description must include "sufficient detail". While the sufficiency of the detail of the description may depend on the precise nature of the findings made by the investigating authority, it should in any event be sufficient to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood by the public[439]. The ability of the public to understand the findings and conclusions of the investigating authority is important, for the concept of "public" is broad: it includes "interested parties" within the meaning of Article 6.11 of the Anti-Dumping Agreement and, for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures. Article 13 of the Anti-Dumping Agreement provides for judicial review of the final determinations referred to in Article 12.2.2. In our view, the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the abovementioned entities to assess the conformity of those findings and conclusions with domestic law, and avail themselves of the Article 13 judicial review mechanism where they consider it necessary. In a similar vein, we also consider that the level of detail should be sufficient to allow the relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures where it considers it necessary. Our approach is consistent with the following findings recently made by the Appellate Body in *China – GOES*:

[437] Panel Report, *EU – Footwear (China)*, para. 7.844. (footnotes omitted)

[438] We note the finding by the Appellate Body in *China – GOES* (para. 265) that "the facts that an investigating authority may consider material to its determinations are circumscribed by the framework of the substantive provisions of the Anti-Dumping Agreement".

[439] Our interpretation is consistent with the finding by the Appellate Body in *China – GOES* (para. 256) that "[t]he inclusion of ["all relevant information"] should therefore give a reasoned account of the factual support for an authority's decision to impose final measures".

> Article[] 12.2.2 […] capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Article[] 12.2.2 … is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Article[] 12.2.2 … seek[s] to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* …[440]

7.271. We agree with these findings, and shall be guided by them in evaluating the complainants' claims.

7.8.3.2 Injury determination

7.272. The complainants' claim that MOFCOM's Final Determination omitted the pricing information underlying MOFCOM's price undercutting analysis, and a description of MOFCOM's treatment of the "quantitative differences" between the volume of subject imports of Grade C and the volume of domestic sales of Grade C. The complainants contend that Articles 12.2 and 12.2.2 required the inclusion of such factual information in MOFCOM's Final Determination.

7.273. Regarding the requirements of Articles 12.2 and 12.2.2 in respect of MOFCOM's price undercutting analysis, we consider that such analysis was "material" to its decision to impose measures, such that "relevant information on the matters of fact" pertaining to that issue should have been included in MOFCOM's public notice. However, we are not persuaded that such "relevant information" should necessarily have included the pricing information underlying MOFCOM's price undercutting analysis. We consider that the inclusion of such underlying information would have introduced a level of detail into the Final Determination that was not necessary for the public to understand the basis for MOFCOM's finding of price undercutting.

7.274. While detailed factual information may need to be disclosed as "essential facts" pursuant to Article 6.9 of the Anti-Dumping Agreement, we observe that the scope of Articles 12.2 and 12.2.2 does not mirror the scope of Article 6.9. We note that the panel in *China – X-ray Equipment* made the following finding in this regard:

> Article 12.2.2 does not require that all "essential facts" underlying the margin of dumping should be included in the public notice. The scope of Article 12.2.2 is more nuanced, and would not require the inclusion of all underlying data.[441]

7.275. We agree with this finding. The object of Article 6.9 is to provide interested parties with sufficient factual information to defend their interests during the investigation. By contrast, the object of Article 12.2.2 is to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood by the public. We are not persuaded that the public would need the pricing information underlying MOFCOM's price undercutting analysis in order to understand MOFCOM's finding that there was significant price undercutting.

7.276. The complainants suggest that the findings of the panel and Appellate Body in *China – GOES* indicate that the "relevant information" to be set forth in MOFCOM's public notice should have included domestic price data.[442] The complainants rely in particular on the Appellate Body's observation in that case that the public notice had not included "*the prices* of domestic products".[443] We do not understand the Appellate Body to have found that domestic price information should be included in the public notice by virtue of Article 12 of the Anti-Dumping Agreement. The Appellate Body referred to the absence of domestic price information when

[440] Panel Report, *China – X-ray Equipment*, paras. 7.458 and 7.459.
[441] Panel Report, *China – X-ray Equipment*, para. 7.465. (footnotes omitted)
[442] Japan's first written submission, paras. 259 and 260. European Union's first written submission, paras. 154 and 155.
[443] Appellate Body Report, *China – GOES*, para. 263. (emphasis original)

summarizing the contents of the public notice. The Appellate Body observed that whereas subject import price information was included, domestic price information was not.[444] However, the Appellate Body did not refer to this fact as a basis for its findings. In making its findings, the Appellate referred instead to the finding by the panel that the public notice did not contain "information relating to the price comparisons between subject imports and domestic products". The Appellate Body concluded on this basis that the public notice was not sufficient to convey all the relevant information on the matters of fact relating to the investigating authority's finding of low subject import pricing.[445] Thereafter, the Appellate Body stated that the public notice should also have included "the facts of price undercutting that were required to understand" the authority's finding of low subject import pricing. The Appellate Body faulted the public notice for not including "any facts relating to the price comparisons of subject imports and domestic products", and agreed with the findings of the panel in this respect.[446] For its part, the *China – GOES* panel had found that the public notice did not meet the requirements of Article 12 because it did not "include any indication that a comparative analysis of prices had been performed or provide the factual information *arising from* the comparison".[447] Thus, although findings were made in respect of facts relating to the price comparisons made, neither the panel nor the Appellate Body in *China – GOES* made any finding that the price information underlying those price comparisons should have been included in the public notice.

7.277. Regarding the "quantitative differences" between the volume of subject imports of Grade C and the volume of domestic sales of Grade C, we recall that we have already upheld the complainants' Article 3.2 claims concerning this matter. Given our concerns with the substance of MOFCOM's treatment of the relevant quantitative differences, and given the need for MOFCOM to revise its Final Determination to reflect its implementation of our Article 3.2 finding, we see no need to evaluate the complainants' procedural claim concerning this matter.

7.8.3.3 Dumping determination

7.278. The complainants submit that MOFCOM's public notice is inconsistent with Articles 12.2 and 12.2.2 because it fails to include (i) the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rates, (ii) the facts that were used to determine the all others rates, and (iii) the facts or reasoning behind why it was appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rates.

7.279. We observe that the complainants' claims under Articles 12.2 and 12.2.2 essentially mirror their Article 6.9 claims concerning this matter. We also observe the complainants' assertion that MOFCOM's Final Determination repeats the statements made in MOFCOM's Dumping Disclosures concerning this matter.[448] We recall that we have rejected the complainants' Article 6.9 claims concerning MOFCOM's disclosure of the essential facts leading to the conclusion that the use of facts available was warranted, and the essential facts that were used to determine the all others rates. Since MOFCOM's disclosure was sufficiently detailed to meet the requirements of Article 6.9, since the complainants contend that the same information was included in the Final Determination, and since the scope of the Article 6.9 obligation is broader than the relevant[449] scope of Articles 12.2 and 12.2.2, we find that MOFCOM's Final Determination is sufficient to meet the requirements of Articles 12.2 and 12.2.2.

7.280. Regarding the reasons why it was appropriate to apply the highest margins of dumping calculated for cooperating exporters as the all others rates, we recall our finding that such reasoning falls outside the scope of Article 6.9 disclosure obligation. However, we consider that the scope of Articles 12.2 and 12.2.2 does cover such reasoning, for Article 12.2.2 refers to "relevant information on the … *reasons* which have led to the imposition of final measures". (emphasis supplied.) We consider that the all others rates are material and that "relevant information" pertaining to the reasons for applying the highest margins of dumping as the all others rates should therefore have been included in MOFCOM's Final Determination. We see nothing in the Final

[444] Appellate Body Report, *China – GOES*, para. 263.
[445] Appellate Body Report, *China – GOES*, para. 264.
[446] Appellate Body Report, *China – GOES*, para. 267.
[447] Panel Report, *China – GOES*, para. 7.591. (emphasis supplied)
[448] Japan's first written submission, para. 313. European Union's first written submission, para. 145.
[449] We refer in this regard to the scope of Articles 12.2 and 12.2.2 in respect of information on matters of *fact* which have led to the imposition of final measures.

Determination concerning this matter. Nor has China identified any part of the Final Determination explaining MOFCOM's reasoning in this regard. Accordingly, we find that the Final Determination is inconsistent with the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

7.8.3.4 Conclusion

7.281. For the above reasons, we reject the complainants' claims that MOFCOM's Final Determination is inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it does not contain relevant information concerning the pricing information underlying MOFCOM's price undercutting findings, the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rates, or the facts that were used to determine the all others rates. We exercise judicial economy in respect of the complainants' Article 12.2 and 12.2.2 claims concerning MOFCOM's treatment of the "quantitative differences" in respect of Grade C. We uphold the complainants' Article 12.2 and 12.2.2 claim concerning MOFCOM's failure to explain in the Final Determination the reasons why MOFCOM considered it appropriate to use the highest margins of dumping for cooperating exporters as the all others rates.

7.9 Treatment of confidential information

7.282. Japan and the European Union claim that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of certain reports to remain confidential without a proper showing of "good cause" for such treatment by the petitioners.[450] In addition, Japan and the European Union claim that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement because MOFCOM failed to require sufficient non-confidential summaries or explanations as to why such summaries were not possible.[451] China asks the Panel to reject the complainants' claims.

7.9.1 Relevant WTO provisions

7.283. Article 6.5 of the Anti-Dumping Agreement provides in relevant part:

> 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.

7.284. Article 6.5.1 of the Anti-Dumping Agreement provides:

> 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.

[450] Japan's first written submission, paras. 265, 271-272, and 280; responses to Panel questions No. 67, para. 50; and No. 99, paras. 36-37; second written submission, paras. 115 and 118; opening statement at the second meeting of the Panel, para. 66; closing statement at the second meeting of the Panel, p. 4; and European Union's first written submission, paras. 77, 85-86, and 88; response to Panel question No. 67, paras. 138 and 144; second written submission, para. 32; and opening statement at the second meeting of the Panel, para. 25.

[451] Japan's first written submission, paras. 265, 271, 281, and 289; response to Panel question No. 68, para. 51; second written submission, para. 115; opening statement at the second meeting of the Panel, para. 68; and European Union's first written submission, paras. 77, 85, 89, 92-93, 95, and 97; response to Panel question No. 68, paras. 145 and 153; second written submission, paras. 32, 41, and 45; and opening statement at the second meeting of the Panel, paras. 25, 32, and 35.

7.9.2 Main arguments of the parties

7.9.2.1 Japan and the European Union

7.285. The complainants claim that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the *full text*[452] of the reports in (i) appendix V to the petition; (ii) appendix VIII to the petition; (iii) appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and (iv) the appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without a showing of "good cause" for such treatment by the petitioners submitting such information.[453] The complainants argue that MOFCOM failed to objectively assess the "good cause" alleged for confidential treatment, and scrutinize the petitioners' showing to determine whether the request was sufficiently substantiated.[454]

7.286. In addition, the complainants claim that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement because MOFCOM failed to require sufficient non-confidential summaries or explanations as to why such summaries were not possible for the following documents: appendices V and VIII to the petition; appendices 1, 7-8, 24-28, 31-33, 35-52, and 56-59 to the petitioners' supplemental evidence of 1 March 2012; and appendix to the petitioners' supplemental evidence of 29 March 2012.[455]

7.9.2.2 China

7.287. With respect to the complainants' claims under Article 6.5 of the Anti-Dumping Agreement, China contends that "good cause" was adequately shown by the petitioners. China submits that the petitioners provided several substantiated reasons as to why confidential treatment was warranted for the names of the relevant third party institutes and the full text of the reports referred to in the four appendices at issue. In addition, China argues that investigating authorities have a broad margin of discretion in determining whether "good cause" has been shown. China also notes that the Anti-Dumping Agreement imposes no obligation on an investigating authority to explain why it considers that confidential information is warranted. Finally, China submits that MOFCOM assessed and determined the demonstration of good cause for granting confidential treatment to the relevant appendices.[456]

7.288. As for the claims under Article 6.5.1 of the Anti-Dumping Agreement, China submits that the petitioners provided either the required non-confidential summaries or statements as to why summarization was not possible. With respect to (i) appendix V to the petition; (ii) appendix VIII to the petition; (iii) appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and (iv) the appendix to the petitioners' supplemental evidence of 29 March 2012, China submits that

[452] The complainants accept that the petitioners demonstrated "good cause" for treating as confidential the *names of the third parties* providing the reports. The complainants consider that the petitioners' concerns could have been addressed by withholding such names. (Japan's first written submission, para. 278; and comments on China's response to Panel question No. 103, para. 59; and European Union's first written submission, para. 87; second written submission, para. 32; and comments on China's response to Panel questions No. 103, para. 61.)

[453] Japan's first written submission, paras. 265, 271-272, and 280; response to Panel question No. 99, paras. 36-37; second written submission, para. 115; opening statement at the second meeting of the Panel, para. 66; and closing statement at the second meeting of the Panel, p. 4; and European Union's first written submission, paras. 77, 85-86, and 88; response to Panel question No. 67, para. 138; second written submission, para. 32; and opening statement at the second meeting of the Panel, para. 25.

[454] Japan's responses to Panel questions No. 67, para. 50; and No. 99, paras. 36-37; second written submission, paras. 115 and 118; opening statement at the second meeting of the Panel, para. 66; closing statement at the second meeting of the Panel, p. 4; and European Union's response to Panel question No. 67, paras. 138 and 144.

[455] Japan's first written submission, paras. 271-272, 280-281, and 289; response to Panel question No. 68, para. 52; second written submission, paras. 115 and 128; opening statement at the second meeting of the Panel, para. 68; and comments on China's response to Panel question No. 103, para. 54; and European Union's first written submission, paras. 77, 85-86, 88-89 and 97; response to Panel question No. 68, para. 145; second written submission, para. 41; opening statement at the second meeting of the Panel, para. 32; and comments on China's response to Panel question No. 103, para. 46.

[456] China's first written submission, paras. 697, 714, 725, 737, and 738; response to Panel question No. 67, paras. 173 and 176; second written submission, paras. 292-295 and 299; opening statement at the second meeting of the Panel, paras. 78-79; response to Panel questions Nos. 99-102, paras. 46-50; and comments on Japan's response to Panel question No. 99, para. 55.

the non-confidential summaries even provided integral parts of the information contained in each original, confidential report. China contends that these non-confidential summaries were sufficiently detailed to provide a reasonable understanding of the substance of the information submitted in confidence. As for the remaining 32 appendices at issue, China submits that the petitioners adequately explained why summarization was not possible.[457]

7.9.3 Main arguments of third parties

7.9.3.1 United States

7.289. The United States recalls that, in anti-dumping investigations, the submission of confidential information is a necessary and frequent occurrence. The United States submits that, while Article 6.5 of the Anti-Dumping Agreement requires that authorities, upon good cause shown, ensure the confidential treatment of such information, Article 6.5.1 of the Anti-Dumping Agreement balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions.[458] The United States contends that "where an investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries of that information, significant prejudice to the ability of companies and Members to defend their interests could occur".[459]

7.9.4 Evaluation by the Panel

7.9.4.1 Article 6.5 of the Anti-Dumping Agreement: showing of "good cause" with respect to the full text of certain reports

7.290. The issue before the Panel is whether or not MOFCOM permitted the *full text* of the four confidential reports in (i) appendix V to the petition; (ii) appendix VIII to the petition; (iii) appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and (iv) the appendix to the petitioners' supplemental evidence of 29 March 2012[460] to remain confidential without objectively assessing the "good cause" alleged for confidential treatment, and scrutinizing the petitioners' showing to determine whether the requests were sufficiently substantiated.[461]

7.291. Article 6.5 of the Anti-Dumping Agreement provides that "[a]ny information which is by nature confidential …, 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". (emphasis added) We note that China accepts that the "investigating authority's obligation to afford confidential treatment to

[457] China's first written submission, paras. 697, 761, 763, and 766-768; response to Panel question No. 70, para. 184; and second written submission, paras. 300-303.

[458] United States' third-party submission, para. 3; and third-party statement, paras. 11-12.

[459] United States' third-party submission, para. 5.

[460] China submits that the European Union failed to make a *prima facie* case of violation. More specifically, China takes issue with the fact that the European Union allegedly failed to (i) specify the four appendices to which its Article 6.5 claim relates, and (ii) refer to any of the statements made by the petitioners regarding their requests for confidential information. (China's first written submission, paras. 699-700, and 702-706; and second written submission, para. 290.) Although the European Union could have been more specific in setting out its Article 6.5 claim in its first written submission, we consider that overall the European Union sufficiently connected its Article 6.5 claim to the relevant appendices. We note that although the European Union initially referred to the appendices at issue (together with other appendices) in a general statement relating to its claims under Articles 6.5 and 6.5.1 (European Union's first written submission, para. 77), the European Union later refers specifically to the fact that China did not require the applicants "to disclose the full texts of any of the four aforementioned reports with the names of the 'authoritative third party institute[s]' … redacted". (European Union's first written submission, para. 88.) We understand that the issue under Article 6.5 only arises before the Panel with respect to the four appendices in question. In addition, we note that, in its second written submission, the European Union clearly refers, in the context of its Article 6.5 claim, to appendices V and VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and appendix to the petitioners' supplemental evidence of 29 March 2012. (European Union's second written submission, para. 32; see also European Union's opening statement at the second meeting of the Panel, para. 26.)

[461] We note that the complainants also argue that the petitioners failed to show "good cause" for treating as confidential the full text of the four confidential reports at issue. As explained in para. 7.302. below, our review of MOFCOM's determinations must be based on the explanations provided by MOFCOM. Thus, we start our review with MOFCOM's assessment of the alleged showing of "good cause".

information arises upon a showing of 'good cause'".[462] The requirement to show "good cause" was examined by the Appellate Body in *EC – Fasteners*. The Appellate Body stated:

> The requirement to show "good cause" for confidential treatment applies to both information that is "by nature" confidential and that which is provided to the authority "on a confidential basis". The "good cause" alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation, who would otherwise have a right to view this information under Article 6 of the *Anti-Dumping Agreement*. Put another way, "good cause" must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information. "Good cause" must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party.
>
> We find that the examples provided in Article 6.5 in the context of information that is "by nature" confidential are helpful in interpreting "good cause" generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved. Article 6.5 states that the disclosure of such information "would be of significant competitive advantage to a competitor" or "would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". These examples suggest that a "good cause" which could justify the non-disclosure of confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired. These examples are only illustrative, however, and we consider that a wide range of other reasons could constitute "good cause" justifying the treatment of information as confidential under Article 6.5.
>
> In practice, a party seeking confidential treatment for information must make its "good cause" showing to the investigating authority upon submission of the information. The authority must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged. The obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a "good cause" showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only "upon good cause shown".[463] (footnotes omitted)

We agree with these findings, and shall be guided by them in evaluating the complainants' claims under Article 6.5 of the Anti-Dumping Agreement.

7.9.4.1.1 Petitioners' requests

7.292. Turning to the facts before the Panel, it is undisputed that, with respect to the four reports referred to in the appendices at issue, the petitioners requested confidential treatment for certain information. With regard to appendix V to the petition, the petitioners stated:

> To produce this statement, the organization had spent a great amount of time and resources into research, analysis, screening and consolidation of relevant fact and data. The statement was provided in a form of a report to the petitioners at a cost.

[462] China's first written submission, para. 719.
[463] Appellate Body Report, *EC – Fasteners*, paras. 537-539.

> The disclosure of the full text of the report itself and the name of the organization would likely make it difficult for the organization to conduct a similar research exercise (e.g. a third party may refuse to answer survey questions) and to provide the full report with the same or similar information and data to other third parties for a fee. It would also seriously jeopardize its normal conduct of business. Therefore, at the request of the organization, the petitioners request confidentiality treatment of the full text of the report itself.[464]

7.293. With respect to appendix VIII to the petition, the petitioners stated:

> The market information contained in this appendix was provided by a third party at a cost. The disclosure of such information would likely cause disruption to normal business or other adverse impact on the third party. Therefore, at the request of the third party, the petitioners are keeping the full text of this appendix itself confidential.[465]

7.294. With respect to appendix 59 to the petitioners' supplemental evidence of 1 March 2012, the petitioners stated:

> The market information contained in this appendix was provided by a third party at a cost. The disclosure of such information would likely cause disruption to normal business or other adverse impact on the third party. Therefore, at the request of the third party, the petitioners are keeping the full text of this appendix itself confidential.[466]

7.295. Finally, concerning the appendix to the petitioners' supplemental evidence of 29 March 2012, the petitioners stated:

> This appendix is provided by a respected organization from the Chinese stainless steel industry. It builds on the "summary of market conditions of certain high-performance stainless steel seamless tubes" submitted [as appendix V to the petition].
>
> In order to provide this further summary, the third-party organization has used its proprietary sources and access and invested a tremendous amount of time and energy in collecting, screening, analyzing and formatting relevant data and information. The disclosure of the full text of the third-party summary itself and the organization's name would likely cause serious adverse impact on the normal operation of the organization. Therefore, at the request of the third-party organization, the petitioners request that the full text of this further summary itself be kept confidential.[467]

7.9.4.1.2 MOFCOM's statement

7.296. In its injury disclosure and final determination, MOFCOM stated:

> With regard to the legitimacy of the petitioners' application to treat the name of the "authoritative third party institute" as confidential, out of consideration that the disclosure of the name of the said institute would affect the normal business of this data providing institute and may lead to business retaliations, the Investigation Authority acknowledges the reason for the confidential treatment request of the petitioners[18], and accepts the confidentiality application.

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[18] According to the reason provided by the petitioners for confidential treatment, a certain authoritative institute in the domestic stainless steel tube industry provided information on

[464] Petition, Exhibits JPN-3 and EU-1, p. 76, with translation amended in Exhibits CHN-16, JPN-29, and EU-32, internal pages 15-16.

[465] Petition, Exhibits JPN-3 and EU-1, p. 90, with translation amended in Exhibits CHN-16, JPN-29, and EU-32, internal page 16.

[466] Petitioners' supplemental evidence of 1 March 2012, Exhibits JPN-8 and EU-15, pp. 10-11, with translation amended in Exhibits CHN-16, JPN-29, and EU-32, internal page 17.

[467] Petitioners' supplemental evidence of 29 March 2012, Exhibits JPN-9 and EU-16, p. 4; and China's first written submission, para. 713.

> domestic and international markets for certain high-performance stainless steel seamless tubes. To do this, the institute in question spent a large amount of time and energy on the research, analysis and selection of relevant data and information, and provided the final report to the petitioners at a certain price. If the petitioners were to disclose the full report itself and the name of the said institute, it would on the one hand create obstacles for this institute to carry out similar research in the future (for example, a third party may not want to cooperate with the institute on its future researches) and on the other hand seriously affect the prospects of the institute to sell reports with same or similar information and data to other third parties. In addition, it would also cause serious negative impacts on the daily operations of the institute. Therefore, at the request of this institute, the petitioners applied for confidential treatment for the full text of the report itself.[468]

7.297. Although MOFCOM's statement is directed at the request for confidential treatment in appendix V to the petition[469], China submits that "MOFCOM's explanation can be extrapolated to apply to the remaining three appendices, as the Petitioners' reasons for requesting confidential treatment were similar, if not identical, for all four appendices in question".[470] Subsequently, China clarified that it submits that, since Appendix V was elaborated upon in the Appendix to the Petitioners' Supplemental Evidence of 29 March 2012, "MOFCOM's statements refer to both Appendix V *and* the Appendix to the Petitioners' Supplemental Evidence of 29 March 2012", and that "[g]iven the similarity between the reasons for confidential treatment included in Appendix VIII to the Petition and Appendix 59 to the Petitioners' Supplemental Evidence of 1 March 2012, the reasoning included in footnote 18 can be extrapolated to apply to the latter appendices as well".[471] We therefore begin by examining the scope of MOFCOM's statement, in order to determine the appendices to which it may reasonably be understood to apply.

7.298. There is no doubt that MOFCOM's statement concerns appendix V to the petition. To the extent that the appendix to the petitioners' supplemental evidence of 29 March 2012 "builds on" appendix V, providing "supplementary information and further explanation" on the domestic production of certain HP-SSST[472], MOFCOM's statement can also be reasonably understood to apply to that supplemental appendix. However, China has not identified any basis for understanding MOFCOM's statement to also apply to the remaining two appendices at issue.[473] We agree with the complainants[474] that China's "extrapolation" argument constitutes *ex post*

[468] Final determination, Exhibits JPN–2 and EU–30, internal page 46; injury disclosure, Exhibit JPN–23, Exhibit EU–24, pp. 21–22, with translation amended in Exhibits CHN-16, JPN-29 and EU-32, footnote 1 and internal pages 15-16.

[469] China's response to Panel questions Nos. 99-102, para. 46.

[470] China's second written submission, para. 295; and response to Panel questions Nos. 99-102, para. 46.

[471] China's comments on Japan's response to Panel question No. 99, para. 62.

[472] Petitioners' supplemental evidence of 29 March 2012, Exhibits JPN-9 and EU-16, p. 4. See also China's response to Panel questions Nos. 99-102, para. 46; and first written submission, para. 745.

[473] See China's response to Panel question No. 101; and European Union's comments on China's response to Panel question No. 101, para. 42. We also note that MOFCOM's comments were made in the context of the petitioners' request for "using the data on domestic market demands from an authoritative third party institute to calculate the import volume of the products under investigation and the share in the domestic market". (Final determination, Exhibits JPN–2 and EU–30, internal page 44; injury disclosure, Exhibit JPN–23, Exhibit EU–24, p. 20.) While appendix V includes information on the volume of domestic production, demand, and imports and exports of the product under consideration (Petition, Exhibits JPN-3 and EU-1, pp. 76-77), and appendix to the petitioners' supplemental evidence of 29 March 2012 contains information on the domestic production of the product under consideration (Petitioners' supplemental evidence of 29 March 2012, Exhibits JPN-9 and EU-16, p. 4), the remaining two appendices refer to other data. Appendix VIII contains information on prices of exports of the product under consideration from Japan and the European Union to China. (Petition, Exhibits JPN-3 and EU-1, p. 90) Appendix 59 to the petitioners' supplemental evidence of 1 March 2012 contains information on costs and fees related to the imports of the product under consideration. (Petitioners' supplemental evidence of 1 March 2012, Exhibits JPN-8 and EU-15, p. 10.)

[474] Japan's opening statement at the second meeting of the Panel, para. 67; and response to Panel question No. 99, paras. 30-31; European Union's response to Panel question No. 99, para. 42; and comments on China's response to Panel question No. 100, para. 41. See also Japan's second written submission, para. 118. We note that China takes issue with the fact that, in European Union's response to Panel question No. 99, the European Union simply agrees with Japan's submissions without providing further details. China submits that a complaining party "cannot simply refer to and rely on the positions taken by a third party [(Japan is a third party in DS460)] in order to develop its claims". China requests that the Panel in DS460 consider that the European Union failed to respond to Panel question No. 99. (China's comments on the European Union's response to Panel question No. 99, paras. 65-66.) We consider that a complaining party may agree with and refer to third-party arguments in support of its claims before WTO dispute settlement. In our

rationalization, which we are bound not to consider when examining the complainants' claims at issue.[475] This is also consistent with the clarification of the scope of MOFCOM's statement subsequently expressed by China, as described above.

7.299. We now examine whether MOFCOM's statement is sufficient to demonstrate that MOFCOM objectively assessed the alleged "good cause", and scrutinized the petitioners' showing of "good cause" with regards to *both* the name of the third party institute and the full text of appendix V and appendix to the petitioners' supplemental evidence of 29 March 2012. We note that the petitioners' requests relating to the two appendices at issue refer to both (i) the name of the institute, and (ii) the full text of the reports. In addition, the petitioners' requests allude to possible adverse effects on the normal operation of the institute, and in conducting research and selling the same or similar information in the future.[476] However, when "acknowledg[ing] the reason for the confidential treatment request" and accepting the "confidentiality application", we agree with the complainants[477] that MOFCOM limited its statement to address only "the legitimacy of the petitioners' application to treat the *name* of the 'authoritative third party institute' as confidential".[478] (emphasis added) China appears to understand that MOFCOM considered that the request was justified with respect to the *full text* of the two reports at issue in footnote 18 of MOFCOM's statement, quoted above.[479] However, we agree with the complainants[480] that it is clear from the text of footnote 18 that it only summarizes the petitioners' arguments for confidential treatment and requests; rather than reflecting MOFCOM's explanation or reasoning.[481] Thus, there is no evidence, and China has not demonstrated otherwise, that MOFCOM objectively assessed the "good cause" alleged for confidential treatment, and scrutinized the petitioners' requests relating to the *full text* of appendix V, and appendix to the petitioners' supplemental evidence of 29 March 2012.[482]

7.300. We now turn to the remaining two appendices at issue under the Article 6.5 claims. As noted above[483], MOFCOM's explanation in its injury disclosure and final determination does not apply to appendix VIII to the petition, or to appendix 59 to the petitioners' supplemental evidence of 1 March 2012. In the absence of any evidence that MOFCOM objectively assessed the "good cause" alleged for confidential treatment, and scrutinized the petitioners' requests relating to the full text of these two appendices, there is no basis for us to conclude that it did.

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view, this is particularly so in cases as the disputes before us where (i) the timetables have been harmonized, to the greatest extent possible, in accordance with Article 9.3 of the DSU, and (ii) complainants have made the same claims, and submitted the same or very similar arguments in both disputes. Thus, we reject China's request accordingly.

[475] See e.g. Appellate Body Report, *US – Tyres (China)*, para. 329 ("[D]uring panel proceedings a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination").

[476] Petition, Exhibits JPN-3 and EU-1, pp. 76-77; and petitioners' supplemental evidence of 29 March 2012, Exhibits JPN-9 and EU-16, p. 4.

[477] Japan's response to Panel question No. 99, para. 30; and European Union's response to Panel question No. 99, para. 42.

[478] We note that the complainants accept that the petitioners demonstrated good cause for treating as confidential the *names of the third parties* providing the reports in the appendices at issue. Japan's first written submission, para. 278; and European Union's first written submission, para. 87. See also Japan's comments on China's response to Panel questions Nos. 99-102, para. 59; and European Union's second written submission, para. 32; and comments on China's response to Panel questions Nos. 99-102, para. 61.

[479] See China's first written submission, para. 737; China's second written submission, para. 298; and response to Panel questions Nos. 99-102, para. 45.

[480] Japan's response to Panel question No. 99, para. 29; comments on China's response to Panel questions Nos. 99-102, paras. 50-52; European Union's response to Panel question No. 99, para. 42; and comments on China's response to Panel question No. 99, para. 40.

[481] China submits that MOFCOM's statement was made in the context of "addressing comments raised by interested parties who questioned the accuracy and reliability of certain data, and called into question the confidential treatment of the name of the 'authoritative third party institute'". (China's comments on Japan's response to Panel question No. 99, paras. 59-62; see also China's response to Panel questions Nos. 99-102, paras. 43-46.) We are unable to understand, and China has not sufficiently explained, how this context, by itself, is sufficient to demonstrate that MOFCOM's statements should rather refer to the full texts of appendix V and appendix to the petitioners' supplemental evidence of 29 March 2012, or to the full text of all four appendices at issue.

[482] We are not finding that MOFCOM could not have treated the full text of the reports as confidential information. We are merely finding that there is no evidence that MOFCOM ever considered whether good cause had been shown for such treatment.

[483] See para. 7.298. above.

7.9.4.1.3 Whether MOFCOM was required to examine the requests for confidential treatment, and explain its conclusions

7.301. We have already established that MOFCOM did not objectively assess the "good cause" alleged for confidential treatment, or scrutinize the petitioners' requests relating to the *full text* of the four appendices at issue. China submits that an investigating authority enjoys a considerable margin of discretion in its examination of a request for confidential treatment and in determining whether "good cause" has been shown, provided that the outcome is not unreasonable.[484] China also contends that "an investigating authority need not explain why it considers that confidential treatment is warranted", and that the "Anti-Dumping Agreement does not require an investigating authority which found that confidential treatment is warranted to do or specify anything, beyond the obligation to treat such information as confidential".[485]

7.302. We are not persuaded by China's argument, since it is well established that a panel's review of an investigating authority's determinations must be based on the explanations provided by that authority. We recall, for example, that the Appellate Body in *US – Tyres (China)* noted that it had "previously clarified that a panel's examination of the conclusions of an investigating authority 'must be critical and searching, and be based on the information contained in the record and the *explanations given by the authority in its published report*'".[486] In the absence of any explanation by MOFCOM, we have no basis to conclude that MOFCOM properly determined that the petitioners had shown "good cause" for their requests for confidential treatment.[487] There is certainly also no basis for us to imply that MOFCOM properly determined that the petitioners had shown "good cause" for their requests for confidential treatment from the fact that MOFCOM ultimately granted their request for confidential treatment.[488]

7.9.4.1.4 Conclusion

7.303. In light of the foregoing, we uphold the complainants' claims that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by permitting the full text of the reports in appendix V, appendix VIII, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without objectively assessing "good cause" and scrutinizing the petitioners' showing.

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[484] China's first written submission, paras. 723 and 725.

[485] China's first written submission, para. 725. See also China's second written submission, para. 294; opening statement at the second meeting of the Panel, para. 80; and response to Panel questions Nos. 99-102, paras. 46-48.

[486] Appellate Body Report, *US – Tyres (China)*, para. 329. (footnote omitted, emphasis original)

[487] Taking this view, we do not address the complainants' arguments relating to whether the petitioners' failed to show "good cause" for treating as confidential the full text of the four confidential reports at issue; or China's arguments as to whether confidential treatment was warranted. (See China's first written submission, paras. 728-733; response to Panel question No. 67, paras. 178-183; second written submission, para. 297; and opening statement at the second meeting of the Panel, paras. 80-81; Japan's comments on China's response to Panel questions Nos. 99-102, paras. 55-59; and European Union's comments on China's response to Panel questions Nos. 99-102, paras. 48-60.)

[488] Late in these proceedings, China argues that, "[s]ince good cause can only be shown by the interested party, a panel should scrutinize an investigating authority's compliance with Article 6.5 [of the Anti-Dumping Agreement] on the basis of this request [by the interested party]. If the panel considers that this request indeed provides 'good cause', an investigating authority will have acted consistently with Article 6.5 by treating the information as confidential. If the panel considers that the request submitted by the interested party does not provide 'good cause', it will find a violation of Article 6.5". (China's response to Panel questions Nos. 99-102, para. 50; see also China's comments on Japan's response to Panel question No. 99, para. 55.) However, pursuant to the proper standard of review to be applied in this case, we may not conduct a *de novo* review of the evidence or substitute our judgement for that of the investigating authority. See paras. 7.4. -7.7. for further details on standard of review. Thus, it is not for us to assess the petitioners' requests; rather we should review MOFCOM's assessment of such requests. We also recall that "[t]he obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment". (Appellate Body Report, *EC – Fasteners*, para. 539; see also Japan's opening statement at the second meeting of the Panel, para. 67; comments on China's response to Panel questions Nos. 99-102, paras. 46-49; and European Union's comments on China's response to Panel questions Nos. 99-102, para. 43.) On this basis, we reject China's argument and do not evaluate *de novo* the petitioners' showing of "good cause".

7.9.4.2 Article 6.5.1 of the Anti-Dumping Agreement

7.304. Turning to the claims under Article 6.5.1 of the Anti-Dumping Agreement, there are two issues before the Panel. The first issue is whether MOFCOM required the petitioners to provide sufficient non-confidential summaries of the substance of each type of confidential information contained in (i) appendix V to the petition; (ii) appendix VIII to the petition; (iii) appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and (iv) the appendix to the petitioners' supplemental evidence of 29 March 2012. The second issue is whether MOFCOM required the petitioners to provide adequate statements as to why summarization was not possible with respect to appendices 1, 7, 8, 24-28, 31-33, 35-52, and 56-58 to the petitioners' supplemental evidence of 1 March 2012.

7.9.4.2.1 Non-confidential summaries

7.305. Article 6.5.1 of the Anti-Dumping Agreement sets forth that investigating authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. We recall that the panel in *China – X-Ray Equipment* stated that "[t]he Article 6.5.1 obligation to summarize the substance of confidential information applies to all information designated as confidential. In cases where multiple types of information are designated as confidential, the substance of each type of confidential information must be summarized".[489] We agree with these findings[490], and shall be guided by them in evaluating the complainants' claims at issue under Article 6.5.1.

7.306. The complainants submit that the non-confidential summaries of the four appendices at issue[491] only disclose the final data provided in each confidential report, without summarizing other confidential information[492] pertaining to the methodologies utilized by the third party institutes to obtain the relevant data, or the underlying evidence they relied upon.[493] The complainants also submit that no explanation was provided as to why summarization is not possible.[494]

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[489] Panel Report, *China – X-Ray Equipment*, para. 7.341. We note that, in exceptional circumstances where such confidential information is not susceptible of summary, interested parties may, alternatively, provide a statement of the reasons why summarization is not possible.

[490] We disagree with China's apparent suggestion that the findings of the panel in *China – X-Ray Equipment* are only relevant "in the context of exhibits having received full confidential treatment and where only the data was summarized". (China's first written submission, paras. 754 and 761-762.) In our view, the Article 6.5.1 obligation to summarize the substance of each type of information designated as confidential applies equally to these disputes.

[491] The four appendices are: (i) appendix V to the petition; (ii) appendix VIII to the petition; (iii) appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and (iv) the appendix to the petitioners' supplemental evidence of 29 March 2012.

[492] In its response to our questions after the first meeting of the Panel, Japan comments that, "surprisingly, China does not submit the confidential versions of these reports to the Panel, despite the availability of protection for [BCI]. Without those confidential documents, the Panel cannot accept China's raw assertions … Japan fails to see what additional evidence Japan could be expected to submit to support its arguments". (Japan's response to Panel question No. 68, para. 51.) Similarly, the European Union states that "[n]either the complainants nor the Panel have any means of commenting on [China's] assertion [that the confidential versions do not contain further information regarding methodologies and underlying evidence] as long as neither the document nor a properly constituted non-confidential summary of it has been provided". (European Union's response to Panel question No. 69, para. 154.) We sympathize with the complainants' difficulty to assess whether MOFCOM complied with its obligations under Article 6.5.1 of the Anti-Dumping Agreement. We note that, despite the complainants' comments earlier in these proceedings, China did not submit the original, confidential version of the four appendices at issue with its second written submission. In light of the complainant's comments, we requested China to submit the confidential versions of the reports at issue, which China did so in its responses to our questions after the second meeting of the Panel. (See China's response to Panel question No. 103.)

[493] We note that the complainants question whether the underlying reports appropriately serve as "positive evidence" before the Panel, because the absence of additional information regarding the methodologies and evidence utilized by the third parties that generated these reports should call into question the very reliability of these reports. (Japan's response to Panel question No. 68, para. 52; comments on China's response to Panel question No. 103, para. 53; European Union's second written submission, para. 44; and comments on China's response to Panel question No. 103, para. 45.) We do not address the complainants' arguments concerning this matter, since the complainants have not pursued any claim in this regard.

[494] Japan's first written submission, paras. 283-284; response to Panel question No. 68, paras. 52-57; second written submission, para. 129; opening statement at the second meeting of the Panel, para. 68; and comments on China's response to Panel question No. 103, paras. 53-59; and European Union's first written

7.307. China generally disagrees with the complainants' allegations, submitting that "the Petitioners provided detailed and adequate non-confidential summaries of the four appendices at issue, explaining the content of the reports, including information and data. For every document, the relevant information was summarized".[495]

7.9.4.2.1.1 Appendix V to the petition

7.308. With respect to the non-confidential version of this appendix[496], the complainants submit that, although it includes data on domestic and global HP-SSST demand, it does not contain any information on how this data was derived.[497]

7.309. China asserts that "[r]egarding the evidence on which the source relied and the methodologies utilized, the Petitioners for instance explained that this evidence was obtained from the third party's proprietary sources, and from the collection, screening and analysis of relevant market data".[498] China also submits that "[t]he original reports that received confidential treatment do not contain further information regarding the methodologies utilized by the third party institutes to obtain the data, or the underlying evidence they relied upon. Therefore, such non-existent information could not be included in the non-confidential summaries of these reports".[499]

7.310. Concerning the methodology used in appendix V, we note China's reliance on the fact that the non-confidential version of this appendix states that "[t]o produce this statement, the organization had spent a great amount of time and resources into research, analysis, screening and consolidation of relevant facts and data".[500] We do not consider this statement to be a sufficiently detailed non-confidential summary to permit a reasonable understanding of or provide any insight into the type of methodology used to determine domestic demand. In addition, we note that the original, confidential version of appendix V briefly explains the methodology used to obtain data on domestic demand, and contains information on the source of the underlying evidence relied upon.[501] In our view, this information is not sufficiently reflected in the non-confidential summary of appendix V.[502]

submission, paras. 91-92; response to Panel question No. 68, paras. 147-148; second written submission, para. 41; opening statement at the second meeting of the Panel, para. 34; and comments on China's response to Panel question No. 103, paras. 48-62.

[495] China's second written submission, para. 300. (footnotes omitted) See also China's first written submission, para. 763.

[496] The non-confidential summary of appendix V to the petition, entitled "[s]ummary of market conditions of certain high-performance stainless steel seamless tubes", includes information on (i) the main ingredients of certain HP-SSST; (ii) domestic production of certain HP-SSST; (iii) domestic and global demand of certain HP-SSST; and (iv) imports and exports of certain HP-SSST by China. (Petition, Exhibits JPN-3 and EU-1, pp. 76-77.)

[497] Japan's response to Panel question No. 68, para. 53 ("[T]he report provides data regarding domestic and global HP-SSST demand, but the non-confidential version says absolutely nothing about how these figures were derived"); comments on China's response to Panel question No. 103, para. 55; and European Union's comments on China's response to Panel question No. 103, paras. 44 and 49-50.

[498] China's first written submission, para. 758 and footnote 777. See also China's first written submission, para. 746 and footnote 762.

[499] China's first written submission, para. 759 and footnote 778. China submits that the non-confidential summary at issue contains the same number of pages as the original, confidential report. (China's first written submission, para. 742.)

[500] Petition, Exhibits JPN-3 and EU-1, p. 76; see also China's first written submission, para. 758.

[501] Appendix V to the petition (BCI), Exhibit CHN-21-EN, p. 3 (section 3).

[502] Petition, Exhibits JPN-3 and EU-1, pp. 76-77. We note that China does not submit specific arguments relating to the methodology used to obtain data on domestic demand, or the source of the underlying evidence concerning domestic demand. In particular, China has not explicitly expressed its disagreement with a position that this particular information present in the confidential version should have been included in the non-confidential summary so as to permit a reasonable understanding of its substance, but rather submits that the information was adequately summarized. We also note that MOFCOM did not invoke the Article 6.5.1 exceptional circumstances mechanism in respect of appendix V.

7.9.4.2.1.2 Appendix to the petitioners' supplemental evidence of 29 March 2012

7.311. With respect to the non-confidential version of this appendix[503], the complainants submit that it neither indicates the various grades of HP-SSST products, nor specifies which domestic producers provided the data used to compile domestic production figures.[504]

7.312. China submits that the original, confidential version of this appendix "do[es] not contain further information regarding the methodologies utilized by the third party institutes to obtain the data, or the underlying evidence they relied upon. Therefore, such non-existent information could not be included in the non-confidential summaries of these reports".[505]

7.313. Concerning the fact that the non-confidential summary does not include which domestic producers provided the data used to compile the domestic production figures[506], we note that the original, confidential version of this appendix does not include this information.[507] MOFCOM clearly cannot be faulted for failing to require the submitter to summarize the substance of certain information which was not in the original, confidential version of this appendix. Turning to the complainants' allegation that the non-confidential summary of this appendix does not indicate the various grades of HP-SSST products[508], we disagree with the complainants' factual description. The non-confidential summary includes the Sumitomo/SMI serial number for HP-SSST product classification, when it states "… for the three steel numbers of products, namely HR3C, Super 304[H] and 347HFG".[509] On this basis, with respect to the appendix to the petitioners' supplemental evidence of 29 March 2012, we reject the complainants' Article 6.5.1 claims accordingly.

7.9.4.2.1.3 Appendix VIII to the petition

7.314. With respect to the non-confidential version of this appendix[510], the complainants submit that it does not summarize confidential information pertaining to the methodology utilized, or the source of data used.[511]

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[503] The non-confidential summary of appendix to the petitioners' supplemental evidence of 29 March 2012, entitled "[f]urther summary of domestic production of certain high-performance stainless steel seamless tubes", provides in relevant part: "[t]his appendix is provided by a respected organization from the Chinese stainless steel industry. It builds on the 'summary of market conditions of certain high-performance stainless steel seamless tubes' submitted in July 2011 [i.e. appendix V] and provides supplementary information and further explanation on the domestic production of certain high-performance stainless steel seamless tubes. The additions include gross production numbers for the three steel numbers of products, namely HR3C, Super 304 and 347HFG. The combined total production numbers were also modified slightly. The new numbers are more precise and should replace those in the first summary". (Petitioners' supplemental evidence of 29 March 2012, Exhibits JPN-9 and EU-16, p. 4.)

[504] Japan's response to Panel question No. 68, para. 57 ("as with the same aspect of Appendix V …, it does not specify, for example, which domestic producers provided the data used by the third party to compile these gross domestic production figures"); comments on China's response to Panel question No. 103, para. 58; and European Union's comments on China's response to Panel question No. 103, paras. 44 and 59.

[505] China's first written submission, para. 759 and footnote 778.

[506] See Japan's response to Panel question No. 68, para. 57.

[507] Appendix to the petitioners' supplemental evidence of 29 March 2012 (BCI), Exhibit CHN-24-EN.

[508] Japan's comments on China's response to Panel question No. 103, para. 58; and European Union's comments on China's response to Panel question No. 103, para. 59.

[509] Petitioners' supplemental evidence of 29 March 2012, Exhibits JPN-9 and EU-16, p. 4.

[510] The non-confidential summary of appendix VIII to the petition, entitled "[m]arket survey on certain high-performance stainless steel seamless tubes", provides in relevant part: "[t]his appendix contains information on the prices of exports of stainless steel high-performance seamless tubes used in high-pressure boilers from Japan and the European Union to China under the three serial numbers of 08Cr18Ni11NbFG, 10Cr18Ni9NbCu3BN and 07Cr25Ni21NbN for the period of 2008 to the first half of 2011, freight and insurance on such exports to China since July 2010, and the prices of these goods sold locally in Japan and the EU since July 2010. … The marked information contained in this appendix was provided by a third party at a cost. …" (Petition, Exhibits JPN-3 and EU-1, p. 90.)

[511] Japan's response to Panel question No. 68, para. 55 ("[T]here is nothing describing, for example: … precisely how the third party obtained its information and from whom (e.g., did it send pricing requests to producers, survey consumers, etc?); how much data the third party actually obtained for each country, period, and product (e.g., were there just single data points, or a sufficiently reliable number of data points?); how the third party took the information it obtained and computed aggregate prices for Japan and the European Union (e.g., did it take simple averages or weighted averages?); etc.); comments on China's response to Panel

7.315. China provides a general description of the non-confidential summary in appendix VIII[512], and generally disagrees with the complainants' claims that information on methodology, underlying evidence, and sources of data was not sufficiently summarized in the non-confidential version.[513] However, China does not submit any specific argument relating to the methodology used to obtain the relevant data or the source of data relied upon in appendix VIII.

7.316. We note that the original, confidential version of appendix VIII briefly explains the methodology used to obtain the relevant data included in the report, and contains information on the source of data relied upon.[514] In our view, this information is not sufficiently reflected in the non-confidential summary of appendix VIII.[515]

7.9.4.2.1.4 Appendix 59 to the petitioners' supplemental evidence of 1 March 2012

7.317. With respect to the non-confidential version of this appendix[516], the complainants submit that it does not summarize confidential information pertaining to the methodology utilized, or the source of a certain fee.[517]

7.318. China provides a general description of the non-confidential summary in appendix 59[518], and generally disagrees with the complainants' claims that information on methodology, underlying evidence, and sources of data was not sufficiently summarized in the non-confidential version.[519] However, China does not submit any specific argument relating to the methodology used to obtain the relevant data or the source of data relied upon in appendix 59.

7.319. We note that the original, confidential version of appendix 59 very briefly explains the methodology used to obtain the relevant data included in the report, and contains information on the source of data with respect to one particular fee.[520] In our view, this information is not sufficiently reflected in the non-confidential summary of appendix 59.[521]

7.9.4.2.1.5 Conclusion

7.320. In light of the foregoing, we uphold the complainants' claims that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require that the

question No. 103, para. 56; and European Union's comments on China's response to Panel question No. 103, paras. 44 and 52-53.

[512] See China's first written submission, paras. 743 and 760.

[513] See China's first written submission, paras. 746, 758, and 763.

[514] Appendix VIII to the petition (BCI), Exhibit CHN-22-EN, pp. 3-5.

[515] Petition, Exhibits JPN-3 and EU-1, p. 90. We also note that China has not explicitly expressed its disagreement with a position that this particular information present in the confidential version should have been included in the non-confidential summary so as to permit a reasonable understanding of its substance, but rather submits that this information was adequately summarized. We also note that MOFCOM did not invoke the Article 6.5.1 exceptional circumstances mechanism in respect of appendix VIII.

[516] The non-confidential summary of appendix 59 to the petitioners' supplemental evidence of 1 March 2012, entitled "[r]esearch report on costs and fees related to the import of stainless steel seamless tubes used in high pressure boilers", provides in relevant part: "[t]he market information contained in this appendix was provided by a third party at a cost. … The data contained include: inspection fee on the import of stainless seamless boiler tubes and pipes was 0.16%; miscellaneous port charges totalled 55-60 RMB/ton for bulk transportation and 40-50 RMB/ton for container transportation; handling fee as a share of goods value was below 0.01%". (Petitioners' supplemental evidence of 1 March 2012, Exhibits JPN-8 and EU-15, pp. 10-11.)

[517] Reponses to the Panels' Questions following the First Substantive Meeting with Parties, para. 56 ("[This summary] contains no information regarding how [the] third party derived its figures for the inspection fee, miscellaneous port charges, and handling fee"); comments on China's response to Panel question No. 103, para. 57; and European Union's comments on China's response to Panel question No. 103, paras. 44 and 55-56.

[518] See China's first written submission, paras. 744 and 760.

[519] See China's first written submission, paras. 746, 758, and 763.

[520] Petitioners' supplemental evidence of 1 March 2012 (BCI), Exhibit CHN-23-EN, p. 2.

[521] Petitioners' supplemental evidence of 1 March 2012, Exhibits JPN-8 and EU-15, pp. 10-11. We also note that China has not explicitly expressed its disagreement with a position that this particular information present in the confidential version should have been included in the non-confidential summary so as to permit a reasonable understanding of its substance, but rather submits that this information was adequately summarized. We also note that MOFCOM did not invoke the Article 6.5.1 exceptional circumstances mechanism in respect of appendix 59.

petitioners provide sufficiently detailed non-confidential summaries of the substance of the confidential information at issue in appendices V and VIII to the petition, and appendix 59 to the petitioners' supplemental evidence of 1 March 2012.[522]

7.9.4.2.2 Statements as to why summarization was not possible

7.321. With respect to the remaining 32 appendices[523], the main issue before the Panel is whether the petitioners provided adequate statements as to why summarization was not possible for purposes of Article 6.5.1 of the Anti-Dumping Agreement.

7.322. Article 6.5.1 of the Anti-Dumping Agreement provides that in exceptional circumstances, where parties indicate that confidential information is not susceptible of summary, a statement of the reasons why summarization is not possible must be provided.

7.323. The Appellate Body in *EC – Fasteners* examined whether a particular statement addressed the issue of why summarization was not possible. The Appellate Body stated:

> With respect to Agrati, its statement asserting for each category that "[t]he information cannot be summarized without disclosing confidential information" speaks to a justification for providing confidential treatment in the first place. It does not address the issue of why summarization of the information is not possible, or why the particular information presents exceptional circumstances that would justify a failure to provide a non-confidential summary. Nor can the single statement repeated by Agrati be read as adequate justification for treating a number of different pieces of information as equally unsusceptible to summarization. … We agree with the Panel that Agrati's statement did not "relate to any of the specific information for which no non-confidential summary [was] provided or to anything having to do with Agrati itself". Therefore, we consider that the Commission failed to ensure that Agrati provided an appropriate statement of why summarization of certain portions of its questionnaire response was not possible.[524]

We agree with the reasoning underlying these findings, and shall be guided by them in evaluating the complainants' claims under Article 6.5.1 of the Anti-Dumping Agreement.

7.324. In the present disputes, the petitioners repeatedly provided the following statement in respect of all of the remaining 32 appendices:

> Concerns the company's business secrets and therefore confidential treatment is requested, cannot be disclosed. [as translated by China]
>
> It concerns the company's business secrets and therefore we request confidential treatment and no disclosure is hereby made. [as translated by Japan and the European Union][525]

7.325. According to China, this is a statement by petitioners of the reasons as to why summarization is not possible.[526] China argues that this statement clarifies that no alternative method of presenting that information can be developed that would not necessarily disclose the sensitive information. In China's view, this is because of "the nature of the information, which

[522] We note that China has neither alleged nor provided any evidence that the petitioners submitted a statement of the reasons why summarization of the information at issue was not possible.

[523] These 32 appendices are appendices 1, 7-8, 24-28, 31-33, 35-52, and 56-58 to the petitioners' supplemental evidence of 1 March 2012.

[524] Appellate Body Report in *EC – Fasteners*, para. 553. (footnotes omitted)

[525] Petitioners' supplemental evidence of 1 March 2012, Exhibits JPN-8 and EU-15, pp. 6-10, with translation amended in Exhibits CHN-16, JPN-29, and EU-32, internal page 18.

[526] China's first written submission, paras. 766-767; response to Panel question No. 70, para. 184; and second written submission, para. 301.

entirely consists of business confidential information. The sensitivity of this information makes it impossible to summarize, as indicated by the statement made by the Petitioners".[527]

7.326. We are not persuaded by China's argument. The statement at issue only addresses the question of why confidential treatment should be provided. It does not provide the reasons why the particular information is not susceptible of summary.[528] In addition, the statement does not relate to any specific information for which it was not possible to provide a non-confidential summary. Our understanding is supported by the fact that the exact same statement is repeatedly used with respect to a large number of different pieces of information. Guided by the Appellate Body's findings in *EC – Fasteners*, we do not consider that the repetition of this single statement can serve as a valid statement of the reasons why summarization of a number of different pieces of information is not possible.

7.327. In light of the foregoing, we uphold the complainants' claims that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement, because MOFCOM failed to require the petitioners to provide adequate statements as to why summarization was not possible.

7.10 Application of provisional measures

7.328. Japan and the European Union claim that, by applying provisional measures for a period exceeding four months, China acted inconsistently with Article 7.4 of the Anti-Dumping Agreement.[529] China does not submit arguments in response to this claim.

7.10.1 Relevant WTO provision

7.329. Article 7.4 of the Anti-Dumping Agreement provides:

> The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.10.2 Main arguments of the parties

7.10.2.1 Japan and the European Union

7.330. Japan and European Union submit that MOFCOM imposed provisional anti-dumping measures from 9 May 2012 to 9 November 2012, after which MOFCOM imposed final anti-dumping measures. MOFCOM thus applied provisional measures for a period of six months.[530]

7.331. Japan and European Union contend that provisional measures should not have been applied for more than four months, because (i) there was no request by exporters representing a significant percentage of the trade involved, and (ii) China did not examine whether a duty lower than the margin of dumping would be sufficient to remove injury.[531]

[527] China's response to Panel question No. 70, para. 184. See also China's first written submission, para. 766; and second written submission, para. 302.
[528] See Japan's second written submission, para. 131.
[529] Japan's first written submission, para. 320; and second written submission, para. 135; and European Union's first written submission, para. 326; and second written submission, para. 177.
[530] Japan's first written submission, para. 321; and second written submission, para. 135; and European Union's first written submission, para. 327.
[531] Japan's first written submission, para. 322; second written submission, para. 135; and opening statement at the second meeting of the Panel, para. 69; and European Union's first written submission, para. 328.

7.10.2.2 China

7.332. Although China acknowledges the Article 7.4 claim[532], China does not submit arguments in response to it. China only submits that "it acknowledged this claim in good faith, and opted not to rebut any *prima facie* case that may or may not have been made in this respect".[533]

7.10.3 Main arguments of third parties

7.10.3.1 United States

7.333. The United States submits that "the text of Article 7.4 [of the Anti-Dumping Agreement] provides that without [a] request from a sufficient percentage of exporters or the imposition of a lesser duty, an investigating authority may not impose provisional measures for a period exceeding four months".[534]

7.10.4 Evaluation by the Panel

7.334. Article 7.4 of the Anti-Dumping Agreement is clear and explicit on the question of the allowable duration of a provisional measure.[535] The complainants submit that MOFCOM imposed provisional anti-dumping measures for six months.[536] The complainants also submit that (i) there was no "request by exporters representing a significant percentage of the trade involved"; and (ii) China did not "examine whether a duty lower than the margin of dumping would be sufficient to remove injury".[537] Thus, the maximum period allowed for the provisional measures at issue was four months. China does not submit arguments in response to this claim. In light of the foregoing, we uphold the complainants' claims that China acted inconsistently with Article 7.4 by applying provisional measures for a period exceeding four months.

7.11 Consequential claims

7.335. Japan and the European Union claim that, by failing to comply with the provisions of the Anti-Dumping Agreement, China has consequently acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.[538]

7.336. We note that the complainants' claims under Article 1 of the Anti-Dumping Agreement, and Article VI of the GATT 1994 are purely consequential, in the sense that they depend on the outcome of other claims pursued by the complainants under other provisions of the Anti-Dumping Agreement. As a consequence of the inconsistencies we have already found to exist with the Anti-Dumping Agreement, we uphold the complainants' consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

[532] China's first written submission, footnote 4; and opening statement at the second meeting of the Panel, para. 94.
[533] China's opening statement at the second meeting of the Panel, para. 94.
[534] United States' third-party submission, para. 62.
[535] See Panel Report, *Mexico – Corn Syrup*, para. 7.182.
[536] Japan's first written submission, para. 321; and second written submission, para. 135; and European Union's first written submission, para. 327. See also preliminary determination notice, section II, Exhibits JPN-6 and EU-17; and final determination notice, sections II, III and IV, Exhibits JPN-1 and EU-29.
[537] Japan's first written submission, para. 322; and second written submission, para. 135; and European Union's first written submission, para. 328.
[538] Japan's first written submission, para. 324; and European Union's first written submission, para. 330; and second written submission, para. 181.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 Complaint by Japan (DS454)

8.1.1 Conclusions

8.1. We uphold Japan's claims that:

a. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:

i. MOFCOM failed to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement;

ii. MOFCOM failed to properly evaluate the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

iii. MOFCOM improperly relied on the market share of subject imports, and its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and

iv. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;

b. MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement;

c. China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization was not possible;

d. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:

i. the methodology used to calculate the margins of dumping for SMI and Kobe; and

ii. import prices, domestic prices, and price comparisons considered by MOFCOM in its injury determination;

e. China's application of provisional measures for a period exceeding four months is inconsistent with Article 7.4 of the Anti-Dumping Agreement;

f. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report the reasons why MOFCOM considered it appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rate for Japanese companies other than SMI and Kobe;

g. As a consequence of the inconsistencies described above, China's anti-dumping measures on HP-SSST from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.2. We reject Japan's claims that:

a. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:

   i. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and

   ii. MOFCOM failed to undertake a segmented analysis, and failed to properly weigh the positive and negative injury factors, when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

b. China's reliance on facts available to calculate the dumping margin for all Japanese companies other than SMI and Kobe is inconsistent with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement;

c. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:

   i. the data underlying MOFCOM's determination of dumping in respect of SMI and Kobe; and

   ii. the determination and the calculation of the dumping margins for all Japanese companies other than SMI and Kobe.

d. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report:

   i. relevant information concerning pricing information underlying MOFCOM's price undercutting findings; and

   ii. the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate, and the facts that were used to determine the all others rate.

8.3. In light of the conclusions set forth in paragraphs 8.1 and 8.2 above, we do not consider it necessary to rule on Japan's claim that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report MOFCOM's treatment, in the context of its price effects analysis, of the difference between the volume of Grade C subject imports and the volume of Grade C domestic products.

8.1.2 Recommendations

8.4. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent China has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that China has nullified or impaired benefits accruing to Japan under that Agreement.

8.5. Pursuant to Article 19.1 of the DSU, having found that China acted inconsistently with certain provisions of the Anti-Dumping Agreement, we recommend that China bring its measures into conformity with its obligations under that Agreement.

8.2 Complaint by the European Union (DS460)

8.2.1 Conclusions

8.6. We uphold the European Union's claims that:

a. China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product;

b. China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to address SMST's request for an adjustment to ensure a fair comparison between the export price and the normal value for Grade C;

c. China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification;

d. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:

   i. MOFCOM failed to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement;

   ii. MOFCOM failed to properly evaluate the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

   iii. MOFCOM improperly relied on the market share of subject imports, and its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and

   iv. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;

e. MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement;

f. China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization was not possible;

g. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:

   i. the methodology used to calculate the margins of dumping for SMST and Tubacex; and

   ii. import prices, domestic prices, and price comparisons considered by MOFCOM in its injury determination;

h. China's application of provisional measures for a period exceeding four months is inconsistent with Article 7.4 of the Anti-Dumping Agreement;

i. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report the reasons why MOFCOM considered it appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rate for European Union companies other than SMST and Tubacex;

j. As a consequence of the inconsistencies described above, China's anti-dumping measures on HP-SSST from the European Union are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.7. We reject the European Union's claims that:

a. China acted inconsistently with Article 6.8 and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement by applying facts available in respect of certain information that SMST sought to rectify at verification;

b. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:

i. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and

ii. MOFCOM failed to undertake a segmented analysis, and failed to properly weigh the positive and negative injury factors, when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

c. China's reliance on facts available to calculate the dumping margin for all European Union companies other than SMST and Tubacex is inconsistent with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement;

d. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:

i. the data underlying MOFCOM's determination of dumping in respect of SMST and Tubacex; and

ii. the determination and the calculation of the dumping margins for all European Union companies other than SMST and Tubacex.

e. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report:

i. relevant information concerning pricing information underlying MOFCOM's price undercutting findings; and

ii. the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate, and the facts that were used to determine the all others rate.

8.8. In light of the conclusions set forth in paragraphs 8.6 and 8.7 above, we do not consider it necessary to rule on the European Union's claims that:

a. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report MOFCOM's treatment, in the context of its price effects analysis, of the difference

between the volume of Grade C subject imports and the volume of Grade C domestic products; and

b. China acted inconsistently with Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

8.9. Consistent with our terms of reference, we find that the Article 2.2.1 claim advanced by the European Union in its first written submission falls outside our terms of reference. We also find that the Article 2.2.1.1 claims advanced by the European Union in its first written submission pertaining to MOFCOM's use of data that allegedly were not in accordance with GAAP, did not reasonably reflect the costs associated with the product under consideration, and were historically utilized by SMST, fall outside our terms of reference.

8.2.2 Recommendations

8.10. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent China has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that China has nullified or impaired benefits accruing to the European Union under that Agreement.

8.11. Pursuant to Article 19.1 of the DSU, having found that China acted inconsistently with certain provisions of the Anti-Dumping Agreement, we recommend that China bring its measures into conformity with its obligations under that Agreement. The second sentence of Article 19.1 provides the Panel with the discretion to suggest ways in which China might implement this recommendation. In this regard, the European Union has proposed specific suggestions for us to make, and requested the Panel to formulate other suggestions[539] Given the complexities to which implementation may give rise, we decline to exercise our discretion under the second sentence of Article 19.1 in the manner requested by the European Union.

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[539] European Union's first written submission, para. 338; and second written submission, paras. 180 and 184.

WT/DS454/R/Add.1
WT/DS460/R/Add.1

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CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN

CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM THE EUROPEAN UNION

REPORTS OF THE PANELS

Addendum

This *addendum* contains Annexes A to D to the Reports of the Panels to be found in document WT/DS454/R-WT/DS460/R.

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LIST OF ANNEXES

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WORKING PROCEDURES OF THE PANELS

ANNEX A-1

JOINT WORKING PROCEDURES OF THE PANELS

1. Pursuant to Article 9.3 of the DSU, the timetables in DS454 and DS460 are harmonized. The Panels shall, to the greatest extent possible, conduct a single panel process, with a single record, resulting in separate reports contained in a single document, taking into account the rights of all Members concerned, and in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired. A complaining party's submissions in one dispute shall be deemed to be an exercise of its third party rights in the other dispute. Third parties may submit single submissions relating to both disputes.

2. In its proceedings, the Panels shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

3. The deliberations of the Panels and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the disputes (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panels by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panels, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. The Panels shall meet in closed session. The parties, and Members having notified their interest in either dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panels to appear before them.

5. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panels Concerning Business Confidential Information, set out in Annex 1 to these Working Procedures.

6. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panels. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

7. Before the first substantive meeting of the Panels with the parties, each party shall submit a written submission in which its presents the facts of its case and its arguments, in accordance with the timetable adopted by the Panels. Each party shall also submit to the Panels, prior to the second substantive meeting of the Panels, a written rebuttal, in accordance with the timetable adopted by the Panels.

8. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panels. If the European Union or Japan requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the European Union and Japan shall submit their responses to the request prior to the first substantive meeting of the Panels, at a time to be determined by the Panels in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

9. Each party shall submit all factual evidence to the Panels no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the opposing party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panels shall accord the opposing party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

10. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panels may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation, to the extent that its significance is reasonably apparent, should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

11. To facilitate the maintenance of the record of the disputes and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the disputes. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6. In order to avoid unnecessary duplication of exhibits, parties may file joint exhibits. In particular, the exhibit of any party in DS454 or DS460 may consist of, and be effected by means of a cross-reference to, a document exhibited by any other party in either dispute, including with respect to submissions with the same due date.

Questions

12. The Panels may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panels the list of members of its delegation in advance of each meeting with the Panels and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panels with the parties shall be conducted as follows:

a. The Panels shall invite the European Union and Japan to make opening statements to present their cases first. Subsequently, the Panels shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panels and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panels' Secretary. Each party shall make available to the Panels and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panels shall give each party the opportunity to ask each other questions or make comments, through the Panels. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panels.

c. The Panels may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the parties to which they wish to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

d. Once the questioning has concluded, the Panels shall afford each party an opportunity to present a brief closing statement, with the European Union and Japan presenting their statements first.

15. The second substantive meeting of the Panels with the parties shall be conducted as follows:

a. The Panels shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panels shall invite China to present its opening statement, followed by the European Union and Japan. If China chooses not to avail itself of that right, the Panels shall invite the European Union and Japan to present their opening statements first. Before each party takes the floor, it shall provide the Panels and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panels' Secretary. Each party shall make available to the Panels and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panels shall give each party the opportunity to ask each other questions or make comments, through the Panels. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to another party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such written questions within a deadline to be determined by the Panels.

c. The Panels may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the parties to which they wish to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

d. Once the questioning has concluded, the Panels shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panels shall invite third parties to make written submissions prior to the first substantive meeting of the Panels with the parties, in accordance with the timetable adopted by the Panels.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panels the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panels shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panels, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panels, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panels, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to a

third party to which it wishes to receive a response in writing. The deadline for receipt of written answers to these questions shall be determined by the Panels.

d. The Panels may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the third parties to which they wish to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panels' reports shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the reports. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panels' examination of the cases.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panels in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panels. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary of statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panels will not summarize in the descriptive part of its reports, or annex to its reports, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panels. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panels reserve the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panels for which a deadline may not be specified in the timetable.

Interim review

23. Following issuance of the interim reports, each party may submit a written request to review precise aspects of the interim reports and request a further meeting with the Panels, in accordance with the timetable adopted by the Panels. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panels is requested, each party may submit written comments on another party's written request for review, in accordance with the timetable adopted by the Panels. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim reports, as well as the final reports prior to their official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panels by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 8 paper copies of all documents it submits to the Panels. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 3 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the disputes.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panels at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXX@wto.org, XXXX@wto.org and XXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panels directly on the other parties in paper form and electronically, at the time it transmits such document to the Panels. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panels. A party may provide its submissions only electronically to third parties. Each third party shall serve any document submitted to the Panels directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panels.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panels. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panels' Secretary is notified.

f. The Panels shall provide the parties with an electronic version of the descriptive part, the interim reports and the final reports, as well as of other documents as appropriate. When the Panels transmit to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the disputes.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANELS CONCERNING BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panels. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which could seriously prejudice an essential interest of the person or entity that supplied the information to the Party. In this regard, BCI shall include information that was previously treated by China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. No person shall have access to BCI except a member of the WTO Secretariat or the Panels, an employee of a party or third party, and an outside advisor for the purposes of these disputes to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in these disputes.

3. A party or third party having access to BCI submitted in these Panels proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of these disputes and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

4. A party or third party submitting or referring to BCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI shall be submitted pursuant to paragraph 26 of the Working Procedures within three working days after the submission of the confidential version containing the BCI.

5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panels before making it that the statement will contain BCI, and the Panels will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted no later than the working day following the meeting where the statement was made. Non-confidential versions of both oral and written statements shall be redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.

6. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

7. The Panels shall not disclose in its reports or in any other way, any information designated as BCI under these procedures. The Panels may, however, make statements of conclusion based on such information. Before the Panels circulate their final reports to the Members, the Panels will give each party an opportunity to review the reports to ensure that they do not contain any information that the party has designated as BCI.

8. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panels' reports.

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ANNEX B

ARGUMENTS OF JAPAN AND THE EUROPEAN UNION

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. This dispute concerns the measures taken by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan.[1] These measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement").

2. To begin, MOFCOM's injury and causation determinations are inconsistent with China's obligations under the Anti-Dumping Agreement. Specifically, MOFCOM failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1; follow the specific requirements set forth in Articles 3.2, 3.4, and 3.5; and conduct a "logical progression of inquiry"[2] in its volume, price effects, impact, and causation analyses.

3. Further, MOFCOM failed to follow several procedural requirements of the Anti-Dumping Agreement. First, MOFCOM failed to disclose information on import and domestic prices and reasoning supporting its price effects finding, inconsistent with Articles 6.9, 12.2, and 12.2.2. Second, MOFCOM treated certain information as confidential without satisfying the requirements of Articles 6.5 and 6.5.1. Third, MOFCOM failed to disclose the pertinent data and calculation methodologies used to determine the existence of dumping and the dumping margins for the investigated Japanese companies, inconsistent with Article 6.9. Fourth, MOFCOM applied facts available to determine the dumping margin for all other Japanese companies without satisfying the requirements of Article 6.8 and Paragraph 1 of Annex II, and also failed to disclose information and reasoning supporting its all others rate determination, inconsistent with Articles 6.9, 12.2, and 12.2.2.

4. Finally, MOFCOM applied provisional measures for a period exceeding four months without having any basis to do so under Article 7.4 of the Anti-Dumping Agreement.

II. LEGAL ARGUMENT

A. MOFCOM's Determinations of Injury and Causation, and its Associated Disclosure of Essential Facts and Final Determination Notice, Are Inconsistent with China's WTO Obligations in Several Respects

1. MOFCOM's Determinations of Injury and Causation Are Inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement

a. Article 3 of the Anti-Dumping Agreement Requires an "Objective Examination" Based on "Positive Evidence", and Calls for a "Logical Progression" of Inquiry

5. Article 3.1 of the Anti-Dumping Agreement "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".[3] It calls for an injury determination based on "positive evidence" and involving an "objective examination" of

[1] The subject products are available in three grades: TP347HFG, S30432, and TP310HNbN. For simplicity, Japan refers to these grades as Products "A", "B", and "C", respectively. Product A is the least expensive and lowest grade, Product B is in the middle, and Product C is the most expensive and highest grade.

[2] Appellate Body Report, *China – GOES*, para. 128.

[3] Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

"three essential components":[4] (i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. These components "are closely interrelated for purposes of the injury determination".[5]

6. Article 3.2 requires that an investigating authority "consider" "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member", and "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree". On the topic of price undercutting, Article 3.2 expressly establishes a *link* between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two.[6]

7. Article 3.4 details the obligation to examine the relationship between subject imports and the state of the domestic industry, which is "analytically akin to the type of link contemplated by the term 'the effect of' under Article 3.2", and "require[s] an examination of the explanatory force of subject imports for the state of the domestic industry".[7] The investigating authority must evaluate *all* fifteen factors listed in Article 3.4. Where there are "positive movements in a number of factors", the investigating authority must provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".[8] Finally, to ensure an "objective" analysis, an investigating authority finding that *a segment* of the domestic industry is impacted by dumped imports cannot automatically extend that conclusion to the *entire* industry without analyzing the impact of dumped imports on the *other segments* that constitute part of that industry, as well as the *industry as a whole*, and providing a *satisfactory explanation* as to why injury to one segment may be extended to the entire industry.[9]

8. Article 3.5 requires an investigating authority to demonstrate "that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. Further, an investigating authority must not attribute injury caused by other known factors to dumped imports, which requires it to separate and distinguish the effects of dumped imports from those of non-attribution factors.[10]

9. The Appellate Body has made clear that Articles 3.1, 3.2, 3.4, and 3.5 "contemplate a *logical progression of inquiry* leading to an investigating authority's ultimate injury and causation determination".[11] Thus, the analyses pursuant to each provision of Article 3 are "closely interrelated"[12], rather than independent of each other, and an investigating authority can reach a proper injury and causation determination only if it follows the logical progression step by step. This interrelationship finds further support in the word "consequent" in Article 3.1, which suggests that the "impact" to be examined under Article 3.4 is something to follow as a result of, or be logically consistent with, the volume and/or price effects analyses under Article 3.2.

b. China's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

10. After finding on the basis of comparison the imports and domestic prices of the HP-SSST product as a whole that "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products"[13], MOFCOM proceeded to compare the prices of each grade of subject imports with those of the corresponding domestic like products. This price effects analysis, however, does not involve an objective examination and is not based on positive

[4] Appellate Body Report, *China – GOES*, para. 127.
[5] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.
[6] Appellate Body Report, *China – GOES*, para. 136.
[7] Appellate Body Report, *China – GOES*, para. 149.
[8] Panel Report, *China – X-Ray Equipment*, para. 7.195 (quoting Panel Report, *Thailand – H-Beams*, para. 7.249).
[9] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. *See also id.*, paras. 191 ff.
[10] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[11] Appellate Body Report, *China – GOES*, para. 128 (emphasis added).
[12] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.
[13] Final Determination, Exhibit JPN-2, p. 53 (emphasis added).

evidence, and is therefore inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In particular: (i) MOFCOM's analysis of the price effects of imported Product C is analytically and factually flawed; and (ii) MOFCOM improperly extended its conclusions concerning the alleged price undercutting effects of Products B and C to the domestic HP-SSST industry as a whole.[14]

i. MOFCOM's analysis of the price effects of imported Product C is analytically and factually flawed

11. MOFCOM's finding that in 2010, "the large scale sales of [imports of Product C] at a low price had relatively noticeable price undercutting impact on the domestic sales price of the domestic like products"[15] is flawed, and falls short of an objective examination based on positive evidence, in at least two respects.

12. First, MOFCOM purportedly "t[ook] into consideration the quantitative difference between the import volume of the subject products and the sales volume of domestic like products", but MOFCOM does not explain the criteria and economic methodology used to accommodate those "quantitative differences".[16]

13. Second, MOFCOM grounded its price undercutting conclusion for Product C on the fact that, in 2009, the price of imported Product C was over 10% higher than the sales price of the corresponding like domestic products, but, in 2010, the import price of the subject product "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products".[17] However, according to MOFCOM's own analysis, in 2010 the price of the domestic Product C *increased* by 112.80% from 2009, while the price of the imports of the same grade *decreased* by 36.32%.[18] The fact that the sales prices of domestic Product C more than doubled from 2009 to 2010 explains why, over the course of that year, the price of imported products became relatively low by comparison. In other words, the dynamic relationship of the prices of *both* imported and domestic products shows that imports of Product C did not have a significant undercutting effect on the prices of the corresponding like domestic products. Moreover, substantial record evidence suggests that the domestic sales of Product C were not in competition with the imports of the same grade, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for MOFCOM to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

ii. MOFCOM improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole

14. Although MOFCOM determined that "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products"[19] and that imports of Product A did not have a significant price undercutting effect on domestic like products of the same grade, MOFCOM concluded that "*in general*, the products under investigation … had a relatively noticeable price undercutting effect on the price of domestic like products".[20] In effect, MOFCOM extended its price undercutting findings with respect to Products B and C (the latter of which Japan has demonstrated was itself flawed) to the *whole* domestic industry. MOFCOM's conclusions are unwarranted and strikingly selective.

15. Guidance as to the prices to be compared in the price undercutting analysis under Article 3.2 can be derived from WTO case law on Article 3.4 because the analyses under these provisions are "analytically akin to" one another.[21] In this context, the Appellate Body has said that "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, *all of the other parts that make up the industry, as*

[14] Japan understands that MOFCOM did not find any price effects for Product A, and did not find price depression or price suppression for any products. The ensuing discussion rests on this understanding.
[15] Final Determination, Exhibit JPN-2, p. 54.
[16] Final Determination, Exhibit JPN-2, pp. 53-54.
[17] Final Determination, Exhibit JPN-2, p. 54.
[18] *See* Japan's First Written Submission, Table 7 at para. 134.
[19] Final Determination, Exhibit JPN-2, p. 53 (emphasis added).
[20] Final Determination, Exhibit JPN-2, p. 54 (emphasis added).
[21] Appellate Body Report, *China – GOES*, para. 149.

well as examine the industry as a whole", or they should "provide a *satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry*".[22]

16. Accordingly, MOFCOM's ultimate price undercutting conclusion with respect to the product *as a whole* required proper grounding in its grade-by-grade analysis to be consistent with Articles 3.1 and 3.2. However, MOFCOM found an alleged price undercutting effect for only Products B and C, which represented a *minority sector* of domestic production (i.e., 20.1% during the POI), while it found no price undercutting effect for Product A, which represented the *vast majority* of domestic production (i.e., almost 80% during the POI).[23] Further, MOFCOM did not consider whether imports of each grade had a price effect on like domestic products of *other* grades, and even if it had, the record evidence shows that the different grades of HP-SSST products did not in fact compete with one another in the Chinese market, and therefore could not have had cross-grade price effects. Thus, MOFCOM did not find "significant" (i.e., "important, notable or consequential"[24]) price undercutting within the meaning of Article 3.2, and did not satisfy the good faith and objectivity requirements set out, as an overarching obligation, in Article 3.1.

c. China's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

17. MOFCOM's analysis of the impact of subject imports on the domestic industry is flawed, and falls short of an objective examination, based on positive evidence. In particular: (i) MOFCOM's analysis was at odds with and did not follow from its volume and price effects analyses; (ii) MOFCOM failed to evaluate the role of the magnitude of the margin of dumping; (iii) MOFCOM improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured; and (iv) MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry.

i. MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses under Article 3.2

18. Prior to undertaking its impact analysis, MOFCOM found no significant increase in volume, and allegedly found price undercutting effects with respect to only Products B and C. Yet, it conducted an impact analysis by considering the impact of subject imports as a whole on the domestic industry as a whole, presumably on the basis of its flawed and partial price effects analysis for the industry as a whole.[25] However, the Appellate Body has indicated that the volume, price effects, and impact inquiries are "*closely interrelated*";[26] the various paragraphs of Article 3 "contemplate a *logical progression of inquiry*";[27] and Article 3.4 requires "an examination of the explanatory force of subject imports for the state of the domestic industry".[28] Moreover, the text of Article 3.1 indicates that the impact of subject imports is contemplated to be the "consequen[ce]" of the volume or price effects of the same imports. By conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses and conclusions, MOFCOM therefore failed to conduct an objective examination based on positive evidence in accordance with Articles 3.1 and 3.4.

ii. MOFCOM failed to examine the magnitude of the margin of dumping

19. At no point in its analysis did MOFCOM evaluate the significance of the margins of dumping for the impact of subject imports on the Chinese HP-SSST industry. However, under Articles 3.1 and 3.4 the investigating authority "is required to evaluate the magnitude of the margin of

[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204 (emphasis added). *See also id.*, paras. 191 ff.

[23] *See* Japan's First Written Submission, Table 4 at para. 54.

[24] Panel Report, *US – Upland Cotton*, para. 7.1325. The panel's interpretation was confirmed by the Appellate Body. Appellate Body Report, *US – Upland Cotton*, para. 426.

[25] *See* Final Determination, Exhibit JPN-2, pp. 63-64.

[26] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115 (emphasis added).

[27] Appellate Body Report, *China – GOES*, para. 128 (emphasis added).

[28] Appellate Body Report, *China – GOES*, para. 149.

dumping and to assess its relevance and the weight to be attributed to it in the injury assessment".[29] MOFCOM therefore acted inconsistently with these provisions.

iii. MOFCOM improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured

20. The outcomes of MOFCOM's analysis of the relevant economic factors and indices of the domestic industry as listed in Article 3.4 were mixed[30], with many of the factors presenting general trends *favorable* for the domestic industry. MOFCOM itself agreed that, at least, production capacity, output, sales volume, market share, employment, labor productivity, and salary per head exhibited positive trends.[31] Yet, after reviewing all the relevant factors, MOFCOM simply concluded that, "[b]ased on the above … the domestic industry is materially injured".[32] In so doing, MOFCOM appears to have attached a high degree of importance to the other relevant factors highlighting negative aspects of the Chinese HP-SSST industry, while disregarding the many factors suggesting that the Chinese HP-SSST industry was not suffering injury. MOFCOM did not provide any explanation whatsoever regarding the weight attributed to any given factor, nor of the inferences it drew from those factors and indices that were positive for the domestic industry. MOFCOM therefore failed to conduct an objective examination, based on positive evidence, within the meaning of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[33]

iv. MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry

21. Finally, in its analysis of all the relevant economic factors, MOFCOM did not engage in an examination of whether the identified state of the domestic industry or market phenomenon had been the impact of subject imports; rather, it only identified the state of the domestic industry or the market phenomenon at issue. Thus, it failed to conduct "an examination of the explanatory force of subject imports for the state of the domestic industry", as the Appellate Body has said is required under Article 3.4.[34]

d. China's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

22. MOFCOM's causation determination is flawed and does not constitute an objective examination of positive evidence as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In particular: (i) the grounds of MOFCOM's causation determination, namely its volume, price effects, and impact analyses, are analytically flawed and factually unsupported; and (ii) MOFCOM failed to separate and distinguish the injurious effects of the decline in domestic demand for HP-SSSTs and the expansion in capacity of domestic producers from the injurious effects of subject imports.

i. MOFCOM's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of subject imports

23. The demonstration of a causal relationship between dumping and injury to the domestic industry constitutes the last step in an investigating authority's "logical progression of inquiry"[35] leading to the final injury determination. As such, a finding of causation is *dependent* upon the outcomes of the previous steps of analysis – namely, the volume and price effects of dumped imports and their impact on the domestic industry.

24. However, in the present case: (i) MOFCOM found the volume and market share of imported HP-SSST products did not significantly increase during the POI, and its focus on the market share *retained* by imported products at the end of the POI was improper; (ii) MOFCOM's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic

[29] Panel Report, *China – X-Ray Equipment*, para. 7.183.
[30] *See* Japan's First Written Submission, Table 6 at para. 66.
[31] Final Determination, Exhibit JPN-2, p. 63.
[32] Final Determination, Exhibit JPN-2, p. 64.
[33] *See* Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314; Panel Report, *Thailand – H-Beams*, paras. 7.225, 7.249; Panel Report, *China – X-Ray Equipment*, para. 7.216.
[34] Appellate Body Report, *China – GOES*, para. 149.
[35] Appellate Body Report, *China – GOES*, para. 128.

products was fatally flawed; and (iii) MOFCOM's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis of the negative indices. Therefore, it follows, *a fortiori*, that by grounding its causation determination on its volume, price effects, and impact analyses, which did not support a finding of injury, MOFCOM failed to conduct an objective examination, based on positive evidence, of the existence of a causal link between the subject imports and the injury itself, inconsistently with Articles 3.1 and 3.5.

ii. MOFCOM failed to separate and distinguish the injurious effects of other known factors from the injurious effects of subject imports

25. MOFCOM agreed that reduced apparent consumption and increased domestic production capacity could have had negative effects on the domestic industry, but it made no attempt to "separat[e] and distinguish[] the injurious effects" of these non-attribution factors "from the injurious effects of the dumped imports", as the Appellate Body has found is required under Articles 3.1 and 3.5.[36] MOFCOM therefore erred.

26. First, despite recognizing that domestic demand for HP-SSST products declined significantly, and acknowledging that this could negatively effect domestic sales prices and other indicators,[37] MOFCOM did not separate and distinguish the injurious effects of this other factor; rather, it simply concluded that "the price undercutting effect of the imports of subject products [was] the reason for the drop in price of domestic like products".[38]

27. Second, MOFCOM recognized that the POI saw a momentous expansion in the production capacity of Chinese producers of HP-SSST products, and such capacity expansion intensified competition and affected the domestic industry's operational metrics.[39] MOFCOM, however, dismissed the relevance of this other factor by observing that "there was no case of oversupply" based on a flawed supply-demand comparison, and by asserting that a main reason for the decrease in return on investment was "reduced pretax profits" rather than "greater average investment as a result of capacity expansion".[40]

2. MOFCOM's Disclosure of Essential Facts Was Insufficient Under Article 6.9 of the Anti-Dumping Agreement Because It Did Not Adequately Disclose the Import Prices and Domestic Prices Used in MOFCOM's Injury and Causation Analyses

28. Article 6.9 of the Anti-Dumping Agreement requires disclosure, "before a final determination is made, [of] the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures".[41] Here, MOFCOM failed to disclose several pieces of information on import and domestic prices critical to its price undercutting determination[42], which served as the foundation for its causation determination. MOFCOM's disclosure of certain price trend information was inadequate for this purpose.[43]

3. MOFCOM's Notice of Final Determination Failed to Satisfy the Requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement With Respect to the Import Prices and Domestic Prices Used in MOFCOM's Injury and Causation Analyses

29. Article 12.2 of the Anti-Dumping Agreement states that, in a preliminary or final determination, an investigating authority must set out "all issues of fact and law considered material"; and Article 12.2.2 further specifies this obligation as it applies to a final determination, requiring that the investigating authority's final report detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". Here, MOFCOM failed to discharge its obligations under Articles 12.2 and 12.2.2 because it did not provide a report stating all relevant information supporting its imposition of definitive anti-dumping

[36] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223. *See also id.*, para. 226.
[37] Final Determination, Exhibit JPN-2, pp. 68-70.
[38] Final Determination, Exhibit JPN-2, p. 70.
[39] Final Determination, Exhibit JPN-2, p. 74.
[40] Final Determination, Exhibit JPN-2, p. 74.
[41] Appellate Body Report, *China – GOES*, para. 240 (emphasis in original).
[42] *See* Japan's First Written Submission, Table 5 at para. 57.
[43] *See* Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – X-Ray Equipment,* para. 7.409.

duties as part of its Final Determination. Specifically, MOFCOM: (i) disclosed only price trend information while omitting key factual information underlying its price undercutting analysis;[44] and (ii) did not provide the reasoning behind how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis.[45] MOFCOM therefore breached Articles 12.2 and 12.2.2.

B. MOFCOM's Treatment of Confidential Information Was Improper Under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement Because MOFCOM Lacked Good Cause and Did Not Require Sufficient Non-Confidential Summaries or Explanations as to Why Such Summaries Are Not Possible

30. With regard to confidential information, Article 6.5 of the Anti-Dumping Agreement requires that "good cause" must be shown for treating information as confidential, and assuming such good cause is shown, Article 6.5.1 requires an interested party to submit sufficient non-confidential summaries or in "exceptional circumstances" indicate it is unable to do so with a statement of the reasons. In the present case, MOFCOM permitted the full texts of the following Appendices to remain confidential despite Petitioners' failure to show "good cause", and therefore China violated Article 6.5: Appendices V and VIII to the Petition; Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012; and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012. Further, Petitioners did not furnish sufficient non-confidential summaries of the following Appendices or any statements as to why such summaries were not possible, and MOFCOM's failure to require such summaries or statements violated Article 6.5.1: Appendices V and VIII to the Petition; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to Petitioners' Supplemental Evidence of 1 March 2012; and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012.[46]

C. MOFCOM's Disclosures of Essential Facts Were Insufficient Under Article 6.9 of the Anti-Dumping Agreement Because They Did Not Disclose the Data and Calculation Methodologies Used to Determine the Existence of Dumping and the Dumping Margins for SMI and Kobe

31. China violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose the most basic facts and analyses related to its anti-dumping determination and margin calculations for SMI and Kobe. Specifically, MOFCOM's dumping disclosures present only basic figures for export price and normal value and a narrative summary of the actions purportedly taken to derive these numbers; they present no cost data, no application of adjustments to price, and no evidence of calculation methodology.[47] MOFCOM thus failed to present the "essential facts" in its anti-dumping determination and margin calculations.

D. MOFCOM's Determination of the Dumping Margin for All Other Japanese Companies, and its Associated Disclosure of Essential Facts and Final Determination Notice, Were Inconsistent with Article 6.8 and Paragraph 1 of Annex II, as well as Articles 6.9, 12.2, and 12.2.2, of the Anti-Dumping Agreement

32. MOFCOM's determination of the all others rate for Japanese HP-SSST exporters is inconsistent with China's obligations under the Anti-Dumping Agreement. MOFCOM applied facts available in setting the all others rate, but it failed to establish the required conditions before it resorted to facts available. It also failed to make necessary disclosures related to its all others rate determination.

33. First, MOFCOM violated Article 6.8 and Paragraph 1 of Annex II because it determined the dumping margin for Japanese exporters other than SMI and Kobe (i.e., the all others rate) based

[44] *See* Japan's First Written Submission, Table 5 at para. 57.

[45] *See* Final Determination, Exhibit JPN-2, pp. 53-54.

[46] *See* Petition, Exhibit JPN-3; Petitioners' Supplemental Evidence, 1 March 2012, Exhibit JPN-8; Petitioners' Supplemental Evidence, 29 March 2012, Exhibit JPN-9.

[47] *See* Preliminary Dumping Disclosure to SMI, Exhibit JPN-18 (containing BCI); Preliminary Dumping Disclosure to Kobe, Exhibit JPN-19 (containing BCI); Final Dumping Disclosure to SMI, Exhibit JPN-20 (containing BCI); Final Dumping Disclosure to Kobe, Exhibit JPN-21 (containing BCI); Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22.

on "facts already known and best information available"[48] without notifying those other Japanese exporters of all the information required of them and of the consequences of not submitting that information.

34. Second, China violated Article 6.9 because MOFCOM failed to disclose the "essential facts" related to its determination of the all others dumping rate.[49] In particular, China failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate; and (ii) the particular facts that were used to determine the all others rate itself.

35. Third, as with its Final Dumping Disclosure, MOFCOM's Final Determination also failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate; and (ii) the particular facts that were used to determine the all others rate itself. It repeated only the same statements from the Final Dumping Disclosure that it decided "to use facts already known and best information available to establish the normal value and export price"[50], and "base its determinations on dumping and dumping margin on facts already known or best information available".[51] Accordingly, MOFCOM failed to meet its obligations under Articles 12.2 and 12.2.2.

E. China's Application of Provisional Measures for a Period Exceeding Four Months Violated Article 7.4 of the Anti-Dumping Agreement

36. China violated Article 7.4 of the Anti-Dumping Agreement because MOFCOM applied provisional anti-dumping measures from 9 May 2012 to 9 November 2012[52], a period of six months, without any request by exporters representing a significant percentage of the trade involved to apply provisional measures for a period of six months or any examination by MOFCOM as to whether a duty lower than the margin of dumping would be sufficient to remove injury. In such circumstances, the maximum period allowed for provisional measures by Article 7.4 is four months.

F. China's Anti-Dumping Measures on HP-SSST From Japan Are Inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

37. China's anti-dumping measures on HP-SSST from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 as a consequence of the breaches of the Anti-Dumping Agreement described above.

III. CONCLUSION

38. For the foregoing reasons, Japan respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and Anti-Dumping Agreement. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and Anti-Dumping Agreement.

[48] Final Determination, Exhibit JPN-2, p. 35.
[49] *See* Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22.
[50] Final Determination, Exhibit JPN-2, p. 35.
[51] Final Determination, Exhibit JPN-2, p. 41.
[52] *See* Preliminary Determination Notice, Exhibit JPN-6, Section II; Final Determination Notice, Exhibit JPN-1, Sections II, III, IV.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. The measures taken by the Government of the People's Republic of China ("China") – particularly by China's investigating authority, the Ministry of Commerce of the People's Republic of China ("MOFCOM") – in imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement").

II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 OF THE ANTI-DUMPING AGREEMENT

A. Legal and Factual Overview Regarding Injury and Causation

2. On the legal side, Article 3.1 of the Anti-Dumping Agreement sets forth the "three essential components" of the injury and causation analysis: "(i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products".[1] Subsequent paragraphs of Article 3 set forth a detailed inquiry into the three essential components, with the goal of each inquiry being to understand whether each component has been satisfied so as to justify an ultimate finding that subject imports are causing injury to the domestic industry. These inquiries must thus proceed in a "logical progression".[2]

3. Article 3.2 provides that investigating authorities must consider "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member", and "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". Thus, with regard to price effects, Article 3.2 sets forth three possible price effect factors that the investigating authority must consider: price undercutting, price depression, and price suppression. And because the final sentence of Article 3.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance", it should be evident that the consideration of one or more of the three possible price effect factors does not necessarily lead to an affirmative price effects determination. Finally, the price effects inquiry must be conducted with respect to the prices of the domestic like product as a whole, given that Article 3.1 specifies that the inquiry relates to "the effect of the dumped imports on prices in the domestic market for like products".

4. Article 3.4 provides that the investigating authority must examine "the impact of the dumped imports on the domestic industry concerned" and must consider "all relevant economic factors and indices having a bearing on the state of the industry". As Article 3.4 calls for an examination of impact "on the domestic industry concerned", the impact inquiry must be conducted with respect to the domestic industry as a whole. However, to proceed in a logical progression, the impact analysis must proceed on the premise that the segments of the domestic industry producing certain like products with respect to which no volume or price effects have been found have not been impacted by the dumped imports. Article 3.4 also requires an examination of "the explanatory force of subject imports for the state of the domestic industry"[3], for which the magnitude of the margins of dumping and the degrees of the volume and price effects found to exist are highly relevant.

[1] Appellate Body Report, *China – GOES*, para. 127.
[2] Appellate Body Report, *China – GOES*, paras. 127-128.
[3] Appellate Body Report, *China – GOES*, para. 149.

5. Finally, Article 3.5 sets forth the ultimate question that the investigating authority must answer: whether "dumped imports are, through the effects of dumping … causing injury within the meaning of this Agreement". Under Article 3.5, proper volume, price effects, and impact analyses may provisionally reveal causation. That provisional conclusion must then be confirmed through a proper non-attribution analysis.

6. On the factual side, there are three critical sets of relevant facts. First, MOFCOM found no increase in the volume of subject imports, but rather that subject import volumes declined significantly during the period of investigation ("POI"). Second, MOFCOM did not find any effects on the prices of domestic Product A (which accounted for 80%[4] of domestic HP-SSST production during the POI) by imports of Product A or by imports of Products B and C. Third, MOFCOM's 2010 price undercutting conclusion for Product C lacked factual support, because MOFCOM ignored the facts that the price differential in 2010 arose because domestic Product C prices *increased* by 112.80% while imported Product C prices *decreased* by 36.32% between 2009 and 2010, and that domestic Product C gained market share.[5] More fundamentally, MOFCOM never established a competitive relationship between imported and domestic Product C and the available facts suggested that both products were not in competition.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2

7. Under Articles 3.1 and 3.2, an investigating authority must find an actual decrease or prevention of increase in prices in the domestic market for like products by virtue of competition with dumped imports in order to justify imposing anti-dumping duties on subject imports. The considerations of price undercutting, price depression, and price suppression explore all possible ways in which dumped imports may produce a decrease or prevention of increase in domestic prices. As for price undercutting, such a determination cannot be based solely on the existence of a mathematical price difference, but requires the investigating authority to show that dumped imports had the effect of placing some downward pressure on domestic prices by selling at lower prices. But even if the undercutting inquiry reveals some downward pressure on domestic prices, for a proper finding of "price effects", the investigating authority must still find subject imports gave rise to an actual decrease or prevention of increase in domestic prices, examining factors such as the magnitude of the margins of dumping and the extent of the price differential between the dumped imports and the domestic like products.

1. MOFCOM Erred in Its Price Undercutting Conclusion for Product C

8. MOFCOM's 2010 price undercutting conclusion for Product C was flawed because it was based on comparing import prices with a trivial quantity of domestic prices, and because the 2010 price differential arose due to a 112.80% *increase* in domestic prices and a 36.32% *decrease* in import prices relative to 2009, while domestic Product C gained market share.[6]

9. The increase in domestic market share and the increase in domestic prices between 2009 and 2010 demonstrate that imported Product C did not place any downward pressure on domestic Product C prices in 2010 and did not cause an actual decrease or prevention of increase in domestic Product C prices in 2010. Moreover, the trivial quantity of domestic sales, vast difference between import and domestic prices, and inverse price movements between the imported and domestic products should have revealed to MOFCOM that price comparisons could not support a price undercutting conclusion for Product C for 2010. Or, at a minimum, these facts should have revealed that, to reach an objective price undercutting conclusion, MOFCOM had an obligation to establish the competitive relationship between, and accordingly the price comparability of, imported and domestic Product C in 2010 before reaching such a price undercutting conclusion.

10. China now argues that MOFCOM did find that imported and domestic Product C were in competition with one another, and that imports of Product C at undercutting prices prevented domestic producers from selling Product C.[7] However, MOFCOM's consideration of the competition between imported and domestic Product C was done in the context of its "like product"

[4] Japan's first written submission, para. 148.
[5] Final Determination, Exhibit JPN-2, pp. 44, 52-54.
[6] *See* Japan's first written submission, paras. 130-139; Japan's opening statement at the first meeting of the Panel, paras. 63-73.
[7] *See* China's response to Panel question No. 35.

determination.[8] MOFCOM did not, as the Anti-Dumping Agreement requires, separately ensure a competitive relationship between products (and therefore price comparability) before undertaking price comparisons for purposes of a price undercutting determination.[9]

11. Further, even if it were sufficient to support its injury analysis, MOFCOM's like product analysis contains several important shortcomings: (i) MOFCOM did not consider the unanimous statements by the importers that subject imports and domestic like products were not substitutable; (ii) MOFCOM's final determination contains only blanket references to the documents China cites and does not provide any explanation as to how these documents support MOFCOM's conclusion, and moreover, MOFCOM withheld as confidential the entirety of several of these documents; and (iii) the sole piece of evidence that China discusses in relation to the price effect of Product C relates to competition between domestic and imported Product B[10], which is not pertinent to the analysis of Product C.

12. Additionally, China appears to suggest that MOFCOM's conclusion from its causation analysis that "the domestic industry was virtually unable to sell domestically as a 'result' of dumped imports, sold at undercutting prices, holding a very high market share" supported its price undercutting conclusion for Product C.[11] However, MOFCOM's conclusion from its causation analysis cannot support its price effects finding, particularly in the absence of any reference in MOFCOM's price effects analysis to that conclusion.[12] Moreover, MOFCOM's conclusion from its causation analysis was a general conclusion about the domestic industry as a whole and not a specific conclusion about Product C.

13. Finally, even if domestic and imported Product C were in a competitive relationship in 2010 that justified making price comparisons in that year, the facts still do not support proper price undercutting and price effects findings in respect of Product C within the meaning of Articles 3.1 and 3.2. The increase in domestic market share and the vast increase in domestic prices between 2009 and 2010 demonstrate that imported Product C did not place any downward pressure on domestic Product C prices in 2010 and certainly did not cause any actual decrease or prevention of increase in domestic Product C prices in 2010.

2. MOFCOM Erred in Extending Its Price Undercutting Conclusions for Products B and C to the Domestic Like Product as a Whole

14. MOFCOM improperly extended its (flawed) price undercutting conclusions for Products B and C to the domestic like product as a whole.[13] MOFCOM did not find any effects on the prices of domestic Product A (which accounted for almost 80% of domestic HP-SSST production during the POI), yet it reached a general price undercutting conclusion.

15. China now submits that MOFCOM found cross-grade price effects that justified extending its price undercutting conclusions for Products B and C to the domestic like product as a whole[14], because MOFCOM found that Products A, B, and C "belong to the same category of products" and that "the price changes of the three are to a certain extent correlated with one another".[15] However, the discussion in MOFCOM's final determination that China cited, which addresses product scope, does not contain the facts or logic that China now relies upon for its argument. MOFCOM's consideration of price effects also does not cross-reference its earlier product scope findings regarding price correlation.[16] Even if it did implicitly, correlation is not the same as causation. To establish the latter, MOFCOM needed to ensure a competitive relationship between the products, which it failed to do. Finally, even if such a competitive relationship existed, MOFCOM never examined price differentials between any of the imported and domestic grades to determine whether those differentials could have given rise to any price effects on domestic Product A.

[8] *See* China's response to Panel question No. 35, paras. 113-123.
[9] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.66.
[10] *See* China's response to Panel question Nos. 35 and 37, paras. 123 and 127.
[11] *See* China's response to Panel question No. 35, paras. 111-112.
[12] *See* Final Determination, Exhibit JPN-2, pp. 52-57.
[13] *See* Japan's first written submission, paras. 140-153; Japan's opening statement at the first meeting of the Panel, paras. 46-62.
[14] *See* China's response to Panel question Nos. 44, 45, 46, 50.
[15] Final Determination, Exhibit JPN-2, pp. 48-49.
[16] *See* Final Determination, Exhibit JPN-2, pp. 52-57.

C. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4

16. MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) it did not logically progress from MOFCOM's volume and price effects analyses; (ii) MOFCOM failed to evaluate the magnitude of the margin of dumping; (iii) MOFCOM did not provide a thorough and persuasive explanation of why and how the domestic industry's negative indicators outweighed the positive ones; and (iv) MOFCOM did not examine whether subject imports had "explanatory force" for the state of the domestic industry.[17]

17. Japan adds three points to further establish the flaws in MOFCOM's impact analysis. First, MOFCOM found no increase in the volume of dumped imports and no proper price effects in relation to Product A, so MOFCOM should have conducted its impact analysis on the premise that the domestic industry segment producing Product A could not have been impacted by dumped imports, which it failed to do. Second, MOFCOM did not properly find price effects in relation to Product C either, so it also had no basis to consider that dumped imports impacted the domestic industry segment producing Product C. Third, MOFCOM never considered whether the extent of the price undercutting it found to exist for Products B and C or the magnitudes of the dumping margins for Products B and C could have had explanatory force for any of the domestic industry's observed negative indicators.

D. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5

18. MOFCOM's causation analysis was flawed because it did not logically progress from its volume, price effects, and impact analyses, and because it improperly attributed injury to subject imports without separating and distinguishing other known factors.[18]

19. Regarding causation, China submits that Article 3.5, rather than Article 3.2, requires consideration of the relationship between the dumped imports and the domestic industry as a whole. Japan does not agree, but notes that MOFCOM's causation analysis merely reiterated the considerations it made pursuant to its Article 3.2 and Article 3.4 analyses[19], so China's argument lacks factual support.

20. Regarding non-attribution, because MOFCOM's volume, price effects, and impact inquiries did not progress logically, the outcome of MOFCOM's causation inquiry necessarily includes injury to the domestic industry caused by other factors. Moreover, as for MOFCOM's actual non-attribution analysis, MOFCOM conducted it with respect to all grades of HP-SSST taken together, without considering the possibility that other factors may have influenced different segments of the market differently. In this regard, MOFCOM should have conducted distinct non-attribution analyses with regard to Product A on the one hand, and Products B and C on the other. Specifically, with regard to Product A, MOFCOM should have examined whether and how the expansion of domestic production capacity caused injury to the domestic industry, given that the subject imports had no impact on domestic producers of Product A. And with regard to Products B and C, MOFCOM should have considered the effects of the decline in domestic demand.

E. Conclusion Regarding Injury and Causation

21. Thus, the Panel should find MOFCOM's injury and causation determinations are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, and should make findings with respect to each of Japan's claims without exercising judicial economy.

III. MOFCOM Lacked Proper Basis for Its Use of Facts Available to Determine the All Others Rate, Thereby Violating Article 6.8 and Annex II of the Anti-Dumping Agreement

22. Article 6.8 requires that before resorting to facts available, an investigating authority must find that an interested party has refused access to or not provided necessary information, or has significantly impeded the investigation. Article 6.8 incorporates by reference Annex II, entitled

[17] *See* Japan's first written submission, paras. 157-185; Japan's opening statement at the first meeting of the Panel, paras. 74-83.

[18] *See* Japan's first written submission, paras. 186-233; Japan's opening statement at the first meeting of the Panel, paras. 84-104.

[19] *See* Final Determination, Exhibit JPN-2, pp. 65-67.

"Best Information Available in Terms of Paragraph 8 of Article 6". Paragraph 1 of Annex II requires that before resorting to facts available, an investigating authority must "specify in detail the information required from any interested party and the manner in which that information should be structured", and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available". Paragraph 7 of Annex II also provides that facts available must be used with "special circumspection", and that a "less favourable" result may be obtained "if an interested party does not cooperate and thus relevant information is being withheld". "[S]pecial circumspection" means that the "the agency's discretion is not unlimited", and that "the facts to be employed are expected to be the 'best information available'".[20] This means that, "there can be no better information available to be used in the particular circumstances".[21]

23. Here, MOFCOM did not provide the notice required by Paragraph 1 of Annex II through its Initiation Notice or its anti-dumping questionnaire to justify its use of facts available to calculate the all others rate for unknown Japanese exporters. MOFCOM's Initiation Notice requested far less information than required to calculate a dumping margin. And Japan disagrees that MOFCOM's alleged "publication" of the anti-dumping questionnaire on its website satisfied its notice obligations[22], because China's own laws and regulations have no provision for "publish[ing]" questionnaires in an anti-dumping investigation.[23]

24. Further, MOFCOM did not demonstrate the lack of cooperation by those unknown Japanese exporters, as required by Article 6.8.

25. Finally, despite having two dumping margins comparable in quality and relevance, MOFCOM chose to "apply the highest dumping margin found for the Japanese respondents" as the all others rate.[24] MOFCOM's only stated that the reason for doing so was "[o]ut of consideration for a unified approach to determine the rates for other companies".[25] MOFCOM, therefore, did not exercise "special circumspection" in determining the all others rate.

IV. MOFCOM'S DISCLOSURE OF ESSENTIAL FACTS AND NOTICE OF FINAL DETERMINATION DID NOT SATISFY THE REQUIREMENTS OF ARTICLES 6.9, 12.2, AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

A. Panels and the Appellate Body Have Provided Ample Guidance Regarding the Requirements of Articles 6.9, 12.2, and 12.2.2

26. Article 6.9 of the Anti-Dumping Agreement requires the disclosure of "essential facts", meaning "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures".[26] Thus, China is simply wrong when it asserts that Article 6.9 requires disclosure of only "a *summary* of the 'essential facts'".[27] China is also wrong that the "case law does not yet provide conclusive guidance" as to what Article 6.9 requires.[28] To the contrary, the case law – including from *China – GOES*, *China – X-Ray Equipment*, *China – Broiler Products*, and *EC – Salmon (Norway)* – clearly establishes the obligations under Article 6.9 (as well as Articles 12.2 and 12.2.2).

27. Further, Article 12.2 states that, with respect to a final determination, an investigating authority must provide a notice or separate report sufficiently setting out "all issues of fact and law considered material by the investigating authorities". And Article 12.2.2 specifies that the

[20] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[21] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289 (quoting Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166).
[22] *See* China's first written submission, paras. 573, 584, 593.
[23] *See* G/ADP/N/1/CHN/2/Suppl.3 (20 October 2004) and G/ADP/N/1/CHN/2/Suppl.1 (18 February 2003).
[24] Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, p. 19.
[25] Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, p. 19. *See also* Final Determination, Exhibit JPN-2, p. 35.
[26] Appellate Body Report, *China – GOES*, para. 240. *See also* Panel Report, *EC – Salmon (Norway)*, para. 7.796.
[27] China's first written submission, para. 651 (emphasis in original) (quoting Appellate Body Report, *China – GOES*, para. 249).
[28] China's first written submission, para. 654.

investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".

28. Finally, where confidentiality is a concern, the disclosure obligations under Articles 6.9, 12.2, and 12.2.2 "should be met by disclosing non-confidential summaries".[29]

B. MOFCOM Violated Article 6.9 with Respect to the Dumping Margins for SMI and Kobe

29. MOFCOM violated Article 6.9 of the Anti-Dumping Agreement because it failed to disclose the data and calculation methodologies used to determine the existence of dumping and the dumping margins for Sumitomo Metal Industries, Ltd. ("SMI") and Kobe Special Tube Co., Ltd. ("Kobe"), which are properly "essential facts".[30] China submits that Japan's claims are only "general allegations" and "not substantiated"[31], but Japan fails to see how it could further substantiate a claim that certain "essential facts" are *missing* from MOFCOM's disclosure documents.[32] China also argues that MOFCOM's disclosure documents included all of the necessary "essential facts"[33], but China only reiterates the brief narrative descriptions that MOFCOM provided in its disclosure documents, which were insufficient. Further, China asserts that the interested parties should have been able to fully understand their own dumping margin determinations in order to defend their interests from the brief narrative summaries that MOFCOM provided and, presumably, each party's own data submissions to MOFCOM.[34] However, this information does not permit each party to understand which data MOFCOM used to determine that party's dumping margin and to comment on that determination so as to defend its interests.[35]

C. MOFCOM Violated Articles 6.9, 12.2, and 12.2.2 with Respect to the Dumping Margin for All Other Japanese Companies

30. MOFCOM violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement by failing to disclose: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate for unknown Japanese exporters; and (ii) the particular facts that were used to determine the all others rate itself, including the facts underpinning the dumping margin for Kobe that MOFCOM used as the all others rate and the facts that justified using Kobe's dumping margin for the all others rate.[36]

31. With regard to the facts leading to the use of "facts available", MOFCOM never made a finding of non-cooperation with respect to the unknown Japanese exporters to which it applied the all others rate, let alone disclosed the facts that may have supported such a finding, whether in its disclosure documents or final determination.

32. With regard to the facts used to determine the all others rate, MOFCOM stated that it equated the all others rate with the highest rate determined for an investigated respondent, which was Kobe's rate.[37] However, MOFCOM failed to disclose all the "essential facts" used to determine Kobe's rate, so MOFCOM also failed to disclose all the "essential facts" used to determine the all others rate.

33. Additionally with regard to the facts used to determine the all others rate, an investigating authority must use the "best information available" and "special circumspection", and may not resort to "adverse inferences". The facts underpinning MOFCOM's determination that the highest dumping margin for an investigated respondent was the "best information available" for determining the all others rate are therefore "essential" or "material" facts that must be disclosed. MOFCOM's analysis of those facts to reach the conclusion that the highest dumping margin was the "best information available" also arguably constituted reasoning that required disclosure pursuant

[29] Appellate Body Report, *China – GOES*, paras. 247, 259.
[30] *See* Japan's first written submission, paras. 290-297. *See also* Japan's response to Panel question No. 71.
[31] China's first written submission, para. 666.
[32] *See* Japan's first written submission, paras. 290-297.
[33] China's first written submission, paras. 669-673.
[34] China's first written submission, paras. 674-676.
[35] *See* Panel Report, *Guatemala – Cement II*, para. 8.229.
[36] *See* Japan's first written submission, paras. 307-319.
[37] *See* Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, Section III.2.

to Article 12.2.2.[38] But MOFCOM never disclosed the facts or reasoning behind why the highest calculated dumping margin was the "best information available" for determining the all others rate.

D. MOFCOM Violated Articles 6.9, 12.2, and 12.2.2 with Respect to the Import Prices and Domestic Prices Used in the Injury and Causation Analyses

34. MOFCOM violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement by failing to disclose several pieces of information critical to its price effects determination, which served as the basis for MOFCOM's ultimate injury and causation determinations. China tries to justify those failures, but those justifications are without merit. First, for those instances for which no price comparisons were made or no price undercutting was found, China argues the missing price and price differential information did not constitute "essential facts" that required disclosure.[39] However, the missing information was certainly "salient for a contrary outcome"[40] and "considered [by MOFCOM in its] process of analysis and decision-making"[41], and therefore required disclosure. Second, China argues that some of the missing price information was confidential[42], but MOFCOM had an obligation to disclose sufficiently detailed non-confidential summaries in a coherent way to permit interested parties to defend their interests.[43] Third, China argues that the -3% to -28% range of underselling that MOFCOM disclosed for Product B for the entire 2008 to 2010 period was sufficient,[44] but MOFCOM should have been able to disclose a separate underselling margin for Product B for each year. Finally, China argues that how MOFCOM accommodated important "quantitative differences" was a methodological question that did not require disclosure[45], but MOFCOM had an obligation to disclose the facts that constituted the "quantitative difference" and the reasons why MOFCOM could take this into account.

V. MOFCOM Lacked Good Cause for Withholding Confidential Information, and Did Not Require Sufficient Non-Confidential Summaries or Explanations as to Why Such Summaries Are Not Possible, Inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

A. MOFCOM Violated Article 6.5 of the Anti-Dumping Agreement

35. China violated Article 6.5 of the Anti-Dumping Agreement because Petitioners did not demonstrate "good cause", and MOFCOM did not objectively examine Petitioners' attempted demonstrations of "good cause", with respect to the confidential treatment of Appendices V and VIII to the Petition, Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012, and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012.

36. China argues that an investigating authority "enjoys a considerable margin of discretion in its examination of a request for confidential treatment and determining whether 'good cause' has been shown, provided the outcome is not unreasonable".[46] However, notwithstanding an investigating authority's discretion, it still "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".[47] Here, beyond the name of the third party providing Appendix V to the Petition, MOFCOM failed to scrutinize Petitioners' confidentiality requests to determine objectively whether Petitioners had established "good cause" for treating the four reports at issue as entirely confidential.

37. China also asserts that "Petitioners did not only request confidential treatment out of concern for the impact on the third parties' businesses", but "provided several other reasons" for

[38] *See* Panel Report, *China – X-Ray Equipment*, para. 7.472. *See also* Panel Report, *China – Broiler Products*, para. 7.528.
[39] China's first written submission, para. 686. *See also* China's response to Panel question No. 75, para. 191.
[40] Appellate Body Report, *China – GOES*, para. 240.
[41] Panel Report, *EC – Salmon (Norway)*, para. 7.796.
[42] China's fist written submission, para. 686.
[43] Appellate Body Report, *China – GOES*, paras. 240, 247, 259.
[44] China's first written submission, paras. 685-686. *See also* China's response to Panel question Nos. 72, 75, 76, 77.
[45] China's first written submission, para. 693.
[46] China's first written submission, para. 725.
[47] Appellate Body Report, *EC – Fasteners (China)*, para. 539.

doing so.[48] However, China cited no underlying documents submitted by Petitioners to support its assertions; none of China's points serve as evidence of efforts by MOFCOM during the investigation to scrutinize Petitioners' confidentiality requests; some of the alleged other reasons simply reiterate concerns regarding the third parties' businesses; and the facts that the reports were obtained by Petitioners for remuneration or that confidentiality was requested by third parties cannot automatically constitute "good cause" under Article 6.5.

38. Finally, China argues that the four reports at issue were also "by nature" confidential.[49] But even if true, that would not absolve MOFCOM of its obligation to scrutinize Petitioners' confidentiality requests and to objectively determine that "good cause" exists for treating the full texts of these four reports as confidential before doing so.

B. MOFCOM Violated Article 6.5.1 of the Anti-Dumping Agreement

39. China violated Article 6.5.1 of the Anti-Dumping Agreement because Petitioners did not furnish sufficient non-confidential summaries or any statements as to why such summaries were not possible, and MOFCOM failed to require such summaries or statements, with respect to several documents submitted by Petitioners.[50] China argues that Petitioners' non-confidential summaries of Appendices V and VIII to the Petition, Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012, and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012 were sufficient.[51] China further argues that Petitioners provided statements as to why summarization is not possible with respect to Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, and 58 to Petitioners' Supplemental Evidence of 1 March 2012[52], or, alternatively, that Petitioners provided sufficient non-confidential summaries of these Appendices.[53]

40. With respect to the first group of documents, China's contention that the non-confidential summaries of these reports were sufficient is erroneous, as Japan has separately argued.[54] With respect to the second group of documents, even if the short statements that Petitioners provided justify confidential treatment, they are not statements as to why summarization is not possible, and they are not sufficient non-confidential summaries because they do not summarize the "*substantive content*" of those appendices.[55]

VI. CHINA APPLIED PROVISIONAL MEASURES FOR A PERIOD EXCEEDING FOUR MONTHS, THEREBY VIOLATING ARTICLE 7.4 OF THE ANTI-DUMPING AGREEMENT

41. China has not attempted to rebut Japan's claim that China violated Article 7.4 of the Anti-Dumping Agreement by applying provisional anti-dumping measures for a period of six months, so Japan considers that there is no dispute in this regard.

VII. CONCLUSION

42. For the foregoing reasons and those set forth in Japan's previous written and oral submissions in this dispute, Japan maintains its request that the Panel find China's measures at issue to be inconsistent with China's obligations under the GATT 1994 and Anti-Dumping Agreement, and recommend that China bring its measures into conformity with those obligations pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[48] China's first written submission, para. 728.
[49] China's first written submission, para. 732.
[50] *See* Japan's first written submission, paras. 265-289.
[51] China's first written submission, paras. 742-746, 757-763.
[52] China's first written submission, paras. 747, 764-767.
[53] *See* China's first written submission, note 791.
[54] *See* Japan's responses to Panel question Nos. 68 and 69.
[55] Panel Report, *China – X-Ray Equipment*, para. 7.342. (emphasis added)

ANNEX B-3

EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN AT THE FIRST PANEL MEETING

I. INTRODUCTION

1. This dispute concerns the measures taken by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan. These measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH CHINA'S ANTI-DUMPING AGREEMENT OBLIGATIONS

2. Despite MOFCOM's limited disclosures, it is evident that MOFCOM's injury and causation determinations violate the Anti-Dumping Agreement and GATT 1994.

A. Description of the Subject Imports and Domestic Like Product

3. There are three grades of subject products in increasing order of price and quality: Products A, B, and C. MOFCOM found the domestic like product to consist of all three grades[1], but that does not mean that differences in price and quality among the grades are not relevant in the injury and causation analysis.[2] Importantly, during the period of investigation ("POI"), virtually 100% of subject imports were of Products B and C – the ultra-supercritical products – while only about 20% of domestic HP-SSST products consisted of Products B and C. Thus, the overwhelming majority (about 80%) of the domestic like products consisted of Product A – the supercritical product.[3] In short, subject imports supplied a different segment of the market than the bulk of the domestic like products, so did not compete with the bulk of those products.

B. Legal Requirements for an Affirmative Injury and Causation Determination

4. Pursuant to Article 3 of the Anti-Dumping Agreement and the Appellate Body's guidance, an affirmative injury and causation determination requires: (i) a significant increase in the volume of dumped imports and/or an effect of dumped imports on prices in the domestic market for like products; (ii) a consequent impact of these dumped imports on domestic producers of such products; and (iii) a finding that injury to the domestic industry was caused by the dumped imports, and not by other known factors. In order for the inquiry to progress logically and ultimately lead to the imposition of antidumping duties on the entirety of dumped imports subject to investigation, each subsequent step of the analysis must logically connect with the preceding steps of the analysis.[4]

C. Summary of MOFCOM's Injury and Causation Determinations

5. With regard to volume, MOFCOM found subject import volumes declined significantly during the POI on all measures. With regard to price effects, MOFCOM found only price undercutting with respect to Products B and C, and on that basis concluded that "in general, … [t]he imports of the subject products had a relatively noticeable price undercutting effect on the price of domestic like products". With regard to impact, MOFCOM conducted its analysis with respect to the domestic industry as a whole, and although it found a mix of positive and negative indicators, it concluded that the domestic industry was materially injured. Finally, MOFCOM reached an affirmative causation determination on the basis of: (i) the high market share of imports; (ii) the price undercutting conclusions with respect to Products B and C; and (iii) the

[1] Final Determination, Exhibit JPN-2, pp. 23-28.
[2] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.50-7.51, 7.65.
[3] *See* Japan's first written submission, para. 54, Table 4, and para. 148.
[4] *See* Appellate Body Report, *China – GOES*, para. 128.

impact conclusion with respect to the domestic industry as a whole. MOFCOM also concluded that other known factors did not break the causal link between dumped imports and injury to the domestic industry.[5]

D. Inconsistency of MOFCOM's Injury and Causation Determinations with the Anti-Dumping Agreement

1. Summary of Japan's Arguments

6. Japan's particular arguments are set forth in its first written submission.[6]

2. Response to China's Arguments

7. Next, Japan explains why China has failed to rebut Japan's *prima facie* case that MOFCOM's injury and causation determinations are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. At the outset, Japan notes that China misinterprets the "positive evidence" obligation of Article 3.1 as being an obligation that relates to only "the quality of the evidence".[7] To the contrary, this obligation relates to not only the quality of the evidence, but also the *existence* and *pertinence* of that evidence. Here, in several instances, MOFCOM failed to support its determinations with any evidence or with pertinent evidence, let alone quality evidence, for which reason the Panel should find MOFCOM's injury and causation determinations to be inconsistent with Article 3.1.

a. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

8. Regarding Japan's argument that MOFCOM improperly reached the conclusion that subject imports had a price undercutting effect on the domestic like product as a whole, first, in China's view, the comparison must focus on the prices of the dumped imports, meaning the relevant consideration is MOFCOM's apparent finding that 70% or even 100% of dumped imports were sold at undercutting prices.[8] However, the Anti-Dumping Agreement and the Appellate Body make clear that the focus of the Article 3.2 price effects inquiry is not only on the prices of subject imports, but also on the prices of domestic like products, as well as the relationship between the two.[9] Thus, to determine whether price undercutting existed, and to justify the subsequent conclusions that MOFCOM reached regarding injury and causation to the domestic industry as a whole, MOFCOM had an obligation to consider the extent to which the subject imports it found to be sold at lower prices may have had an effect on prices in the domestic market for like products. Since MOFCOM found no price undercutting for Product A, which accounted for about 80% of domestic production, and which did not compete with Products B and C, MOFCOM had no basis to find price effects pursuant to Articles 3.1 and 3.2 with respect to the domestic market for like products.

9. Second, China justifies basing its price effects conclusion on finding price undercutting for only about 20% of the domestic like product by invoking the fact that the second sentence of Article 3.2 uses the term "a like product", instead of "the like product".[10] However, Article 3.1, which specifies the "essential components"[11] of the analysis, specifies the requirement for an investigating authority to determine "the effect of the dumped imports on prices in *the* domestic market for like products"[12], meaning the like product as a whole.

10. Third, China suggests that MOFCOM found imports of Products B and C caused effects on domestic prices of Product A based on the fact that Products A, B and C "belong to the same category of products" (i.e., are the domestic "like product"), as well as Petitioners' statement

[5] *See* Final Determination, Exhibit JPN-2, pp. 43-77.
[6] *See* Japan's first written submission, paras. 122-234. Japan clarifies that, notwithstanding the title of Section V.A.1.b.ii of its first written submission, Japan's argument in that section is in fact that MOFCOM improperly extended the price effects conclusion it made for only a portion of the domestic like product, as defined by MOFCOM, to *the domestic like product as a whole*.
[7] China's first written submission, paras. 234-235.
[8] China's first written submission, paras. 338-341.
[9] *See* Appellate Body Report, *China – GOES*, paras. 127-128, 138, 147, 154.
[10] China's first written submission, paras. 347-351.
[11] Appellate Body Report, *China – GOES*, para. 127.
[12] Emphasis added.

regarding "correlation" between the prices of Products A, B and C.[13] However, to find cross-grade price effects merely based on a "like product" determination and Petitioners' unverified statement is not a finding based on "positive evidence" and an "objective examination"[14], especially given record evidence showing the lack of competition between Product A and Products B and C. And even if a correlation were proved, that does not establish that price movements of one product caused price movements of the other products.

11. Regarding Japan's argument that MOFCOM's price undercutting conclusion for Product C was analytically and factually flawed, first, China argues that a price undercutting finding may be based solely on the factual difference between import and domestic prices, without considering the "effect" of imports.[15] This is incorrect. Under a proper reading of Articles 3.1 and 3.2, consideration of the "effect" of imports (i.e., the "explanatory force" of imports)[16] is relevant for not only price suppression and depression, but also undercutting. Thus, an inquiry into "price undercutting by the dumped imports" requires assessing whether dumped imports are having the *effect* of taking the place of domestic like products by selling at lower prices or of rendering domestic prices less firm[17], and not just of whether dumped imports are mathematically priced lower. Here, given the facts, including the opposite trends in price and volume of imported and domestic Product C[18], MOFCOM's price undercutting conclusion for Product C is clearly not objective or based on positive evidence.

12. Second, China argues that the "similar quantitative difference" of greater than 99% import market share for Product C in 2009 and 2010 justifies price comparisons, and ultimately a price undercutting conclusion, for Product C for those two years.[19] Japan fails to see how, without a meaningful quantity of both import and domestic sales, any objective price undercutting conclusion could be reached with respect to a particular product.

b. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. Regarding Japan's argument that MOFCOM's impact analysis did not logically progress from its volume and price effects analyses, China submits Article 3.4 requires an impact analysis with respect to the domestic industry as a whole.[20] However, the successive provisions of Article 3 "contemplate a logical progression of inquiry"[21], and Article 3.4 is concerned with "the relationship between subject imports and the state of the domestic industry".[22] Here, MOFCOM was required to ensure a logical progression from its volume and price effects findings to its impact and causation analyses, which it failed to do.

14. Regarding Japan's argument that MOFCOM failed to evaluate the magnitude of the margin of dumping, China argues that Article 3.4 does not require such an evaluation[23], but China is wrong.[24] Moreover, MOFCOM evaluated the magnitude of the margin of dumping only in deciding if cumulation was appropriate, not in its injury assessment[25], and so erred.

15. Regarding Japan's argument that MOFCOM did not provide a thorough and persuasive explanation of why and how the domestic industry's negative indicators outweighed the positive

[13] China's first written submission, paras. 365-367.
[14] *See* Panel Report, *China – X-Ray Equipment*, para. 7.65.
[15] China's first written submission, paras. 285-299.
[16] *See, e.g.*, Appellate Body Report, *China – GOES*, paras. 138, 149.
[17] *See The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 30 January 2014, http://www.oed.com/view/Entry/211547 (defining "undercut" as "[t]o supplant … by selling at lower prices" or "[t]o render unstable; to render less firm, to undermine").
[18] Notably, in 2009, imported Product C prices were *above* domestic Product C prices by 10%, and imported Product C prices ended up being below domestic Product C prices in 2010 by about 50% because domestic prices *increased* by 112.80% while import prices *decreased* by 36.32%. *See* Japan's first written submission, paras. 133-135.
[19] China's first written submission, paras. 267-281.
[20] China's first written submission, paras. 390-391, 393-400.
[21] Appellate Body Report, *China – GOES*, para. 128.
[22] Appellate Body Report, *China – GOES*, para. 149.
[23] China's first written submission, para. 424.
[24] *See* Panel Report, *China – X-Ray Equipment*, para. 7.183.
[25] *See* China's first written submission, para. 426 (citing Final Determination, Exhibit JPN-2, pp. 41-42).

ones, China wrongly asserts that it undertook the requisite evaluation.[26] Rather, MOFCOM simply restated its factual conclusions regarding each factor, and juxtaposed those factual conclusions using a variety of transitional terms.[27]

16. Regarding Japan's argument that MOFCOM did not examine whether subject imports had explanatory force for the state of the domestic industry, very little[28] is needed to establish that MOFCOM simply failed to undertake this requisite inquiry.[29]

c. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

17. Regarding Japan's argument that MOFCOM's causation analysis did not logically progress from its volume, price effects, and impact analyses, China argues it was permitted to consider the subject imports' high market share in its causation analysis.[30] However, Article 3.5 requires causation to be based on the particular effects of dumping specified in Articles 3.2 and 3.4, which with respect to volume require "a significant increase in dumped imports". Articles 3.5 also requires "an examination of all relevant evidence", which must include the sharp decline in import volumes found by MOFCOM. As for the link between MOFCOM's price effects and impact conclusions and its causation determination, the flaws in those conclusions already discussed also undermine MOFCOM's causation determination.[31]

18. Regarding Japan's argument that MOFCOM improperly attributed injury to subject imports, and not to other known factors, MOFCOM did not properly "separate and distinguish":[32] (i) the decline in domestic demand; and (ii) the expansion of domestic production capacity. With respect to Products B and C, there is no contradiction in Japan's argument,[33] because it is undeniable that domestic demand for these products decreased significantly during the POI, which caused significant decreases in import volume and domestic sales volume, as well as prices.[34] Thus, whatever injury the approximately 20% of the domestic industry producing Products B and C may have been suffering was evidently the result of a significant decrease in domestic demand. As for Product A, there were only trivial imports of Product A during the POI[35], and MOFCOM never found volume or price effects on the domestic industry with respect to Product A. Thus, MOFCOM should have presupposed that injury to the 80% of the domestic industry producing Product A should be attributed to factors other than dumped imports. Here, that other factor was evidently the known expansion of domestic production capacity. China has presented no arguments that dismiss the role of capacity expansion as a non-attribution factor.[36]

III. MOFCOM VIOLATED SEVERAL PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AGREEMENT

19. China violated its procedural obligations with respect to: (i) the disclosure of essential facts; (ii) the notice provided with MOFCOM's final determination; (iii) the determination of the all others rate; (iv) the treatment of confidential information; and (v) the application of provisional measures. China's arguments in its FWS cannot overturn this conclusion.

IV. TRANSLATION ISSUES

20. With regard to translation issues, none of China's objections has any impact on Japan's claims and arguments. Japan's views on China's alternative translations are expressed in Exhibit JPN-29 submitted to the Panel on February 18.

[26] China's first written submission, paras. 447-453.
[27] *See* Final Determination, Exhibit JPN-2, p. 63.
[28] *See* China's first written submission, para. 460.
[29] *See* Appellate Body Report, *China – GOES*, para. 149.
[30] China's first written submission, para. 516.
[31] *See* Panel Report, *China – X-Ray Equipment*, para. 7.239.
[32] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[33] *See* China's first written submission, para. 550.
[34] *See* Japan's first written submission, para. 54, Table 4, and para. 57, Table 5.
[35] *See* Japan's first written submission, para. 54, Table 4.
[36] *See* China's first written submission, paras. 557-561.

V. CONCLUSION

21. Japan respectfully requests the Panel to find that China's measures are inconsistent with the GATT 1994 and Anti-Dumping Agreement. Moreover, Japan respectfully requests the Panel to make findings with respect to each of Japan's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy.

ANNEX B-4

EXECUTIVE SUMMARY OF THE STATEMENTS OF JAPAN AT THE SECOND PANEL MEETING

I. INTRODUCTION

1. Japan has already established why the measures by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). In the oral statement we review the principal issues at stake in this dispute, and address the few new points by China that merit response.

II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH CHINA'S ANTI-DUMPING AGREEMENT OBLIGATIONS

A. Overview of Key Facts Related to Injury and Causation

2. There are three sets of critical facts pertaining to injury and causation.[1] First, MOFCOM found no increase in the volume of subject imports, but rather a significant decreasing trend during the period of investigation ("POI"). Second, MOFCOM found no price effects on Product A, which accounted for almost 80% of domestic HP-SSST production during the POI, yet reached a general price effects conclusion for the domestic like product as a whole. Third, MOFCOM found price undercutting for Product C in 2010, despite several facts indicating that there was no competitive relationship between imported and domestic Product C that could justify making price comparisons, and thus that imports of Product C could not actually be having an effect on prices of domestic Product C.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

1. Legal Requirements for a Price Effects Finding

3. As for the legal requirements for price effects[2], to begin, "price undercutting" cannot be found based on a mathematical price difference alone; rather, it requires a showing that dumped imports had an effect of placing downward pressure on domestic prices by selling at lower prices. A competitive relationship between the dumped imports and domestic like products whose prices are being compared is critical for finding "price undercutting".

4. That said, Articles 3.1 and 3.2 require an investigating authority to determine whether *price effects* exist. Under Article 3.2, price undercutting, price depression, and price suppression are three factors to be considered, but "[n]o one or several of these factors can necessarily give decisive guidance". As such, a "price undercutting" finding may provide guidance for determining whether price effects exist, but it is not sufficient. The United States concurs.[3] Thus, even if "price undercutting" is found, *price effects* cannot be found unless dumped imports gave rise to an actual decrease or prevention of increase in prices in the domestic market for like products. This requires an investigating authority to find both a price differential and degree of competition between the dumped imports and domestic like products, and also consider other relevant factors.

5. Finally, Articles 3.1 and 3.2 require an investigating authority to determine "the effect of the dumped imports on prices *in the domestic market for like products*".[4] This is plainly a reference to the entire domestic market, meaning that the price effects to be found at this stage of the inquiry must be with respect to the domestic like product as a whole.

[1] *See* Japan's second written submission, paras. 12-16.
[2] *See* Japan's second written submission, paras. 17-28.
[3] United States' response to Panel question No. 7, paras. 19-20.
[4] Emphasis added.

2. MOFCOM Improperly Found Price Effects for Product C

6. On MOFCOM's price effects finding for Product C, the record evidence does not support a price undercutting or price effects conclusion for Product C; rather, it indicates that there was no competitive relationship between imported and domestic Product C.[5]

7. China argues that because Japan has not challenged MOFCOM's "like" product finding under Article 2.6 of the Anti-Dumping Agreement, it is precluded from raising a lack of competitive relationship between imported and domestic Product C under Articles 3.1 and 3.2.[6] However, China ignores *China – X-Ray Equipment*, where the panel distinguished between the competitiveness considerations under Article 2.6 and Article 3.2.[7] Importantly, "like" products – or even sub-groupings of "like" products – do not always compete with one another in the actual market, so a complainant may raise competitive relationships and price comparability for a price undercutting analysis under Article 3.2 without challenging likeness under Article 2.6. Here, for Product C, the trivial quantity of domestic sales, vast difference between import and domestic prices, inverse price movements between imported and domestic products, and unanimous statements of domestic importers as to a lack of substitutability between imported and domestic products should have revealed that domestic and imported Product C were not in fact in a competitive relationship, and therefore their prices were not in fact comparable, for purposes of finding price undercutting for Product C.

8. China also argues that it found a competitive relationship between imported and domestic Product C sufficient to support its price undercutting determination for Product C.[8] As Japan has explained: (i) MOFCOM's consideration of the competitive relationship was in the context of its "like product" determination, and therefore inapposite; (ii) MOFCOM never considered the unanimous statements by importers that subject imports and domestic like products were not substitutable; (iii) MOFCOM never explained how any of the documents China references actually support its conclusion, and withheld several of these documents as entirely confidential; and (iv) the particular evidence and conclusions that China references are not specific to Product C.[9] China now quotes one importer as stating that it did not buy domestic products in 2010 because "the price of imports was more competitive"[10], but this importer clearly intended to state that imported and domestic products were not commercially substitutable in the actual market.[11] Without some evidence of the actual degree of competition between imported and domestic Product C, MOFCOM could not have objectively found that the price differential it observed between imported and domestic Product C in 2010 could have actually had effects on prices of domestic Product C.

3. MOFCOM Improperly Extended Its Price Effects Conclusions for Products B and C to the Domestic Like Product as a Whole

9. MOFCOM improperly extended the price effects conclusions it reached for Products B and C to the domestic like product as a whole.[12] China attempts to justify MOFCOM's conclusion by reference to: (i) MOFCOM's apparent finding of a price correlation between the different HP-SSST grades; and (ii) alleged evidence of the substitutability of Product A by Products B and C.[13] Japan finds it difficult to understand how *higher* priced imports of Products B and C could have price *undercutting* effects on *lower* priced domestic Product A.

10. On China's first point, as explained[14], MOFCOM's brief analysis came in its scope determination, and moreover, correlation itself does not establish that lower prices of imported Products B and C pushed down prices of domestic Product A. As for Petitioners' assertion that a

[5] *See* Japan's first written submission, paras. 130-139; Japan's opening statement at the first meeting of the Panel, paras. 63-73; Japan's second written submission, paras. 30-37.
[6] *See* China's second written submission, paras. 97-104.
[7] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.67.
[8] *See* China's second written submission, paras. 105-115.
[9] *See* Japan's second written submission, paras. 33-37.
[10] China's second written submission, para. 114 (quoting Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, p. 3).
[11] Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, questions 19, 22.
[12] *See* Japan's first written submission, paras. 140-153; Japan's opening statement at the first meeting of the Panel, paras. 46-62; Japan's second written submission, paras. 38-46.
[13] *See* China's second written submission, paras. 138-156.
[14] *See* Japan's second written submission, paras. 39-42.

decrease in Product B and C prices "will certainly drive down" Product A prices[15], this assertion makes little sense because Product A can perform reliably in supercritical boilers but not ultrasupercritical boilers, while Products B and C are essential for ultrasupercritical boilers[16], so there is a technical dichotomy between these products.

11. On China's second point of substitutability, MOFCOM never addressed this issue in its price effects analysis, and even if it found substitutability, it never examined the degree of substitutability and the extent of the price differential between Product A and Products B and C in its determination. China's reference to evidence that Products B and C could substitute for Product A[17] is misleading, because it plainly served to establish that lower-grade Product A could not physically substitute for higher-grade Products B and C in ultrasupercritical boilers; it did not establish actual *commercial substitutability*.

12. Japan emphasized that such an argument is rather an ex post rationalization.[18] China's position on the requirements under Article 3.2 naturally suggests that MOFCOM considers that it is not obligated to find either a volume effect or a price effect of the dumped imports on domestically produced Product A. Thus, it is doubtful that MOFCOM did engage in the inquiry of the effect of the dumped imports on domestically produced Product A while MOFCOM considered it non-obligatory. We are aware that China submits that MOFCOM can rely on its finding in the scope analysis later in its price effect analysis.[19] Japan agrees an investigating authority can rely on its finding in a prior part of its determination. It is obvious, however, that such a reliance on a prior finding should have been explicitly mentioned in the relevant part of the Final Determination, in light of the requirement for an objective examination based on positive evidence under the Anti-Dumping Agreement. China's ex post rationalization cannot cure deficiencies in MOFCOM's original Final Determination.

C. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. MOFCOM's impact analysis violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) it did not logically progress from MOFCOM's volume and price effects analyses; (ii) MOFCOM failed to evaluate the magnitude of the margin of dumping; (iii) MOFCOM did not adequately explain why and how the domestic industry's negative indicators outweighed the positive ones; and (iv) MOFCOM did not examine whether subject imports had "explanatory force" for the state of the domestic industry.[20] Japan already rebutted much of what China argues on this topic.[21] China's view that Article 3.4 does not require a separate evaluation of "factors affecting domestic prices" and "the magnitude of the margin of dumping"[22] is not consistent with a Vienna Convention interpretation of Article 3.4, because it fails to address why Article 3.4 explicitly references these factors. Rather, Article 3.4 requires examination of "the explanatory force of subject imports for the state of the domestic industry"[23], and for this purpose, examination of the "factors affecting domestic prices" and "the magnitude of the margin of dumping" is highly pertinent.

D. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

14. MOFCOM's causation analysis violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it did not logically progress from its volume, price effects, and impact analyses, and because MOFCOM improperly attributed injury to subject imports without separating and distinguishing other known factors.[24] Again, Japan already rebutted much of what China argues on

[15] *See* China's second written submission, para. 140 (quoting Final Determination, Exhibit JPN-2, p. 48).
[16] *See* Japan's opening statement at the first meeting of the Panel, para. 8.
[17] *See* China's second written submission, paras. 143-150.
[18] *See* Japan's closing statement at the first meeting of the Panel.
[19] Ibid., para. 12.
[20] *See* Japan's first written submission, paras. 157-185; Japan's opening statement at the first meeting of the Panel, paras. 74-83; Japan's second written submission, paras. 50-53.
[21] *See* China's second written submission, paras. 168-206.
[22] *See* China's second written submission, paras. 182-188.
[23] Appellate Body Report, *China – GOES*, para. 149.
[24] *See* Japan's first written submission, paras. 186-233; Japan's opening statement at the first meeting of the Panel, paras. 84-104; Japan's second written submission, paras. 56-61.

this topic.[25] On non-attribution, China now argues that Article 3.5 requires an investigating authority to provide only "reasonable explanations as to why the injurious effects of certain factors are not sufficient to break the causal link".[26] However, in *US – Hot-Rolled Steel*, the Appellate Body made clear that an investigating authority must identify the "nature and extent" of the injurious effects of the non-attribution factor and the dumped imports, and distinguish the two.[27] Here, different factors were at work in different segments of the domestic HP-SSST market, yet MOFCOM failed to consider any possibility that this was the case. For Product A, increasing domestic demand combined with decreasing domestic prices indicated a typical oversupply situation, where an expansion of domestic production capacity surely contributed to the domestic industry's injury. For Products B and C, there is no dispute that domestic demand declined sharply, which also contributed to the domestic industry's injury. Yet MOFCOM failed to separate and distinguish the injurious effects of these non-attribution factors in the different segments of the market.

III. MOFCOM VIOLATED SEVERAL PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AGREEMENT

A. MOFCOM's Use of Facts Available to Determine the All Others Rate Violated Article 6.8 and Annex II of the Anti-Dumping Agreement

15. MOFCOM's use of facts available to determine the all others rate for unknown Japanese exporters violated Article 6.8 and Annex II of the Anti-Dumping Agreement for three reasons:[28] (i) MOFCOM failed to provide the requisite notice before using facts available; (ii) MOFCOM did not demonstrate the lack of cooperation by unknown Japanese exporters before using facts available; and (iii) MOFCOM failed to use the "best information available" and exercise "special circumspection".

B. MOFCOM's Disclosure of Essential Facts and Notice of Final Determination Violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement

16. MOFCOM's disclosure of essential facts and notice of final determination are inconsistent with Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement in three respects. First, MOFCOM violated Article 6.9 because it failed to disclose the data and calculation methodologies used to determine the existence of dumping and the dumping margins for SMI and Kobe.[29] Second, MOFCOM violated Articles 6.9, 12.2, and 12.2.2 by failing to disclose, in connection with its determination of the all others rate: (i) the facts justifying the use of "facts available"; (ii) the data and calculation methodologies underpinning the dumping margin for Kobe, which MOFCOM used as the all others rate; and (iii) the facts justifying the use of the highest dumping margin for an investigated respondent as the all others rate.[30] Third, MOFCOM violated Articles 6.9, 12.2, and 12.2.2 by failing to disclose several pieces of information regarding import prices and domestic prices critical to its price effects determination.[31]

C. MOFCOM's Treatment of Confidential Information Violated Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

17. As for MOFCOM's treatment of confidential information: first, MOFCOM violated Article 6.5 of the Anti-Dumping Agreement because Petitioners did not demonstrate "good cause", and MOFCOM did not objectively examine Petitioners' attempted demonstrations of "good cause", with respect to the confidential treatment of the full texts of four appendices submitted by Petitioners; and second, China violated Article 6.5.1 of the Anti-Dumping Agreement because Petitioners did not furnish sufficient non-confidential summaries or any statements as to why such summaries were not possible, and MOFCOM failed to require such summaries or statements, with respect to

[25] *See* China's second written submission, paras. 207-242.
[26] China's second written submission, para. 229.
[27] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[28] *See* Japan's first written submission, paras. 302-306; Japan's second written submission, paras. 63-81.
[29] *See* Japan's first written submission, paras. 290-297; Japan's second written submission, paras. 89-95.
[30] *See* Japan's first written submission, paras. 307-319; Japan's second written submission, paras. 96-104.
[31] *See* Japan's first written submission, paras. 235-264; Japan's second written submission, paras. 105-113.

several documents submitted by Petitioners.[32] Furthermore, China stated that in its first written submission, it explained that the Petitioners provided "good cause" for the confidential treatment of the four appendices, but such explanation cannot be found in any document on the record including the Final Determination. Japan thus presented a prima facie case that China failed to scrutinize whether the confidentiality request shows "good cause" at the time of the investigation. It is incumbent on China to rebut this prima facie case by presenting evidence that MOFCOM did scrutinize confidential requests by Petitioners in a manner argued by China, but China has not done so.

D. China's Application of Provisional Measures for a Period Exceeding Four Months Violated Article 7.4 of the Anti-Dumping Agreement

18. Finally, China has not objected to Japan's claim that China violated Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for more than four months.

IV. CONCLUSION

19. Japan maintains that China's measures are inconsistent with its obligations under the GATT 1994 and the Anti-Dumping Agreement. Japan respectfully requests that the Panel make findings with respect to *each* of Japan's claims under the GATT 1994 and the Anti-Dumping Agreement, including each claim under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy as to any of Japan's claims.

[32] *See* Japan's first written submission, paras. 265-289; Japan's second written submission, paras. 114-134.

ANNEX B-5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION AND GENERAL FACTUAL BACKGROUND

1. The present dispute concerns China's measures imposing anti-dumping duties on certain high-performance stainless steel seamless tubes ("HP-SSST") from the European Union, as set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2012] (the "Preliminary Determination notice") and Notice No. 72 [2012] (the "Final Determination notice"), including any and all annexes and any amendments thereof.

2. The product under investigation is high-performance stainless steel seamless tubes of particular specification and having such features as high endurance strength, good structure stability, anti-steam oxidation and excellent corrosion resistance at high temperature (HP-SSST). The main applications of HP-SSST are in superheaters and reheaters of supercritical and ultra-supercritical boilers. The terms supercritical and ultra-supercritical describe the pressure of the water inside the boiler. There are three types of HP-SSST, with various names according to different national standards regimes and producers' designations:

Table 1: HP-SSST Product Identification

Product	*ASTM grade/ASTMUNS steel number*	*China National Standard GB5310-2008*	*Mannesmann serial number*	*Sumitomo serial number*
A	**TP347HFG (S34710)**	08Cr18Ni11NbFG	DMV347HFG	347HFG
B	**S30432**	10Cr18Ni9NbCu3BN	DMV304HCu	Super304H
C	**TP310HNbN (S31042)**	07Cr25Ni21NbN	DMV310N	HR3C

3. In this submission, the European Union refers to Products "A", "B", and "C". The three types of HP-SSST are noticeably different.

II. THRESHOLD ISSUE: REQUEST THAT THE PANELS AMEND TWO ASPECTS OF THE BCI PROCEDURES

4. The European Union objects to the Panels automatically classifying as BCI in these WTO panel proceedings information that was submitted as BCI in the anti-dumping proceeding (unless in the public domain).[1]

5. First, the question of designation is ultimately a matter that must rest with the WTO adjudicator and cannot be delegated to any other entity or person. Second, the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm, because the DSU provides expressly that it does not regulate the capacity of a Member to disclose statements of its own position to the public. The BCI Procedures in this case include a statement that BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. Thus, in this case, the issue of designation for this particular category of information is delegated, in absolute terms, not just to a particular party, but to a particular firm. It means that there is no guarantee that a balanced and proportionate approach to designation will be adopted. The European Union considers that this statement in the BCI Procedures is WTO inconsistent.

6. The European Union requests that the relevant sentence in paragraph 1 of the BCI Procedures be modified to read: "In this regard, parties and third parties are encouraged to designate as BCI information that was previously submitted to China's Ministry of Commerce

[1] Joint Working Procedures of the Panels, Annex 1, Additional Working Procedures of the Panels Concerning Business Confidential Information ("BCI Procedures"), paragraphs 1 and 2.

("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes." Furthermore, the European Union requests that a final sentence be added to paragraph 1 of the BCI Procedures as follows: "In case of disagreement, the Panels shall decide on BCI designation".

7. The European Union objects to the requirement that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to the Panels. The European Union considers that the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm.

8. The European Union requests that paragraph 2 of the BCI Procedures be deleted or amended to read as follows: "The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue in these disputes, the party may also provide, with a copy to the other parties, an authorizing letter from the entity. That letter may authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue".

9. To the extent that the Panels, and eventually the Secretariat, are concerned about protecting the WTO from any consequences of disclosure, a provision along the following lines would be sufficient: "Each party and third party shall be solely responsible for ensuring its own compliance with any applicable confidentiality rules and solely responsible for the confidentiality designation it makes when submitting information to the Panel, and any consequences thereof".

III. PROCEDURAL CLAIMS

1. Claim under Articles 6.5 and 6.5.1 ADA

10. The European Union submits that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission.

11. With respect to Article 6.5 of the Anti-Dumping Agreement, the European Union submits that China acted inconsistently with this provision because China permitted the full texts of the relevant documents to remain confidential without a showing of good cause. The European Union submits that the concern regarding the potential disruption of these third parties' businesses could have been addressed by simply withholding the names of the third parties providing these reports, as well as perhaps the names of any entities that provided information to the third parties that prepared these reports, at least to the extent that the information in the reports would be referred to or relied on by the Applicant or the investigating authority.

12. With respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union submits that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible.

2. Claim under Article 6.7 and Annex I, paragraph 1 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

13. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 1 of the Anti-Dumping Agreement because China refused to take into account information relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable, which was appropriately submitted so that it could have been used in the investigation without undue difficulties, and which was supplied in a timely fashion.

14. At the verification, SMST submitted to the investigating authorities that certain financial expenses had been inadvertently double-counted in the SMST Dumping Questionnaire Response, and adduced corrected information that was duly verified. The only reason provided by China in the SMST Final Disclosure and in the Final Determination for refusing to take the corrected information into account was that SMST did not raise this point before the verification started.

3. Claim under Articles 6.4 and 6.9 of the Anti-Dumping Agreement

15. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping, injury and causation determinations. In particular, China failed to disclose information on dumping calculations and import and domestic prices essential to its price effects finding. Consequently, interested parties were unable properly to defend their interests.

16. Essential facts supporting an anti-dumping margin determination include the data underlying the margin calculations and adjustments to the data. These facts also include information on the calculation methodology, for example, the formulas used in calculations and the data applied in those formulas. China's anti-dumping disclosures contain none of this information. This lack of disclosure critically impaired the interested parties' defence to the dumping determination and dumping margin calculations. Without the missing data and calculation methodology information, they could not present the necessary rebutting arguments or address the errors in China's analyses.

17. China failed to disclose several pieces of information critical to its price effects determination. Specifically, China failed to disclose: (i) complete information about the import prices it used in its price effects analysis (although an import price for Product C could be derived from other information supplied by China); (ii) any domestic prices; (iii) the percentage change in the domestic price of Product C in the first half of 2011 as compared with the first half of 2010 (this is particularly disconcerting because it would appear that in fact there were no sales of Product C by the Applicants during the first half of 2011); (iv) the margins of overselling for Product A and the HP-SSST product as a whole (to the extent that there were relevant domestic sales); and (v) the margin of overselling or underselling for Product C in the first half of 2011.

4. Claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

18. *Dumping determinations:* The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination.

19. The Final Determination did not provide "sufficient detail" on its justification for applying facts available in its all others rate determinations because it provided no detail. At no point in the proceeding did China disclose the factual basis or the legal reasoning supporting its definitive assessment of the all others rates. In failing to provide this information, China failed to satisfy the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

20. *Injury determination:* China did not provide all of the relevant information and reasoning supporting its price undercutting conclusions. Specifically, its finding of price undercutting: (i) omitted key factual information; and (ii) did not provide the reasoning behind one critical aspect of its price comparisons by type. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties.

IV. SUBSTANTIVE CLAIMS – DUMPING DETERMINATIONS

1. Claim under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement

21. The European Union claims that, in the measure at issue, China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) or in a manner that reasonably reflects the costs associated with the production and sale of Product B (DMV 304HCu).

22. The European Union submits that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement because the amounts for administrative, selling and general costs were not based on actual data pertaining to production and sales in the ordinary course of trade of the like product, and particularly Product B (DMV 304HCu), by SMST, as recorded in SMST QR Table 6-5 and duly verified.

23. China's error is compounded by the fact that, as outlined above, the unrepresentative and rejected data that China disclosed during consultations that it did use from SMST QR Table 6-3 (DMV 304HCu (EU)) did not pertain to production and sales in the ordinary course of trade, as required by Article 2.2.2 of the Anti-Dumping Agreement. The European Union finds further support for its claim in the immediate context of Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement.

2. Claim under Article 2.4 of the Anti-Dumping Agreement

24. The European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N). China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it relied for its findings of dumping on a comparison of export prices and domestic prices that included different product mixes without taking any steps to control for differences in physical characteristics affecting comparability or making necessary adjustments.

3. Claim under Article 6.8 and Annex II, paragraph 1 of the Anti-Dumping Agreement

25. As a consequence of the preceding substantive dumping claims, and as a consequence of any possible substantive consequences of the above procedural claims insofar as they relate to dumping, and given that the "facts available" used by China to establish the EU all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the EU all others rate, also acting, in this respect, inconsistently with the above cited provisions of the Anti-Dumping Agreement, and inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement. Furthermore, China acted inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement because it determined the dumping margin for other EU and Japanese exporters based on facts available without notifying them of all the information required and of the consequences of not submitting that information.

V. SUBSTANTIVE CLAIMS – INJURY DETERMINATION

26. The European Union submits that China's determinations with respect to injury and causation are inconsistent with China's obligations under Article 3 of the Anti-Dumping Agreement – particularly Articles 3.1, 3.2, 3.4, and 3.5 – in that they do not stem from an objective evaluation, based on positive evidence, of the facts on the record, and do not satisfy all of the requirements of those provisions.

27. The European Union submits that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because:

28. (i) China's analysis of the price effects of imported Product C is analytically and factually flawed. The data indicates that domestic sales volume of Product C during the investigation period was very small compared to import volume. Under such circumstances, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for China to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

29. (ii) China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. China found *some* price undercutting limited to a *minority* industry sector that *does not actually compete* with other sectors which must be read in the context of the general finding that the *vast majority* of the domestic production of HP-SSST was not subject to any price undercutting effect by the subject imports.

30. Second, the European Union submits that China's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because:

31. (i) China's impact analysis did not logically follow from its volume and price effects analyses and conclusions; When, as in this particular case, an investigating authority *has itself elected* to conduct an analysis of volume and price effects by type, and where *the outcome of that analysis already indicates lack of injury with respect to two out of three product types, including the product type predominantly produced by the domestic industry*, that is a matter that must at least be *addressed* in the impact analysis.

32. (ii) China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment. At no point of the investigation did China evaluate the significance of the margins of dumping, properly calculated, for the impact of the imports on the Chinese HP-SSST industry.

33. (iii) China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. The Final Determination is silent as to why China disregarded the relevance of the majority of the factors and indices having a positive bearing on the state of the domestic industry.

34. Third, the European Union submits that China's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because:

35. (i) China's causation determination lacks any foundation in its volume, price effects, and impact analyses. The European Union submits that China reached its conclusion concerning the existence of a "causal link" between HP-SSST imports and the injury suffered by the domestic industry despite the fact that: (a) the volume and market share of imported HP-SSST products did not significantly increase; (b) China's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis on the negative indices.

36. (ii) China failed to separate and distinguish the injurious effects of two other known factors that were causing injury to the domestic industry, namely the decline in domestic demand for HP-SSST and the expansion of the production capacity of the domestic HP-SSST industry.

VI. OTHER CLAIMS

1. Claim under Article 7.4 of the Anti-Dumping Agreement

37. By applying provisional measures for six months in the given circumstances, China acted inconsistently with Article 7.4.

2. Consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

38. As a consequence of the breaches described above, China's anti-dumping measures on HP-SSST are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

VII. REQUEST THAT PANEL EXERCISE RIGHT PURSUANT TO ARTICLE 13.1 OF THE DSU

39. The European Union respectfully requests that the Panel exercise its right to seek information from China pursuant to Article 13.1 of the DSU. Article 13.1 of the DSU gives the Panel the right to seek information from any body that it deems appropriate, and requires Members to respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

40. In these proceedings, the only explanation given by China for failing to comply with its WTO obligations concerning disclosure and making information available is alleged confidentiality. The European Union has explained why this is not a valid explanation, also given the possibility of preparing non-confidential summaries. However, now that this Panel has adopted procedures to

protect Business Confidential Information, there is clearly no longer any basis for China not to provide the necessary information.

41. In these panel proceedings, the European Union does two things. First, the European Union asks that the Panel draw the reasonable and logical conclusions from the procedural inconsistencies that the European Union identified with respect to the substantive aspects of the measure at issue. For example, the European Union explained that China has breached its procedural obligations with regard to the disclosure of the essential facts relating to the injury determination, and particularly the price-undercutting finding with respect to Product B. Our submission is that, as a consequence, the price-undercutting analysis with respect to Product B is unreliable, and the European Union asks the Panel to make a finding to that effect. Thus, what the European Union seeks from China in terms of implementation is not merely disclosure. Rather, the European Union seeks: disclosure; a full opportunity for all interested parties and Members to comment and defend their interests; and a consequent re-assessment of this aspect of the injury determination, and thus of the injury determination as a whole. The European Union asks the Panel to make it clear that this is what China is expected to do.

42. Second, at the same time, already in these proceedings, the European Union seeks full and proper disclosure from China (duly protected by the BCI rules now in place). The European Union respectfully requests the Panel to exercise its right under Article 13.1 of the DSU to seek from China information equivalent to the full disclosure that should have been made, that is, of all the essential facts, having particular regard to the concerns raised by the European Union and Japan, and given the BCI procedures in place. In this respect, the European Union insists particularly (but not only) on the price-undercutting finding with respect to Product B. The European Union asks that China provide complete, specific and precise information on the import and domestic products that were compared, including full product descriptions, dates of transactions, volumes, prices and terms of each transaction, and any adjustments.

VIII. REQUEST THAT PANEL MAKE A SUGGESTION PURSUANT TO ARTICLE 19.1 OF THE DSU

43. The European Union will be seeking steps to ensure that this measure is rectified and eventually dis-applied "immediately" (to borrow the language of Article 21.3 of the DSU) and in any event as soon as possible. Accordingly, the European Union respectfully requests the Panel to formulate suggestions to that effect, and reserves the right to request or re-iterate specific suggestions as the proceedings go forward.

IX. CONCLUSION

44. For the reasons set forth in the submission, the European Union respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

ANNEX B-6

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In this second written submission, the European Union further explains why it requests the Panel to find that China's measures imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement of the WTO.

II. STANDARD OF REVIEW

2. Both parties agree with regards to the standard of review. However, the European Union rejects China's assertion according to which the European Union has not made a *prima facie* case and refers to the reasons put forward in its submissions.

3. The European Union is willing to respond to any questions on the matter the Panel may have.

III. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES

A. Absolute delegation of the authority and obligation to determine BCI designation to a firm submitting information to the investigating authority in a domestic anti-dumping proceeding

4. The European Union contends that the BCI procedures, by providing automatic classification as BCI of information that was originally submitted as BCI in the context of municipal anti-dumping proceedings in the current WTO proceedings, are WTO inconsistent. The European Union considers that such a decision should be based on objective criteria. In other words, in the view of the European Union, it is for a Member to seek designation of information as BCI and it is for the adjudicator to make a designation after an assessment based on objective criteria.

5. The European Union puts forward a harmonious interpretation of the relevant DSU rules together with the provisions of the Anti-Dumping Agreement. Article 18 of the DSU sets out the general principle of due process in the context of the WTO dispute settlement system. It prohibits *ex parte* communication with a panel and states that written submissions to a panel are confidential but shall be made available to the parties to the dispute. In the view of the European Union, this is also confirmed by the joint reading of Article 6.5 of the Anti-Dumping Agreement and footnote 17, which confirm that even information designated as confidential by the investigating authority may be disclosed, provided that it is adequately protected.

6. The European Union considers the issue to be a fundamental one and to touch upon one of the cornerstones of rule-of-law based judicial systems. The European Union argues that, by allowing an interpretation of the provisions above mentioned in a way contrary to the reading advanced in its submissions, the system would allow a situation in which information submitted to adjudicators is not available to the other litigant, and this would amount to a breach of the fundamental principle of due process.

7. The European Union understands that it is always necessary to strike a balance between various interests, namely: confidentiality, the interest of being in a position to make administrative and judicial determinations, due process. Such balance, however, has to be conducted independently and objectively by the panel.

B. The imposition of an obligation on the submitting Member to obtain prior written authorisation from another entity or firm

8. The European Union claims that BCI procedures are WTO inconsistent insofar as they require a party to seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to a Panel. The European Union rejects China's reading of Articles 6.5 and 17.7 of the Anti-Dumping Agreement, according to which these provisions impose an obligation to automatically confer BCI status in WTO dispute settlement proceedings to information classified as confidential before national investigating authorities.

9. The European Union claims that this does not guarantee a balanced and proportionate approach to BCI designation.

C. China's request relating to the timing of objections to translations

10. The European Union requests that paragraph 10 of the Working Procedures be amended, so to make it clear that it does not contain an absolute rule to raise objections to translations promptly in writing no later than next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing. China agrees.

IV. PROCEDURAL CLAIMS

A. Designation of information as confidential without good cause and failure to require sufficient non-confidential summaries: Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

1. Designation of information as confidential without good cause: Article 6.5 of the Anti-Dumping Agreement

11. The European Union claims that China's treatment of confidential information submitted by the applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission. China claims that the European Union has not made a *prima facie* case and has not specified the documents to which its claims relate. The European Union rejects these arguments and points out that China, in its first written submissions, had shown to be aware of the documents to which the claim relates and that the European Union and Japan shared the same claim with respect to these reports.

12. The European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submissions, the Applicants provided no summary of any other contents of these reports, including the methodologies utilized by the third party institutes to obtain these data or the underlying evidence they relied upon. This, according to the European Union, contrasts with the Panel Report in *China-X-Ray Equipment* about the necessity to summarise the substance of each type of confidential information in cases where multiple type of information are designated as confidential. The European Union respectfully requests the Panel to reject China's arguments and affirm the claims made by the European Union and Japan.

2. Failure to require sufficient non-confidential summaries: Art. 6.5.1 of the Anti-Dumping Agreement

13. The European Union claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible.

14. In particular, China submits that two of the reports are themselves already summaries. According to China, they contain no information regarding methodologies and no underlying evidence and China describes them as being based on "non-existent information". The European Union casts doubts that affirming that documents are based on "non-existent

information" could be helpful for China's arguments. In the view of the European Union, indeed, such fact provides strong indication of substantial inconsistencies linked to procedural irregularities.

15. The European Union considers that China has failed to provide a statement of reasons as to why further summarisation is not possible that is consistent with Article 6.5.1 of the Anti-Dumping Agreement.

B. SMST dumping determination, failure to take into account relevant information provided during the verification: Art. 6.7 and Annex I, paragraph 7 and Art. 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

16. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement because China refused to take into account information which was relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable and was appropriately submitted. China claims to have refused to take the corrected information into account because SMST did not raise this point before the verification started.

17. The European Union bases its procedural claim on the fact that information was rejected exclusively because it was submitted at verification. The European Union does not argue that investigating authorities should not have discretion as to the information they should accept, but it only claims that they should be open to do so if it does not impede the verification.

C. Inadequate disclosure and failure to inform interested parties of the essential facts under consideration: Articles 6.4 and 6.9 of the Anti-Dumping Agreement

1. With respect to the dumping determinations

18. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations. China claims that the European Union has not made a *prima facie* case of violation of Article 6.4 of the Anti-Dumping Agreement because no request for information was made. China also argues that the European Union failed to make a *prima facie* case with respect to the violation of Article 6.9 of the Anti-Dumping Agreement, because the arguments of the European Union would amount to general allegations.

19. The European Union rejects China's argument according to which lack of understanding as to how, for instance, the normal value in the case of SMST was calculated, is unreasonable and, therefore, should allow non-disclosure. The European Union, in fact, argues that it was not possible for multiple parties, all acting in good faith, to understand how the calculation was made, and to know which numbers where used by MOFCOM to conduct its calculations. The European Union considers that knowing the actual number used in the case of SMST would permit to SMST to understand how the calculation was made, and allow it to defend its interests accordingly. *Vice versa*, in the current situation, SMST and the European Union are unable to do so.

2. With respect to the injury determination

20. With respect to the injury determination, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations. China claims that the summaries it provided are sufficient and the European Union rejects this argument because such information was partial and argues that there were other available means to address the understandable concerns for disclosure and, at the same time, to allow exporters to understand the facts and defend their interests accordingly. With respect to the claim by China whereby the European Union has acknowledged, in particular, that Product A import price in 2008 was confidential, the European Union argues that it has never considered MOFCOM to be entitled to treat the data in its entirety as confidential and that the latter should have provided the exporters with –at least- meaningful price range.

21. With respect to China's argument regarding the underselling of Product B, the European Union remains of the view that MOFCOM should have disclosed a number for each year and claims that China has failed to do so in response to Panel Question 76.

D. Failure to set forth or otherwise make available in sufficient detail the findings and conclusions: Articles 12.2 and 12.2 of the Antidumping Agreement

1. With respect to the dumping determination

22. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive antidumping duties against the investigated imports as part of its Final Determination. According to the European Union, China has not provided valid justification for its failure to reveal why it resorted to facts available and how it determined the highest dumping margin found for the relevant exporters that received an individual margin to be the appropriate one.

23. The European Union is not persuaded by the response provided by China according to which it is sufficient to state that facts available were used with respect to firms that did not submit a questionnaire. According to the European Union, this simply amounts to a restatement of the facts and does not provide indication for the underlying reasoning.

24. The European Union requests the Panel to reject China's arguments and to affirm the claims made by the European Union and Japan.

2. With respect to the injury determination

25. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with regards to injury and causation determination. Specifically, China's finding of price undercutting omitted key factual information and did not provide the reasoning behind one critical aspect of its price comparisons by type. The European Union claims that the information provided by China was not sufficient.

26. The European Union recognizes that Art. 12.2.2 of the Anti-Dumping Agreement requires an authority to pay due regard to confidentiality. However, it claims that there is no apparent reason why China did not –at least- disclose non-confidential summaries, so to permit a comparison of import prices by type and total product basis.

V. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

A. SMST dumping determination, normal value for product B (DMV 304HCu), SG&A, failure to use actual data reasonably reflecting costs, use of unrepresentative and rejected data concerning samples: Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement

27. The European Union comments, in its rebuttal, on China's Responses to the Panel's Questions.

28. As regards Question 7, the European Union claims that China is incorrect to assert that the Appellate Body Report in *EC – Bed Linen* supports its position in these proceedings. In its Second Written Submissions, the European Union highlights many flaws in the understanding by China of the Report above mentioned with regards to the interpretation of Article 2.2.2 of the Anti-Dumping Agreement. Furthermore, the European Union rejects the view of China according to which the Panel request by the European Union is inconsistent with Art. 6.2 DSU because, allegedly, it did not provide a brief summary of the legal basis of the complaint. The European Union argues that this was not the case, as it provided a sufficiently detailed summary and eventually points out to the differences between a Panel request and first submissions, which China seems to neglect.

29. As regards Question 8, the European Union argues that China is incorrect to assert that the Panel Report in *US – Corrosion-Resistant Steel Sunset Review* supports its position in these proceedings. The European Union claims that the report, in fact, confirms that the Panel must take

into account whether the ability of the respondent to defend itself has been prejudiced, given the actual course of the panel proceedings. The European Union considers that China has had ample opportunity to respond but chose to remain silent on the substance of the matter.

30. With reference to Question 22, the European Union disagrees with China about its argument according to which anything that is "used" by a firm automatically becomes "actual data pertaining to production and sales in the ordinary course of trade". The European Union cannot accept the consequences of such reasoning, which would lead to a situation in which the determination of the amounts for administrative, selling and general costs and profits would depend upon whether or not particular information or data would be "used" by the firm being investigated.

31. With regards to Question 23, the European Union challenges China's assertion according to which SMST did not request the investigating authority not to use the relevant Table 6-3 SG&A. According to the European Union, the translations of the requests by SMST to which China refers are redundant and lead to meaningless results, as that would mean that SMST had requested not to use the data in the "constructed cost" calculation, and the expression "constructed cost" never appears in the Anti-Dumping Agreement.

32. Regarding Question 24, the European Union reaffirms the concerns it had already made explicit in its oral Statement and in its responses to the Panel Questions on the coefficients applied to the calculation.

B. SMST dumping determination, product C (DMV 310N), failure to make a fair comparison, failure to adjust for different product mixes: Article 2.4 of the Anti-Dumping Agreement

33. The European Union claims that China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices. In its rebuttal, the European Union focuses on commenting China's responses to the Panel's Questions.

34. With regards to Question 12, the European Union acknowledges that China agrees with the summary of the former's claims and arguments.

35. Concerning Question 14, the European Union claims that China declined to answer with respect to the remainder of the evidence referenced in footnote 195 of the First Written Submission of the European Union. It adds that the Panel can and should proceed on the basis that the information provided by the European Union was actually verified by MOFCOM. The European Union considers MOFCOM to have not ensured a fair comparison and thus to have acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

36. With reference to Question 15, the European Union challenges the view of China according to which SMST did not provide evidence regarding the price differences. It also adds that SMST was merely seeking that the authority take the necessary steps to ensure a fair comparison.

37. Concerning Question 16, the European Union claims that MOFCOM, according to Article 2.4 of the Anti-Dumping Agreement, should have made sure that the basket of transactions used to calculate normal value included only those products that were comparable to the product sold in China. The European Union argues that the Appellate Body Report in *EC – Fasteners (China)* supports the same conclusion, and that MOFCOM did not act accordingly.

38. Finally, with regards to Question 17, the European Union, contrary to what China argues, claims that SMST did provide the necessary information.

C. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph I of the Anti-Dumping Agreement

39. The European Union had claimed that China improperly relied on "facts available" when establishing the EU all others rate. China responded that, in its view, even if it is true that the dumping margin for SMST was calculated in a WTO inconsistent manner, no provision of the Anti-Dumping Agreement would require China to make an adjustment. The European Union claims that

if China would nevertheless maintain an all others rate like the one it has applied, it would be in violation of Article 6.8 of the Anti-Dumping Agreement.

VI. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

A. Summary of the applicable legal framework: Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement

40. As submitted before, the European Union considers that the Appellate Body Report *China – GOES*, and in particular its paragraphs 126-128, are highly pertinent for the issues under consideration.

B. Price effects: Articles 3.1 and 3.2 of the Anti-Dumping Agreement

41. The European Union claims that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The European Union argues that two aspects deserve to be separately addressed: i) whether the definition of price undercutting involves not just a price differential but also an element of price effect; ii) *how* an investigating authority is required to establish through its price undercutting enquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports.

42. As for the first issue, the European Union sees China's replies to be in contradiction with each other as to whether a price effect is needed in order to have a "price undercutting". The European Union is of the view that the definition of price undercutting is such that a price effect needs to be present, like China seems to have asserted in its response to Panel Question 31(c).

43. As regards the second issue, China seems to be of the view that an investigating authority is never obliged to investigate questions of effect if only a price differential can be established, whereas the European Union is of the opposite view.

44. The European Union considers that possibly consensus could be reached on the first issue and that parties could be left to argue about the second aspect.

1. China' analysis of price-undercutting with respect to product C is flawed

45. China argues that the European Union did not challenge "MOFCOM's findings about the like product", so that such findings are, in the view of China, incontestable. The European Union rebuts that. It is bringing a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and as part of this it is challenging MOFCOM's determination that imports of Product C were in competition with domestically produced Product c in the Chinese market.

46. The European Union argues that, as regards the Chinese analysis undertaken as part of the like product determination, it does not amount to an objective examination based on positive evidence either. Even assuming that in 2010 imported Product C and domestic Product C were in adjacent or slightly overlapping markets, the evidence on the record would still not have allowed for a finding of price undercutting in the sense of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

2. China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole

47. China claims that it established correlation among the prices of the three grades of HP-SSST on the basis of positive evidence. The European Union claims that China's price effects analysis does not contain any examination of cross-grade price effects. The conclusions regarding price correlation which China refers to were made in respect to the scope of the investigation, and were not referred to in the price effects analysis.

48. The European Union points to the significant price differences between imported Products B and C and domestic Product A. In neglecting such price differentials, China –in the view of the European Union- has not conducted an objective examination.

C. Impact on domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement and D. Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

49. The European Union refers back to its First Written Submission and to its First Opening Oral Statement.

VII. OTHER CLAIMS

A. Application of provisional measures in excess of four months: Article 7.4 of the Anti-Dumping Agreement

50. China acknowledges the claim by the European Union according to which it has violated Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for a period exceeding four months, but it does not respond. The European Union respectfully requests the Panel to find in favour of the European Union on this issue.

B. Consequential claims: Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

51. China does not respond on the claims made by the European Union under Article 1 of the Anti-Dumping Agreement and Article VI GATT 1994. The European Union respectfully requests the Panel to find in favour of the European Union on this issue.

VIII. CONCLUSION

52. The European Union respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

ANNEX B-7

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

I. INTRODUCTION

1. In this Oral Statement we first address the various threshold issues. We will then address some dumping issues. Finally, we turn to some of the main injury issues.

II. THRESHOLD ISSUE: REQUEST THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES

A. Request that the panel amend two aspects of the BCI Procedures

2. The European Union submits that two aspects of the BCI Procedures are WTO inconsistent and requested the BCI Procedures to be amended accordingly.

3. (i) The BCI Procedures are WTO inconsistent as they automatically classify as BCI information that was submitted as BCI in the municipal anti-dumping proceeding. The question of designation should be subject to objective criteria established and eventually applied by the WTO adjudicator. The BCI Procedures take this matter out of the hands of the adjudicator. There is no guarantee that a balanced and proportionate approach to designation will be adopted. It contradicts the fact that it is for the Member to seek designation (or not).

4. (ii) The BCI Procedures are WTO inconsistent as they provide that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings. This requirement takes out of the hands of the submitting Member and eventually the adjudicator the question of what may be submitted in DSU proceedings. It provides a proxy for unlawfully delegated designation, because whatever the correct designation, a firm could simply withhold authorisation.

5. China submits that the EU request is "flawed". However, it provides no explanation of why that is supposed to be the case. The same is true of China's assertion that this is demonstrated by the case-law cited by the European Union.

6. China observes that the Panel in the cited case-law has decided that additional protection for BCI is justified. That is correct. However, this is not the matter that has been placed before the Panel by the European Union.

7. China submits that the Panel has ensured the necessary balance because it has required the submission of non-confidential summaries. Yet, it does not explain how the filing of non-confidential summaries is supposed to bear on the issues.

8. China submits that panels have the authority to adopt BCI procedures pursuant to Article 12.1 of the DSU. The European Union does not disagree. However, our point is that they must do so in a manner that is consistent with the DSU.

9. China submits that the protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. However, the European Union is not arguing that the protection afforded by the BCI Procedures diminishes the protection afforded by the DSU.

10. China submits that a Member's ability to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. However, we do not argue that a Member's ability to designate information as confidential is impaired.

11. Finally, China asserts that the Panel's approach is consistent with Article 6.5 of the AD Agreement. The AD Agreement recognises that the interest in confidentiality must be taken into account. Nevertheless, designation of information as confidential is not something absolutely in the hands of the submitting firm, but depends on the investigating authority being satisfied that

good cause has been shown and that such designation is warranted; even then designation remains discretionary. Also, the rule is against disclosure to competitors, not adjudicators.

B. China's request relating to the timing of objections to translations

12. China requests the Panel to amend paragraph 10 of the Working Procedures so that it provides that objections to translations should be raised promptly in writing no later than the next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing.

13. The WTO Agreement is authentic in English, French and Spanish and these are the languages in which litigation is conducted and adjudications delivered. Nevertheless, evidence placed on the record in some other language is still evidence placed on the record, i.e. evidence of fact. However, translation is not a pure question of fact. Translation is about meaning, and the meaning of municipal law is a mixed question of law and fact (i.e. a legal characterisation of the facts). Article 17.6 of the DSU indicates that issues of law and legal interpretations, that is, including translation issues, can be raised on appeal. Therefore, a panel's working procedures may not provide that a party is absolutely precluded from raising a translation issue on appeal.

14. The European Union understands that translation is a particular type of issue, of a preliminary nature, and that it may be reasonable to expect parties to raise any obvious translation issues early. This is similar to so-called preliminary issues. Parties are expected to raise them at a sufficiently early stage. Nevertheless, there is no absolute bar to them being raised later, including in appeal proceedings.

15. The particular difficulty with translation issues is that their significance may not always be apparent until such time as particular terms are set in the context of a particular adjudication. The European Union would also observe that there are no circumstances in which it would make sense to win a case based on an incorrect translation.

16. The European Union has understood that paragraph 10 of the Working Procedures is not an absolute rule, since it uses the term "should". Therefore, the request is not necessary, because the provision as drafted is not absolute. If the Panel considers the requested amendment, then (1) there should be no absolute rule and in any event two weeks is too short and (2) a balanced approach should be adopted.

III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

A. SMST dumping determination, Product C, failure to make a fair comparison, failure to adjust for different product mixes: Article 2.4 AD Agreement

17. China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value. In calculating normal value for Product C, China compared two baskets with a very different product mix.

18. China's focus on what occurred during the investigation is not helpful, since what really matters is whether or not, objectively, China ensured a fair comparison. In any event, China's insistence on the content of SMST's Dumping Questionnaire Response is odd. China accepts that SMST raised the point in a timely manner. In this respect, China does not allege any procedural deficiency, nor could it, since the measure at issue itself expressly records the fact that SMST raised the point.

19. China's submission that SMST's request was "tied-to the original low volume claim" is inaccurate and irrelevant. The request was a stand-alone request. Even if it would have been "tied-to" some other request, in failing to ensure a fair comparison, the measure is inconsistent with Article 2.4 of the AD Agreement.

20. China's argument that SMST failed to provide "a modicum of an indication" of an impact on price comparability should be rejected. The point raised by SMST is expressly dealt with in the measure at issue. It is stated that SMST presented *evidence proving* that the relevant transactions related to a product that was *different* from the products exported to China. SMST demonstrated that, also because of the very thin dimensions of the products, they require more extensive

rolling/drawing resulting in higher cost. Obviously, the use of processing technology, including rolling/drawing, involves costs and the greater the use of such technology, the greater the costs. SMST also provided the specific documents relating to these transactions.

B. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph 1 of the AD Agreement

21. As a consequence of the preceding substantive dumping claims and possible substantive consequences of the procedural claims, and given that the "facts available" used by China to establish the all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the all others rate, acting inconsistently with Article 6.8 and Paragraph 1 of Annex II of the AD Agreement. Furthermore, China acted inconsistently with this provision, because it determined the dumping margin for other exporters based on facts without notifying them of all the information required and of the consequences of not submitting that information. China argues that, even if the dumping margin for SMST was calculated in a WTO inconsistent manner, *no provision* of the AD Agreement would require China to make a consequent adjustment to the all others rate. This is assertion is wrong. If the current dumping margin calculated for SMST of 11.1% would be demonstrated to be WTO inconsistent, and the re-determination would fix it at a lower amount, then it would no longer be a determined "fact". Accordingly, "11.1%" would no longer be a "fact" "available" within the meaning of Article 6.8 of the AD Agreement.

IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

22. China's determinations with respect to injury and causation are inconsistent with Article 3 of the AD Agreement, in particular Articles 3.1, 3.2, 3.4, and 3.5. In *China – GOES* the Appellate Body stated that the different paragraphs of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination". Most of China's inconsistencies are a breach of this required "logical progression of inquiry".

A. Price effects: Articles 3.1 and 3.2 of the AD Agreement

23. China's determination violates Articles 3.1 and 3.2 of the AD Agreement in two respects. First, China's analysis of the price effects of imported Product C is flawed. Second, China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole.

1. China's analysis of price-undercutting with respect to Product C is flawed

(a) Article 3.2 requires "price undercutting", not just a "price differential *per se*"

24. MOFCOM erroneously concluded that imports of Product C had "price undercutting effects on the corresponding like domestic products".

25. China argues that "any factual elements other than the price differential between the import price and domestic price are irrelevant". Yet, a "price differential *per se*" is only a **snapshot** that looks at import prices and domestic prices.

26. The key question is whether any "price differential *per se*" will suffice, or whether one has to consider whether the "price differential *per se*" has the effect of price undercutting.

27. It follows clearly from the statements of the Appellate Body in *China – GOES* that Article 3.2 of the AD Agreement contains *three* price *effects*: (1) price undercutting; (2) price depression; (3) price suppression; and not just a "price differential *per se*" and two price effects. When the Appellate Body refers to price depression and price suppression, it calls these "the last two price effects" in Article 3.2, presuming that price undercutting is also a "price effect". Price undercutting was not at issue in the *China - GOES* case, but the Appellate Body considers that the focus of Article 3.1 of the AD Agreement on price effects colours the whole of Article 3.2 of the AD Agreement. Given that "price effects" inform the whole of Article 3.2 of the AD Agreement, it is equally appropriate that, in conducting an analysis of price undercutting, one is required to consider whether a first variable – that is, a price differential *per se* – has explanatory force for the occurrence of a second variable – that is, price undercutting.

28. Interpreting Article 3.2 as requiring a consideration of the relationship between a price differential *per se* and a potential price undercutting does not duplicate the causation analysis under Article 3.5. Both provisions posit different inquiries. The analysis pursuant to Article 3.5 concerns the causal relationship between subject imports and injury to the domestic industry. The analysis under Article 3.2 concerns the relationship between a price differential *per se* and an alleged price undercutting, i.e. subject imports and domestic prices.

29. In this case, there are strong reasons to doubt that a price differential *per se* had explanatory force for any alleged price undercutting. The inverse price movements, the vast difference in import and domestic price levels and the trivial volume of domestically produced Product C, all suggest that imports of Product C were not in competition with domestically produced Product C.

(b) Allegations that "similar quantitative difference" justifies price comparison

30. China considers that in 2009 and 2010 the imports of Product C held a similar market share, and that, on this basis, it was "meaningful" to compare the prices in spite of the tiny amount of domestic sales. Yet, showing that the market share of Product C was tiny in both years, does not show anything but the fact that these domestic sales were outlier transactions not just in one year but in both years.

2. China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic industry as a whole

31. China extended its conclusions concerning the price undercutting of Products B and C to the domestic industry as a whole, although it only found some price undercutting limited to a minority industry sector that does not actually compete with other sectors, in the context of the general finding that the vast majority of the domestic production was not subject to any price undercutting effect. China could have examined "all of the other parts that make up the industry" by conducting a cross-type analysis of price effects. Instead, it selected the minority sub-categories of the like domestic products where it found price undercutting effect and unduly extended its findings to the whole group of like domestic products.

32. The question is whether the focus of the price effects inquiry under Article 3.2 is only on the prices of subject imports, or also on the prices of domestic like products. Both the Appellate Body in *China - GOES* as well as the panel in *China - X-Ray Equipment* have clarified this issue. The test required under a price undercutting analysis relates to the effect of such imports on domestic prices. It is insufficient to study whether all of the subject imports are sold at undercutting prices. The analysis needs to include the effect of such imports on domestic prices.

33. There was evidence in the record that the products were not in competition with each other. Thus, an additional analysis was required in order to extend the price undercutting findings for Products B and C to Product A.

B. Impact on domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement

34. First, China's impact analysis did not logically follow from its volume and price effects analyses and conclusions. When an investigating authority has itself elected to conduct an analysis of volume and price effects by type, and where the outcome of that analysis already indicates lack of injury with respect to two out of three product types, that matter must at least be addressed in the impact analysis.

35. Second, China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment.

36. Third, China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. Instead of a thorough and persuasive explanation as to whether the negative factors outweighed the at least seven positive factors, China simply enumerates the different factors.

C. Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

37. China's causation determination lacks any foundation in its volume, price effects, and impact analyses. China reached its conclusion despite the fact that: (a) the volume and market share of imported products did not significantly increase; (b) China's analysis of the undercutting effect of imported products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete.

38. Second, China failed to separate and distinguish the injurious effects of two other known factors, namely the decline in domestic demand and the expansion of the production capacity of the domestic industry.

ANNEX B-8

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

I. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES

1. The European Union has submitted that the BCI Procedures are WTO inconsistent insofar as they provide for the automatic classification as BCI of information that was submitted as confidential in the municipal anti-dumping proceeding.

2. In the first place, we do not agree with China that, if the firm is unwilling to designate the information as non-confidential or provide a non-confidential summary, the only option for the investigating authority is to disregard such information. Article 6.5.2 does not *require* the authority to disregard such information; it merely provides for that *discretion*.

3. The DSU does provide for designation by Members (not firms or investigating authorities). However, the concept of confidentiality is an objective one.

4. For similar reasons, the European Union has also submitted that the BCI Procedures are WTO inconsistent insofar as they provide that a party must provide prior written authorisation from the entity that submitted such information in the anti-dumping proceedings.

5. In its Second Written Submission China argues that such a letter is "necessary" to "allow" an investigating authority to comply with its obligations under Article 6.5 of the Anti-Dumping Agreement. However, seeking to include such a rule in the BCI procedures does not "allow" anything. Rather, it seeks to ***impose*** an obligation on the European Union. Whatever obligations may bear on an investigating authority pursuant to Article 6.5, it is not the purpose of these proceedings to hand down a ruling on the interpretation of Article 6.5 ***and its application by the European Union***. No such matter is within the Panel's terms of reference.

6. What must govern the particular issue raised in *these proceedings* is Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement.

II. PROCEDURAL CLAIMS

7. As set out in our First Written Submission, the European Union, like Japan, claims that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, with respect to certain specific documents.

8. As set out before, the European Union considers that China is not permitted to engage in *ex-post* rationalisation at this stage of the process.

9. With respect to China's assertion that it disclosed "a large part of the original text", the European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submission, the Applicants provided no summary of any other contents of these reports.

10. We also recall that, with respect to this group of Appendices, the Applicants did not explain why a summary of other aspects of these reports, including the methodologies utilized therein or underlying evidence, could not be provided.

11. As set out in our First Written Submission, with respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union, like Japan, claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible, with respect to the documents specified therein.

12. We do not understand why China believes that affirming that the documents are based on "non-existent information" might be helpful to China's case. The whole purpose of these transparency provisions is to provide the interested parties with the opportunity to assess and

challenge the factual assertions, evidence and arguments on which petitioners and the investigating authority base themselves.

13. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account certain information corrected to eliminate double counting. China responded to this *procedural* claim by focussing on the substance.

14. Focussing on the *procedural* claim, our claim is based on the terms of the measure at issue itself, which simply records rejection of the information *solely* on the grounds that it was submitted at verification.

15. We believe that China's submissions in these very proceedings demonstrate that to be the case, because it is simply a matter of reconciling Tables 6-6 to 6-8 with Table 6-5, by ensuring that, in compiling Table 6-5, no double counting takes place. We seek only that the Panel take such steps as may be necessary in order to ensure that China understands that it should ensure that no such double counting occurs in the re-determination.

16. As set out in our First Written Submission, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations.

17. First, China states that: "It is difficult for China to rebut the arguments of Japan and the European Union, since they fail to mention the formulas that MOFCOM allegedly failed to disclose". The heart of the problem is that it is impossible for the European Union and Japan to set out the detail of matters that MOFCOM has not disclosed in the first place.

18. Second, the heart of the disagreement between the Parties is now crystal clear. China considers that Article 6.9 only covers the factual basis for inference, not the inferences themselves. We disagree for the reasons we have given before. Our conclusion is that China is simply wrong to assert that something loses its quality as a fact simply because it is inferred.

19. With respect to the injury determinations, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations.

20. With respect to China's argument that the complainants have acknowledged that the Product A import price in 2008 was confidential, we refer to our Response to Panel Question 73.

21. With respect to China's argument that there were only two domestic producers and this made disclosure of a range impossible, the European Union disagrees. Elsewhere in its submissions China expressly recognises the possibility of providing a range that does not consist of the minimum and maximum prices actually charged. This method would therefore have permitted China to provide a range.

22. Similarly, China's argument to the effect that each producer would have known the average domestic price of the other is not convincing, because it would not be possible for one producer to extract the average *weighted* domestic price of the other producer from the data.

23. Finally, the European Union does not agree with China that the question of whether or not there were other ways of providing the data whilst respecting confidentiality is irrelevant.

24. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the all others rate and the use of facts available.

25. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information

supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the injury and causation determinations. As the Appellate Body did in *China – GOES*, the Panel in the present case should not accept China's use of price change data in place of the data that actually are relevant to its determination that import prices "noticeabl[y]" undercut domestic prices.

26. Second, China also failed to satisfy its obligations under Articles 12.2 and 12.2.2 because with regard to its price comparison of imported and domestically produced Product C, China failed to provide any detail on how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis. The European Union recognizes that Article 12.2.2 requires an authority to pay due regard to confidentiality. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data or price ranges that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties, in line with what the Appellate Body stated in *China – GOES.*

III. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

27. The European Union claims that China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) in a manner that reasonably reflects the costs associated with the production and sale in the ordinary course of trade of Product B (DMV 304HCu).

28. We cannot agree with China that the fact that we have demonstrated that the calculation is based on aberrational sample transactions, without this being contested by China, is irrelevant. We cannot agree with China that the fact that the coefficients are not actual data pertaining to production and sales in the ordinary course of trade is irrelevant. We cannot agree with China that the fact that Table 6-5 was verified whilst Table 6-3 was not with respect to SG&A is irrelevant. We cannot agree with China that the fact that SMST repeatedly requested MOFCOM to disregard the SG&A in Table 6-3 and directed it instead to Table 6-5 is irrelevant. We cannot agree with China that the fact that China has sought to insert the term "this" into the translation of the disclosure document when it is not there is irrelevant. We cannot agree with China that the fact that China only now provides the information relevant to the calculation is irrelevant. We cannot agree with China that the reasonableness of the SG&A amounts used by China is irrelevant. And most of all, we cannot agree with China that the circumstances do not require it to re-visit the measure and correct the error, in good faith.

29. The position with respect to the coefficients is also clear. According to China, anything "used" by a firm is, by definition, actual data pertaining to production and sales in the ordinary course of trade; and in any event it is sufficient for the purposes of Article 2.2.2 if the amounts are based *in part* on actual data pertaining to production and sales in the ordinary course of trade. We have explained why we disagree with both of these assertions, which we think are obviously wrong.

30. No doubt if the European Union had written the entire provision out in its Panel Request (as well as expressly referring to Article 2.2.2), instead of simply providing a brief summary, in accordance with the terms of Article 6.2 of the DSU, we would now be facing an (equally unmeritorious) claim of failure to consult, pursuant to Article 4 of the DSU. China cannot profit from its totally inadequate disclosure in the municipal anti-dumping proceedings in order to engineer a situation where it can try to pressure Members back to square one (causing substantial additional delay).

31. To recall, the European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N).

32. Specifically, as we have already indicated with respect to costs of production, we note that Table 6-3 (DMV 310N (EU)) contains the cost of production of Product C per month. Table 4-2, Domestic (regional) Sales, cells K5 and K6 state that the two sales were made on 15 October 2010 and 17 November 2010 and were the only sales of Product C made in those months. Cells E18 and F18 of Table 6-3 (DMV 310N (EU)) demonstrate that the cost of production for those months

is about twice as high as the cost of production in April and May 2011. In April and May 2011 Product C was sold in representative quantities. We also note that in December 2010 two samples were delivered to customers. These samples were correctly excluded from the normal value by China. They represented the only product C produced in December 2010 and the cost of production is extremely high, as it is for the production of the samples of Product B.

IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

33. The European Union claims that China's determinations with respect to injury and causation are inconsistent with China's obligations under Article 3 of the Anti-Dumping Agreement, in particular Articles 3.1, 3.2, 3.4, and 3.5.

34. In the view of the EU, the term "price undercutting" poses two interpretative challenges: The first question to be addressed relates to what constitutes "price undercutting". The EU maintains that price undercutting, by definition, involves not just a "price differential" but also an element of "price effect". The second question is: *How* is an investigating authority required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports?

35. The key difference seems to be that China considers that any mere "price differential" amounts to a "price effect". The EU, on the other hand, considers that there may be situations where a mere "price differential" does not contain a "price effect". Therefore, the key interpretative question on this issue would be: Is it sufficient to simply establish a price differential? The European Union has adduced a number of reasons for its position. The most pertinent usage of the word "undercut" is: "To supplant […] by selling at lower prices". "To supplant" means "Chiefly of things: to take the place of, succeed to the position of, supersede". The European Union has already described in detail how the relevant sentence in Article 3.2 of the Anti-Dumping Agreement refers to "effect". Suffice it to say here that the sentence starts with the words "With regard to the effect of the dumped imports on prices" and hence clearly refers to three price effects, and not to two price effects (in the form of price depression/suppression) and a non-price effect.

36. A finding of "price undercutting" thus requires a finding of a price differential plus a finding of a price effect. There can be no price effect if there is no competitive relationship between the dumped imports and the domestic like product. There are other factors that may impact the finding of a price effect.

37. The European Union considers that in a case where an investigating authority has strong reasons to doubt the presence of undercutting, the investigating authority needs at least *to discuss* the evidence pointing to the absence of such effect.

38. As pointed out before, the European Union considers that China's analysis of the price effects of imported Product C is erroneous, and falls short of an objective examination, based on positive evidence. In the view of the European Union, China confuses two different types of analysis. The consideration that is undertaken pursuant to Article 2.6 of the Anti-Dumping Agreement is not identical with the requirement "under Article 3.2 of the Anti-Dumping Agreement […] to consider whether the prices are actually comparable".

39. The European Union argues that China improperly extended its price undercutting findings with respect to Products B and C to the whole industry to conclude that imports of HP-SSST products had a price undercutting effect on like domestic products.

40. China's arguments fall into two categories: On the one side, China argues that its alleged finding of "price correlation" justified such an extension. On the other side, China argued that there was evidence of substitutability of Product A by Products B and C.

41. As regards the price correlation argument, the EU addressed the essence of these arguments already in its Second Written Submission.

42. Turning to China's "substitutability" argument, given that we are in a trade context, what matters is *commercial substitutability* in the real world, not theoretical substitutability in a world where commercial aspects would not matter.

43. As regards China's impact analysis, the European Union refers back to its previous statements. Article 3.4 explicitly refers to a number of factors, and does not contain anything capable of supporting China's "on the one hand […] on the other hand"- distinction.

44. As regards Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the European Union refers back to its previous statements.

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ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

1. THE EUROPEAN UNION'S CLAIMS REGARDING MOFCOM'S DUMPING DETERMINATION

1.1 MOFCOM's determination of the SG&A and its consistency with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement

1. The bulk of the claims made by the European Union under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement are outside the Panel's terms of reference. In accordance with paragraph 8 of the Working Procedures of the Panels, China respectfully submits a request for preliminary ruling in this respect. The European Union's claims that are within the Panel's terms of reference are flawed by an incorrect depiction of the facts, as available to MOFCOM at the time it made its determination. MOFCOM used the SG&A amount that was reported by SMST in the *only table* of the questionnaire in which SMST was required to report the *actual unit SG&A amount for each specific grade* of the product under consideration, distinguishing between sales to the European Union and sales to China. SMST itself stated that these were the actual data for SG&A. Importantly, during the procedure SMST never requested that the SG&A data in Table 6-3 should not be used, nor did it submit an alternative per grade SG&A amount. The European Union's erroneous claim that MOFCOM did not explain the source of the SG&A amount may relate, *inter alia*, to a translation mistake in Exhibit EU–25 (BCI).

2. Moreover, MOFCOM simply could not use the SG&A data in Table 6-5, since this data was not broken down per grade. Also, SMST itself had reported the specific SG&A amount in Table 6-3 for EU sales, and MOFCOM was not allowed to disregard it without any valid ground.

3. The SG&A data used by MOFCOM must be considered actual, since, far from being "arbitrarily determined" by MOFCOM, the SG&A amount had been provided by SMST as actual data. As such, MOFCOM used "actual data of the exporter or producer under investigation" that related to the product at issue. Furthermore, the data were based on the records of SMST. The SG&A data in Table 6-3 had been reported by SMST, stating that "[t]he figures reported in Table 6-3 were taken from cost calculations for the individual orders of subject merchandise produced during the POI".

1.2 MOFCOM's dumping determination for SMST's sales of Grade C and its consistency with Article 2.4 of the Anti-Dumping Agreement

4. In order to ensure a fair comparison, MOFCOM opened the dialogue with SMST with the questionnaire, in which MOFCOM asked multiple questions on the products, prices, adjustments, costs, production processes and other relevant items and clearly informed SMST on how it should make a request for adjustment. All of SMST's answers and supporting documents provided in its questionnaire response, without any exception, demonstrated beyond any reasonable doubt that there were no physical differences that had an impact on price comparability between Grade C exported to China and Grade C sold domestically by SMST. During the investigation, SMST never informed MOFCOM that these answers in its questionnaire response were wrong, nor why this would have been the case. During the investigation, SMST never lodged any substantiated request in relation to a fair comparison concerning sales of Grade C, and therefore, the claim presented by the European Union must fail. SMST merely lodged several contradictory and incoherent statements concerning first, low volume sales and, second, low volumes sales of tubes with differences in diameter and, finally, just sales of tubes with differences in diameter.

5. Therefore, MOFCOM's decision against taking into account SMST's unsubstantiated statements presented subsequent to its questionnaire response, and to rather base its findings on the clear and consistent information contained in the questionnaire response, is consistent with China's obligations under Article 2.4 of the Anti-Dumping Agreement.

1.3 MOFCOM's determination of SMST's dumping margin, as consistent with Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

6. The European Union's claims under Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement relate to an alleged double-counting of administrative expenses. However, an examination of the facts makes it clear that there was simply no double-counting in the dumping margin determination.

7. Moreover, Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement cannot be construed as containing a requirement to accept all information provided during a verification visit. The fact that a verification visit's purpose may be "to verify information provided or to obtain further details" does not imply that an investigating authority is *compelled* to verify information provided or to obtain further details, let alone that it prescribes any approach that must be followed to pursue that objective. As such, Article 6.7 and Annex I of the Anti-Dumping Agreement leave a significant margin of discretion to investigating authorities. With respect to the alleged use of facts available, it suffices to say that MOFCOM simply did not rely on any SG&A amount in which there allegedly was a double-counting. Article 6.8 of the Anti-Dumping Agreement and Annex II are thus irrelevant to the case at hand, since MOFCOM did not make any determinations on the basis of "facts available".

2. CLAIMS REGARDING MOFCOM'S INJURY DETERMINATION

2.1 Consistency of MOFCOM's consideration of price effects with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

8. With respect to MOFCOM's consideration of the price effects of Grade C, MOFCOM did explain the methodology used to take into account the quantitative difference for the Grade C price effects consideration, contrary to the allegations made by Japan and the European Union. In any event, the argument made by Japan and the European Union blurs the lines between the substantive requirements laid down in Articles 3.1 and 3.2 and the procedural obligations set out in other provisions.

9. In addition, Japan and the European Union's claim is based on an incorrect understanding of the nature of the price undercutting consideration under Article 3.2 of the Anti-Dumping Agreement. The factual existence of price undercutting by the dumped imports is considered in itself to have an effect on domestic prices. A finding of price undercutting is a purely factual consideration, which only requires a comparison of prices. Thus, any factual circumstances other than the price difference that exists between the import price and domestic price of Grade C (for instance, the increase in the prices of domestic Grade C) are irrelevant for the price undercutting consideration. Moreover, Article 3.2 of the Anti-Dumping Agreement does not require an investigating authority to establish what caused the price undercutting (for instance, an increase of the domestic price or a decrease of the import price). Finally, the allegation that imports of Grade C were not in competition with the domestically produced Grade C is legally irrelevant and completely disregards MOFCOM's findings and in-depth analysis of this matter.

10. By claiming that MOFCOM improperly extended its conclusions concerning the price undercutting by Grade B and Grade C to the "domestic industry" "as a whole", Japan and the European Union misrepresent the nature of the price undercutting consideration in two main ways. First, they erroneously presume that the price undercutting consideration under Article 3.2 of the Anti-Dumping Agreement must be made with respect to the *domestic industry*, whereas it relates to the prices of the dumped imports as compared with the *price of a like product*. As such, the price effects consideration concerns the relationship between subject imports and a variable other than the domestic industry, that is, *domestic prices*. The assessment of the effects of the price undercutting on the domestic industry as a whole is relevant as to whether there is a causal link between the prices of the dumped imports and the impact on the domestic industry, in the *causation* analysis, not in the price undercutting consideration.

11. Second, considering that price undercutting had to be found with respect to the like product *as a whole* is at odds with the wording of Article 3.2 of the Anti-Dumping Agreement. A textual analysis, in particular with respect to the use of the indefinite article (as opposed to the abundant references to the concept of "like product" with use of the definite article in other

provisions), reveals that for the price undercutting consideration, the prices of the dumped imports must be compared with the prices of *some* like products. Moreover, the consideration under Article 3.2 of the Anti-Dumping Agreement focuses on price undercutting *by the prices of the dumped imports*. MOFCOM's consideration revealed that virtually all dumped imports were made at undercutting prices. Japan and the European Union's position is also at odds with the purpose of the price effects consideration, which will logically progress through the impact analysis towards the causation analysis.

12. In addition, far from being selective, MOFCOM's methodology on the basis of which it limited its price undercutting examination to "matching" models was objective and in line with Article 3.2.

2.2 Consistency of MOFCOM's analysis of the impact on the domestic industry with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. Any degree of "selectiveness" alleged to exist by Japan logically follows from the explicit requirements of the relevant provisions of the Anti-Dumping Agreement. Moreover, any differences between the approach under Article 3.2 and the approach under Article 3.4 may have to be assessed under Article 3.5 of the Anti-Dumping Agreement, which "links" both elements. In addition, Japan erroneously postulates that there existed a "segment of the domestic industry producing Products B and C" and a "segment of the domestic industry producing Product A" as well as a "domestic industry sector" per grade.

14. The European Union also claims that MOFCOM's impact analysis was improperly based on its flawed price effects analysis because the data relating to Grade A and Grade C are non-attribution factors. This reveals clearly that the European Union's argument concerns the non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement, or, at best, the causation analysis in general.

15. With respect to the evaluation of the margin of dumping, it is factually incorrect that MOFCOM did not evaluate this in the part of the Final Determination relating to the injury determination. In addition, similar to what was confirmed by case law for the evaluation of the "factors affecting prices", Article 3.4 does not as a general rule require an evaluation of the magnitude of the margin of dumping beyond the analysis of this factor as required by the provisions of the Anti-Dumping Agreement dealing specifically with the dumping margin. With respect to the conclusion reached by MOFCOM, the Final Determination provides a solid reflection of MOFCOM's reasoned evaluation of the weight and relevance of all factors. MOFCOM concluded that the weight and relevance of the positive factors fell short of those of the negative factors. This is something very different from the allegation that MOFCOM "disregarded" positive factors.

16. Finally, MOFCOM did not fail to examine whether subject imports provided explanatory force for the state of the domestic industry. The interpretation put forward by Japan creates an obligation that simply cannot be found in Article 3.4 of the Anti-Dumping Agreement. Moreover, a correct overview of the facts shows that MOFCOM properly examined the explanatory force, even under Japan's misguided interpretation.

2.3 The consistency of MOFCOM's causation determination with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

17. In its causation analysis, MOFCOM duly established a link between its price effects consideration and the impact analysis. The effects of price undercutting by the dumped imports on the domestic industry must be assessed by an investigating authority, *inter alia* taking into account how it defined the like product and the product concerned for the purposes of this investigation. MOFCOM had found in this respect that the three grades constitute a "single product" with correlation between their prices.

18. With respect to the importance attached to the market share, consistently with its finding under Article 3.2, MOFCOM stated as a first point in its causation analysis that imports of the subject products from the EU and Japan showed year-on-year declines. MOFCOM however continued its analysis and found that in order to assess the impact of the price undercutting by dumped imports on the domestic industry, it had to take into account the volume of imports made at undercutting prices. In line with the findings of the panel in *EC – Tube or Pipe Fittings*, MOFCOM

analyzed the key variables to derive an understanding about the impact of the price undercutting on the domestic industry, i.e. the quantity of sales at undercutting prices and the margin of undercutting. Contrary to allegations put forward by Japan and the European Union, Article 3.5 of the Anti-Dumping Agreement certainly allows an investigating authority to attach importance to the volume of imports. Indeed, an investigating authority is obliged to consider all relevant evidence.

19. Moreover, an analysis of MOFCOM's findings reveals that it was reasonable in concluding that the decline in apparent consumption and the capacity expansion did not break the causal link established between the dumped imports and the material injury. The conclusions reached by MOFCOM are reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and constitute meaningful explanations of the nature and extent of the injurious effects of reduced apparent consumption.

3. CLAIMS REGARDING MOFCOM'S DETERMINATION OF THE ALL OTHERS RATE

20. By means of the Initiation Notice and the different forms by which this was communicated, MOFCOM fulfilled its obligations under paragraph 1 of Annex II and was entitled to use facts available with respect to those exporters/producers that did not come forward and/or did not respond to the questionnaire. A very similar situation was addressed by the panel in *China – Broiler Products*, which explicitly dismissed Japan's misplaced reliance on the notion that MOFCOM could not substitute information with facts available, other than the information requested in the Initiation Notice. This conclusion is reinforced by the publication of the questionnaire on MOFCOM's website, which included a similar notice that if the information was not timely supplied, then facts available could be used. In view of the above, the claim must be rejected that MOFCOM failed to comply with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement.

21. As regards Article 6.4 of the Anti-Dumping Agreement, this alleged infringement must be dismissed, as the European Union does not present a *prima facie* case. The European Union limits its arguments under this provision to simply a bare reference to this provision.

22. The claim on the basis of Article 6.9 of the Anti-Dumping Agreement must equally fail since MOFCOM adequately disclosed the facts leading to the conclusion that the use of facts available was warranted (the failure of various interested parties to respond to the Initiation Notice by means of the registration form and/or the failure to respond to the questionnaire) as well as the facts used to determine the all others rate (the highest dumping margin of the Japanese responding companies for the all others rate for Japan, and it used the highest dumping margin of the EU responding companies for the all others rate for the European Union). Similar comments apply to the alleged violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

4. CLAIMS REGARDING MOFCOM'S DISCLOSURE DOCUMENTS AND FINAL DETERMINATION

23. The European Union fails to make a *prima facie* case for the alleged inconsistency with Article 6.4 because it fails to show that MOFCOM denied an interested party's request to see information used by the authorities.

24. Japan and the European Union's claims with respect to the dumping determinations under Article 6.9 of the Anti-Dumping Agreement are only supported by general allegations, which are not substantiated in any way by means of a specific reference to the disclosure documents. A complaining party may not simply submit evidence in the form of exhibits, accompanied by some general allegations and expect the panel to divine from it a claim of WTO-inconsistency. This implies that no *prima facie* case has been made. In any event, the examples provided by China demonstrate that the general allegations relied upon by Japan and the European Union are factually incorrect and that MOFCOM satisfied its obligations under Article 6.9.

25. Japan and the European Union's claims in relation to the injury and causation determinations must equally fail. With respect to Article 6.9, MOFCOM disclosed all "essential facts", and as concerned "essential facts" for which it was bound by confidentiality obligations, it provided sufficient non-confidential summaries, *inter alia* in the form of a range of the confidential margins. With respect to the claims under Articles 12.2 and 12.2.2, similarly, MOFCOM included all

"relevant information on the matters of fact" where appropriate, in the form of a proper non-confidential summary.

5. CLAIMS REGARDING MOFCOM'S TREATMENT OF CONFIDENTIAL INFORMATION

26. With respect to the alleged violation of Article 6.5 of the Anti-Dumping Agreement, the European Union fails to specify the documents for which it alleges that confidential treatment was improperly granted and fails to refer to the statements considered by MOFCOM as providing "good cause". Accordingly, it fails to make a *prima facie* case. In relation to Japan's claim, the facts of this case show that the Petitioners did not only request confidential treatment out of concern for the impact on the third parties' businesses. Rather, they provided several other reasons justifying the confidential treatment of the four appendices at issue. As such, their concern could not have been sufficiently addressed by withholding the names of the third parties. Moreover, in line with the Petitioners' request and as revealed by the non-confidential versions of the four appendices at issue, the confidential treatment did *not* concern the entirety of the four appendices at issue *on a blanket basis*. Rather, the non-confidential versions lodged by the Petitioners included a large part of the original text. MOFCOM acted consistently with Article 6.5 of the Anti-Dumping Agreement.

27. In relation to the claim under Article 6.5.1 of the Anti-Dumping Agreement, the Petitioners provided a broad range of details in the concerned non-confidential summaries and/or statements as to why summarization was not possible. With respect to the appendices the confidential treatment of which is challenged by Japan under Article 6.5, the non-confidential versions clearly disclose more than merely the final data, as alleged by Japan and the European Union, but also provide further summaries or even integral parts of the information contained in each original (confidential) report. They are certainly sufficiently detailed to provide a "reasonable understanding" of the substance of the information submitted in confidence. With respect to the Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, the translation provided by Japan and the European Union does not correctly reflect the original Chinese version. As a matter of fact, the column "Note and non-confidential summary" provides a statement of reasons as to why further summarization is not possible.

6. OTHER ISSUES

28. The European Union brings a request for the amendment of the BCI Procedures adopted by the Panels. China considers that the Panels have, after discussing the matter with the parties to the disputes, determined that additional protection was justified in this case and specified the form that this additional protection would take. Moreover, the BCI procedures are in line with Article 6.5 of the Anti-Dumping Agreement. As such, there is nothing WTO inconsistent about the content of the BCI Working Procedures as adopted by the Panels in accordance with Article 12.1 of the DSU and they do not need to be amended in this respect.

29. The European Union further requests that the Panel exercise its right to seek information, as well as to make a suggestion for implementation, pursuant to Articles 13.1 and 19.1 of the DSU respectively. While China does not call into question the Panel's discretion to decide whether or not to exercise its rights under Articles 13.1 and 19.1 of the DSU, it does not consider it appropriate to do so in this dispute.

30. China respectfully requests the Panels to amend paragraph 10 of the Working Procedures of the Panels, to ensure a more even-handed treatment of both the complainants and the defendant in this dispute with respect to the timeframe within which objections to translations should be raised.

7. CONCLUSION

31. For the reasons set forth in its submission, China requests that the Panel in DS454 and the Panel in DS460 reject the claims of respectively Japan and the European Union in their entirety and find that MOFCOM’s determinations in the underlying investigation were fully consistent with China’s obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX C-2

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

Mr. Chairman, distinguished Members of the Panels,

1. The People's Republic of China ("China") would like to thank you for agreeing to serve on these Panels. China also takes this occasion to thank the Secretariat for its valuable assistance. In this oral statement, China will briefly touch upon some key factual and legal issues in this dispute, leaving as much time as possible for answering any questions the Panels may have.

1. THE ANTI-DUMPING INVESTIGATION AT ISSUE

2. The single product under consideration includes three grades, with Grade A as the low-end grade and Grade B and Grade C as the high-end grades. On the import side, Grade B represented over 70% of the imports of the product under consideration, with Grade C making up the bulk or all of the remaining imports. The domestic industry produced and sold all three grades. However, sales of the low-end Grade A represented a large share of its sales since its ability to sell Grade B and Grade C was hampered by unfair competition from imports.

3. The dumped imports from Japan and the European Union still held a market share of around 50%, and their prices decreased year-on-year. The imports were found to be made at undercutting prices. Imports of Grade B (representing over 70% of total imports) were made at prices that were up to 28% lower than the domestic sales price. Imports of Grade C were found to be made at undercutting prices as well. For Grade A, it was not possible to compare prices because of the quantitative difference between imports and domestic sales in 2008 and the absence of import sales in other years. As such, there was price undercutting by all grades that were actually imported by Japan and the European Union in years other than 2008 (that is, Grade B and Grade C).

4. Faced with these imports at undercutting prices, the domestic industry was suffering injury. MOFCOM's analysis revealed the presence of a number of positive indicators, but its assessment showed that the negative indicators outweighed the positive factors.

5. In its assessment of the causal link, MOFCOM took into account that the import volume decreased, as revealed by the volume effects analysis. However, when assessing the impact of the price undercutting on the domestic industry, MOFCOM did take into consideration that the dumped imports made at undercutting prices still held significant market shares. The imports of Grade B and Grade C made it practically impossible for the domestic industry to sell the high-end grades of the product under consideration. The fall in the (undercutting) import price of the high-end grades resulted in a significant fall in the domestic sales price that the domestic industry managed to charge in these high-end grades. The fall in price of the imported high-end grades also impacted the sales price at which the domestic industry could sell the low-end product grade (Grade A).

2. KEY LEGAL ISSUES AT STAKE

6. One of the key elements vitiating the claims by Japan and the European Union is the failure to respect the inherently different nature of the inquiries under paragraphs 2, 3 and 5 of Article 3 of the Anti-Dumping Agreement and the relationship between those inquiries. Assessment of the WTO consistency of the different steps in an injury analysis, such as the price effects consideration and the impact assessment, should be made according to the obligations in the paragraph that governs such specific step. Japan and the European Union's claims, however, conflate those obligations contained in the specific paragraphs with one another or simply transpose the obligations contained in one paragraph to a different step in the injury analysis.

7. This is clearly revealed by the fact that Japan and the European Union allege that MOFCOM has erroneously extended its conclusion concerning price undercutting of Grade B and Grade C to the "domestic industry as a whole". A similar misunderstanding affects Japan's claim with respect to the impact assessment under Article 3.4 of the Anti-Dumping Agreement. Japan fails to

acknowledge that the focus of the price effects consideration and the impact assessment are inherently different. Considerations that may result from these differences, if any, need to be addressed in the causation analysis under Article 3.5 of the Anti-Dumping Agreement, not in the impact assessment under Article 3.4.

8. Another factor which undermines the position of Japan and the European Union is the apparent lack of understanding of the inherently different nature of a price undercutting consideration, on the one hand, and a price depression or suppression analysis, on the other hand.

9. China would like to stress once again the importance of assessing the European Union's dumping claims on the basis of a correct, complete and contemporaneous overview of the factual elements relating to these claims. This factual overview reveals that if any mistakes were made in relation to the dumping matters at stake, these were made by the EU exporter concerned, not by the investigating authority. Whether or not a different determination would have or should have been reached by MOFCOM in the absence of the mistakes by the EU exporter, is not an assessment to be made by the Panel. The Panel should assess the European Union's claims on the basis of an analysis of the record at the time of the determination.

3. THE EUROPEAN UNION'S RESPONSE TO CHINA'S REQUEST FOR PRELIMINARY RULING

10. In response to China's request for a preliminary ruling on the terms of reference, the European Union, instead of focusing on the procedural matter at stake, addresses a wide range of substantive aspects which are of no relevance whatsoever to the procedural question posed to the Panel. China notes that the response to China's request for a preliminary ruling is not the appropriate medium to raise additional substantive arguments.

11. Each of the four provisions listed in the European Union's request for the establishment of a panel contains multiple obligations. Where a provision contains only a single obligation, a simple reference to the provision may be a sufficient summary of the legal basis of the complaint. Where a provision, such as those at stake contains multiple obligations, a panel request may need to specify which of the obligations is being challenged. If so, it goes without saying that the obligations identified represent the totality of the claims before the panel under the provisions in question. This is the situation presently before the Panel in DS460. The summary of the legal basis of the complaint of the European Union is expressly limited, by the use of the words "in particular", to the obligations for the SG&A to (1) reflect the records of the exporter and (2) be based on actual data.

12. The arguments presented by the European Union in its response to the request for preliminary ruling must fail. No summary of the legal basis of the claims at stake was included in the panel request. Since the request for the establishment of a panel clearly limited the European Union's claims regarding the SG&A to two specific obligations, China obviously limited the preparation of its defence to these specific obligations. This precluded China from including arguments about other obligations in its first written submission. The absence of a legal summary of the basis of the complaint for the other claims raised by the European Union in its first written submission did not only result in a prejudice to China. As a result of this absence, the request for the establishment of the panel equally failed to fulfil its function of informing the third parties of the basis for the complaint and precluded WTO Members from assessing whether they had a substantial interest in the matter before the Panel.

13. In its response, the European Union includes a number of allegations which are irrelevant to the subject matter of the requested preliminary ruling. China will clarify once again in writing why the allegations of the European Union are factually incorrect. However, at this stage, China considers that the decision on the preliminary ruling should focus on the procedural matter at stake and not on the surprisingly confused substantive inaccuracies put forward by the European Union.

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

1. MOFCOM'S DETERMINATION OF THE SG&A AND ITS CONSISTENCY WITH ARTICLES 2.2, 2.2.1, 2.2.1.1 AND 2.2.2 OF THE ANTI-DUMPING AGREEMENT

1. The European Union's submissions during the Panel process leave it unclear as to exactly which claims the European Union is raising, how these claims relate to each other, and which arguments relate to which claims. The lack of any clarity and precision in relation to how the European Union is developing its claims in its first written submission, in any event, is of limited importance to the present dispute, given the high level of precision and clarity of the claims included in the European Union's request for the establishment of a panel. The latter expressly limits its claims under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement to the claims that the SG&A amounts "do not reflect the records and the actual data". The use of the word "in particular" makes this even clearer.

2. The request for the establishment of a panel by the European Union is thus, in the words of the panel in *US – Corrosion-Resistant Steel Sunset Review*, "not unclear and does not lack specificity: it is absolutely and clearly mute with respect to the issue of whether" the SG&A amounts, for instance, are based on data that pertain to "production and sales in the ordinary course of trade". As such, it is "insufficient on its face to provide the foundation sought by" the European Union.[1]

3. There are two claims within the Panel's terms of reference. First, the European Union claims that the SG&A amounts used by MOFCOM for the determination of SMST's constructed normal value for Grade B are not "based on actual data". China does not consider that it can be reasonably disputed that the SG&A amounts used by MOFCOM "built upon" or "construct upon" the costs of production. It also cannot be disputed that these costs of production are actual. As a result, it is clear that the SG&A amounts used by MOFCOM for the determination of the constructed normal value of Grade B of SMST were "based on" the cost of production and thus based on "actual data".

4. Whether or not the coefficients used are also actual data is irrelevant, since in any event, the SG&A amount were "based on" actual data. Article 2.2.2 does not require the SG&A amount to be actual data in itself. Nevertheless, for the sake of good order, China points out that the coefficients also constitute "actual data". The coefficients are "the internal rates used by SMST in preparing price/cost calculations for orders" and were used by SMST in its daily operations and, accordingly, are data that pertained to acts, existed in fact, are real, and were in existence at the time. Therefore, the coefficients are actual data. If figures used for constructed value determinations would no longer be considered to be based on actual data, as from the moment that they would be allocated on the basis of coefficients, this would have unwarranted systemic consequences.

5. Second, the European Union seems to claim that the SG&A amounts for Grade B in the EU market provided by SMST in table 6-3 are not based on SMST's records. The *New Shorter Oxford English Dictionary* defines "record" as "[…] knowledge or information preserved in writing, […] a written or otherwise permanently recorded account of a fact or event […] Also, a document […] on which such an account is recorded […]; in pl., a collection of such accounts, documents, etc.".[2] The production costs and the coefficients are clearly part of SMST's records in this sense.

2. MOFCOM'S DUMPING DETERMINATION FOR SMST'S SALES OF GRADE C AND ITS CONSISTENCY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

6. In line with its practice, MOFCOM used the product types (or "baskets of transactions") proposed by the exporter to minimize the need for adjustments by using. In addition, MOFCOM

[1] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para.7.53.
[2] The New Shorter Oxford English Dictionary, Exhibit CHN–15, Vol. II, p. 2506.

requested the exporters to make substantiated requests for adjustments for any differences that affect price comparability. The product types set by SMST and the absence of any need for adjustments as stated by SMST were the two parameters that MOFCOM relied upon to ensure a fair comparison. At no point during the investigation did SMST request to amend the product types (or the "basket of transactions") used for the determination of the normal value. SMST also never requested any adjustment. Assuming that physical differences affected price comparability, SMST failed to comply with its obligation "to make substantiated requests for "due allowance", whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability".[3] By contrast, MOFCOM fully complied with its obligation to ensure a fair comparison. A very similar claim was addressed in *EU – Footwear (China)* and the findings in that case show that no violation of Article 2.4 can be found in the present dispute.

7. This is true, even if assuming that SMST demonstrated that the physical differences identified in the course of the investigation affected price comparability. Moreover, in any event, SMST did not demonstrate that these physical differences affected price comparability. SMST demonstrated the existence of physical differences (that is, a differences in outer diameter). However, it did not even attempt to demonstrate that these differences affect price comparability. The European Union cannot point to a single piece of evidence submitted by SMST to demonstrate an impact on price comparability (which is a consideration separate from different prices).

3. MOFCOM'S DETERMINATION OF SMST'S DUMPING MARGIN IS CONSISTENT WITH ARTICLE 6.7 AND ANNEX I, PARAGRAPH 7 AND ARTICLE 6.8 AND ANNEX II, PARAGRAPHS 3 AND 6 OF THE ANTI-DUMPING AGREEMENT

8. The alleged double-counting issue is non-existent and the claims presented by the European Union thus lack any factual basis. In any event, Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement do not contain any obligation for an investigating authority to accept information, let alone any claim, presented to it during the verification visit. Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement relate to the situation in which determinations are made based on the facts available. MOFCOM simply did not rely on any alleged double-counting and, as such, did not make any determinations on the basis of the alleged facts available.

9. Moreover, in the absence of any double-counting, the alleged procedural violation did not and could not have had any adverse impact on the European Union, as there is no case of nullification or impairment of the European Union's rights. The facts of this case rebut the presumption of nullification or impairment laid down in Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

4. CLAIMS REGARDING MOFCOM'S PRICE UNDERCUTTING CONSIDERATION

4.1 The consistency of MOFCOM's consideration of price undercutting by imports of Grade C with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

10. While MOFCOM's finding of likeness does not necessarily imply that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration,[4] it does imply that there is "likeness" between the grade included in the basket of domestic goods that was explicitly found to be "like" the corresponding grade included within the scope of the product under consideration. In the present case, this is even more evident, in view of MOFCOM's finding that the corresponding grades are "basically identical" and "substitutable". The fact that the complainants did not challenge MOFCOM's findings relating to the competitive relationship under Article 2.6 of the Anti-Dumping Agreement results in the irrelevance of this aspect under Article 3.2. Japan and the European Union must take, as a given, the competitive relationship between the domestically produced Grade C and the imported Grade C.

11. Moreover, MOFCOM analyzed at length the competitive relationship between the imported grades and the corresponding domestically produced grades. This discussion was included in the Final Determination when addressing the like product determination, in relation to which the

[3] Panel Report, *EU – Footwear (China)*, para. 7.278.
[4] Panel Report, *China – X-Ray Equipment*, para. 7.65.

interested parties logically raised this issue. Obviously, "in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination".[5] In view of the complete absence of any discussion of MOFCOM's findings, it is clear that no *prima facie* case has been made by the complainants.

12. In view of the above, no finding can be made in this dispute that MOFCOM failed to properly establish the competitive relationship between imported Grade C and domestically produced Grade C. This is irrespective of whether or not the Panels consider that there should be "explanatory force" or that a price differential will always constitute an effect. In this respect, as addressed in previous submissions, China considers that Article 3.2 allows an investigating authority to find (or to presume conclusively) price undercutting in case the dumped import prices are below the comparable domestic prices. No additional "effect" consideration is required since price undercutting is in itself an effect. An important element reflecting the manifest unreasonableness of the complainants' interpretation is the disregard of the inherently different nature of a price undercutting consideration and a price depression/suppression consideration.

13. The complainants further rely on the allegation that the sales of Grade C were "outlier transactions". However, Japan and the European Union fail to provide any evidence for the alleged "outlier" nature of the sales of Grade C and, as such, do not substantiate their claims. Moreover, the outlier nature of sales may be relevant from the supply-side perspective, but this is not the case from the demand-side perspective (for the customer when making its purchasing decisions). Also, Article 3.2 provides no methodological guidance on how to consider price effects.[6]

4.2 The consistency with Articles 3.1 and 3.2 of the Anti-Dumping Agreement of MOFCOM's overall consideration of price undercutting by imports of the product under consideration

14. MOFCOM found a price correlation between the different grades making up the product under consideration and the domestic like product. On this basis, MOFCOM found that Grade A should not be excluded from the scope of the product under consideration. The price correlation and the effect of imports of Grade B and Grade C at undercutting prices on prices of Grade A is a matter of elementary economics. In order for dumped imports to have an effect on prices of like products, the dumped imports should be able to substitute the domestic like products. For MOFCOM's overall price undercutting consideration in the case at hand, the relevant question is thus whether or not the high-end grades (Grade B and Grade C) are capable of substituting the low-end grade (Grade A). The possibility to substitute the low-end grades by the high-end grades of HP-SSST is evident and was referred to during the investigation by interested parties, including the exporters.

15. Therefore, no violation can be found of Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to MOFCOM's overall price undercutting consideration. This is irrespective of whether or not price effects need to be considered for the like product "as a whole" as alleged by Japan and the European Union. In any event, Japan and the European Union's legal interpretation and reliance on the price effects on the like product "as a whole" are erroneous, as explained at length in China's previous submissions.

5. CONSISTENCY OF MOFCOM'S ANALYSIS OF THE IMPACT ON THE DOMESTIC INDUSTRY WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

16. The price undercutting by imports of Grade B and Grade C had an effect on prices of the domestically produced Grade A, given the substitutability and resulting price correlation between these three grades. As such, it is irrelevant as to whether an impact assessment should be carried out on any basis other than focusing on the domestic industry as a whole and/or should be accompanied by additional explanations in case price effects were considered on a per grade basis. This is because the circumstances that would allegedly lead to such additional inquiries are simply not present in the case at hand.

[5] Panel Reports, *US – Softwood Lumber VI*, para. 7.136, *US – Countervailing Duty Investigation on DRAMS*, footnote 264.

[6] See for instance Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.292; *EC – Fasteners (China)*, para. 7.328.

17. In any event, any alleged degree of "selectiveness" of MOFCOM's approach logically arises from the explicit requirements of the relevant provisions of the Anti-Dumping Agreement, rather than from any bias or attempt to inflate the chances of maximizing an affirmative finding of injury. MOFCOM considered price undercutting on a grade-by-grade basis, in line with its obligation under Article 3.2 of the Anti-Dumping Agreement to ensure comparability of the prices being compared. In its impact assessment, MOFCOM focused on the impact on the domestic industry as a whole, consistent with its obligation under Article 3.4 of the Anti-Dumping Agreement. In no way did MOFCOM determine its approach "depending on which approach would maximize the chance of finding injury to the domestic industry". This approach was furthermore in line with the logical progression of inquiry leading to an investigating authority's ultimate decision on whether or not dumped imports are causing injury to the domestic industry.

18. For the reasons explained in China's first written submission, MOFCOM's evaluation of the magnitude of the margin of dumping was sufficient for the purposes of Article 3.4 of the Anti-Dumping Agreement and MOFCOM properly found that the domestic industry was injured. Finally, MOFCOM did ensure the explanatory force, to the extent required. This is true even under Japan's erroneous interpretation. China's explanation in this respect is not an "post hoc attempt" but is rather taken from the Final Determination itself.

6. THE CONSISTENCY OF MOFCOM'S CAUSATION DETERMINATION WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

19. MOFCOM logically progressed its inquiry, starting from its product scope and like product findings, via its price effects consideration and impact assessment, leading towards this final conclusion under Article 3.5 of the Anti-Dumping Agreement.

20. When assessing the impact of price undercutting on the domestic industry, MOFCOM relied on the high market share of the dumped imports. This, however, does not imply that MOFCOM relied on a significant increase of dumped imports under Article 3.2 of the Anti-Dumping Agreement to find causation under Article 3.5. Indeed, a distinction must be made between MOFCOM's conclusion that there was no significant increase in the volume of the dumped imports under Article 3.2 of the Anti-Dumping Agreement and MOFCOM's reliance on the fact that dumped imports retained a high market share under Article 3.5. Article 3.5 of the Anti-Dumping Agreement certainly allows an investigating authority to attach importance to the volume of imports in this context. The appropriateness of MOFCOM's approach is also confirmed by the finding of the panel in *EC – Tube or Pipe Fittings*.[7]

21. A finding that imports decreased does not compel an investigation authority to conclude that the domestic industry did not suffer any material injury or that any injury suffered by the domestic industry could not be caused by the subject imports. Moreover, the present situation appears to be a textbook example of a case in which a causal link can be found, despite the lack of a significant increase in dumped imports.

22. MOFCOM's non-attribution analysis was consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The explanations provided by MOFCOM constitute "meaningful explanations of the nature and extent of the injurious effects"[8] of reduced apparent consumption. The complainants' allegations fail in relation to the irrelevance of trends in domestic demand for Grade A. Grade B and Grade C can substitute Grade A. Therefore, demand for Grade A is obviously a relevant consideration.

23. MOFCOM further made a reasonable conclusion that the effects of the expansion of capacity were not sufficient to break the causal link between dumped imports and material injury.

7. OTHER CLAIMS

24. With respect to claims raised by Japan and the European Union in relation to the all others rate, China considers that it complied with all its obligations in this respect. In relation to the consequential claims by the European Union, China points out that the alleged violations at the basis of these claims are inexistent. In any event, the European Union takes issue with the

[7] Panel Report, *EC – Tube or Pipe Fittings,* para. 7.277.
[8] Appellate Body Report, *US – Lamb*, para. 186.

particular "facts available" relied upon. This is a matter that should be assessed under paragraph 7 of Annex II, the only provision dealing with the substantive quality of the "facts available" that are relied upon. No claim is made under this provision. To the extent the European Union is requesting the Panel to make a finding of violation consequential to any alleged procedural violations, China points out that exactly because "it is in the nature of a procedural claim that one does not know what the substantive consequences may eventually be of remedying the procedural effect", a procedural claim cannot lead to a consequential finding of a substantive violation.

25. China has demonstrated, in considerable detail, that its disclosure documents and Final Determination are consistent with its obligations under Articles 6.4, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. With respect to the calculation methodology, China considers that the wording of Article 6.9 of the Anti-Dumping Agreement is clear, in the sense that it only covers "essential facts" and does not cover reasoning. In the context of Article 6.9, a "calculation methodology" forms part of the investigating authority's reasoning, and does not amount to a fact in any event. Japan appears to concede that the calculation methodology is "not entirely distinct from legal interpretation". This implies that the calculation methodology does not fall within the notion of "fact", since facts do not "have any overlap whatsoever with legal interpretation". The European Union's the position that inferences drawn from relied upon facts can still constitute "facts" for the purposes of Article 6.9 of the Anti-Dumping Agreement is contradicted by the findings of the panel in *EC – Salmon (Norway)*, which described a "fact" as "[a] thing assumed or alleged as a basis for inference".[9] Article 6.9 thus only covers the factual basis for inference, not the inferences themselves.

26. MOFCOM's treatment of confidential information submitted by the Petitioners was consistent with China's obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. In this respect, the Anti-Dumping Agreement imposes no obligation on an investigating authority to explain why it considers that confidential treatment is warranted. Moreover, Japan and the European Union are both mistaken in claiming that the potential disruption of the third parties' businesses could have been sufficiently addressed by withholding their names. Such approach would not have addressed the concerns of the Petitioners or the third parties in question regarding the full disclosure of the four concerned appendices, as is evident on the face of the Petitioners' request for confidential treatment.

27. The Petitioners provided detailed and adequate non-confidential summaries of the four appendices at issue, explaining the content of the reports, including information and data. Regarding the other 32 additional Appendices to the Petitioners' Supplemental Evidence of 1 March 2012, a description of the information contained therein is provided. A statement is also provided as to why summarization of the content of those appendices was not possible, due to confidentiality considerations with regard to business secrets.

8. CONCLUSION

28. For the reasons set forth in its submissions, China requests that the Panel in DS454 and the Panel in DS460 reject the claims of respectively Japan and the European Union in their entirety and find that MOFCOM's determinations in the underlying investigation were fully consistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994.

[9] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

ANNEX C-4

EXECUTIVE SUMMARY OF THE STATEMENTS OF
CHINA AT THE SECOND PANEL MEETING

1. MOFCOM'S OVERALL PRICE UNDERCUTTING CONSIDERATION

1. The consistency of MOFCOM's grade-by-grade price undercutting consideration with WTO law is confirmed by the use of the indefinite article in relation to the concept of "like product" in Articles 3.1 and 3.2. Regarding the complainants' reliance on the definite article before "domestic market", Article 3.1 does not speak about the effect of the dumped import on *the* domestic market, but on the effect on *prices* in that domestic market. The reference to "the" domestic market clarifies that these "prices" referred to by an indefinite article must relate to "the" domestic market for like products. China's interpretation is also in line with the role that the price undercutting consideration plays in the logical progression of inquiry leading towards a possible affirmative finding of injury caused by dumped imports. The consideration under Article 3.2 must allow an investigating authority to understand the undercutting that occurs and the frequency and magnitude of that undercutting. This will enable it to logically progress its inquiry towards an assessment of the extent of the impact of price undercutting on the domestic industry under Article 3.5, taking into account the nature of the injury found to exist under Article 3.4.[1]

2. Even if assuming that somehow, an investigating authority would be required under Article 3.2 to find price undercutting for the like product as a whole (*quod non*), no violation can be found in the case at hand because of the substitutability of Grade A by Grade B and/or Grade C and the resulting price correlation. The potential to substitute as well as the actual occurrence of substitution was referred to several times by the Japanese exporter SMI itself.

2. MOFCOM'S PRICE UNDERCUTTING CONSIDERATION OF GRADE C

3. Any price differential that is found between comparable products will constitute price undercutting for the purposes of Article 3.2 and will constitute an effect as such. The wording of Article 3.2 supports such position; that is, in order to find price undercutting, it suffices to find a price differential between comparable products.

4. Japan and the European Union read the Appellate Body's findings in *China – GOES* in isolation of the qualifications given by the Appellate Body. The Appellate Body explicitly found that for price undercutting, the inquiry as to the "effect" consists of a price comparison - "a comparison be made between the two" - without any need for an additional inquiry. Even if assuming that any additional inquiry as to the "effect" was actually required (*quod non*), the arguments relied upon by the complainants cannot lead to a finding of violation because of MOFCOM's extensive assessment of the competitive relationship in its like product assessment.

5. China is not claiming that a likeness finding implies that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration. Rather, China is stating that an explicit finding of likeness between the imported grades with their corresponding domestic grades implies that domestic Grade C is "like", and thus in competition with, the imported Grade C. Products for which the prices are comparable for the purposes of Article 3.2 are a subset of like products. Like products are in turn a subset of competitive products, as found by the Appellate Body in *Korea – Taxes on Alcoholic Beverages*. China is thus not arguing that a finding that products are "like" will always suffice to ensure price comparability, as the complainants attempt to portray China's arguments. However, to the extent that the complainants consider that there was a lack of price comparability under Article 3.2 in the present dispute, this claim is actually based on an alleged lack of competitive relationship. Given the specific likeness finding for domestic Grade C and imported Grade C, these cannot be considered as not comparable for the purpose of Article 3.2 because of an alleged absence of a competitive relationship.

[1] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.277.

3. SG&A DATA FOR SMST'S NORMAL VALUE FOR GRADE B

6. In relation to the terms of reference matter, China is not taking issue with the European Union for failing to cite the full wording of the relevant provisions. Rather, China takes issue with the European Union's attempt to raise additional claims after it had explicitly limited its panel request to an alleged inconsistency in relation to two specific obligations.

7. The irrelevance of the European Union's artificial distinction between the "actual data" reference in Article 2.2.2 and the "actual amounts" reference in Article 2.2.2(ii) is clear from the findings of the panel in that case (*EC – Bed Linen*).[2] The European Union further misrepresents the panel's findings in *US – Corrosion-Resistant Steel Sunset Review*, while the parallels between these two cases are striking:[3] although the two claims - actual data and ordinary course of trade - may have the same legal basis - Article 2.2.2 - the European Union expressly limited its panel request to the actual data requirement. The panel in that dispute also stated that "we do not believe it is necessary to examine the issue of prejudice to the United States by any alleged "lack of specificity" in the Panel request".[4] Furthermore, the European Union reprimands China for allegedly disclosing the content of the consultations. In addition to being contrary to established case law, it is the European Union's own first written submission that mentions several times that China disclosed the exact number and the source during the consultations.

8. With respect to the claims within the Panel's terms of reference, Article 2.2.2 requires SG&A to be "based on" actual data. It cannot seriously be disputed that the SG&A amounts used by MOFCOM are in fact "founded" on, "built upon" or are "supported by" the costs of production.[5] It also cannot be disputed that these costs of production are "actual" in that these "existed in act or in fact" and were "in existence at the time".

4. FAIR COMPARISON FOR SMST'S DUMPING DETERMINATION FOR GRADE C

9. The European Union is claiming that in the circumstances of the present case, without any evidence of impact on price comparability and in the absence of any request to do so, an investigating authority must spontaneously amend the product types used. In particular, the European Union claims that when "an exporter has presented evidence of differences in physical characteristics and prices, an investigating authority" must amend the product types to ensure that the products sold on the domestic market with differences are not used to calculate normal value.[6]

10. In extending findings under Article 3.2 to the fair comparison requirement under Article 2.4, the European Union refers to the Appellate Body's findings in *EC – Fasteners*.[7] Interestingly, these findings confirm the discretion of an investigating authority as to the methodology it follows to ensure fair comparison. Further confirmation can be found in the panel's findings in *EC – Footwear*.[8] In that dispute, the panel dismissed the position that the product types or "basket" definitions should reflect "all the characteristics of the product which may have affected price comparability". China considers that the use of the product types submitted by SMST is an important element in determining MOFCOM's compliance with Article 2.4. China does, however, consider that it is not possible to exclude certain products from the scope of the investigation on the basis of Article 2.4.

11. SMST never demonstrated any impact of the alleged physical differences on price comparability. The European Union seems to argue that an investigating authority should spontaneously analyze all data received and carry out several calculations to identify possible differences in costs of production, even if it has not been directed to this data or the required calculations by the exporter. This would inevitably impose an unreasonable burden on investigating authorities.

[2] Panel Report, *EC – Bed Linen*, para. 6.99.
[3] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53.
[4] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53.
[5] Appellate Body Report, *EC – Hormones*, para. 163.
[6] European Union's second written submission, para. 127.
[7] European Union's second written submission, footnote 148.
[8] Panel Report, *EC* – Footwear, paras. 7.280 – 7.283.

5. OTHER CLAIMS

12. With respect to the dumping disclosure, it is not sufficient for the complainants to "point to the fact that they do not disclose the essential facts". A decision by the complainants to remain silent about China's submissions cannot result in a finding of violation, especially as China rebutted these general statements in specific terms. The methodology of MOFCOM's disclosure did permit interested parties to understand how the calculation had been made (see for instance SMST's comments on the Preliminary Dumping Disclosure (Exhibit EU-19 (BCI)), paragraphs 3 to 4).

13. In relation to the injury disclosure and final determination, with respect to those grades and time periods for which no price comparisons were made in the absence of domestic sales or imports, there was no price differential information. As such, the information on import prices could not have led to a contrary outcome in the price undercutting consideration. Regarding confidential information that may have required disclosure, an appropriate non-confidential summary may take the form of "a non-confidential range [of] the percentage difference between the average unit values", which is exactly what MOFCOM did in the present case.[9]

14. Regarding MOFCOM's use of facts available for the "all others rate", compliance should be assessed with respect to the exporters existing at the time, and not with respect to exporters that did not exist at the time when the measures were adopted, and who may or may not have subsequently come into existence. Japan further invokes for the first time, in paragraphs 76 to 81 of its second written submission, a violation of Paragraph 7 of Annex II. China is concerned by this claim, as it is clearly outside the Panel's terms of reference.

15. China recalls that the prospective nature of the WTO dispute settlement system precludes a suggestion such as the one requested by the European Union, since Article 19.1 of the DSU simply requires that a measure is brought into compliance, not that any preceding non-compliance is restored.

16. With respect to a number of claims, the complainants have developed their arguments in different ways and/or have engaged in a more detailed analysis than the other complainant. As a result, for those claims, China considers it appropriate that the findings of each of the Panels are set out separately, taking into account that it is for each complainant separately to make a *prima facie* case.

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[9] China's first written submission, paras. 685 and 692.

ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

THIRD-PARTY STATEMENT OF THE REPUBLIC OF KOREA

1. On behalf of the Republic of Korea, I first would like to extend my sincere gratitude to the members of the Panel for providing us a chance to present our view on the issues that we think are important in this case. This anti-dumping case casts some serious questions with respect to the anti-dumping investigations procedure which may affect the defending rights of the exporters and ultimately the final determinations by the authorities. We hope the Panel guides us through this case with wisdom as to how the investigating authorities should conduct their anti-dumping investigations.

2. Among various issues, Korea would like to raise two issues which are (1) When can the investigating authorities determine the dumping margin on the basis of facts available for all other companies and (2) When does the burden of proof with regard to the fair comparison obligation under Article 2.4 of the AD Agreement shift to exporters from the investigating authorities. Korea will discuss the two issues in order.

When can investigating authorities determine the dumping margin on the basis of facts available under Article 6.8 of the AD Agreement for all other companies

3. The European Union claimed that the use of facts available is permitted in the calculation of an all others rate, provided that some efforts are made in terms of seeking to identify other firms or specifying the consequences of not providing information. Korea agrees with the European Union on that in order to apply facts available for calculating dumping margin, certain conditions must be met under Article 6.8 and Annex II of the AD Agreement.

4. Furthermore, Korea would like to emphasize that the dumping margin for those firms which were willing to be investigated but were excluded from the sample group according to Article 6.10 of the AD Agreement should be calculated in accordance with Article 9.4 of the AD Agreement.

5. We hope the Panel could shed light on the requirements for the authorities to calculate dumping margin with facts available, and the firms to which such dumping margins could be applied.

When does the burden of proof or fair comparison obligation under Article 2.4 of the AD Agreement shift to exporters from the investigating authorities

6. European Union claims that in calculating normal value for model Product C according to Table 1 on page 4 of its First Written Submission, China reflected the value of goods that were different from the goods sold for export to China. China responds that, although it is true that under Article 2.4 of the AD Agreement the obligation to ensure a fair comparison lies on the investigating authorities and not the exporters, exporters also have an important role to play in the process and since the SMST did not raise any issue on prices between Product C and the goods incorrectly compared, the investigating authorities cannot be deemed to have breached Article 2.4 of the AD Agreement.

7. According to the European Union, the compared goods are much thinner than Product C and their usages are different. While Product C is used in a primary boiler system, incorrectly compared goods cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves.

8. We believe that the burden under Article 2.4 of the AD Agreement to ensure a fair comparison does not shift to the exporters just because the exporters did not claim that there is a price difference between the export product and the product under authority's consideration for calculating the normal value. Especially, the last sentence of Article 2.4 of the AD Agreement states 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.

9. In this case, all the Parties agree that the SMST has claimed the difference in physical characteristics between the export product and the product considered for calculating the normal value. If such a factual claim was raised at the time of the investigation, through which an investigating authority could have thrown suspicion on the issue of fair comparison, the investigating authority should have evaluated further to determine whether the product it has chosen for the comparison was appropriate, and if it did not, the investigating authority's obligation of fair comparison under Article 2.4 of the AD Agreement could not be deemed to have been released.

10. We hope the Panel to provide us with a criterion that is applicable in determining the moment when the fair comparison obligation of the investigating authorities under Article 2.4 of the AD Agreement shifts to exporters.

ANNEX D-2

THIRD-PARTY STATEMENT OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you, Mr. Chairman and Members of the Panel. The Kingdom of Saudi Arabia would like to take this opportunity to provide its views on the proper interpretation of the Anti-Dumping Agreement. In particular, the Kingdom will address: (i) the use of recorded costs in dumping margin calculations; (ii) the "fair comparison" obligation; and (iii) the injury determination's "logical progression".

II. AN INVESTIGATING AUTHORITY IS OBLIGATED TO ACCEPT AN EXPORTER'S RECORDED COSTS EXCEPT IN LIMITED CIRCUMSTANCES

2. First, Article 2.2.1.1 of the Anti-Dumping Agreement imposes a "positive obligation"[1] on an investigating authority to use an exporter's recorded costs subject *only* to the two conditions stated in that provision. There is no other basis to reject exporters' costs, and WTO panels have consistently held that an investigating authority is required to use recorded costs if these two conditions are met.[2] This obligation rests solely on the investigating authority and applies to all of Article 2.2.

3. The two conditions are provided in the first sentence of Article 2.2.1.1. The first condition is that the exporter's records are "in accordance with the generally accepted accounting principles of the exporting country".

4. The second condition is that these records "reasonably reflect the costs associated with the production and sale of the product under consideration". The second condition is met where there is a sufficiently close relationship between the recorded cost and the actual cost to the company for the production and sale of the product at issue.[3] The phrase "reasonably reflect" does not permit an investigating authority to substitute its subjective preference as to the recording of an exporter's costs, nor does the phrase permit the authority to question whether the costs recorded are "reasonable". Instead, "the test for determining whether a cost can be used in the calculation of 'cost of production'" is simply "whether it is 'associated with the production and sale' of the like product".[4] Thus, for example, the Panel in *US – Softwood Lumber V* stated that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the *market value* of those [costs]"; to accept this premise "would require [the Panel] to read into the text words which are simply not there".[5]

III. A "FAIR COMPARISON" REQUIRES COMPARABILITY OF THE EXPORT PRICE AND ITS PARTICULAR NORMAL VALUE

5. Next, the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement obligates an investigating authority to ensure comparability between an investigated product's export price and normal value. The Kingdom wishes to highlight several aspects of the required "comparison" for the Panel's consideration.

6. First, a proper definition of "like product" is necessary to ensure that a price comparison is "fair". Article 2.1 of the Anti-Dumping Agreement requires that the determination of dumping be a comparison of the export price to the domestic price of a "like product". Article 2.6 defines "like

[1] Panel Report, *US – Softwood Lumber V*, para. 7.237.

[2] See, e.g., Panel Reports, *EC – Salmon (Norway)*, para. 7.483 and *US – Softwood Lumber V*, para. 7.23.

[3] Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, paras. 7.393, 7.423; see also Panel Report, *EC – Salmon (Norway)*, para. 7.483.

[4] Panel Report, *EC – Salmon (Norway)*, para. 7.483.

[5] Panel Report, *US – Softwood Lumber V*, para. 7.321 and fn. 446 (citing Appellate Body Report, *India – Quantitative Restrictions*, para. 94). (emphasis original)

product" as "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The phrases "alike in all respects" and "closely resembling" show that the adjusted values that form the basis for a determination of dumping should depart as little as possible from actual prices in the markets at issue.

7. Second, "normal value" must be specific to the exported product and its unique product and pricing characteristics. In defining dumping of an exported product, Article 2.1 refers to "its" normal value; Article 2.4 refers twice to "the" normal value. The consistent use of the possessive or the definite article in referring to "normal value" is intentional: the Anti-Dumping Agreement requires an investigating authority to determine the normal value, of a particular "like product", that most closely reflects the unique characteristics and pricing structure of the particular exported product.

8. Third, the comparison contemplated by Article 2.4 is a comparison of two values that are defined in relation to each other. This follows from the text of Article 2: a determination of dumping requires "price comparability". Although this term is a unitary concept like "fair comparison", the consistent use of "comparability" or "comparable" in conjunction with "price" is significant.

9. Article 2 repeatedly emphasizes the comparability of two interrelated values. Article 2.1 defines dumping as the situation in which a product's export price is "less than the comparable price" of the like product consumed in the exporter's home market. Article 2.2 permits an investigating authority to depart from the like product's home-market sales prices where "such sales do not permit a proper comparison" and to use a "comparison with a comparable price of the like product" exported to a third country. Footnote 2 refers to the need for a "proper comparison", and Article 2.5, which addresses shipments through an intermediate country, underscores an investigating authority's obligation to base the dumping determination on a "comparable price". Finally, the language of Article 2.4, and the emphasis on the "comparison" throughout, underscores the importance of ensuring that a dumping calculation accounts for all differences that affect price comparability. This exercise, which is required by the text of Article 2.4, does not permit an investigating authority to ignore any similarity or difference that might affect "comparability".

10. The jurisprudence therefore has established that artificially modifying the prices of certain export transactions is not a "fair comparison"[6]. This principle should be equally applicable to normal value because both it and export price affect price comparability, which is the core objective of the dumping calculation. As such, an impermissible price comparison may result, for example, from using values other than the exporter's own prices to establish normal value, from comparing products that are too different to be considered "like", or from adjusting only one value for factors that affect both the normal value and the export price equally.

IV. AN INVESTIGATING AUTHORITY IS REQUIRED TO DETERMINE INJURY BASED ON A "LOGICAL PROGRESSION" OF ANALYSIS

11. Finally, on the subject of injury, the Kingdom is of the view that an investigating authority's determination under Article 3 of the Anti-Dumping Agreement must establish a logical progression of analysis among its "essential components" in order to constitute the requisite "objective examination" of "positive evidence".

12. Article 3.1 lists the injury determination's three "essential components". The subsequent paragraphs of Article 3 elaborate on these components, their relationship with each other, and how they must fit into the "overall framework of an injury determination".[7] The sequential analysis contemplated by Article 3 and its repeated emphasis on the "same imports" establish that the injury components are "closely interrelated"[8] and work together to produce a "logical" conclusion about whether subject imports caused material injury to the domestic industry. As the Appellate Body has stated, the various provisions of Article 3 "contemplate a logical progression of

[6] See Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[7] Appellate Body Report, *China – GOES*, paras. 127-128.
[8] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

inquiry leading to an investigating authority's ultimate injury and causation determination".[9] This inquiry entails sequential analyses of subject imports' volume effects and price effects under Article 3.2 and then their impact on the domestic industry under Article 3.4. Finally, under Article 3.5, these elements are "linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated".[10]

13. Although an investigating authority enjoys discretion as to the methodologies employed to determine injury under Article 3, its examination of the impact of subject imports on the domestic industry under Article 3.4 will constitute an "objective examination" only where it logically progresses from the assessment of those imports' volume effects and price effects under Article 3.2. This follows from three requirements of Article 3, which establish an analytical and evidentiary linkage between Articles 3.2 and 3.4.

14. First, the text of Article 3 states that an investigating authority is required to examine the same group of dumped imports under Articles 3.2 and 3.4. The Appellate Body has recognized and confirmed this point.[11]

15. Second, Article 3.4 requires an investigating authority to examine the same dumped imports as were considered under Article 3.2 in order to properly assess whether those imports have "explanatory force … for the state of the domestic industry".[12] Thus, an investigating authority "must derive an understanding"[13] of the impact of the subject imports – the same imports that have been found under Article 3.2 to have produced volume and price effects – on the domestic industry in that market.

16. Third, the investigating authority's examination of the "explanatory force" of the dumped imports for the state of the domestic industry will constitute an "objective examination" only where it represents a "logical progression" from the examination of those same imports' volume effects and price effects under Article 3.2.[14] The inquiry under Article 3.4 complements and conforms to the analyses carried out under Article 3.2 in order to produce the ultimate conclusion on causation under Article 3.5. This analysis necessarily involves a linkage between the identified volume and price effects and the state of the domestic industry. Indeed, the Panel in *China – Broiler Products* noted that the examination of the situation of the domestic industry under Article 3.4 is "inextricably linked" to the "earlier examination of the price effects of subject imports" under Article 3.2. The Panel therefore ruled that implementation of the Panel's findings with respect to Article 3.2 would require the reexamination of the original determination concerning the impact of subject imports on the domestic industry under Article 3.4.[15]

V. CONCLUSION

17. Mr. Chairman, this concludes the Kingdom's statement. I thank you for your attention.

[9] Appellate Body Report, *China – GOES*, para. 128.
[10] Ibid.
[11] Appellate Body Report, *China – GOES*, para. 127.
[12] Ibid. para. 149. See also Panel Reports, *China – X-Ray Equipment*, para. 7.254; and *China – Broiler Products*, fn. 822.
[13] Appellate Body Report, *China – GOES*, para. 149.
[14] Appellate Body Report, *China – GOES*, para. 149.
[15] Panel Report, *China – Broiler Products*, para. 7.555.

ANNEX D-3

THIRD-PARTY STATEMENT OF TURKEY

TABLE OF CASES

Short Name	Full Citation
US – DRAMS (Panel)	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
Thailand – H Beams (AB)	Appellate Body Report, *Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steal and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 29 November 2005
Mexico – Pipes and Tubes AD Duties (Panel)	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS184/AB/R, adopted 24 July 2007
EC – Fasteners (Panel)	Panel Report, *European Communities-Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners*, WT/DS397/R, adopted 29 September 2010
EC – Fasteners (AB)	Appellate Body Report, *Communities-Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners*, WT/DS397/R/AB, adopted 28 July 2011
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel From The United States*, WT/DS414/R, adopted 16 November 2012
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel From The United States*, WT/DS414/AB/R, adopted 16 November 2012
China – Broiler Products (Panel)	Panel Report, *Anti-Dumping and Countervailing Duty Measures on Broiler Products From The United States*, WT/DS427/R, adopted 25 September 2013

I. INTRODUCTION

Mr. Chairman, Distinguished Members of the Panel,

1. The Republic of Turkey (hereinafter referred to as "Turkey") would like to thank the Panel for the opportunity to present her views in this proceeding on the dispute among the People's Republic of China (hereinafter referred to as China), the European Union (hereinafter referred to as the EU) and Japan.

2. Turkey would like submit its third party opinion due its interest on the correct and coherent interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the "ADA").

3. In this statement Turkey will focus on two issues: Whether paragraph 1 of Article 3 of the ADA envisages hierarchy among the paragraphs 2, 4 and 5 in course of an injury and causation analysis; and the legal interpretation of the phrase "*best endeavor*" within the context of the use of "*facts available*" based findings vis-à-vis "*unknown exporters*".

II. THE QUESTION CONCERNING "LOGICAL PROGRESSION" IN ANALYSIS ON INJURY AND CAUSATION IN DUMPING INVESTIGATIONS

Mr. Chairman,

4. As underlined numerous times in Panel[1] and Appellate Body Reports[2], Article 3.1 of the ADA acts like a chapeau of the remaining paragraphs of Article 3 putting the investigating authority under the responsibility to undertake its injury/causation examination objectively by relying on positive evidence. The investigating authority has to act in accordance with the overarching principles of Article 3.1 every time it assesses the volume and trend of dumped imports; evaluates the price effect of these imports on the domestic industry and analysis the impact of dumped imports on the state of the domestic industry.

5. Article 3.1 reads as follows;

> "A determination of injury for the purpose of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for the like products, and *(b)* the *consequent* impact of *these* imports on domestic producers of such products. *(emphasis added)*

6. The EU and Japan highlight in their written submission that the word "*consequent*" bridges the evaluation on the volume and price effect of the dumped imports with the conclusions on impact of such imports on the economic performance of the domestic producers.[3] It is understood from this statement that the investigating authority is obliged to show initially the absolute or relative increase of volume of dumped imports and the adverse price effect of these imports before moving to establish the negative impact of these imports on the economic indicators of the domestic industry.

7. Turkey acknowledges that this pattern of evaluation is frequently used by investigating authorities in their analysis of injury and causation. Turkey's concern, however, does not relate to whether such an approach is warranted under Article 3 but to the question whether this system, named as "*logical progression*", paves way to a legal obligation that confines the investigating authority to stop its injury and causation analysis in the event that the authority concludes that there is no absolute/relative increase in the volume of dumped imports and/or no price undercutting, depression or suppression caused by dumped imports. Is the authority blocked to proceed to the next stage of the assessment, namely the analysis of the economic state of the domestic industry, if it finds that paragraph 2 of Article 3 is not legally satisfied?

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[1] Panel Report, *Mexico – Pipes and Tubes AD Duties,* para. 7.247; Panel Report, *EC – Fasteners*, para. 7.323.

[2] AB Report, *Thailand – H Beams*, para. 106; AB Report, *EC – Fasteners*, para. 414;AB Report, *China – GOES*, para. 126.

[3] EU's first written submission, para. 218; Japan's first written submission, para. 121.

8. Turkey's position is not affirmative on this issue. As underscored by the Appellate Body[4] the injury analysis should be an exercise of the cross-consideration of the volume of the dumped imports; the price effect of the dumped imports on the prices of the domestic producers and evaluation of the economic state of the domestic industry. In that framework, our legal interpretation does not point out an obligation to follow a hierarchy or sequence among these components of injury analysis.

9. Often, the investigating authorities begin their injury analysis by evaluating the volume and price trend of the product under consideration originating in the country under investigation. Assessment on the price effect of imports and the state of the domestic industry comes at the second phase. Such a pattern, however, should not lead to the conclusion that the investigating authority is legally bound to pass first the stage concerning the volume and price effect of dumped imports to proceed to the coming phases of the injury analysis.

10. As clearly identified in the first sentence of paragraph 5 of Article 3 the essence of causality should be the negative effects of dumped imports on the domestic industry, through the act of dumping, as set forth in paragraphs 2 and 4 of Article 3. The examination should include all relevant evidence before the authorities including those that weaken the causality between dumped imports and injury incurred by the domestic industry. Furthermore the investigating authority is also obliged to focus on known factors other than the influence of dumped imports to identify whether these factors erode the link between dumping and injury.

11. To concentrate on "other factors" the investigating authority has to finish first its evaluation on the "primary factors" which relate to the impact of dumped imports. Without finishing its work on the "main factors" causing injury, how can the authority evaluate "other known factors" as formulated in paragraph 5 of Article 3? Turkey conceives that the legal mechanics of paragraph 5 requires the authority to undertake a full-fledge examination of different parts of the injury analysis without keeping any relevant information out of the scope.

12. Nevertheless, this legal interpretation should not be comprehended as that the authority is obliged to continue the investigation even though it identifies that there is no significant increase in imports; no adverse price affect or no erosion in the economic parameters of the domestic industry. What Turkey underscores is that the authority should complete its examination comprehensively, by including all aspects of the injury analysis, before reaching the conclusion that it terminates the investigation due to the absence of legal requirements as stipulated in paragraph 2 and 4 of Article 3.

13. In light of the principles stipulated in paragraph 1 and 5 of Article 3, Turkey would like to emphasize once more that injury-causality analysis should be undertaken with a comprehensive approach without singling out any significant, verifiable and objective factor that may weaken or strengthen the injury determination and causation analysis between dumped imports and injury.

III. THE NOTION OF "BEST ENDEVOUR" CONCERNING THE USE "FACT AVAILABLE" IN "ALL OTHERS" RATE

14. The question whether the investigating authority has the discretion to use "facts available" based calculations and findings vis-à-vis unknown exporters was one of the heavily addressed issues in panels *China – GOES*[5] and *China-Broiler Products*.[6]

15. Considering the time-limits, Turkey will not reiterate her position on this issue but would like to stress that She is in line with the latest ruling in the WTO case law pointing out that it will be difficult for a member to determine an appropriate anti-dumping margin for certain unknown producers/exporters and apply an anti-dumping measure if "facts available" based calculations cannot be used for "unknown" producers/exporters.[7]

16. Turkey, however, would like to share briefly her position concerning the threshold of "best endeavor" that the investigation authority has to pass to conclude that all effort was shown to identify unknown producer/exporters, importers and other interested parties.

[4] AB Report, *China – GOES*, para. 127.
[5] Panel Report, *China – GOES*, paras. 7.384-7.386.
[6] Panel Report, *China – Broiler Products*, para. 7.305.
[7] Panel Report, *China – Broiler Products*, para. 7.305.

17. Pursuant to paragraph 1 of Article 6 of the ADA all interested parties in an anti-dumping investigation shall be given notice of the information required and ample opportunity to present in writing all evidence which they consider is relevant. Furthermore, as requested in paragraph 1 of Annex II of the ADA the information required from any interested party should be in specific detail and the interested party should be informed on possible consequences if the desired information is not supplied in reasonable time.

18. Even though there are certain clear-cut rules on the content of the communication, neither paragraph 8 of Article 6 nor Annex II of the ADA shed light on the form of the requested information or the medium of communication the investigation authority should use.[8] Such components of the investigation are left to the discretion of the investigating authority which is obliged to act in goodwill and respect due process rules as well as defense rights of the interested parties in context of Article 6 of the ADA.

19. In practice, it is known that the starting point for the investigating authority to identify foreign producer/exporters is the petition itself. In most cases the authority expects the petitioning domestic industry to come up with the identities of the foreign producers/exporters because of the assumption that these domestic producers would possess the most accurate information on the market, their competitors and pricing trends. At this stage the investigating authority will be under the legal obligation to check the adequacy and accuracy of the information in line with paragraph 6 of Article 6 of the ADA. As addressed by the WTO jurisprudence, however, such an obligation is not absolute and the investigating authority has the leeway to satisfy as to the accuracy and adequacy of the information in a number of ways without resorting to some type of formal verification. In that manner, relying on the reputation of the source is considered as one of these ways. In line with WTO case law there is no expectation of the verification of the accuracy of each piece of information which would render the investigation unmanageable[9]. Nevertheless, Turkey understands that the investigating authority has to show the utmost caution on the accuracy and adequacy of the submitted information as expected from an objective and even-handed authority.

20. Except the foreign companies shown in the petition, the question whether the authority has to pin point each and every foreign producer/exporter that exported the subject merchandise in the period of investigation is the essence of the discussion on "best endeavor". In light of the latest rulings in WTO jurisprudence[10] Turkey maintains that even though the authority is under the obligation to check the accuracy of the submitted information and extend its examination if it is not fully satisfied with the submitted information; there is no legal obligation to further its works to such extremes to identify each unknown producer/exporter.

21. As a matter of fact, in investigations where the industry is fragmented on both importer and exporter side the investigating authority should not be held legally responsible for not directly communicating[11] to each and every producer/exporter or not showing the highest enthusiasm to get in touch with these exporters. Furthermore, considering the textual reading of Article 5, 6 and Annex II of the ADA as well as the recent holdings in WTO case law, in such cases, it would be unreasonable to conclude that the authority has no discretion to use facts available based findings vis-à-vis unknown exporters for the reason that it did not display the best endeavor to contact them. As accurately pointed out, the investigating authority will not be in the position to draw a line between two types of "unknown" producers/exporters, namely those who exist and are exporting but refuse to appear and those who are not exporting in period of investigation.[12]

22. To summarize, Turkey would like to stress that the margins of the "best endeavor" to identify unknown producer/exporters, importers and other interested parties should be evaluated within the merits of each case before reaching a conclusion that the investigating authority was well warranted to rely on "fact available" based calculations and findings vis-à-vis these producer/exporters.

[8] Panel Report, *China – Broiler Products*, para. 7.301; Panel Report, *China – GOES*, para. 7.386.
[9] Panel Report, *US – DRAMS*, para. 6.78.
[10] Appellate Body Report, *Mexico – Rice*, para. 251; Panel Report, *China – Broiler Products*, para. 7.302.
[11] Panel Report, *China – Broiler Products*, para. 7.304.
[12] Panel Report, *China – Broiler Products*, footnote 498.

IV. CONCLUSION

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

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. PROCEDURAL AND TRANSPARENCY REQUIREMENTS OF GATT ARTICLE 6

a. Designation of Confidential Information and Requirement for Public Summaries under Articles 6.5 and 6.5.1 of the AD Agreement

1. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that the parties to an investigation must be given a full and fair opportunity to see relevant information and to defend their interests. At the same time, investigative authorities may need to protect confidential information. Indeed, in AD investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities, upon good cause shown, to ensure the confidential treatment of such information. Article 6.5.1 balances the need to protect such information against the disclosure requirements of other Article 6 provisions. It provides that an investigating authority, if it accepts confidential information, must provide or otherwise assure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries of that information, significant prejudice to the ability of companies and Members to defend their interests could occur.

b. Acceptance of Certain Information Presented during Verification

2. The main purpose of "on-the-spot investigation" conducted pursuant to AD Article 6.7 is to verify the information already submitted or obtain further detail. On-the-spot investigations are not opportunities for interested parties to submit a significant amount of new information.

3. The United States notes that Paragraph 7 of Annex I provides that a firm is entitled to prepare for the on-the-spot investigation and contemplates that an investigating authority may request that a firm provide additional information, including potentially minor corrections or clarifications to information already submitted.

4. With respect to what must be accepted by the investigating authority, Article 6.8 and Annex II provide that an investigating authority may make determinations on the basis of facts available when information is not submitted in a reasonable time. The investigating authority is not required to use information in circumstances including when the information is submitted in an untimely fashion and when its acceptance would cause difficulties in the conduct of the investigation. Accordingly, whether any information proffered at verification should be accepted will be a fact-specific inquiry.

c. Alleged Inadequate Disclosure and Failure to Inform Parties of the Essential Facts under Consideration in Violation of AD Articles 6.4 and 6.9

5. The United States recalls that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States agrees with the EU that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. The United States agrees that there is no "disclosure" of confidential information within the meaning of Article 6.5 if the investigating authority is providing the confidential information only to the party that submitted it. To the extent that there may be aspects of the calculation that may not be able to be disclosed because they contain another interested party's confidential information, the second clause of Article 6.4 explicitly excludes from the disclosure requirements such information treated as confidential under Article 6.5.

6. With respect to Article 6.9, the United States notes that the calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating

authority's imposition of final measures. Without such information, no affirmative determination could be made and no definitive duties could be imposed. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

7. Furthermore, with respect to the determination of the existence and margin of dumping, the investigating authority must disclose the data used in: (1) the determination of normal value (including constructed value); (2) the determination of export price; (3) the sales that were used in the comparison between normal value and export prices; (4) any adjustments for differences which affect price comparability; and (5) the formulas that were applied to the data. All of these would be "essential" facts within the meaning of Article 6.9.

8. Contrary to China's arguments, the fact that a party has provided information to the investigating authority does not mean that the exporter knows with certainty which of that information will be used and in what capacity. Moreover, China's claim that all that is required is a summary of the essential facts is a misreading of Article 6.9, which require that an investigating authority provide the essential facts underlying its determination and not merely a stated conclusion based on these facts.

9. For injury determination, the United States notes that Article 6.9 considers information on the price levels for domestically produced products and comparison between the prices for this product and the imports under consideration to be essential facts for price effect findings.

d. Use of Facts Available to Determine the Dumping Margins with respect to All Other Companies in Alleged Breach of Article 6.8 and Paragraph 1 of Annex II

10. The United States recalls that Article 6.8 establishes that an investigating authority may only resort to facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. An investigating authority may not assign a margin based on facts available when the authority has not requested the information in the first place. Thus, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. In other words, exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.

11. Article 6.8 should be read together with paragraph 1 of Annex II, which requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use facts available. These provisions together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.

II. ALLEGED FAILURE TO SET FORTH OR OTHERWISE MAKE AVAILABLE IN SUFFICIENT DETAIL CERTAIN FINDINGS AND CONCLUSIONS WITH RESPECT TO THE ALL OTHERS RATE AND THE INJURY DETERMINATION IN VIOLATION OF AD ARTICLES 12.2 AND 12.2.2

12. With respect to the dumping determination, Article 12.2 provides that, in a preliminary or final determination, the investigating authority must provide notice or a separate report setting out "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Article 12.2.2 further provides that for a final determination, an investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".

13. The factual and legal bases for the investigative authority to resort to facts available with respect to all other exporters that it did not examine constitute material issues of fact and law considered. These issues go to the very heart of the determination of what margin to apply to unexamined exporters. Consequently, Article 12.2 requires that the investigative authority provide in sufficient detail the findings and conclusions that lead to application of facts available. Similarly, Article 12.2.2 requires, among other things, the that the investigative authority provide "all

relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculations of the "all others" rate.

14. With respect to the injury determination, the United States notes the that, pursuant to Article 12.2.2, any facts related to the price comparisons of the subject imports and domestic products are relevant information on the matters of fact that an investigating authority should disclose in its final determination.

III. ALLEGED BREACH OF ARTICLE 2 OF THE AD AGREEMENT IN THE CALCULATION OF DUMPING MARGINS

a. Determinations of SG&A Costs Should be Based, Whenever Possible, on Sales Made in the Ordinary Course of Trade Pursuant to AD Article 2.2.2

15. Article 2.2.2 provides that an investigating authority should, where possible, base SG&A and profit on sale of the like product made in the ordinary course of trade. If, and only if, such sales in the ordinary course of trade are unavailable, Article 2.2.2 then provides alternative methodologies for determining SG&A and profit.

16. The EU argues that MOFCOM breached Article 2.2.2 because it based SG&A on certain sample sales and these sales were outside the ordinary course of trade. However, there are many reasons to find a normal value sales transaction not in the ordinary course of trade. The AD Agreement does not require an investigating authority to treat all sample sales as outside the ordinary course of trade. Instead, the investigating authority must evaluate the record evidence to determine whether it supports finding that the sample sale was concluded on terms and conditions that are incompatible with normal commercial practice for sales of the like product, in the market in question, at the relevant time.

b. Investigating Authorities Shall Normally Calculate Cost on the Basis of Records Kept by the Exporters When the Costs are in Accordance with Generally Accepted Accounting Principles (GAAP) and Reasonably Reflect Cost Pursuant to AD Article 2.2.1.1

17. The United States considers Article 2.2.1.1 to require an investigating authority to normally calculate costs on the basis of records kept by an exporter or producer's books and provided that the books and records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. If the evidence in this dispute establishes that the records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration, MOFCOM would have been obligated to use those records pursuant to Article 2.2.1.1 or obligated to provide a reason supported by the record evidence to depart from the "normal" methodology provided for in Article 2.2.1.1.

c. An Investigating Authority Should Conduct Model Matching to Ensure a Fair Comparison Pursuant to AD Article 2.4

18. Article 2.4 sets forth the overarching obligation of an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. A fair comparison requires the investigating authority to strive to compare similar products as well as transactions. In finding the correct set of products to compare, the investigating authority must conduct an exercise such as a model matching exercise. When subject merchandise consists of two or more significantly diverse product models, investigating authorities will match foreign-like products and home-market products using model match criteria to assure accurate price comparisons within but not across relevant product categories. Because model matching ensures that only sales of products with similar physical characteristics are compared to each other or necessary adjustments for the differences are made, some sort of model matching exercise is an essential component of establishing a fair comparison.

19. Generally, the investigating authority has the obligation to seek information regarding differences in physical characteristics that may affect price comparability in order to make a fair comparison. The investigating authority can fulfill this obligation by asking parties to: 1) identify and explain the differences in physical characteristics and 2) identify which of those differences in

physical characteristics may affect price comparability. If an investigating authority sought such information, but an exporter or producer merely identified differences in physical characteristics between the products at issue without claiming that those differences affected price, then the investigating authority need not independently undertake an analysis of the differences in physical characteristics to determine whether they affected price comparability.

IV. INJURY DETERMINATION

a. Evaluation of the Margin of Dumping

20. The United States notes that Articles 3.1 and 3.4 do not require an authority to evaluate the *significance* of dumping margins. Neither article requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way.

b. Import Volumes and Causation Determinations

21. With regard to Article 3.2, the United States disagrees with EU and Japan to the extent they assert that an authority may not attach significance to the fact that imports "retain" a significant share of the market over the period. Although Article 3.2 does specify that an authority "shall consider whether there has been a significant increase in dumped imports", either on an absolute or relative basis, it does not expressly or implicitly prevent an authority from considering in its analysis the fact that imports have a significant market share level. In a situation in which significant volumes of subject imports are having a significant adverse impact on domestic prices, the existence of significant import volumes or market share is obviously one item of "relevant evidence" that an authority may want to consider in its Article 3.5 analysis.

c. Application of Provisional Measures for a Period Exceeding Four Months

22. The text of Article 7.4 provides that without request from a sufficient percentage of exporters or the imposition of a lesser duty, an investigating authority may not impose provisional measures for a period exceeding four months. To the extent that MOFCOM applied provisional measures for six months without a request by exporters representing a significant percentage of the trade involved and without MOFCOM examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the United States agrees that China breached Article 7.4.

d. The EU's Proposed Amendments to the BCI Procedures and the Request that the Panel Seek Confidential Information Pursuant to DSU Article 13.1

23. Article 6.5 expressly provides 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. No provision of the AD Agreement or the DSU creates an exception that would permit information that the investigating authority accepted as confidential in the underlying investigation be disclosed within the context of a WTO proceeding without the specific permission of the party submitting that information to the investigating authority.

24. Protecting confidential information, including by securing the specific permission of the party submitting the information, is crucial to the proper functioning of trade remedy proceedings. If the protections in Article 6.5 were treated as non-applicable in the context of a dispute, parties could be deterred from disclosing confidential information to investigating authorities, potentially impeding or frustrating the proceeding. It is also important to recognize that confidential information often raises significant domestic sensitivities. For example, in order to ensure confidential information stays properly protected, consistent with WTO obligations, Members may have domestic legal provisions that impose penalties, including criminal penalties, on government officials that disclose such information without authorization. The Panel should not request that a party supply BCI information from the underlying proceeding absent the specific permission of the party that submitted it.

V. THE PANEL'S TERMS OF REFERENCE

a. Sufficiency of a Panel Request Assessed in Light of the Disclosure Afforded to the Interested Member and the Discussion during the Administrative Proceedings

25. The level of disclosure provided in the underlying proceeding can affect the sufficiency of a complaining Member's panel request. Compliance with DSU Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances". Such circumstances would include the level of disclosure provided in the underlying proceeding.

26. In contrast, the United States disagrees that the sufficiency of a panel request must be assessed in the light of the discussion between the investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue. The argumentation at the administrative proceeding level is not relevant in evaluating the sufficiency of a panel request. Using the issues raised before the investigating authorities during the administrative proceedings would be contrary to DSU Article 6.2, which requires a Member to present the problem clearly to the responding party and other Members (including those deciding whether to become third parties). It is not enough that a Member is aware of the possible universe of issues which may be raised as claims before a panel; the specific issue must be made clear in the panel request. A responding party and other Members are entitled to a clear presentation of the problem. They are not required to guess.

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WT/DS454/R/Add.1
WT/DS460/R/Add.1

13 February 2015

(15-0878)

Original: English

CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN

CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM THE EUROPEAN UNION

REPORTS OF THE PANELS

Addendum

This *addendum* contains Annexes A to D to the Reports of the Panels to be found in document WT/DS454/R-WT/DS460/R.

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WORKING PROCEDURES OF THE PANELS

ANNEX A-1

JOINT WORKING PROCEDURES OF THE PANELS

1. Pursuant to Article 9.3 of the DSU, the timetables in DS454 and DS460 are harmonized. The Panels shall, to the greatest extent possible, conduct a single panel process, with a single record, resulting in separate reports contained in a single document, taking into account the rights of all Members concerned, and in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired. A complaining party's submissions in one dispute shall be deemed to be an exercise of its third party rights in the other dispute. Third parties may submit single submissions relating to both disputes.

2. In its proceedings, the Panels shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

3. The deliberations of the Panels and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the disputes (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panels by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panels, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. The Panels shall meet in closed session. The parties, and Members having notified their interest in either dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panels to appear before them.

5. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panels Concerning Business Confidential Information, set out in Annex 1 to these Working Procedures.

6. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panels. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

7. Before the first substantive meeting of the Panels with the parties, each party shall submit a written submission in which its presents the facts of its case and its arguments, in accordance with the timetable adopted by the Panels. Each party shall also submit to the Panels, prior to the second substantive meeting of the Panels, a written rebuttal, in accordance with the timetable adopted by the Panels.

8. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panels. If the European Union or Japan requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the European Union and Japan shall submit their responses to the request prior to the first substantive meeting of the Panels, at a time to be determined by the Panels in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

9. Each party shall submit all factual evidence to the Panels no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the opposing party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panels shall accord the opposing party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

10. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panels may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation, to the extent that its significance is reasonably apparent, should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

11. To facilitate the maintenance of the record of the disputes and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the disputes. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6. In order to avoid unnecessary duplication of exhibits, parties may file joint exhibits. In particular, the exhibit of any party in DS454 or DS460 may consist of, and be effected by means of a cross-reference to, a document exhibited by any other party in either dispute, including with respect to submissions with the same due date.

Questions

12. The Panels may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panels the list of members of its delegation in advance of each meeting with the Panels and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panels with the parties shall be conducted as follows:

a. The Panels shall invite the European Union and Japan to make opening statements to present their cases first. Subsequently, the Panels shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panels and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panels' Secretary. Each party shall make available to the Panels and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panels shall give each party the opportunity to ask each other questions or make comments, through the Panels. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panels.

c. The Panels may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the parties to which they wish to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

d. Once the questioning has concluded, the Panels shall afford each party an opportunity to present a brief closing statement, with the European Union and Japan presenting their statements first.

15. The second substantive meeting of the Panels with the parties shall be conducted as follows:

a. The Panels shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panels shall invite China to present its opening statement, followed by the European Union and Japan. If China chooses not to avail itself of that right, the Panels shall invite the European Union and Japan to present their opening statements first. Before each party takes the floor, it shall provide the Panels and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panels' Secretary. Each party shall make available to the Panels and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panels shall give each party the opportunity to ask each other questions or make comments, through the Panels. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to another party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such written questions within a deadline to be determined by the Panels.

c. The Panels may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the parties to which they wish to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

d. Once the questioning has concluded, the Panels shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panels shall invite third parties to make written submissions prior to the first substantive meeting of the Panels with the parties, in accordance with the timetable adopted by the Panels.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panels the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panels shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panels, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panels, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panels, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to a

third party to which it wishes to receive a response in writing. The deadline for receipt of written answers to these questions shall be determined by the Panels.

d. The Panels may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the third parties to which they wish to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panels' reports shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the reports. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panels' examination of the cases.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panels in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panels. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary of statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panels will not summarize in the descriptive part of its reports, or annex to its reports, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panels. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panels reserve the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panels for which a deadline may not be specified in the timetable.

Interim review

23. Following issuance of the interim reports, each party may submit a written request to review precise aspects of the interim reports and request a further meeting with the Panels, in accordance with the timetable adopted by the Panels. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panels is requested, each party may submit written comments on another party's written request for review, in accordance with the timetable adopted by the Panels. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim reports, as well as the final reports prior to their official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panels by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 8 paper copies of all documents it submits to the Panels. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 3 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the disputes.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panels at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXX@wto.org, XXXX@wto.org and XXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panels directly on the other parties in paper form and electronically, at the time it transmits such document to the Panels. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panels. A party may provide its submissions only electronically to third parties. Each third party shall serve any document submitted to the Panels directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panels.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panels. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panels' Secretary is notified.

f. The Panels shall provide the parties with an electronic version of the descriptive part, the interim reports and the final reports, as well as of other documents as appropriate. When the Panels transmit to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the disputes.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANELS CONCERNING BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panels. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which could seriously prejudice an essential interest of the person or entity that supplied the information to the Party. In this regard, BCI shall include information that was previously treated by China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. No person shall have access to BCI except a member of the WTO Secretariat or the Panels, an employee of a party or third party, and an outside advisor for the purposes of these disputes to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in these disputes.

3. A party or third party having access to BCI submitted in these Panels proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of these disputes and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

4. A party or third party submitting or referring to BCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI shall be submitted pursuant to paragraph 26 of the Working Procedures within three working days after the submission of the confidential version containing the BCI.

5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panels before making it that the statement will contain BCI, and the Panels will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted no later than the working day following the meeting where the statement was made. Non-confidential versions of both oral and written statements shall be redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.

6. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

7. The Panels shall not disclose in its reports or in any other way, any information designated as BCI under these procedures. The Panels may, however, make statements of conclusion based on such information. Before the Panels circulate their final reports to the Members, the Panels will give each party an opportunity to review the reports to ensure that they do not contain any information that the party has designated as BCI.

8. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panels' reports.

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ANNEX B

ARGUMENTS OF JAPAN AND THE EUROPEAN UNION

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. This dispute concerns the measures taken by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan.[1] These measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement").

2. To begin, MOFCOM's injury and causation determinations are inconsistent with China's obligations under the Anti-Dumping Agreement. Specifically, MOFCOM failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1; follow the specific requirements set forth in Articles 3.2, 3.4, and 3.5; and conduct a "logical progression of inquiry"[2] in its volume, price effects, impact, and causation analyses.

3. Further, MOFCOM failed to follow several procedural requirements of the Anti-Dumping Agreement. First, MOFCOM failed to disclose information on import and domestic prices and reasoning supporting its price effects finding, inconsistent with Articles 6.9, 12.2, and 12.2.2. Second, MOFCOM treated certain information as confidential without satisfying the requirements of Articles 6.5 and 6.5.1. Third, MOFCOM failed to disclose the pertinent data and calculation methodologies used to determine the existence of dumping and the dumping margins for the investigated Japanese companies, inconsistent with Article 6.9. Fourth, MOFCOM applied facts available to determine the dumping margin for all other Japanese companies without satisfying the requirements of Article 6.8 and Paragraph 1 of Annex II, and also failed to disclose information and reasoning supporting its all others rate determination, inconsistent with Articles 6.9, 12.2, and 12.2.2.

4. Finally, MOFCOM applied provisional measures for a period exceeding four months without having any basis to do so under Article 7.4 of the Anti-Dumping Agreement.

II. LEGAL ARGUMENT

A. MOFCOM's Determinations of Injury and Causation, and its Associated Disclosure of Essential Facts and Final Determination Notice, Are Inconsistent with China's WTO Obligations in Several Respects

1. MOFCOM's Determinations of Injury and Causation Are Inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement

a. Article 3 of the Anti-Dumping Agreement Requires an "Objective Examination" Based on "Positive Evidence", and Calls for a "Logical Progression" of Inquiry

5. Article 3.1 of the Anti-Dumping Agreement "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".[3] It calls for an injury determination based on "positive evidence" and involving an "objective examination" of

[1] The subject products are available in three grades: TP347HFG, S30432, and TP310HNbN. For simplicity, Japan refers to these grades as Products "A", "B", and "C", respectively. Product A is the least expensive and lowest grade, Product B is in the middle, and Product C is the most expensive and highest grade.

[2] Appellate Body Report, *China – GOES*, para. 128.

[3] Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

"three essential components":[4] (i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. These components "are closely interrelated for purposes of the injury determination".[5]

6. Article 3.2 requires that an investigating authority "consider" "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member", and "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree". On the topic of price undercutting, Article 3.2 expressly establishes a *link* between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two.[6]

7. Article 3.4 details the obligation to examine the relationship between subject imports and the state of the domestic industry, which is "analytically akin to the type of link contemplated by the term 'the effect of' under Article 3.2", and "require[s] an examination of the explanatory force of subject imports for the state of the domestic industry".[7] The investigating authority must evaluate *all* fifteen factors listed in Article 3.4. Where there are "positive movements in a number of factors", the investigating authority must provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".[8] Finally, to ensure an "objective" analysis, an investigating authority finding that *a segment* of the domestic industry is impacted by dumped imports cannot automatically extend that conclusion to the *entire* industry without analyzing the impact of dumped imports on the *other segments* that constitute part of that industry, as well as the *industry as a whole*, and providing a *satisfactory explanation* as to why injury to one segment may be extended to the entire industry.[9]

8. Article 3.5 requires an investigating authority to demonstrate "that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. Further, an investigating authority must not attribute injury caused by other known factors to dumped imports, which requires it to separate and distinguish the effects of dumped imports from those of non-attribution factors.[10]

9. The Appellate Body has made clear that Articles 3.1, 3.2, 3.4, and 3.5 "contemplate a *logical progression of inquiry* leading to an investigating authority's ultimate injury and causation determination".[11] Thus, the analyses pursuant to each provision of Article 3 are "closely interrelated"[12], rather than independent of each other, and an investigating authority can reach a proper injury and causation determination only if it follows the logical progression step by step. This interrelationship finds further support in the word "consequent" in Article 3.1, which suggests that the "impact" to be examined under Article 3.4 is something to follow as a result of, or be logically consistent with, the volume and/or price effects analyses under Article 3.2.

b. China's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

10. After finding on the basis of comparison the imports and domestic prices of the HP-SSST product as a whole that "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products"[13], MOFCOM proceeded to compare the prices of each grade of subject imports with those of the corresponding domestic like products. This price effects analysis, however, does not involve an objective examination and is not based on positive

[4] Appellate Body Report, *China – GOES*, para. 127.
[5] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.
[6] Appellate Body Report, *China – GOES*, para. 136.
[7] Appellate Body Report, *China – GOES*, para. 149.
[8] Panel Report, *China – X-Ray Equipment*, para. 7.195 (quoting Panel Report, *Thailand – H-Beams*, para. 7.249).
[9] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. *See also id.*, paras. 191 ff.
[10] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[11] Appellate Body Report, *China – GOES*, para. 128 (emphasis added).
[12] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.
[13] Final Determination, Exhibit JPN-2, p. 53 (emphasis added).

evidence, and is therefore inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In particular: (i) MOFCOM's analysis of the price effects of imported Product C is analytically and factually flawed; and (ii) MOFCOM improperly extended its conclusions concerning the alleged price undercutting effects of Products B and C to the domestic HP-SSST industry as a whole.[14]

i. MOFCOM's analysis of the price effects of imported Product C is analytically and factually flawed

11. MOFCOM's finding that in 2010, "the large scale sales of [imports of Product C] at a low price had relatively noticeable price undercutting impact on the domestic sales price of the domestic like products"[15] is flawed, and falls short of an objective examination based on positive evidence, in at least two respects.

12. First, MOFCOM purportedly "t[ook] into consideration the quantitative difference between the import volume of the subject products and the sales volume of domestic like products", but MOFCOM does not explain the criteria and economic methodology used to accommodate those "quantitative differences".[16]

13. Second, MOFCOM grounded its price undercutting conclusion for Product C on the fact that, in 2009, the price of imported Product C was over 10% higher than the sales price of the corresponding like domestic products, but, in 2010, the import price of the subject product "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products".[17] However, according to MOFCOM's own analysis, in 2010 the price of the domestic Product C *increased* by 112.80% from 2009, while the price of the imports of the same grade *decreased* by 36.32%.[18] The fact that the sales prices of domestic Product C more than doubled from 2009 to 2010 explains why, over the course of that year, the price of imported products became relatively low by comparison. In other words, the dynamic relationship of the prices of *both* imported and domestic products shows that imports of Product C did not have a significant undercutting effect on the prices of the corresponding like domestic products. Moreover, substantial record evidence suggests that the domestic sales of Product C were not in competition with the imports of the same grade, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for MOFCOM to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

ii. MOFCOM improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole

14. Although MOFCOM determined that "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products"[19] and that imports of Product A did not have a significant price undercutting effect on domestic like products of the same grade, MOFCOM concluded that "*in general*, the products under investigation … had a relatively noticeable price undercutting effect on the price of domestic like products".[20] In effect, MOFCOM extended its price undercutting findings with respect to Products B and C (the latter of which Japan has demonstrated was itself flawed) to the *whole* domestic industry. MOFCOM's conclusions are unwarranted and strikingly selective.

15. Guidance as to the prices to be compared in the price undercutting analysis under Article 3.2 can be derived from WTO case law on Article 3.4 because the analyses under these provisions are "analytically akin to" one another.[21] In this context, the Appellate Body has said that "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, *all of the other parts that make up the industry, as*

[14] Japan understands that MOFCOM did not find any price effects for Product A, and did not find price depression or price suppression for any products. The ensuing discussion rests on this understanding.
[15] Final Determination, Exhibit JPN-2, p. 54.
[16] Final Determination, Exhibit JPN-2, pp. 53-54.
[17] Final Determination, Exhibit JPN-2, p. 54.
[18] *See* Japan's First Written Submission, Table 7 at para. 134.
[19] Final Determination, Exhibit JPN-2, p. 53 (emphasis added).
[20] Final Determination, Exhibit JPN-2, p. 54 (emphasis added).
[21] Appellate Body Report, *China – GOES*, para. 149.

well as examine the industry as a whole", or they should "provide a *satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry*".[22]

16. Accordingly, MOFCOM's ultimate price undercutting conclusion with respect to the product *as a whole* required proper grounding in its grade-by-grade analysis to be consistent with Articles 3.1 and 3.2. However, MOFCOM found an alleged price undercutting effect for only Products B and C, which represented a *minority sector* of domestic production (i.e., 20.1% during the POI), while it found no price undercutting effect for Product A, which represented the *vast majority* of domestic production (i.e., almost 80% during the POI).[23] Further, MOFCOM did not consider whether imports of each grade had a price effect on like domestic products of *other* grades, and even if it had, the record evidence shows that the different grades of HP-SSST products did not in fact compete with one another in the Chinese market, and therefore could not have had cross-grade price effects. Thus, MOFCOM did not find "significant" (i.e., "important, notable or consequential"[24]) price undercutting within the meaning of Article 3.2, and did not satisfy the good faith and objectivity requirements set out, as an overarching obligation, in Article 3.1.

c. China's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

17. MOFCOM's analysis of the impact of subject imports on the domestic industry is flawed, and falls short of an objective examination, based on positive evidence. In particular: (i) MOFCOM's analysis was at odds with and did not follow from its volume and price effects analyses; (ii) MOFCOM failed to evaluate the role of the magnitude of the margin of dumping; (iii) MOFCOM improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured; and (iv) MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry.

i. MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses under Article 3.2

18. Prior to undertaking its impact analysis, MOFCOM found no significant increase in volume, and allegedly found price undercutting effects with respect to only Products B and C. Yet, it conducted an impact analysis by considering the impact of subject imports as a whole on the domestic industry as a whole, presumably on the basis of its flawed and partial price effects analysis for the industry as a whole.[25] However, the Appellate Body has indicated that the volume, price effects, and impact inquiries are "*closely interrelated*";[26] the various paragraphs of Article 3 "contemplate a *logical progression of inquiry*";[27] and Article 3.4 requires "an examination of the explanatory force of subject imports for the state of the domestic industry".[28] Moreover, the text of Article 3.1 indicates that the impact of subject imports is contemplated to be the "consequen[ce]" of the volume or price effects of the same imports. By conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses and conclusions, MOFCOM therefore failed to conduct an objective examination based on positive evidence in accordance with Articles 3.1 and 3.4.

ii. MOFCOM failed to examine the magnitude of the margin of dumping

19. At no point in its analysis did MOFCOM evaluate the significance of the margins of dumping for the impact of subject imports on the Chinese HP-SSST industry. However, under Articles 3.1 and 3.4 the investigating authority "is required to evaluate the magnitude of the margin of

[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204 (emphasis added). *See also id.*, paras. 191 ff.

[23] *See* Japan's First Written Submission, Table 4 at para. 54.

[24] Panel Report, *US – Upland Cotton*, para. 7.1325. The panel's interpretation was confirmed by the Appellate Body. Appellate Body Report, *US – Upland Cotton*, para. 426.

[25] *See* Final Determination, Exhibit JPN-2, pp. 63-64.

[26] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115 (emphasis added).

[27] Appellate Body Report, *China – GOES*, para. 128 (emphasis added).

[28] Appellate Body Report, *China – GOES*, para. 149.

dumping and to assess its relevance and the weight to be attributed to it in the injury assessment".[29] MOFCOM therefore acted inconsistently with these provisions.

iii. MOFCOM improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured

20. The outcomes of MOFCOM's analysis of the relevant economic factors and indices of the domestic industry as listed in Article 3.4 were mixed[30], with many of the factors presenting general trends *favorable* for the domestic industry. MOFCOM itself agreed that, at least, production capacity, output, sales volume, market share, employment, labor productivity, and salary per head exhibited positive trends.[31] Yet, after reviewing all the relevant factors, MOFCOM simply concluded that, "[b]ased on the above … the domestic industry is materially injured".[32] In so doing, MOFCOM appears to have attached a high degree of importance to the other relevant factors highlighting negative aspects of the Chinese HP-SSST industry, while disregarding the many factors suggesting that the Chinese HP-SSST industry was not suffering injury. MOFCOM did not provide any explanation whatsoever regarding the weight attributed to any given factor, nor of the inferences it drew from those factors and indices that were positive for the domestic industry. MOFCOM therefore failed to conduct an objective examination, based on positive evidence, within the meaning of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[33]

iv. MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry

21. Finally, in its analysis of all the relevant economic factors, MOFCOM did not engage in an examination of whether the identified state of the domestic industry or market phenomenon had been the impact of subject imports; rather, it only identified the state of the domestic industry or the market phenomenon at issue. Thus, it failed to conduct "an examination of the explanatory force of subject imports for the state of the domestic industry", as the Appellate Body has said is required under Article 3.4.[34]

d. China's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

22. MOFCOM's causation determination is flawed and does not constitute an objective examination of positive evidence as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In particular: (i) the grounds of MOFCOM's causation determination, namely its volume, price effects, and impact analyses, are analytically flawed and factually unsupported; and (ii) MOFCOM failed to separate and distinguish the injurious effects of the decline in domestic demand for HP-SSSTs and the expansion in capacity of domestic producers from the injurious effects of subject imports.

i. MOFCOM's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of subject imports

23. The demonstration of a causal relationship between dumping and injury to the domestic industry constitutes the last step in an investigating authority's "logical progression of inquiry"[35] leading to the final injury determination. As such, a finding of causation is *dependent* upon the outcomes of the previous steps of analysis – namely, the volume and price effects of dumped imports and their impact on the domestic industry.

24. However, in the present case: (i) MOFCOM found the volume and market share of imported HP-SSST products did not significantly increase during the POI, and its focus on the market share *retained* by imported products at the end of the POI was improper; (ii) MOFCOM's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic

[29] Panel Report, *China – X-Ray Equipment*, para. 7.183.
[30] *See* Japan's First Written Submission, Table 6 at para. 66.
[31] Final Determination, Exhibit JPN-2, p. 63.
[32] Final Determination, Exhibit JPN-2, p. 64.
[33] *See* Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314; Panel Report, *Thailand – H-Beams*, paras. 7.225, 7.249; Panel Report, *China – X-Ray Equipment*, para. 7.216.
[34] Appellate Body Report, *China – GOES*, para. 149.
[35] Appellate Body Report, *China – GOES*, para. 128.

products was fatally flawed; and (iii) MOFCOM's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis of the negative indices. Therefore, it follows, *a fortiori*, that by grounding its causation determination on its volume, price effects, and impact analyses, which did not support a finding of injury, MOFCOM failed to conduct an objective examination, based on positive evidence, of the existence of a causal link between the subject imports and the injury itself, inconsistently with Articles 3.1 and 3.5.

ii. MOFCOM failed to separate and distinguish the injurious effects of other known factors from the injurious effects of subject imports

25. MOFCOM agreed that reduced apparent consumption and increased domestic production capacity could have had negative effects on the domestic industry, but it made no attempt to "separat[e] and distinguish[] the injurious effects" of these non-attribution factors "from the injurious effects of the dumped imports", as the Appellate Body has found is required under Articles 3.1 and 3.5.[36] MOFCOM therefore erred.

26. First, despite recognizing that domestic demand for HP-SSST products declined significantly, and acknowledging that this could negatively effect domestic sales prices and other indicators,[37] MOFCOM did not separate and distinguish the injurious effects of this other factor; rather, it simply concluded that "the price undercutting effect of the imports of subject products [was] the reason for the drop in price of domestic like products".[38]

27. Second, MOFCOM recognized that the POI saw a momentous expansion in the production capacity of Chinese producers of HP-SSST products, and such capacity expansion intensified competition and affected the domestic industry's operational metrics.[39] MOFCOM, however, dismissed the relevance of this other factor by observing that "there was no case of oversupply" based on a flawed supply-demand comparison, and by asserting that a main reason for the decrease in return on investment was "reduced pretax profits" rather than "greater average investment as a result of capacity expansion".[40]

2. MOFCOM's Disclosure of Essential Facts Was Insufficient Under Article 6.9 of the Anti-Dumping Agreement Because It Did Not Adequately Disclose the Import Prices and Domestic Prices Used in MOFCOM's Injury and Causation Analyses

28. Article 6.9 of the Anti-Dumping Agreement requires disclosure, "before a final determination is made, [of] the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures".[41] Here, MOFCOM failed to disclose several pieces of information on import and domestic prices critical to its price undercutting determination[42], which served as the foundation for its causation determination. MOFCOM's disclosure of certain price trend information was inadequate for this purpose.[43]

3. MOFCOM's Notice of Final Determination Failed to Satisfy the Requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement With Respect to the Import Prices and Domestic Prices Used in MOFCOM's Injury and Causation Analyses

29. Article 12.2 of the Anti-Dumping Agreement states that, in a preliminary or final determination, an investigating authority must set out "all issues of fact and law considered material"; and Article 12.2.2 further specifies this obligation as it applies to a final determination, requiring that the investigating authority's final report detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". Here, MOFCOM failed to discharge its obligations under Articles 12.2 and 12.2.2 because it did not provide a report stating all relevant information supporting its imposition of definitive anti-dumping

[36] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223. *See also id.*, para. 226.
[37] Final Determination, Exhibit JPN-2, pp. 68-70.
[38] Final Determination, Exhibit JPN-2, p. 70.
[39] Final Determination, Exhibit JPN-2, p. 74.
[40] Final Determination, Exhibit JPN-2, p. 74.
[41] Appellate Body Report, *China – GOES*, para. 240 (emphasis in original).
[42] *See* Japan's First Written Submission, Table 5 at para. 57.
[43] *See* Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – X-Ray Equipment,* para. 7.409.

duties as part of its Final Determination. Specifically, MOFCOM: (i) disclosed only price trend information while omitting key factual information underlying its price undercutting analysis;[44] and (ii) did not provide the reasoning behind how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis.[45] MOFCOM therefore breached Articles 12.2 and 12.2.2.

B. MOFCOM's Treatment of Confidential Information Was Improper Under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement Because MOFCOM Lacked Good Cause and Did Not Require Sufficient Non-Confidential Summaries or Explanations as to Why Such Summaries Are Not Possible

30. With regard to confidential information, Article 6.5 of the Anti-Dumping Agreement requires that "good cause" must be shown for treating information as confidential, and assuming such good cause is shown, Article 6.5.1 requires an interested party to submit sufficient non-confidential summaries or in "exceptional circumstances" indicate it is unable to do so with a statement of the reasons. In the present case, MOFCOM permitted the full texts of the following Appendices to remain confidential despite Petitioners' failure to show "good cause", and therefore China violated Article 6.5: Appendices V and VIII to the Petition; Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012; and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012. Further, Petitioners did not furnish sufficient non-confidential summaries of the following Appendices or any statements as to why such summaries were not possible, and MOFCOM's failure to require such summaries or statements violated Article 6.5.1: Appendices V and VIII to the Petition; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to Petitioners' Supplemental Evidence of 1 March 2012; and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012.[46]

C. MOFCOM's Disclosures of Essential Facts Were Insufficient Under Article 6.9 of the Anti-Dumping Agreement Because They Did Not Disclose the Data and Calculation Methodologies Used to Determine the Existence of Dumping and the Dumping Margins for SMI and Kobe

31. China violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose the most basic facts and analyses related to its anti-dumping determination and margin calculations for SMI and Kobe. Specifically, MOFCOM's dumping disclosures present only basic figures for export price and normal value and a narrative summary of the actions purportedly taken to derive these numbers; they present no cost data, no application of adjustments to price, and no evidence of calculation methodology.[47] MOFCOM thus failed to present the "essential facts" in its anti-dumping determination and margin calculations.

D. MOFCOM's Determination of the Dumping Margin for All Other Japanese Companies, and its Associated Disclosure of Essential Facts and Final Determination Notice, Were Inconsistent with Article 6.8 and Paragraph 1 of Annex II, as well as Articles 6.9, 12.2, and 12.2.2, of the Anti-Dumping Agreement

32. MOFCOM's determination of the all others rate for Japanese HP-SSST exporters is inconsistent with China's obligations under the Anti-Dumping Agreement. MOFCOM applied facts available in setting the all others rate, but it failed to establish the required conditions before it resorted to facts available. It also failed to make necessary disclosures related to its all others rate determination.

33. First, MOFCOM violated Article 6.8 and Paragraph 1 of Annex II because it determined the dumping margin for Japanese exporters other than SMI and Kobe (i.e., the all others rate) based

[44] *See* Japan's First Written Submission, Table 5 at para. 57.

[45] *See* Final Determination, Exhibit JPN-2, pp. 53-54.

[46] *See* Petition, Exhibit JPN-3; Petitioners' Supplemental Evidence, 1 March 2012, Exhibit JPN-8; Petitioners' Supplemental Evidence, 29 March 2012, Exhibit JPN-9.

[47] *See* Preliminary Dumping Disclosure to SMI, Exhibit JPN-18 (containing BCI); Preliminary Dumping Disclosure to Kobe, Exhibit JPN-19 (containing BCI); Final Dumping Disclosure to SMI, Exhibit JPN-20 (containing BCI); Final Dumping Disclosure to Kobe, Exhibit JPN-21 (containing BCI); Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22.

on "facts already known and best information available"[48] without notifying those other Japanese exporters of all the information required of them and of the consequences of not submitting that information.

34. Second, China violated Article 6.9 because MOFCOM failed to disclose the "essential facts" related to its determination of the all others dumping rate.[49] In particular, China failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate; and (ii) the particular facts that were used to determine the all others rate itself.

35. Third, as with its Final Dumping Disclosure, MOFCOM's Final Determination also failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate; and (ii) the particular facts that were used to determine the all others rate itself. It repeated only the same statements from the Final Dumping Disclosure that it decided "to use facts already known and best information available to establish the normal value and export price"[50], and "base its determinations on dumping and dumping margin on facts already known or best information available".[51] Accordingly, MOFCOM failed to meet its obligations under Articles 12.2 and 12.2.2.

E. China's Application of Provisional Measures for a Period Exceeding Four Months Violated Article 7.4 of the Anti-Dumping Agreement

36. China violated Article 7.4 of the Anti-Dumping Agreement because MOFCOM applied provisional anti-dumping measures from 9 May 2012 to 9 November 2012[52], a period of six months, without any request by exporters representing a significant percentage of the trade involved to apply provisional measures for a period of six months or any examination by MOFCOM as to whether a duty lower than the margin of dumping would be sufficient to remove injury. In such circumstances, the maximum period allowed for provisional measures by Article 7.4 is four months.

F. China's Anti-Dumping Measures on HP-SSST From Japan Are Inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

37. China's anti-dumping measures on HP-SSST from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 as a consequence of the breaches of the Anti-Dumping Agreement described above.

III. CONCLUSION

38. For the foregoing reasons, Japan respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and Anti-Dumping Agreement. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and Anti-Dumping Agreement.

[48] Final Determination, Exhibit JPN-2, p. 35.
[49] *See* Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22.
[50] Final Determination, Exhibit JPN-2, p. 35.
[51] Final Determination, Exhibit JPN-2, p. 41.
[52] *See* Preliminary Determination Notice, Exhibit JPN-6, Section II; Final Determination Notice, Exhibit JPN-1, Sections II, III, IV.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. The measures taken by the Government of the People's Republic of China ("China") – particularly by China's investigating authority, the Ministry of Commerce of the People's Republic of China ("MOFCOM") – in imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement").

II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 OF THE ANTI-DUMPING AGREEMENT

A. Legal and Factual Overview Regarding Injury and Causation

2. On the legal side, Article 3.1 of the Anti-Dumping Agreement sets forth the "three essential components" of the injury and causation analysis: "(i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products".[1] Subsequent paragraphs of Article 3 set forth a detailed inquiry into the three essential components, with the goal of each inquiry being to understand whether each component has been satisfied so as to justify an ultimate finding that subject imports are causing injury to the domestic industry. These inquiries must thus proceed in a "logical progression".[2]

3. Article 3.2 provides that investigating authorities must consider "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member", and "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". Thus, with regard to price effects, Article 3.2 sets forth three possible price effect factors that the investigating authority must consider: price undercutting, price depression, and price suppression. And because the final sentence of Article 3.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance", it should be evident that the consideration of one or more of the three possible price effect factors does not necessarily lead to an affirmative price effects determination. Finally, the price effects inquiry must be conducted with respect to the prices of the domestic like product as a whole, given that Article 3.1 specifies that the inquiry relates to "the effect of the dumped imports on prices in the domestic market for like products".

4. Article 3.4 provides that the investigating authority must examine "the impact of the dumped imports on the domestic industry concerned" and must consider "all relevant economic factors and indices having a bearing on the state of the industry". As Article 3.4 calls for an examination of impact "on the domestic industry concerned", the impact inquiry must be conducted with respect to the domestic industry as a whole. However, to proceed in a logical progression, the impact analysis must proceed on the premise that the segments of the domestic industry producing certain like products with respect to which no volume or price effects have been found have not been impacted by the dumped imports. Article 3.4 also requires an examination of "the explanatory force of subject imports for the state of the domestic industry"[3], for which the magnitude of the margins of dumping and the degrees of the volume and price effects found to exist are highly relevant.

[1] Appellate Body Report, *China – GOES*, para. 127.
[2] Appellate Body Report, *China – GOES*, paras. 127-128.
[3] Appellate Body Report, *China – GOES*, para. 149.

5. Finally, Article 3.5 sets forth the ultimate question that the investigating authority must answer: whether "dumped imports are, through the effects of dumping … causing injury within the meaning of this Agreement". Under Article 3.5, proper volume, price effects, and impact analyses may provisionally reveal causation. That provisional conclusion must then be confirmed through a proper non-attribution analysis.

6. On the factual side, there are three critical sets of relevant facts. First, MOFCOM found no increase in the volume of subject imports, but rather that subject import volumes declined significantly during the period of investigation ("POI"). Second, MOFCOM did not find any effects on the prices of domestic Product A (which accounted for 80%[4] of domestic HP-SSST production during the POI) by imports of Product A or by imports of Products B and C. Third, MOFCOM's 2010 price undercutting conclusion for Product C lacked factual support, because MOFCOM ignored the facts that the price differential in 2010 arose because domestic Product C prices *increased* by 112.80% while imported Product C prices *decreased* by 36.32% between 2009 and 2010, and that domestic Product C gained market share.[5] More fundamentally, MOFCOM never established a competitive relationship between imported and domestic Product C and the available facts suggested that both products were not in competition.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2

7. Under Articles 3.1 and 3.2, an investigating authority must find an actual decrease or prevention of increase in prices in the domestic market for like products by virtue of competition with dumped imports in order to justify imposing anti-dumping duties on subject imports. The considerations of price undercutting, price depression, and price suppression explore all possible ways in which dumped imports may produce a decrease or prevention of increase in domestic prices. As for price undercutting, such a determination cannot be based solely on the existence of a mathematical price difference, but requires the investigating authority to show that dumped imports had the effect of placing some downward pressure on domestic prices by selling at lower prices. But even if the undercutting inquiry reveals some downward pressure on domestic prices, for a proper finding of "price effects", the investigating authority must still find subject imports gave rise to an actual decrease or prevention of increase in domestic prices, examining factors such as the magnitude of the margins of dumping and the extent of the price differential between the dumped imports and the domestic like products.

1. MOFCOM Erred in Its Price Undercutting Conclusion for Product C

8. MOFCOM's 2010 price undercutting conclusion for Product C was flawed because it was based on comparing import prices with a trivial quantity of domestic prices, and because the 2010 price differential arose due to a 112.80% *increase* in domestic prices and a 36.32% *decrease* in import prices relative to 2009, while domestic Product C gained market share.[6]

9. The increase in domestic market share and the increase in domestic prices between 2009 and 2010 demonstrate that imported Product C did not place any downward pressure on domestic Product C prices in 2010 and did not cause an actual decrease or prevention of increase in domestic Product C prices in 2010. Moreover, the trivial quantity of domestic sales, vast difference between import and domestic prices, and inverse price movements between the imported and domestic products should have revealed to MOFCOM that price comparisons could not support a price undercutting conclusion for Product C for 2010. Or, at a minimum, these facts should have revealed that, to reach an objective price undercutting conclusion, MOFCOM had an obligation to establish the competitive relationship between, and accordingly the price comparability of, imported and domestic Product C in 2010 before reaching such a price undercutting conclusion.

10. China now argues that MOFCOM did find that imported and domestic Product C were in competition with one another, and that imports of Product C at undercutting prices prevented domestic producers from selling Product C.[7] However, MOFCOM's consideration of the competition between imported and domestic Product C was done in the context of its "like product"

[4] Japan's first written submission, para. 148.
[5] Final Determination, Exhibit JPN-2, pp. 44, 52-54.
[6] *See* Japan's first written submission, paras. 130-139; Japan's opening statement at the first meeting of the Panel, paras. 63-73.
[7] *See* China's response to Panel question No. 35.

determination.[8] MOFCOM did not, as the Anti-Dumping Agreement requires, separately ensure a competitive relationship between products (and therefore price comparability) before undertaking price comparisons for purposes of a price undercutting determination.[9]

11. Further, even if it were sufficient to support its injury analysis, MOFCOM's like product analysis contains several important shortcomings: (i) MOFCOM did not consider the unanimous statements by the importers that subject imports and domestic like products were not substitutable; (ii) MOFCOM's final determination contains only blanket references to the documents China cites and does not provide any explanation as to how these documents support MOFCOM's conclusion, and moreover, MOFCOM withheld as confidential the entirety of several of these documents; and (iii) the sole piece of evidence that China discusses in relation to the price effect of Product C relates to competition between domestic and imported Product B[10], which is not pertinent to the analysis of Product C.

12. Additionally, China appears to suggest that MOFCOM's conclusion from its causation analysis that "the domestic industry was virtually unable to sell domestically as a 'result' of dumped imports, sold at undercutting prices, holding a very high market share" supported its price undercutting conclusion for Product C.[11] However, MOFCOM's conclusion from its causation analysis cannot support its price effects finding, particularly in the absence of any reference in MOFCOM's price effects analysis to that conclusion.[12] Moreover, MOFCOM's conclusion from its causation analysis was a general conclusion about the domestic industry as a whole and not a specific conclusion about Product C.

13. Finally, even if domestic and imported Product C were in a competitive relationship in 2010 that justified making price comparisons in that year, the facts still do not support proper price undercutting and price effects findings in respect of Product C within the meaning of Articles 3.1 and 3.2. The increase in domestic market share and the vast increase in domestic prices between 2009 and 2010 demonstrate that imported Product C did not place any downward pressure on domestic Product C prices in 2010 and certainly did not cause any actual decrease or prevention of increase in domestic Product C prices in 2010.

2. MOFCOM Erred in Extending Its Price Undercutting Conclusions for Products B and C to the Domestic Like Product as a Whole

14. MOFCOM improperly extended its (flawed) price undercutting conclusions for Products B and C to the domestic like product as a whole.[13] MOFCOM did not find any effects on the prices of domestic Product A (which accounted for almost 80% of domestic HP-SSST production during the POI), yet it reached a general price undercutting conclusion.

15. China now submits that MOFCOM found cross-grade price effects that justified extending its price undercutting conclusions for Products B and C to the domestic like product as a whole[14], because MOFCOM found that Products A, B, and C "belong to the same category of products" and that "the price changes of the three are to a certain extent correlated with one another".[15] However, the discussion in MOFCOM's final determination that China cited, which addresses product scope, does not contain the facts or logic that China now relies upon for its argument. MOFCOM's consideration of price effects also does not cross-reference its earlier product scope findings regarding price correlation.[16] Even if it did implicitly, correlation is not the same as causation. To establish the latter, MOFCOM needed to ensure a competitive relationship between the products, which it failed to do. Finally, even if such a competitive relationship existed, MOFCOM never examined price differentials between any of the imported and domestic grades to determine whether those differentials could have given rise to any price effects on domestic Product A.

[8] *See* China's response to Panel question No. 35, paras. 113-123.
[9] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.66.
[10] *See* China's response to Panel question Nos. 35 and 37, paras. 123 and 127.
[11] *See* China's response to Panel question No. 35, paras. 111-112.
[12] *See* Final Determination, Exhibit JPN-2, pp. 52-57.
[13] *See* Japan's first written submission, paras. 140-153; Japan's opening statement at the first meeting of the Panel, paras. 46-62.
[14] *See* China's response to Panel question Nos. 44, 45, 46, 50.
[15] Final Determination, Exhibit JPN-2, pp. 48-49.
[16] *See* Final Determination, Exhibit JPN-2, pp. 52-57.

C. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4

16. MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) it did not logically progress from MOFCOM's volume and price effects analyses; (ii) MOFCOM failed to evaluate the magnitude of the margin of dumping; (iii) MOFCOM did not provide a thorough and persuasive explanation of why and how the domestic industry's negative indicators outweighed the positive ones; and (iv) MOFCOM did not examine whether subject imports had "explanatory force" for the state of the domestic industry.[17]

17. Japan adds three points to further establish the flaws in MOFCOM's impact analysis. First, MOFCOM found no increase in the volume of dumped imports and no proper price effects in relation to Product A, so MOFCOM should have conducted its impact analysis on the premise that the domestic industry segment producing Product A could not have been impacted by dumped imports, which it failed to do. Second, MOFCOM did not properly find price effects in relation to Product C either, so it also had no basis to consider that dumped imports impacted the domestic industry segment producing Product C. Third, MOFCOM never considered whether the extent of the price undercutting it found to exist for Products B and C or the magnitudes of the dumping margins for Products B and C could have had explanatory force for any of the domestic industry's observed negative indicators.

D. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5

18. MOFCOM's causation analysis was flawed because it did not logically progress from its volume, price effects, and impact analyses, and because it improperly attributed injury to subject imports without separating and distinguishing other known factors.[18]

19. Regarding causation, China submits that Article 3.5, rather than Article 3.2, requires consideration of the relationship between the dumped imports and the domestic industry as a whole. Japan does not agree, but notes that MOFCOM's causation analysis merely reiterated the considerations it made pursuant to its Article 3.2 and Article 3.4 analyses[19], so China's argument lacks factual support.

20. Regarding non-attribution, because MOFCOM's volume, price effects, and impact inquiries did not progress logically, the outcome of MOFCOM's causation inquiry necessarily includes injury to the domestic industry caused by other factors. Moreover, as for MOFCOM's actual non-attribution analysis, MOFCOM conducted it with respect to all grades of HP-SSST taken together, without considering the possibility that other factors may have influenced different segments of the market differently. In this regard, MOFCOM should have conducted distinct non-attribution analyses with regard to Product A on the one hand, and Products B and C on the other. Specifically, with regard to Product A, MOFCOM should have examined whether and how the expansion of domestic production capacity caused injury to the domestic industry, given that the subject imports had no impact on domestic producers of Product A. And with regard to Products B and C, MOFCOM should have considered the effects of the decline in domestic demand.

E. Conclusion Regarding Injury and Causation

21. Thus, the Panel should find MOFCOM's injury and causation determinations are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, and should make findings with respect to each of Japan's claims without exercising judicial economy.

III. MOFCOM Lacked Proper Basis for Its Use of Facts Available to Determine the All Others Rate, Thereby Violating Article 6.8 and Annex II of the Anti-Dumping Agreement

22. Article 6.8 requires that before resorting to facts available, an investigating authority must find that an interested party has refused access to or not provided necessary information, or has significantly impeded the investigation. Article 6.8 incorporates by reference Annex II, entitled

[17] *See* Japan's first written submission, paras. 157-185; Japan's opening statement at the first meeting of the Panel, paras. 74-83.

[18] *See* Japan's first written submission, paras. 186-233; Japan's opening statement at the first meeting of the Panel, paras. 84-104.

[19] *See* Final Determination, Exhibit JPN-2, pp. 65-67.

"Best Information Available in Terms of Paragraph 8 of Article 6". Paragraph 1 of Annex II requires that before resorting to facts available, an investigating authority must "specify in detail the information required from any interested party and the manner in which that information should be structured", and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available". Paragraph 7 of Annex II also provides that facts available must be used with "special circumspection", and that a "less favourable" result may be obtained "if an interested party does not cooperate and thus relevant information is being withheld". "[S]pecial circumspection" means that the "the agency's discretion is not unlimited", and that "the facts to be employed are expected to be the 'best information available'".[20] This means that, "there can be no better information available to be used in the particular circumstances".[21]

23. Here, MOFCOM did not provide the notice required by Paragraph 1 of Annex II through its Initiation Notice or its anti-dumping questionnaire to justify its use of facts available to calculate the all others rate for unknown Japanese exporters. MOFCOM's Initiation Notice requested far less information than required to calculate a dumping margin. And Japan disagrees that MOFCOM's alleged "publication" of the anti-dumping questionnaire on its website satisfied its notice obligations[22], because China's own laws and regulations have no provision for "publish[ing]" questionnaires in an anti-dumping investigation.[23]

24. Further, MOFCOM did not demonstrate the lack of cooperation by those unknown Japanese exporters, as required by Article 6.8.

25. Finally, despite having two dumping margins comparable in quality and relevance, MOFCOM chose to "apply the highest dumping margin found for the Japanese respondents" as the all others rate.[24] MOFCOM's only stated that the reason for doing so was "[o]ut of consideration for a unified approach to determine the rates for other companies".[25] MOFCOM, therefore, did not exercise "special circumspection" in determining the all others rate.

IV. MOFCOM'S DISCLOSURE OF ESSENTIAL FACTS AND NOTICE OF FINAL DETERMINATION DID NOT SATISFY THE REQUIREMENTS OF ARTICLES 6.9, 12.2, AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

A. Panels and the Appellate Body Have Provided Ample Guidance Regarding the Requirements of Articles 6.9, 12.2, and 12.2.2

26. Article 6.9 of the Anti-Dumping Agreement requires the disclosure of "essential facts", meaning "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures".[26] Thus, China is simply wrong when it asserts that Article 6.9 requires disclosure of only "a *summary* of the 'essential facts'".[27] China is also wrong that the "case law does not yet provide conclusive guidance" as to what Article 6.9 requires.[28] To the contrary, the case law – including from *China – GOES*, *China – X-Ray Equipment*, *China – Broiler Products*, and *EC – Salmon (Norway)* – clearly establishes the obligations under Article 6.9 (as well as Articles 12.2 and 12.2.2).

27. Further, Article 12.2 states that, with respect to a final determination, an investigating authority must provide a notice or separate report sufficiently setting out "all issues of fact and law considered material by the investigating authorities". And Article 12.2.2 specifies that the

[20] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[21] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289 (quoting Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166).
[22] *See* China's first written submission, paras. 573, 584, 593.
[23] *See* G/ADP/N/1/CHN/2/Suppl.3 (20 October 2004) and G/ADP/N/1/CHN/2/Suppl.1 (18 February 2003).
[24] Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, p. 19.
[25] Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, p. 19. *See also* Final Determination, Exhibit JPN-2, p. 35.
[26] Appellate Body Report, *China – GOES*, para. 240. *See also* Panel Report, *EC – Salmon (Norway)*, para. 7.796.
[27] China's first written submission, para. 651 (emphasis in original) (quoting Appellate Body Report, *China – GOES*, para. 249).
[28] China's first written submission, para. 654.

investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".

28. Finally, where confidentiality is a concern, the disclosure obligations under Articles 6.9, 12.2, and 12.2.2 "should be met by disclosing non-confidential summaries".[29]

B. MOFCOM Violated Article 6.9 with Respect to the Dumping Margins for SMI and Kobe

29. MOFCOM violated Article 6.9 of the Anti-Dumping Agreement because it failed to disclose the data and calculation methodologies used to determine the existence of dumping and the dumping margins for Sumitomo Metal Industries, Ltd. ("SMI") and Kobe Special Tube Co., Ltd. ("Kobe"), which are properly "essential facts".[30] China submits that Japan's claims are only "general allegations" and "not substantiated"[31], but Japan fails to see how it could further substantiate a claim that certain "essential facts" are *missing* from MOFCOM's disclosure documents.[32] China also argues that MOFCOM's disclosure documents included all of the necessary "essential facts"[33], but China only reiterates the brief narrative descriptions that MOFCOM provided in its disclosure documents, which were insufficient. Further, China asserts that the interested parties should have been able to fully understand their own dumping margin determinations in order to defend their interests from the brief narrative summaries that MOFCOM provided and, presumably, each party's own data submissions to MOFCOM.[34] However, this information does not permit each party to understand which data MOFCOM used to determine that party's dumping margin and to comment on that determination so as to defend its interests.[35]

C. MOFCOM Violated Articles 6.9, 12.2, and 12.2.2 with Respect to the Dumping Margin for All Other Japanese Companies

30. MOFCOM violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement by failing to disclose: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate for unknown Japanese exporters; and (ii) the particular facts that were used to determine the all others rate itself, including the facts underpinning the dumping margin for Kobe that MOFCOM used as the all others rate and the facts that justified using Kobe's dumping margin for the all others rate.[36]

31. With regard to the facts leading to the use of "facts available", MOFCOM never made a finding of non-cooperation with respect to the unknown Japanese exporters to which it applied the all others rate, let alone disclosed the facts that may have supported such a finding, whether in its disclosure documents or final determination.

32. With regard to the facts used to determine the all others rate, MOFCOM stated that it equated the all others rate with the highest rate determined for an investigated respondent, which was Kobe's rate.[37] However, MOFCOM failed to disclose all the "essential facts" used to determine Kobe's rate, so MOFCOM also failed to disclose all the "essential facts" used to determine the all others rate.

33. Additionally with regard to the facts used to determine the all others rate, an investigating authority must use the "best information available" and "special circumspection", and may not resort to "adverse inferences". The facts underpinning MOFCOM's determination that the highest dumping margin for an investigated respondent was the "best information available" for determining the all others rate are therefore "essential" or "material" facts that must be disclosed. MOFCOM's analysis of those facts to reach the conclusion that the highest dumping margin was the "best information available" also arguably constituted reasoning that required disclosure pursuant

[29] Appellate Body Report, *China – GOES*, paras. 247, 259.
[30] *See* Japan's first written submission, paras. 290-297. *See also* Japan's response to Panel question No. 71.
[31] China's first written submission, para. 666.
[32] *See* Japan's first written submission, paras. 290-297.
[33] China's first written submission, paras. 669-673.
[34] China's first written submission, paras. 674-676.
[35] *See* Panel Report, *Guatemala – Cement II*, para. 8.229.
[36] *See* Japan's first written submission, paras. 307-319.
[37] *See* Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, Section III.2.

to Article 12.2.2.[38] But MOFCOM never disclosed the facts or reasoning behind why the highest calculated dumping margin was the "best information available" for determining the all others rate.

D. MOFCOM Violated Articles 6.9, 12.2, and 12.2.2 with Respect to the Import Prices and Domestic Prices Used in the Injury and Causation Analyses

34. MOFCOM violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement by failing to disclose several pieces of information critical to its price effects determination, which served as the basis for MOFCOM's ultimate injury and causation determinations. China tries to justify those failures, but those justifications are without merit. First, for those instances for which no price comparisons were made or no price undercutting was found, China argues the missing price and price differential information did not constitute "essential facts" that required disclosure.[39] However, the missing information was certainly "salient for a contrary outcome"[40] and "considered [by MOFCOM in its] process of analysis and decision-making"[41], and therefore required disclosure. Second, China argues that some of the missing price information was confidential[42], but MOFCOM had an obligation to disclose sufficiently detailed non-confidential summaries in a coherent way to permit interested parties to defend their interests.[43] Third, China argues that the -3% to -28% range of underselling that MOFCOM disclosed for Product B for the entire 2008 to 2010 period was sufficient,[44] but MOFCOM should have been able to disclose a separate underselling margin for Product B for each year. Finally, China argues that how MOFCOM accommodated important "quantitative differences" was a methodological question that did not require disclosure[45], but MOFCOM had an obligation to disclose the facts that constituted the "quantitative difference" and the reasons why MOFCOM could take this into account.

V. MOFCOM Lacked Good Cause for Withholding Confidential Information, and Did Not Require Sufficient Non-Confidential Summaries or Explanations as to Why Such Summaries Are Not Possible, Inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

A. MOFCOM Violated Article 6.5 of the Anti-Dumping Agreement

35. China violated Article 6.5 of the Anti-Dumping Agreement because Petitioners did not demonstrate "good cause", and MOFCOM did not objectively examine Petitioners' attempted demonstrations of "good cause", with respect to the confidential treatment of Appendices V and VIII to the Petition, Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012, and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012.

36. China argues that an investigating authority "enjoys a considerable margin of discretion in its examination of a request for confidential treatment and determining whether 'good cause' has been shown, provided the outcome is not unreasonable".[46] However, notwithstanding an investigating authority's discretion, it still "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".[47] Here, beyond the name of the third party providing Appendix V to the Petition, MOFCOM failed to scrutinize Petitioners' confidentiality requests to determine objectively whether Petitioners had established "good cause" for treating the four reports at issue as entirely confidential.

37. China also asserts that "Petitioners did not only request confidential treatment out of concern for the impact on the third parties' businesses", but "provided several other reasons" for

[38] *See* Panel Report, *China – X-Ray Equipment*, para. 7.472. *See also* Panel Report, *China – Broiler Products*, para. 7.528.
[39] China's first written submission, para. 686. *See also* China's response to Panel question No. 75, para. 191.
[40] Appellate Body Report, *China – GOES*, para. 240.
[41] Panel Report, *EC – Salmon (Norway)*, para. 7.796.
[42] China's fist written submission, para. 686.
[43] Appellate Body Report, *China – GOES*, paras. 240, 247, 259.
[44] China's first written submission, paras. 685-686. *See also* China's response to Panel question Nos. 72, 75, 76, 77.
[45] China's first written submission, para. 693.
[46] China's first written submission, para. 725.
[47] Appellate Body Report, *EC – Fasteners (China)*, para. 539.

doing so.[48] However, China cited no underlying documents submitted by Petitioners to support its assertions; none of China's points serve as evidence of efforts by MOFCOM during the investigation to scrutinize Petitioners' confidentiality requests; some of the alleged other reasons simply reiterate concerns regarding the third parties' businesses; and the facts that the reports were obtained by Petitioners for remuneration or that confidentiality was requested by third parties cannot automatically constitute "good cause" under Article 6.5.

38. Finally, China argues that the four reports at issue were also "by nature" confidential.[49] But even if true, that would not absolve MOFCOM of its obligation to scrutinize Petitioners' confidentiality requests and to objectively determine that "good cause" exists for treating the full texts of these four reports as confidential before doing so.

B. MOFCOM Violated Article 6.5.1 of the Anti-Dumping Agreement

39. China violated Article 6.5.1 of the Anti-Dumping Agreement because Petitioners did not furnish sufficient non-confidential summaries or any statements as to why such summaries were not possible, and MOFCOM failed to require such summaries or statements, with respect to several documents submitted by Petitioners.[50] China argues that Petitioners' non-confidential summaries of Appendices V and VIII to the Petition, Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012, and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012 were sufficient.[51] China further argues that Petitioners provided statements as to why summarization is not possible with respect to Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, and 58 to Petitioners' Supplemental Evidence of 1 March 2012[52], or, alternatively, that Petitioners provided sufficient non-confidential summaries of these Appendices.[53]

40. With respect to the first group of documents, China's contention that the non-confidential summaries of these reports were sufficient is erroneous, as Japan has separately argued.[54] With respect to the second group of documents, even if the short statements that Petitioners provided justify confidential treatment, they are not statements as to why summarization is not possible, and they are not sufficient non-confidential summaries because they do not summarize the "*substantive content*" of those appendices.[55]

VI. CHINA APPLIED PROVISIONAL MEASURES FOR A PERIOD EXCEEDING FOUR MONTHS, THEREBY VIOLATING ARTICLE 7.4 OF THE ANTI-DUMPING AGREEMENT

41. China has not attempted to rebut Japan's claim that China violated Article 7.4 of the Anti-Dumping Agreement by applying provisional anti-dumping measures for a period of six months, so Japan considers that there is no dispute in this regard.

VII. CONCLUSION

42. For the foregoing reasons and those set forth in Japan's previous written and oral submissions in this dispute, Japan maintains its request that the Panel find China's measures at issue to be inconsistent with China's obligations under the GATT 1994 and Anti-Dumping Agreement, and recommend that China bring its measures into conformity with those obligations pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[48] China's first written submission, para. 728.
[49] China's first written submission, para. 732.
[50] *See* Japan's first written submission, paras. 265-289.
[51] China's first written submission, paras. 742-746, 757-763.
[52] China's first written submission, paras. 747, 764-767.
[53] *See* China's first written submission, note 791.
[54] *See* Japan's responses to Panel question Nos. 68 and 69.
[55] Panel Report, *China – X-Ray Equipment*, para. 7.342. (emphasis added)

ANNEX B-3

EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN AT THE FIRST PANEL MEETING

I. INTRODUCTION

1. This dispute concerns the measures taken by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan. These measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH CHINA'S ANTI-DUMPING AGREEMENT OBLIGATIONS

2. Despite MOFCOM's limited disclosures, it is evident that MOFCOM's injury and causation determinations violate the Anti-Dumping Agreement and GATT 1994.

A. Description of the Subject Imports and Domestic Like Product

3. There are three grades of subject products in increasing order of price and quality: Products A, B, and C. MOFCOM found the domestic like product to consist of all three grades[1], but that does not mean that differences in price and quality among the grades are not relevant in the injury and causation analysis.[2] Importantly, during the period of investigation ("POI"), virtually 100% of subject imports were of Products B and C – the ultra-supercritical products – while only about 20% of domestic HP-SSST products consisted of Products B and C. Thus, the overwhelming majority (about 80%) of the domestic like products consisted of Product A – the supercritical product.[3] In short, subject imports supplied a different segment of the market than the bulk of the domestic like products, so did not compete with the bulk of those products.

B. Legal Requirements for an Affirmative Injury and Causation Determination

4. Pursuant to Article 3 of the Anti-Dumping Agreement and the Appellate Body's guidance, an affirmative injury and causation determination requires: (i) a significant increase in the volume of dumped imports and/or an effect of dumped imports on prices in the domestic market for like products; (ii) a consequent impact of these dumped imports on domestic producers of such products; and (iii) a finding that injury to the domestic industry was caused by the dumped imports, and not by other known factors. In order for the inquiry to progress logically and ultimately lead to the imposition of antidumping duties on the entirety of dumped imports subject to investigation, each subsequent step of the analysis must logically connect with the preceding steps of the analysis.[4]

C. Summary of MOFCOM's Injury and Causation Determinations

5. With regard to volume, MOFCOM found subject import volumes declined significantly during the POI on all measures. With regard to price effects, MOFCOM found only price undercutting with respect to Products B and C, and on that basis concluded that "in general, … [t]he imports of the subject products had a relatively noticeable price undercutting effect on the price of domestic like products". With regard to impact, MOFCOM conducted its analysis with respect to the domestic industry as a whole, and although it found a mix of positive and negative indicators, it concluded that the domestic industry was materially injured. Finally, MOFCOM reached an affirmative causation determination on the basis of: (i) the high market share of imports; (ii) the price undercutting conclusions with respect to Products B and C; and (iii) the

[1] Final Determination, Exhibit JPN-2, pp. 23-28.
[2] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.50-7.51, 7.65.
[3] *See* Japan's first written submission, para. 54, Table 4, and para. 148.
[4] *See* Appellate Body Report, *China – GOES*, para. 128.

impact conclusion with respect to the domestic industry as a whole. MOFCOM also concluded that other known factors did not break the causal link between dumped imports and injury to the domestic industry.[5]

D. Inconsistency of MOFCOM's Injury and Causation Determinations with the Anti-Dumping Agreement

1. Summary of Japan's Arguments

6. Japan's particular arguments are set forth in its first written submission.[6]

2. Response to China's Arguments

7. Next, Japan explains why China has failed to rebut Japan's *prima facie* case that MOFCOM's injury and causation determinations are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. At the outset, Japan notes that China misinterprets the "positive evidence" obligation of Article 3.1 as being an obligation that relates to only "the quality of the evidence".[7] To the contrary, this obligation relates to not only the quality of the evidence, but also the *existence* and *pertinence* of that evidence. Here, in several instances, MOFCOM failed to support its determinations with any evidence or with pertinent evidence, let alone quality evidence, for which reason the Panel should find MOFCOM's injury and causation determinations to be inconsistent with Article 3.1.

a. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

8. Regarding Japan's argument that MOFCOM improperly reached the conclusion that subject imports had a price undercutting effect on the domestic like product as a whole, first, in China's view, the comparison must focus on the prices of the dumped imports, meaning the relevant consideration is MOFCOM's apparent finding that 70% or even 100% of dumped imports were sold at undercutting prices.[8] However, the Anti-Dumping Agreement and the Appellate Body make clear that the focus of the Article 3.2 price effects inquiry is not only on the prices of subject imports, but also on the prices of domestic like products, as well as the relationship between the two.[9] Thus, to determine whether price undercutting existed, and to justify the subsequent conclusions that MOFCOM reached regarding injury and causation to the domestic industry as a whole, MOFCOM had an obligation to consider the extent to which the subject imports it found to be sold at lower prices may have had an effect on prices in the domestic market for like products. Since MOFCOM found no price undercutting for Product A, which accounted for about 80% of domestic production, and which did not compete with Products B and C, MOFCOM had no basis to find price effects pursuant to Articles 3.1 and 3.2 with respect to the domestic market for like products.

9. Second, China justifies basing its price effects conclusion on finding price undercutting for only about 20% of the domestic like product by invoking the fact that the second sentence of Article 3.2 uses the term "a like product", instead of "the like product".[10] However, Article 3.1, which specifies the "essential components"[11] of the analysis, specifies the requirement for an investigating authority to determine "the effect of the dumped imports on prices in *the* domestic market for like products"[12], meaning the like product as a whole.

10. Third, China suggests that MOFCOM found imports of Products B and C caused effects on domestic prices of Product A based on the fact that Products A, B and C "belong to the same category of products" (i.e., are the domestic "like product"), as well as Petitioners' statement

[5] *See* Final Determination, Exhibit JPN-2, pp. 43-77.
[6] *See* Japan's first written submission, paras. 122-234. Japan clarifies that, notwithstanding the title of Section V.A.1.b.ii of its first written submission, Japan's argument in that section is in fact that MOFCOM improperly extended the price effects conclusion it made for only a portion of the domestic like product, as defined by MOFCOM, to *the domestic like product as a whole*.
[7] China's first written submission, paras. 234-235.
[8] China's first written submission, paras. 338-341.
[9] *See* Appellate Body Report, *China – GOES*, paras. 127-128, 138, 147, 154.
[10] China's first written submission, paras. 347-351.
[11] Appellate Body Report, *China – GOES*, para. 127.
[12] Emphasis added.

regarding "correlation" between the prices of Products A, B and C.[13] However, to find cross-grade price effects merely based on a "like product" determination and Petitioners' unverified statement is not a finding based on "positive evidence" and an "objective examination"[14], especially given record evidence showing the lack of competition between Product A and Products B and C. And even if a correlation were proved, that does not establish that price movements of one product caused price movements of the other products.

11. Regarding Japan's argument that MOFCOM's price undercutting conclusion for Product C was analytically and factually flawed, first, China argues that a price undercutting finding may be based solely on the factual difference between import and domestic prices, without considering the "effect" of imports.[15] This is incorrect. Under a proper reading of Articles 3.1 and 3.2, consideration of the "effect" of imports (i.e., the "explanatory force" of imports)[16] is relevant for not only price suppression and depression, but also undercutting. Thus, an inquiry into "price undercutting by the dumped imports" requires assessing whether dumped imports are having the *effect* of taking the place of domestic like products by selling at lower prices or of rendering domestic prices less firm[17], and not just of whether dumped imports are mathematically priced lower. Here, given the facts, including the opposite trends in price and volume of imported and domestic Product C[18], MOFCOM's price undercutting conclusion for Product C is clearly not objective or based on positive evidence.

12. Second, China argues that the "similar quantitative difference" of greater than 99% import market share for Product C in 2009 and 2010 justifies price comparisons, and ultimately a price undercutting conclusion, for Product C for those two years.[19] Japan fails to see how, without a meaningful quantity of both import and domestic sales, any objective price undercutting conclusion could be reached with respect to a particular product.

b. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. Regarding Japan's argument that MOFCOM's impact analysis did not logically progress from its volume and price effects analyses, China submits Article 3.4 requires an impact analysis with respect to the domestic industry as a whole.[20] However, the successive provisions of Article 3 "contemplate a logical progression of inquiry"[21], and Article 3.4 is concerned with "the relationship between subject imports and the state of the domestic industry".[22] Here, MOFCOM was required to ensure a logical progression from its volume and price effects findings to its impact and causation analyses, which it failed to do.

14. Regarding Japan's argument that MOFCOM failed to evaluate the magnitude of the margin of dumping, China argues that Article 3.4 does not require such an evaluation[23], but China is wrong.[24] Moreover, MOFCOM evaluated the magnitude of the margin of dumping only in deciding if cumulation was appropriate, not in its injury assessment[25], and so erred.

15. Regarding Japan's argument that MOFCOM did not provide a thorough and persuasive explanation of why and how the domestic industry's negative indicators outweighed the positive

[13] China's first written submission, paras. 365-367.
[14] *See* Panel Report, *China – X-Ray Equipment*, para. 7.65.
[15] China's first written submission, paras. 285-299.
[16] *See, e.g.*, Appellate Body Report, *China – GOES*, paras. 138, 149.
[17] *See The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 30 January 2014, http://www.oed.com/view/Entry/211547 (defining "undercut" as "[t]o supplant … by selling at lower prices" or "[t]o render unstable; to render less firm, to undermine").
[18] Notably, in 2009, imported Product C prices were *above* domestic Product C prices by 10%, and imported Product C prices ended up being below domestic Product C prices in 2010 by about 50% because domestic prices *increased* by 112.80% while import prices *decreased* by 36.32%. *See* Japan's first written submission, paras. 133-135.
[19] China's first written submission, paras. 267-281.
[20] China's first written submission, paras. 390-391, 393-400.
[21] Appellate Body Report, *China – GOES*, para. 128.
[22] Appellate Body Report, *China – GOES*, para. 149.
[23] China's first written submission, para. 424.
[24] *See* Panel Report, *China – X-Ray Equipment*, para. 7.183.
[25] *See* China's first written submission, para. 426 (citing Final Determination, Exhibit JPN-2, pp. 41-42).

ones, China wrongly asserts that it undertook the requisite evaluation.[26] Rather, MOFCOM simply restated its factual conclusions regarding each factor, and juxtaposed those factual conclusions using a variety of transitional terms.[27]

16. Regarding Japan's argument that MOFCOM did not examine whether subject imports had explanatory force for the state of the domestic industry, very little[28] is needed to establish that MOFCOM simply failed to undertake this requisite inquiry.[29]

c. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

17. Regarding Japan's argument that MOFCOM's causation analysis did not logically progress from its volume, price effects, and impact analyses, China argues it was permitted to consider the subject imports' high market share in its causation analysis.[30] However, Article 3.5 requires causation to be based on the particular effects of dumping specified in Articles 3.2 and 3.4, which with respect to volume require "a significant increase in dumped imports". Articles 3.5 also requires "an examination of all relevant evidence", which must include the sharp decline in import volumes found by MOFCOM. As for the link between MOFCOM's price effects and impact conclusions and its causation determination, the flaws in those conclusions already discussed also undermine MOFCOM's causation determination.[31]

18. Regarding Japan's argument that MOFCOM improperly attributed injury to subject imports, and not to other known factors, MOFCOM did not properly "separate and distinguish":[32] (i) the decline in domestic demand; and (ii) the expansion of domestic production capacity. With respect to Products B and C, there is no contradiction in Japan's argument,[33] because it is undeniable that domestic demand for these products decreased significantly during the POI, which caused significant decreases in import volume and domestic sales volume, as well as prices.[34] Thus, whatever injury the approximately 20% of the domestic industry producing Products B and C may have been suffering was evidently the result of a significant decrease in domestic demand. As for Product A, there were only trivial imports of Product A during the POI[35], and MOFCOM never found volume or price effects on the domestic industry with respect to Product A. Thus, MOFCOM should have presupposed that injury to the 80% of the domestic industry producing Product A should be attributed to factors other than dumped imports. Here, that other factor was evidently the known expansion of domestic production capacity. China has presented no arguments that dismiss the role of capacity expansion as a non-attribution factor.[36]

III. MOFCOM VIOLATED SEVERAL PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AGREEMENT

19. China violated its procedural obligations with respect to: (i) the disclosure of essential facts; (ii) the notice provided with MOFCOM's final determination; (iii) the determination of the all others rate; (iv) the treatment of confidential information; and (v) the application of provisional measures. China's arguments in its FWS cannot overturn this conclusion.

IV. TRANSLATION ISSUES

20. With regard to translation issues, none of China's objections has any impact on Japan's claims and arguments. Japan's views on China's alternative translations are expressed in Exhibit JPN-29 submitted to the Panel on February 18.

[26] China's first written submission, paras. 447-453.
[27] *See* Final Determination, Exhibit JPN-2, p. 63.
[28] *See* China's first written submission, para. 460.
[29] *See* Appellate Body Report, *China – GOES*, para. 149.
[30] China's first written submission, para. 516.
[31] *See* Panel Report, *China – X-Ray Equipment*, para. 7.239.
[32] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[33] *See* China's first written submission, para. 550.
[34] *See* Japan's first written submission, para. 54, Table 4, and para. 57, Table 5.
[35] *See* Japan's first written submission, para. 54, Table 4.
[36] *See* China's first written submission, paras. 557-561.

V. CONCLUSION

21. Japan respectfully requests the Panel to find that China's measures are inconsistent with the GATT 1994 and Anti-Dumping Agreement. Moreover, Japan respectfully requests the Panel to make findings with respect to each of Japan's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy.

ANNEX B-4

EXECUTIVE SUMMARY OF THE STATEMENTS OF JAPAN AT THE SECOND PANEL MEETING

I. INTRODUCTION

1. Japan has already established why the measures by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). In the oral statement we review the principal issues at stake in this dispute, and address the few new points by China that merit response.

II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH CHINA'S ANTI-DUMPING AGREEMENT OBLIGATIONS

A. Overview of Key Facts Related to Injury and Causation

2. There are three sets of critical facts pertaining to injury and causation.[1] First, MOFCOM found no increase in the volume of subject imports, but rather a significant decreasing trend during the period of investigation ("POI"). Second, MOFCOM found no price effects on Product A, which accounted for almost 80% of domestic HP-SSST production during the POI, yet reached a general price effects conclusion for the domestic like product as a whole. Third, MOFCOM found price undercutting for Product C in 2010, despite several facts indicating that there was no competitive relationship between imported and domestic Product C that could justify making price comparisons, and thus that imports of Product C could not actually be having an effect on prices of domestic Product C.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

1. Legal Requirements for a Price Effects Finding

3. As for the legal requirements for price effects[2], to begin, "price undercutting" cannot be found based on a mathematical price difference alone; rather, it requires a showing that dumped imports had an effect of placing downward pressure on domestic prices by selling at lower prices. A competitive relationship between the dumped imports and domestic like products whose prices are being compared is critical for finding "price undercutting".

4. That said, Articles 3.1 and 3.2 require an investigating authority to determine whether *price effects* exist. Under Article 3.2, price undercutting, price depression, and price suppression are three factors to be considered, but "[n]o one or several of these factors can necessarily give decisive guidance". As such, a "price undercutting" finding may provide guidance for determining whether price effects exist, but it is not sufficient. The United States concurs.[3] Thus, even if "price undercutting" is found, *price effects* cannot be found unless dumped imports gave rise to an actual decrease or prevention of increase in prices in the domestic market for like products. This requires an investigating authority to find both a price differential and degree of competition between the dumped imports and domestic like products, and also consider other relevant factors.

5. Finally, Articles 3.1 and 3.2 require an investigating authority to determine "the effect of the dumped imports on prices *in the domestic market for like products*".[4] This is plainly a reference to the entire domestic market, meaning that the price effects to be found at this stage of the inquiry must be with respect to the domestic like product as a whole.

[1] *See* Japan's second written submission, paras. 12-16.
[2] *See* Japan's second written submission, paras. 17-28.
[3] United States' response to Panel question No. 7, paras. 19-20.
[4] Emphasis added.

2. MOFCOM Improperly Found Price Effects for Product C

6. On MOFCOM's price effects finding for Product C, the record evidence does not support a price undercutting or price effects conclusion for Product C; rather, it indicates that there was no competitive relationship between imported and domestic Product C.[5]

7. China argues that because Japan has not challenged MOFCOM's "like" product finding under Article 2.6 of the Anti-Dumping Agreement, it is precluded from raising a lack of competitive relationship between imported and domestic Product C under Articles 3.1 and 3.2.[6] However, China ignores *China – X-Ray Equipment*, where the panel distinguished between the competitiveness considerations under Article 2.6 and Article 3.2.[7] Importantly, "like" products – or even sub-groupings of "like" products – do not always compete with one another in the actual market, so a complainant may raise competitive relationships and price comparability for a price undercutting analysis under Article 3.2 without challenging likeness under Article 2.6. Here, for Product C, the trivial quantity of domestic sales, vast difference between import and domestic prices, inverse price movements between imported and domestic products, and unanimous statements of domestic importers as to a lack of substitutability between imported and domestic products should have revealed that domestic and imported Product C were not in fact in a competitive relationship, and therefore their prices were not in fact comparable, for purposes of finding price undercutting for Product C.

8. China also argues that it found a competitive relationship between imported and domestic Product C sufficient to support its price undercutting determination for Product C.[8] As Japan has explained: (i) MOFCOM's consideration of the competitive relationship was in the context of its "like product" determination, and therefore inapposite; (ii) MOFCOM never considered the unanimous statements by importers that subject imports and domestic like products were not substitutable; (iii) MOFCOM never explained how any of the documents China references actually support its conclusion, and withheld several of these documents as entirely confidential; and (iv) the particular evidence and conclusions that China references are not specific to Product C.[9] China now quotes one importer as stating that it did not buy domestic products in 2010 because "the price of imports was more competitive"[10], but this importer clearly intended to state that imported and domestic products were not commercially substitutable in the actual market.[11] Without some evidence of the actual degree of competition between imported and domestic Product C, MOFCOM could not have objectively found that the price differential it observed between imported and domestic Product C in 2010 could have actually had effects on prices of domestic Product C.

3. MOFCOM Improperly Extended Its Price Effects Conclusions for Products B and C to the Domestic Like Product as a Whole

9. MOFCOM improperly extended the price effects conclusions it reached for Products B and C to the domestic like product as a whole.[12] China attempts to justify MOFCOM's conclusion by reference to: (i) MOFCOM's apparent finding of a price correlation between the different HP-SSST grades; and (ii) alleged evidence of the substitutability of Product A by Products B and C.[13] Japan finds it difficult to understand how *higher* priced imports of Products B and C could have price *undercutting* effects on *lower* priced domestic Product A.

10. On China's first point, as explained[14], MOFCOM's brief analysis came in its scope determination, and moreover, correlation itself does not establish that lower prices of imported Products B and C pushed down prices of domestic Product A. As for Petitioners' assertion that a

[5] *See* Japan's first written submission, paras. 130-139; Japan's opening statement at the first meeting of the Panel, paras. 63-73; Japan's second written submission, paras. 30-37.
[6] *See* China's second written submission, paras. 97-104.
[7] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.67.
[8] *See* China's second written submission, paras. 105-115.
[9] *See* Japan's second written submission, paras. 33-37.
[10] China's second written submission, para. 114 (quoting Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, p. 3).
[11] Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, questions 19, 22.
[12] *See* Japan's first written submission, paras. 140-153; Japan's opening statement at the first meeting of the Panel, paras. 46-62; Japan's second written submission, paras. 38-46.
[13] *See* China's second written submission, paras. 138-156.
[14] *See* Japan's second written submission, paras. 39-42.

decrease in Product B and C prices "will certainly drive down" Product A prices[15], this assertion makes little sense because Product A can perform reliably in supercritical boilers but not ultrasupercritical boilers, while Products B and C are essential for ultrasupercritical boilers[16], so there is a technical dichotomy between these products.

11. On China's second point of substitutability, MOFCOM never addressed this issue in its price effects analysis, and even if it found substitutability, it never examined the degree of substitutability and the extent of the price differential between Product A and Products B and C in its determination. China's reference to evidence that Products B and C could substitute for Product A[17] is misleading, because it plainly served to establish that lower-grade Product A could not physically substitute for higher-grade Products B and C in ultrasupercritical boilers; it did not establish actual *commercial substitutability*.

12. Japan emphasized that such an argument is rather an ex post rationalization.[18] China's position on the requirements under Article 3.2 naturally suggests that MOFCOM considers that it is not obligated to find either a volume effect or a price effect of the dumped imports on domestically produced Product A. Thus, it is doubtful that MOFCOM did engage in the inquiry of the effect of the dumped imports on domestically produced Product A while MOFCOM considered it non-obligatory. We are aware that China submits that MOFCOM can rely on its finding in the scope analysis later in its price effect analysis.[19] Japan agrees an investigating authority can rely on its finding in a prior part of its determination. It is obvious, however, that such a reliance on a prior finding should have been explicitly mentioned in the relevant part of the Final Determination, in light of the requirement for an objective examination based on positive evidence under the Anti-Dumping Agreement. China's ex post rationalization cannot cure deficiencies in MOFCOM's original Final Determination.

C. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. MOFCOM's impact analysis violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) it did not logically progress from MOFCOM's volume and price effects analyses; (ii) MOFCOM failed to evaluate the magnitude of the margin of dumping; (iii) MOFCOM did not adequately explain why and how the domestic industry's negative indicators outweighed the positive ones; and (iv) MOFCOM did not examine whether subject imports had "explanatory force" for the state of the domestic industry.[20] Japan already rebutted much of what China argues on this topic.[21] China's view that Article 3.4 does not require a separate evaluation of "factors affecting domestic prices" and "the magnitude of the margin of dumping"[22] is not consistent with a Vienna Convention interpretation of Article 3.4, because it fails to address why Article 3.4 explicitly references these factors. Rather, Article 3.4 requires examination of "the explanatory force of subject imports for the state of the domestic industry"[23], and for this purpose, examination of the "factors affecting domestic prices" and "the magnitude of the margin of dumping" is highly pertinent.

D. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

14. MOFCOM's causation analysis violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it did not logically progress from its volume, price effects, and impact analyses, and because MOFCOM improperly attributed injury to subject imports without separating and distinguishing other known factors.[24] Again, Japan already rebutted much of what China argues on

[15] *See* China's second written submission, para. 140 (quoting Final Determination, Exhibit JPN-2, p. 48).
[16] *See* Japan's opening statement at the first meeting of the Panel, para. 8.
[17] *See* China's second written submission, paras. 143-150.
[18] *See* Japan's closing statement at the first meeting of the Panel.
[19] Ibid., para. 12.
[20] *See* Japan's first written submission, paras. 157-185; Japan's opening statement at the first meeting of the Panel, paras. 74-83; Japan's second written submission, paras. 50-53.
[21] *See* China's second written submission, paras. 168-206.
[22] *See* China's second written submission, paras. 182-188.
[23] Appellate Body Report, *China – GOES*, para. 149.
[24] *See* Japan's first written submission, paras. 186-233; Japan's opening statement at the first meeting of the Panel, paras. 84-104; Japan's second written submission, paras. 56-61.

this topic.[25] On non-attribution, China now argues that Article 3.5 requires an investigating authority to provide only "reasonable explanations as to why the injurious effects of certain factors are not sufficient to break the causal link".[26] However, in *US – Hot-Rolled Steel*, the Appellate Body made clear that an investigating authority must identify the "nature and extent" of the injurious effects of the non-attribution factor and the dumped imports, and distinguish the two.[27] Here, different factors were at work in different segments of the domestic HP-SSST market, yet MOFCOM failed to consider any possibility that this was the case. For Product A, increasing domestic demand combined with decreasing domestic prices indicated a typical oversupply situation, where an expansion of domestic production capacity surely contributed to the domestic industry's injury. For Products B and C, there is no dispute that domestic demand declined sharply, which also contributed to the domestic industry's injury. Yet MOFCOM failed to separate and distinguish the injurious effects of these non-attribution factors in the different segments of the market.

III. MOFCOM VIOLATED SEVERAL PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AGREEMENT

A. MOFCOM's Use of Facts Available to Determine the All Others Rate Violated Article 6.8 and Annex II of the Anti-Dumping Agreement

15. MOFCOM's use of facts available to determine the all others rate for unknown Japanese exporters violated Article 6.8 and Annex II of the Anti-Dumping Agreement for three reasons:[28] (i) MOFCOM failed to provide the requisite notice before using facts available; (ii) MOFCOM did not demonstrate the lack of cooperation by unknown Japanese exporters before using facts available; and (iii) MOFCOM failed to use the "best information available" and exercise "special circumspection".

B. MOFCOM's Disclosure of Essential Facts and Notice of Final Determination Violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement

16. MOFCOM's disclosure of essential facts and notice of final determination are inconsistent with Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement in three respects. First, MOFCOM violated Article 6.9 because it failed to disclose the data and calculation methodologies used to determine the existence of dumping and the dumping margins for SMI and Kobe.[29] Second, MOFCOM violated Articles 6.9, 12.2, and 12.2.2 by failing to disclose, in connection with its determination of the all others rate: (i) the facts justifying the use of "facts available"; (ii) the data and calculation methodologies underpinning the dumping margin for Kobe, which MOFCOM used as the all others rate; and (iii) the facts justifying the use of the highest dumping margin for an investigated respondent as the all others rate.[30] Third, MOFCOM violated Articles 6.9, 12.2, and 12.2.2 by failing to disclose several pieces of information regarding import prices and domestic prices critical to its price effects determination.[31]

C. MOFCOM's Treatment of Confidential Information Violated Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

17. As for MOFCOM's treatment of confidential information: first, MOFCOM violated Article 6.5 of the Anti-Dumping Agreement because Petitioners did not demonstrate "good cause", and MOFCOM did not objectively examine Petitioners' attempted demonstrations of "good cause", with respect to the confidential treatment of the full texts of four appendices submitted by Petitioners; and second, China violated Article 6.5.1 of the Anti-Dumping Agreement because Petitioners did not furnish sufficient non-confidential summaries or any statements as to why such summaries were not possible, and MOFCOM failed to require such summaries or statements, with respect to

[25] *See* China's second written submission, paras. 207-242.
[26] China's second written submission, para. 229.
[27] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[28] *See* Japan's first written submission, paras. 302-306; Japan's second written submission, paras. 63-81.
[29] *See* Japan's first written submission, paras. 290-297; Japan's second written submission, paras. 89-95.
[30] *See* Japan's first written submission, paras. 307-319; Japan's second written submission, paras. 96-104.
[31] *See* Japan's first written submission, paras. 235-264; Japan's second written submission, paras. 105-113.

several documents submitted by Petitioners.[32] Furthermore, China stated that in its first written submission, it explained that the Petitioners provided "good cause" for the confidential treatment of the four appendices, but such explanation cannot be found in any document on the record including the Final Determination. Japan thus presented a prima facie case that China failed to scrutinize whether the confidentiality request shows "good cause" at the time of the investigation. It is incumbent on China to rebut this prima facie case by presenting evidence that MOFCOM did scrutinize confidential requests by Petitioners in a manner argued by China, but China has not done so.

D. China's Application of Provisional Measures for a Period Exceeding Four Months Violated Article 7.4 of the Anti-Dumping Agreement

18. Finally, China has not objected to Japan's claim that China violated Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for more than four months.

IV. CONCLUSION

19. Japan maintains that China's measures are inconsistent with its obligations under the GATT 1994 and the Anti-Dumping Agreement. Japan respectfully requests that the Panel make findings with respect to *each* of Japan's claims under the GATT 1994 and the Anti-Dumping Agreement, including each claim under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy as to any of Japan's claims.

[32] *See* Japan's first written submission, paras. 265-289; Japan's second written submission, paras. 114-134.

ANNEX B-5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION AND GENERAL FACTUAL BACKGROUND

1. The present dispute concerns China's measures imposing anti-dumping duties on certain high-performance stainless steel seamless tubes ("HP-SSST") from the European Union, as set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2012] (the "Preliminary Determination notice") and Notice No. 72 [2012] (the "Final Determination notice"), including any and all annexes and any amendments thereof.

2. The product under investigation is high-performance stainless steel seamless tubes of particular specification and having such features as high endurance strength, good structure stability, anti-steam oxidation and excellent corrosion resistance at high temperature (HP-SSST). The main applications of HP-SSST are in superheaters and reheaters of supercritical and ultra-supercritical boilers. The terms supercritical and ultra-supercritical describe the pressure of the water inside the boiler. There are three types of HP-SSST, with various names according to different national standards regimes and producers' designations:

Table 1: HP-SSST Product Identification

Product	*ASTM grade/ASTMUNS steel number*	*China National Standard GB5310-2008*	*Mannesmann serial number*	*Sumitomo serial number*
A	**TP347HFG (S34710)**	08Cr18Ni11NbFG	DMV347HFG	347HFG
B	**S30432**	10Cr18Ni9NbCu3BN	DMV304HCu	Super304H
C	**TP310HNbN (S31042)**	07Cr25Ni21NbN	DMV310N	HR3C

3. In this submission, the European Union refers to Products "A", "B", and "C". The three types of HP-SSST are noticeably different.

II. THRESHOLD ISSUE: REQUEST THAT THE PANELS AMEND TWO ASPECTS OF THE BCI PROCEDURES

4. The European Union objects to the Panels automatically classifying as BCI in these WTO panel proceedings information that was submitted as BCI in the anti-dumping proceeding (unless in the public domain).[1]

5. First, the question of designation is ultimately a matter that must rest with the WTO adjudicator and cannot be delegated to any other entity or person. Second, the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm, because the DSU provides expressly that it does not regulate the capacity of a Member to disclose statements of its own position to the public. The BCI Procedures in this case include a statement that BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. Thus, in this case, the issue of designation for this particular category of information is delegated, in absolute terms, not just to a particular party, but to a particular firm. It means that there is no guarantee that a balanced and proportionate approach to designation will be adopted. The European Union considers that this statement in the BCI Procedures is WTO inconsistent.

6. The European Union requests that the relevant sentence in paragraph 1 of the BCI Procedures be modified to read: "In this regard, parties and third parties are encouraged to designate as BCI information that was previously submitted to China's Ministry of Commerce

[1] Joint Working Procedures of the Panels, Annex 1, Additional Working Procedures of the Panels Concerning Business Confidential Information ("BCI Procedures"), paragraphs 1 and 2.

("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes." Furthermore, the European Union requests that a final sentence be added to paragraph 1 of the BCI Procedures as follows: "In case of disagreement, the Panels shall decide on BCI designation".

7. The European Union objects to the requirement that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to the Panels. The European Union considers that the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm.

8. The European Union requests that paragraph 2 of the BCI Procedures be deleted or amended to read as follows: "The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue in these disputes, the party may also provide, with a copy to the other parties, an authorizing letter from the entity. That letter may authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue".

9. To the extent that the Panels, and eventually the Secretariat, are concerned about protecting the WTO from any consequences of disclosure, a provision along the following lines would be sufficient: "Each party and third party shall be solely responsible for ensuring its own compliance with any applicable confidentiality rules and solely responsible for the confidentiality designation it makes when submitting information to the Panel, and any consequences thereof".

III. PROCEDURAL CLAIMS

1. Claim under Articles 6.5 and 6.5.1 ADA

10. The European Union submits that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission.

11. With respect to Article 6.5 of the Anti-Dumping Agreement, the European Union submits that China acted inconsistently with this provision because China permitted the full texts of the relevant documents to remain confidential without a showing of good cause. The European Union submits that the concern regarding the potential disruption of these third parties' businesses could have been addressed by simply withholding the names of the third parties providing these reports, as well as perhaps the names of any entities that provided information to the third parties that prepared these reports, at least to the extent that the information in the reports would be referred to or relied on by the Applicant or the investigating authority.

12. With respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union submits that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible.

2. Claim under Article 6.7 and Annex I, paragraph 1 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

13. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 1 of the Anti-Dumping Agreement because China refused to take into account information relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable, which was appropriately submitted so that it could have been used in the investigation without undue difficulties, and which was supplied in a timely fashion.

14. At the verification, SMST submitted to the investigating authorities that certain financial expenses had been inadvertently double-counted in the SMST Dumping Questionnaire Response, and adduced corrected information that was duly verified. The only reason provided by China in the SMST Final Disclosure and in the Final Determination for refusing to take the corrected information into account was that SMST did not raise this point before the verification started.

3. Claim under Articles 6.4 and 6.9 of the Anti-Dumping Agreement

15. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping, injury and causation determinations. In particular, China failed to disclose information on dumping calculations and import and domestic prices essential to its price effects finding. Consequently, interested parties were unable properly to defend their interests.

16. Essential facts supporting an anti-dumping margin determination include the data underlying the margin calculations and adjustments to the data. These facts also include information on the calculation methodology, for example, the formulas used in calculations and the data applied in those formulas. China's anti-dumping disclosures contain none of this information. This lack of disclosure critically impaired the interested parties' defence to the dumping determination and dumping margin calculations. Without the missing data and calculation methodology information, they could not present the necessary rebutting arguments or address the errors in China's analyses.

17. China failed to disclose several pieces of information critical to its price effects determination. Specifically, China failed to disclose: (i) complete information about the import prices it used in its price effects analysis (although an import price for Product C could be derived from other information supplied by China); (ii) any domestic prices; (iii) the percentage change in the domestic price of Product C in the first half of 2011 as compared with the first half of 2010 (this is particularly disconcerting because it would appear that in fact there were no sales of Product C by the Applicants during the first half of 2011); (iv) the margins of overselling for Product A and the HP-SSST product as a whole (to the extent that there were relevant domestic sales); and (v) the margin of overselling or underselling for Product C in the first half of 2011.

4. Claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

18. *Dumping determinations:* The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination.

19. The Final Determination did not provide "sufficient detail" on its justification for applying facts available in its all others rate determinations because it provided no detail. At no point in the proceeding did China disclose the factual basis or the legal reasoning supporting its definitive assessment of the all others rates. In failing to provide this information, China failed to satisfy the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

20. *Injury determination:* China did not provide all of the relevant information and reasoning supporting its price undercutting conclusions. Specifically, its finding of price undercutting: (i) omitted key factual information; and (ii) did not provide the reasoning behind one critical aspect of its price comparisons by type. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties.

IV. SUBSTANTIVE CLAIMS – DUMPING DETERMINATIONS

1. Claim under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement

21. The European Union claims that, in the measure at issue, China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) or in a manner that reasonably reflects the costs associated with the production and sale of Product B (DMV 304HCu).

22. The European Union submits that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement because the amounts for administrative, selling and general costs were not based on actual data pertaining to production and sales in the ordinary course of trade of the like product, and particularly Product B (DMV 304HCu), by SMST, as recorded in SMST QR Table 6-5 and duly verified.

23. China's error is compounded by the fact that, as outlined above, the unrepresentative and rejected data that China disclosed during consultations that it did use from SMST QR Table 6-3 (DMV 304HCu (EU)) did not pertain to production and sales in the ordinary course of trade, as required by Article 2.2.2 of the Anti-Dumping Agreement. The European Union finds further support for its claim in the immediate context of Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement.

2. Claim under Article 2.4 of the Anti-Dumping Agreement

24. The European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N). China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it relied for its findings of dumping on a comparison of export prices and domestic prices that included different product mixes without taking any steps to control for differences in physical characteristics affecting comparability or making necessary adjustments.

3. Claim under Article 6.8 and Annex II, paragraph 1 of the Anti-Dumping Agreement

25. As a consequence of the preceding substantive dumping claims, and as a consequence of any possible substantive consequences of the above procedural claims insofar as they relate to dumping, and given that the "facts available" used by China to establish the EU all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the EU all others rate, also acting, in this respect, inconsistently with the above cited provisions of the Anti-Dumping Agreement, and inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement. Furthermore, China acted inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement because it determined the dumping margin for other EU and Japanese exporters based on facts available without notifying them of all the information required and of the consequences of not submitting that information.

V. SUBSTANTIVE CLAIMS – INJURY DETERMINATION

26. The European Union submits that China's determinations with respect to injury and causation are inconsistent with China's obligations under Article 3 of the Anti-Dumping Agreement – particularly Articles 3.1, 3.2, 3.4, and 3.5 – in that they do not stem from an objective evaluation, based on positive evidence, of the facts on the record, and do not satisfy all of the requirements of those provisions.

27. The European Union submits that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because:

28. (i) China's analysis of the price effects of imported Product C is analytically and factually flawed. The data indicates that domestic sales volume of Product C during the investigation period was very small compared to import volume. Under such circumstances, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for China to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

29. (ii) China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. China found *some* price undercutting limited to a *minority* industry sector that *does not actually compete* with other sectors which must be read in the context of the general finding that the *vast majority* of the domestic production of HP-SSST was not subject to any price undercutting effect by the subject imports.

30. Second, the European Union submits that China's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because:

31. (i) China's impact analysis did not logically follow from its volume and price effects analyses and conclusions; When, as in this particular case, an investigating authority *has itself elected* to conduct an analysis of volume and price effects by type, and where *the outcome of that analysis already indicates lack of injury with respect to two out of three product types, including the product type predominantly produced by the domestic industry*, that is a matter that must at least be *addressed* in the impact analysis.

32. (ii) China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment. At no point of the investigation did China evaluate the significance of the margins of dumping, properly calculated, for the impact of the imports on the Chinese HP-SSST industry.

33. (iii) China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. The Final Determination is silent as to why China disregarded the relevance of the majority of the factors and indices having a positive bearing on the state of the domestic industry.

34. Third, the European Union submits that China's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because:

35. (i) China's causation determination lacks any foundation in its volume, price effects, and impact analyses. The European Union submits that China reached its conclusion concerning the existence of a "causal link" between HP-SSST imports and the injury suffered by the domestic industry despite the fact that: (a) the volume and market share of imported HP-SSST products did not significantly increase; (b) China's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis on the negative indices.

36. (ii) China failed to separate and distinguish the injurious effects of two other known factors that were causing injury to the domestic industry, namely the decline in domestic demand for HP-SSST and the expansion of the production capacity of the domestic HP-SSST industry.

VI. OTHER CLAIMS

1. Claim under Article 7.4 of the Anti-Dumping Agreement

37. By applying provisional measures for six months in the given circumstances, China acted inconsistently with Article 7.4.

2. Consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

38. As a consequence of the breaches described above, China's anti-dumping measures on HP-SSST are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

VII. REQUEST THAT PANEL EXERCISE RIGHT PURSUANT TO ARTICLE 13.1 OF THE DSU

39. The European Union respectfully requests that the Panel exercise its right to seek information from China pursuant to Article 13.1 of the DSU. Article 13.1 of the DSU gives the Panel the right to seek information from any body that it deems appropriate, and requires Members to respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

40. In these proceedings, the only explanation given by China for failing to comply with its WTO obligations concerning disclosure and making information available is alleged confidentiality. The European Union has explained why this is not a valid explanation, also given the possibility of preparing non-confidential summaries. However, now that this Panel has adopted procedures to

protect Business Confidential Information, there is clearly no longer any basis for China not to provide the necessary information.

41. In these panel proceedings, the European Union does two things. First, the European Union asks that the Panel draw the reasonable and logical conclusions from the procedural inconsistencies that the European Union identified with respect to the substantive aspects of the measure at issue. For example, the European Union explained that China has breached its procedural obligations with regard to the disclosure of the essential facts relating to the injury determination, and particularly the price-undercutting finding with respect to Product B. Our submission is that, as a consequence, the price-undercutting analysis with respect to Product B is unreliable, and the European Union asks the Panel to make a finding to that effect. Thus, what the European Union seeks from China in terms of implementation is not merely disclosure. Rather, the European Union seeks: disclosure; a full opportunity for all interested parties and Members to comment and defend their interests; and a consequent re-assessment of this aspect of the injury determination, and thus of the injury determination as a whole. The European Union asks the Panel to make it clear that this is what China is expected to do.

42. Second, at the same time, already in these proceedings, the European Union seeks full and proper disclosure from China (duly protected by the BCI rules now in place). The European Union respectfully requests the Panel to exercise its right under Article 13.1 of the DSU to seek from China information equivalent to the full disclosure that should have been made, that is, of all the essential facts, having particular regard to the concerns raised by the European Union and Japan, and given the BCI procedures in place. In this respect, the European Union insists particularly (but not only) on the price-undercutting finding with respect to Product B. The European Union asks that China provide complete, specific and precise information on the import and domestic products that were compared, including full product descriptions, dates of transactions, volumes, prices and terms of each transaction, and any adjustments.

VIII. REQUEST THAT PANEL MAKE A SUGGESTION PURSUANT TO ARTICLE 19.1 OF THE DSU

43. The European Union will be seeking steps to ensure that this measure is rectified and eventually dis-applied "immediately" (to borrow the language of Article 21.3 of the DSU) and in any event as soon as possible. Accordingly, the European Union respectfully requests the Panel to formulate suggestions to that effect, and reserves the right to request or re-iterate specific suggestions as the proceedings go forward.

IX. CONCLUSION

44. For the reasons set forth in the submission, the European Union respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

ANNEX B-6

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In this second written submission, the European Union further explains why it requests the Panel to find that China's measures imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement of the WTO.

II. STANDARD OF REVIEW

2. Both parties agree with regards to the standard of review. However, the European Union rejects China's assertion according to which the European Union has not made a *prima facie* case and refers to the reasons put forward in its submissions.

3. The European Union is willing to respond to any questions on the matter the Panel may have.

III. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES

A. Absolute delegation of the authority and obligation to determine BCI designation to a firm submitting information to the investigating authority in a domestic anti-dumping proceeding

4. The European Union contends that the BCI procedures, by providing automatic classification as BCI of information that was originally submitted as BCI in the context of municipal anti-dumping proceedings in the current WTO proceedings, are WTO inconsistent. The European Union considers that such a decision should be based on objective criteria. In other words, in the view of the European Union, it is for a Member to seek designation of information as BCI and it is for the adjudicator to make a designation after an assessment based on objective criteria.

5. The European Union puts forward a harmonious interpretation of the relevant DSU rules together with the provisions of the Anti-Dumping Agreement. Article 18 of the DSU sets out the general principle of due process in the context of the WTO dispute settlement system. It prohibits *ex parte* communication with a panel and states that written submissions to a panel are confidential but shall be made available to the parties to the dispute. In the view of the European Union, this is also confirmed by the joint reading of Article 6.5 of the Anti-Dumping Agreement and footnote 17, which confirm that even information designated as confidential by the investigating authority may be disclosed, provided that it is adequately protected.

6. The European Union considers the issue to be a fundamental one and to touch upon one of the cornerstones of rule-of-law based judicial systems. The European Union argues that, by allowing an interpretation of the provisions above mentioned in a way contrary to the reading advanced in its submissions, the system would allow a situation in which information submitted to adjudicators is not available to the other litigant, and this would amount to a breach of the fundamental principle of due process.

7. The European Union understands that it is always necessary to strike a balance between various interests, namely: confidentiality, the interest of being in a position to make administrative and judicial determinations, due process. Such balance, however, has to be conducted independently and objectively by the panel.

B. The imposition of an obligation on the submitting Member to obtain prior written authorisation from another entity or firm

8. The European Union claims that BCI procedures are WTO inconsistent insofar as they require a party to seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to a Panel. The European Union rejects China's reading of Articles 6.5 and 17.7 of the Anti-Dumping Agreement, according to which these provisions impose an obligation to automatically confer BCI status in WTO dispute settlement proceedings to information classified as confidential before national investigating authorities.

9. The European Union claims that this does not guarantee a balanced and proportionate approach to BCI designation.

C. China's request relating to the timing of objections to translations

10. The European Union requests that paragraph 10 of the Working Procedures be amended, so to make it clear that it does not contain an absolute rule to raise objections to translations promptly in writing no later than next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing. China agrees.

IV. PROCEDURAL CLAIMS

A. Designation of information as confidential without good cause and failure to require sufficient non-confidential summaries: Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

1. Designation of information as confidential without good cause: Article 6.5 of the Anti-Dumping Agreement

11. The European Union claims that China's treatment of confidential information submitted by the applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission. China claims that the European Union has not made a *prima facie* case and has not specified the documents to which its claims relate. The European Union rejects these arguments and points out that China, in its first written submissions, had shown to be aware of the documents to which the claim relates and that the European Union and Japan shared the same claim with respect to these reports.

12. The European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submissions, the Applicants provided no summary of any other contents of these reports, including the methodologies utilized by the third party institutes to obtain these data or the underlying evidence they relied upon. This, according to the European Union, contrasts with the Panel Report in *China-X-Ray Equipment* about the necessity to summarise the substance of each type of confidential information in cases where multiple type of information are designated as confidential. The European Union respectfully requests the Panel to reject China's arguments and affirm the claims made by the European Union and Japan.

2. Failure to require sufficient non-confidential summaries: Art. 6.5.1 of the Anti-Dumping Agreement

13. The European Union claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible.

14. In particular, China submits that two of the reports are themselves already summaries. According to China, they contain no information regarding methodologies and no underlying evidence and China describes them as being based on "non-existent information". The European Union casts doubts that affirming that documents are based on "non-existent

information" could be helpful for China's arguments. In the view of the European Union, indeed, such fact provides strong indication of substantial inconsistencies linked to procedural irregularities.

15. The European Union considers that China has failed to provide a statement of reasons as to why further summarisation is not possible that is consistent with Article 6.5.1 of the Anti-Dumping Agreement.

B. SMST dumping determination, failure to take into account relevant information provided during the verification: Art. 6.7 and Annex I, paragraph 7 and Art. 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

16. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement because China refused to take into account information which was relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable and was appropriately submitted. China claims to have refused to take the corrected information into account because SMST did not raise this point before the verification started.

17. The European Union bases its procedural claim on the fact that information was rejected exclusively because it was submitted at verification. The European Union does not argue that investigating authorities should not have discretion as to the information they should accept, but it only claims that they should be open to do so if it does not impede the verification.

C. Inadequate disclosure and failure to inform interested parties of the essential facts under consideration: Articles 6.4 and 6.9 of the Anti-Dumping Agreement

1. With respect to the dumping determinations

18. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations. China claims that the European Union has not made a *prima facie* case of violation of Article 6.4 of the Anti-Dumping Agreement because no request for information was made. China also argues that the European Union failed to make a *prima facie* case with respect to the violation of Article 6.9 of the Anti-Dumping Agreement, because the arguments of the European Union would amount to general allegations.

19. The European Union rejects China's argument according to which lack of understanding as to how, for instance, the normal value in the case of SMST was calculated, is unreasonable and, therefore, should allow non-disclosure. The European Union, in fact, argues that it was not possible for multiple parties, all acting in good faith, to understand how the calculation was made, and to know which numbers where used by MOFCOM to conduct its calculations. The European Union considers that knowing the actual number used in the case of SMST would permit to SMST to understand how the calculation was made, and allow it to defend its interests accordingly. *Vice versa*, in the current situation, SMST and the European Union are unable to do so.

2. With respect to the injury determination

20. With respect to the injury determination, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations. China claims that the summaries it provided are sufficient and the European Union rejects this argument because such information was partial and argues that there were other available means to address the understandable concerns for disclosure and, at the same time, to allow exporters to understand the facts and defend their interests accordingly. With respect to the claim by China whereby the European Union has acknowledged, in particular, that Product A import price in 2008 was confidential, the European Union argues that it has never considered MOFCOM to be entitled to treat the data in its entirety as confidential and that the latter should have provided the exporters with –at least- meaningful price range.

21. With respect to China's argument regarding the underselling of Product B, the European Union remains of the view that MOFCOM should have disclosed a number for each year and claims that China has failed to do so in response to Panel Question 76.

D. Failure to set forth or otherwise make available in sufficient detail the findings and conclusions: Articles 12.2 and 12.2 of the Antidumping Agreement

1. With respect to the dumping determination

22. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive antidumping duties against the investigated imports as part of its Final Determination. According to the European Union, China has not provided valid justification for its failure to reveal why it resorted to facts available and how it determined the highest dumping margin found for the relevant exporters that received an individual margin to be the appropriate one.

23. The European Union is not persuaded by the response provided by China according to which it is sufficient to state that facts available were used with respect to firms that did not submit a questionnaire. According to the European Union, this simply amounts to a restatement of the facts and does not provide indication for the underlying reasoning.

24. The European Union requests the Panel to reject China's arguments and to affirm the claims made by the European Union and Japan.

2. With respect to the injury determination

25. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with regards to injury and causation determination. Specifically, China's finding of price undercutting omitted key factual information and did not provide the reasoning behind one critical aspect of its price comparisons by type. The European Union claims that the information provided by China was not sufficient.

26. The European Union recognizes that Art. 12.2.2 of the Anti-Dumping Agreement requires an authority to pay due regard to confidentiality. However, it claims that there is no apparent reason why China did not –at least- disclose non-confidential summaries, so to permit a comparison of import prices by type and total product basis.

V. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

A. SMST dumping determination, normal value for product B (DMV 304HCu), SG&A, failure to use actual data reasonably reflecting costs, use of unrepresentative and rejected data concerning samples: Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement

27. The European Union comments, in its rebuttal, on China's Responses to the Panel's Questions.

28. As regards Question 7, the European Union claims that China is incorrect to assert that the Appellate Body Report in *EC – Bed Linen* supports its position in these proceedings. In its Second Written Submissions, the European Union highlights many flaws in the understanding by China of the Report above mentioned with regards to the interpretation of Article 2.2.2 of the Anti-Dumping Agreement. Furthermore, the European Union rejects the view of China according to which the Panel request by the European Union is inconsistent with Art. 6.2 DSU because, allegedly, it did not provide a brief summary of the legal basis of the complaint. The European Union argues that this was not the case, as it provided a sufficiently detailed summary and eventually points out to the differences between a Panel request and first submissions, which China seems to neglect.

29. As regards Question 8, the European Union argues that China is incorrect to assert that the Panel Report in *US – Corrosion-Resistant Steel Sunset Review* supports its position in these proceedings. The European Union claims that the report, in fact, confirms that the Panel must take

into account whether the ability of the respondent to defend itself has been prejudiced, given the actual course of the panel proceedings. The European Union considers that China has had ample opportunity to respond but chose to remain silent on the substance of the matter.

30. With reference to Question 22, the European Union disagrees with China about its argument according to which anything that is "used" by a firm automatically becomes "actual data pertaining to production and sales in the ordinary course of trade". The European Union cannot accept the consequences of such reasoning, which would lead to a situation in which the determination of the amounts for administrative, selling and general costs and profits would depend upon whether or not particular information or data would be "used" by the firm being investigated.

31. With regards to Question 23, the European Union challenges China's assertion according to which SMST did not request the investigating authority not to use the relevant Table 6-3 SG&A. According to the European Union, the translations of the requests by SMST to which China refers are redundant and lead to meaningless results, as that would mean that SMST had requested not to use the data in the "constructed cost" calculation, and the expression "constructed cost" never appears in the Anti-Dumping Agreement.

32. Regarding Question 24, the European Union reaffirms the concerns it had already made explicit in its oral Statement and in its responses to the Panel Questions on the coefficients applied to the calculation.

B. SMST dumping determination, product C (DMV 310N), failure to make a fair comparison, failure to adjust for different product mixes: Article 2.4 of the Anti-Dumping Agreement

33. The European Union claims that China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices. In its rebuttal, the European Union focuses on commenting China's responses to the Panel's Questions.

34. With regards to Question 12, the European Union acknowledges that China agrees with the summary of the former's claims and arguments.

35. Concerning Question 14, the European Union claims that China declined to answer with respect to the remainder of the evidence referenced in footnote 195 of the First Written Submission of the European Union. It adds that the Panel can and should proceed on the basis that the information provided by the European Union was actually verified by MOFCOM. The European Union considers MOFCOM to have not ensured a fair comparison and thus to have acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

36. With reference to Question 15, the European Union challenges the view of China according to which SMST did not provide evidence regarding the price differences. It also adds that SMST was merely seeking that the authority take the necessary steps to ensure a fair comparison.

37. Concerning Question 16, the European Union claims that MOFCOM, according to Article 2.4 of the Anti-Dumping Agreement, should have made sure that the basket of transactions used to calculate normal value included only those products that were comparable to the product sold in China. The European Union argues that the Appellate Body Report in *EC – Fasteners (China)* supports the same conclusion, and that MOFCOM did not act accordingly.

38. Finally, with regards to Question 17, the European Union, contrary to what China argues, claims that SMST did provide the necessary information.

C. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph I of the Anti-Dumping Agreement

39. The European Union had claimed that China improperly relied on "facts available" when establishing the EU all others rate. China responded that, in its view, even if it is true that the dumping margin for SMST was calculated in a WTO inconsistent manner, no provision of the Anti-Dumping Agreement would require China to make an adjustment. The European Union claims that

if China would nevertheless maintain an all others rate like the one it has applied, it would be in violation of Article 6.8 of the Anti-Dumping Agreement.

VI. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

A. Summary of the applicable legal framework: Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement

40. As submitted before, the European Union considers that the Appellate Body Report *China – GOES*, and in particular its paragraphs 126-128, are highly pertinent for the issues under consideration.

B. Price effects: Articles 3.1 and 3.2 of the Anti-Dumping Agreement

41. The European Union claims that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The European Union argues that two aspects deserve to be separately addressed: i) whether the definition of price undercutting involves not just a price differential but also an element of price effect; ii) *how* an investigating authority is required to establish through its price undercutting enquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports.

42. As for the first issue, the European Union sees China's replies to be in contradiction with each other as to whether a price effect is needed in order to have a "price undercutting". The European Union is of the view that the definition of price undercutting is such that a price effect needs to be present, like China seems to have asserted in its response to Panel Question 31(c).

43. As regards the second issue, China seems to be of the view that an investigating authority is never obliged to investigate questions of effect if only a price differential can be established, whereas the European Union is of the opposite view.

44. The European Union considers that possibly consensus could be reached on the first issue and that parties could be left to argue about the second aspect.

1. China' analysis of price-undercutting with respect to product C is flawed

45. China argues that the European Union did not challenge "MOFCOM's findings about the like product", so that such findings are, in the view of China, incontestable. The European Union rebuts that. It is bringing a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and as part of this it is challenging MOFCOM's determination that imports of Product C were in competition with domestically produced Product c in the Chinese market.

46. The European Union argues that, as regards the Chinese analysis undertaken as part of the like product determination, it does not amount to an objective examination based on positive evidence either. Even assuming that in 2010 imported Product C and domestic Product C were in adjacent or slightly overlapping markets, the evidence on the record would still not have allowed for a finding of price undercutting in the sense of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

2. China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole

47. China claims that it established correlation among the prices of the three grades of HP-SSST on the basis of positive evidence. The European Union claims that China's price effects analysis does not contain any examination of cross-grade price effects. The conclusions regarding price correlation which China refers to were made in respect to the scope of the investigation, and were not referred to in the price effects analysis.

48. The European Union points to the significant price differences between imported Products B and C and domestic Product A. In neglecting such price differentials, China –in the view of the European Union- has not conducted an objective examination.

C. Impact on domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement and D. Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

49. The European Union refers back to its First Written Submission and to its First Opening Oral Statement.

VII. OTHER CLAIMS

A. Application of provisional measures in excess of four months: Article 7.4 of the Anti-Dumping Agreement

50. China acknowledges the claim by the European Union according to which it has violated Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for a period exceeding four months, but it does not respond. The European Union respectfully requests the Panel to find in favour of the European Union on this issue.

B. Consequential claims: Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

51. China does not respond on the claims made by the European Union under Article 1 of the Anti-Dumping Agreement and Article VI GATT 1994. The European Union respectfully requests the Panel to find in favour of the European Union on this issue.

VIII. CONCLUSION

52. The European Union respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

ANNEX B-7

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

I. INTRODUCTION

1. In this Oral Statement we first address the various threshold issues. We will then address some dumping issues. Finally, we turn to some of the main injury issues.

II. THRESHOLD ISSUE: REQUEST THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES

A. Request that the panel amend two aspects of the BCI Procedures

2. The European Union submits that two aspects of the BCI Procedures are WTO inconsistent and requested the BCI Procedures to be amended accordingly.

3. (i) The BCI Procedures are WTO inconsistent as they automatically classify as BCI information that was submitted as BCI in the municipal anti-dumping proceeding. The question of designation should be subject to objective criteria established and eventually applied by the WTO adjudicator. The BCI Procedures take this matter out of the hands of the adjudicator. There is no guarantee that a balanced and proportionate approach to designation will be adopted. It contradicts the fact that it is for the Member to seek designation (or not).

4. (ii) The BCI Procedures are WTO inconsistent as they provide that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings. This requirement takes out of the hands of the submitting Member and eventually the adjudicator the question of what may be submitted in DSU proceedings. It provides a proxy for unlawfully delegated designation, because whatever the correct designation, a firm could simply withhold authorisation.

5. China submits that the EU request is "flawed". However, it provides no explanation of why that is supposed to be the case. The same is true of China's assertion that this is demonstrated by the case-law cited by the European Union.

6. China observes that the Panel in the cited case-law has decided that additional protection for BCI is justified. That is correct. However, this is not the matter that has been placed before the Panel by the European Union.

7. China submits that the Panel has ensured the necessary balance because it has required the submission of non-confidential summaries. Yet, it does not explain how the filing of non-confidential summaries is supposed to bear on the issues.

8. China submits that panels have the authority to adopt BCI procedures pursuant to Article 12.1 of the DSU. The European Union does not disagree. However, our point is that they must do so in a manner that is consistent with the DSU.

9. China submits that the protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. However, the European Union is not arguing that the protection afforded by the BCI Procedures diminishes the protection afforded by the DSU.

10. China submits that a Member's ability to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. However, we do not argue that a Member's ability to designate information as confidential is impaired.

11. Finally, China asserts that the Panel's approach is consistent with Article 6.5 of the AD Agreement. The AD Agreement recognises that the interest in confidentiality must be taken into account. Nevertheless, designation of information as confidential is not something absolutely in the hands of the submitting firm, but depends on the investigating authority being satisfied that

good cause has been shown and that such designation is warranted; even then designation remains discretionary. Also, the rule is against disclosure to competitors, not adjudicators.

B. China's request relating to the timing of objections to translations

12. China requests the Panel to amend paragraph 10 of the Working Procedures so that it provides that objections to translations should be raised promptly in writing no later than the next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing.

13. The WTO Agreement is authentic in English, French and Spanish and these are the languages in which litigation is conducted and adjudications delivered. Nevertheless, evidence placed on the record in some other language is still evidence placed on the record, i.e. evidence of fact. However, translation is not a pure question of fact. Translation is about meaning, and the meaning of municipal law is a mixed question of law and fact (i.e. a legal characterisation of the facts). Article 17.6 of the DSU indicates that issues of law and legal interpretations, that is, including translation issues, can be raised on appeal. Therefore, a panel's working procedures may not provide that a party is absolutely precluded from raising a translation issue on appeal.

14. The European Union understands that translation is a particular type of issue, of a preliminary nature, and that it may be reasonable to expect parties to raise any obvious translation issues early. This is similar to so-called preliminary issues. Parties are expected to raise them at a sufficiently early stage. Nevertheless, there is no absolute bar to them being raised later, including in appeal proceedings.

15. The particular difficulty with translation issues is that their significance may not always be apparent until such time as particular terms are set in the context of a particular adjudication. The European Union would also observe that there are no circumstances in which it would make sense to win a case based on an incorrect translation.

16. The European Union has understood that paragraph 10 of the Working Procedures is not an absolute rule, since it uses the term "should". Therefore, the request is not necessary, because the provision as drafted is not absolute. If the Panel considers the requested amendment, then (1) there should be no absolute rule and in any event two weeks is too short and (2) a balanced approach should be adopted.

III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

A. SMST dumping determination, Product C, failure to make a fair comparison, failure to adjust for different product mixes: Article 2.4 AD Agreement

17. China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value. In calculating normal value for Product C, China compared two baskets with a very different product mix.

18. China's focus on what occurred during the investigation is not helpful, since what really matters is whether or not, objectively, China ensured a fair comparison. In any event, China's insistence on the content of SMST's Dumping Questionnaire Response is odd. China accepts that SMST raised the point in a timely manner. In this respect, China does not allege any procedural deficiency, nor could it, since the measure at issue itself expressly records the fact that SMST raised the point.

19. China's submission that SMST's request was "tied-to the original low volume claim" is inaccurate and irrelevant. The request was a stand-alone request. Even if it would have been "tied-to" some other request, in failing to ensure a fair comparison, the measure is inconsistent with Article 2.4 of the AD Agreement.

20. China's argument that SMST failed to provide "a modicum of an indication" of an impact on price comparability should be rejected. The point raised by SMST is expressly dealt with in the measure at issue. It is stated that SMST presented *evidence proving* that the relevant transactions related to a product that was *different* from the products exported to China. SMST demonstrated that, also because of the very thin dimensions of the products, they require more extensive

rolling/drawing resulting in higher cost. Obviously, the use of processing technology, including rolling/drawing, involves costs and the greater the use of such technology, the greater the costs. SMST also provided the specific documents relating to these transactions.

B. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph 1 of the AD Agreement

21. As a consequence of the preceding substantive dumping claims and possible substantive consequences of the procedural claims, and given that the "facts available" used by China to establish the all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the all others rate, acting inconsistently with Article 6.8 and Paragraph 1 of Annex II of the AD Agreement. Furthermore, China acted inconsistently with this provision, because it determined the dumping margin for other exporters based on facts without notifying them of all the information required and of the consequences of not submitting that information. China argues that, even if the dumping margin for SMST was calculated in a WTO inconsistent manner, *no provision* of the AD Agreement would require China to make a consequent adjustment to the all others rate. This is assertion is wrong. If the current dumping margin calculated for SMST of 11.1% would be demonstrated to be WTO inconsistent, and the re-determination would fix it at a lower amount, then it would no longer be a determined "fact". Accordingly, "11.1%" would no longer be a "fact" "available" within the meaning of Article 6.8 of the AD Agreement.

IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

22. China's determinations with respect to injury and causation are inconsistent with Article 3 of the AD Agreement, in particular Articles 3.1, 3.2, 3.4, and 3.5. In *China – GOES* the Appellate Body stated that the different paragraphs of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination". Most of China's inconsistencies are a breach of this required "logical progression of inquiry".

A. Price effects: Articles 3.1 and 3.2 of the AD Agreement

23. China's determination violates Articles 3.1 and 3.2 of the AD Agreement in two respects. First, China's analysis of the price effects of imported Product C is flawed. Second, China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole.

1. China's analysis of price-undercutting with respect to Product C is flawed

(a) Article 3.2 requires "price undercutting", not just a "price differential *per se*"

24. MOFCOM erroneously concluded that imports of Product C had "price undercutting effects on the corresponding like domestic products".

25. China argues that "any factual elements other than the price differential between the import price and domestic price are irrelevant". Yet, a "price differential *per se*" is only a **snapshot** that looks at import prices and domestic prices.

26. The key question is whether any "price differential *per se*" will suffice, or whether one has to consider whether the "price differential *per se*" has the effect of price undercutting.

27. It follows clearly from the statements of the Appellate Body in *China – GOES* that Article 3.2 of the AD Agreement contains *three* price *effects*: (1) price undercutting; (2) price depression; (3) price suppression; and not just a "price differential *per se*" and two price effects. When the Appellate Body refers to price depression and price suppression, it calls these "the last two price effects" in Article 3.2, presuming that price undercutting is also a "price effect". Price undercutting was not at issue in the *China - GOES* case, but the Appellate Body considers that the focus of Article 3.1 of the AD Agreement on price effects colours the whole of Article 3.2 of the AD Agreement. Given that "price effects" inform the whole of Article 3.2 of the AD Agreement, it is equally appropriate that, in conducting an analysis of price undercutting, one is required to consider whether a first variable – that is, a price differential *per se* – has explanatory force for the occurrence of a second variable – that is, price undercutting.

28. Interpreting Article 3.2 as requiring a consideration of the relationship between a price differential *per se* and a potential price undercutting does not duplicate the causation analysis under Article 3.5. Both provisions posit different inquiries. The analysis pursuant to Article 3.5 concerns the causal relationship between subject imports and injury to the domestic industry. The analysis under Article 3.2 concerns the relationship between a price differential *per se* and an alleged price undercutting, i.e. subject imports and domestic prices.

29. In this case, there are strong reasons to doubt that a price differential *per se* had explanatory force for any alleged price undercutting. The inverse price movements, the vast difference in import and domestic price levels and the trivial volume of domestically produced Product C, all suggest that imports of Product C were not in competition with domestically produced Product C.

(b) Allegations that "similar quantitative difference" justifies price comparison

30. China considers that in 2009 and 2010 the imports of Product C held a similar market share, and that, on this basis, it was "meaningful" to compare the prices in spite of the tiny amount of domestic sales. Yet, showing that the market share of Product C was tiny in both years, does not show anything but the fact that these domestic sales were outlier transactions not just in one year but in both years.

2. China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic industry as a whole

31. China extended its conclusions concerning the price undercutting of Products B and C to the domestic industry as a whole, although it only found some price undercutting limited to a minority industry sector that does not actually compete with other sectors, in the context of the general finding that the vast majority of the domestic production was not subject to any price undercutting effect. China could have examined "all of the other parts that make up the industry" by conducting a cross-type analysis of price effects. Instead, it selected the minority sub-categories of the like domestic products where it found price undercutting effect and unduly extended its findings to the whole group of like domestic products.

32. The question is whether the focus of the price effects inquiry under Article 3.2 is only on the prices of subject imports, or also on the prices of domestic like products. Both the Appellate Body in *China - GOES* as well as the panel in *China - X-Ray Equipment* have clarified this issue. The test required under a price undercutting analysis relates to the effect of such imports on domestic prices. It is insufficient to study whether all of the subject imports are sold at undercutting prices. The analysis needs to include the effect of such imports on domestic prices.

33. There was evidence in the record that the products were not in competition with each other. Thus, an additional analysis was required in order to extend the price undercutting findings for Products B and C to Product A.

B. Impact on domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement

34. First, China's impact analysis did not logically follow from its volume and price effects analyses and conclusions. When an investigating authority has itself elected to conduct an analysis of volume and price effects by type, and where the outcome of that analysis already indicates lack of injury with respect to two out of three product types, that matter must at least be addressed in the impact analysis.

35. Second, China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment.

36. Third, China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. Instead of a thorough and persuasive explanation as to whether the negative factors outweighed the at least seven positive factors, China simply enumerates the different factors.

C. Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

37. China's causation determination lacks any foundation in its volume, price effects, and impact analyses. China reached its conclusion despite the fact that: (a) the volume and market share of imported products did not significantly increase; (b) China's analysis of the undercutting effect of imported products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete.

38. Second, China failed to separate and distinguish the injurious effects of two other known factors, namely the decline in domestic demand and the expansion of the production capacity of the domestic industry.

ANNEX B-8

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

I. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES

1. The European Union has submitted that the BCI Procedures are WTO inconsistent insofar as they provide for the automatic classification as BCI of information that was submitted as confidential in the municipal anti-dumping proceeding.

2. In the first place, we do not agree with China that, if the firm is unwilling to designate the information as non-confidential or provide a non-confidential summary, the only option for the investigating authority is to disregard such information. Article 6.5.2 does not *require* the authority to disregard such information; it merely provides for that *discretion*.

3. The DSU does provide for designation by Members (not firms or investigating authorities). However, the concept of confidentiality is an objective one.

4. For similar reasons, the European Union has also submitted that the BCI Procedures are WTO inconsistent insofar as they provide that a party must provide prior written authorisation from the entity that submitted such information in the anti-dumping proceedings.

5. In its Second Written Submission China argues that such a letter is "necessary" to "allow" an investigating authority to comply with its obligations under Article 6.5 of the Anti-Dumping Agreement. However, seeking to include such a rule in the BCI procedures does not "allow" anything. Rather, it seeks to ***impose*** an obligation on the European Union. Whatever obligations may bear on an investigating authority pursuant to Article 6.5, it is not the purpose of these proceedings to hand down a ruling on the interpretation of Article 6.5 ***and its application by the European Union***. No such matter is within the Panel's terms of reference.

6. What must govern the particular issue raised in *these proceedings* is Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement.

II. PROCEDURAL CLAIMS

7. As set out in our First Written Submission, the European Union, like Japan, claims that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, with respect to certain specific documents.

8. As set out before, the European Union considers that China is not permitted to engage in *ex-post* rationalisation at this stage of the process.

9. With respect to China's assertion that it disclosed "a large part of the original text", the European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submission, the Applicants provided no summary of any other contents of these reports.

10. We also recall that, with respect to this group of Appendices, the Applicants did not explain why a summary of other aspects of these reports, including the methodologies utilized therein or underlying evidence, could not be provided.

11. As set out in our First Written Submission, with respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union, like Japan, claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible, with respect to the documents specified therein.

12. We do not understand why China believes that affirming that the documents are based on "non-existent information" might be helpful to China's case. The whole purpose of these transparency provisions is to provide the interested parties with the opportunity to assess and

challenge the factual assertions, evidence and arguments on which petitioners and the investigating authority base themselves.

13. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account certain information corrected to eliminate double counting. China responded to this *procedural* claim by focussing on the substance.

14. Focussing on the *procedural* claim, our claim is based on the terms of the measure at issue itself, which simply records rejection of the information *solely* on the grounds that it was submitted at verification.

15. We believe that China's submissions in these very proceedings demonstrate that to be the case, because it is simply a matter of reconciling Tables 6-6 to 6-8 with Table 6-5, by ensuring that, in compiling Table 6-5, no double counting takes place. We seek only that the Panel take such steps as may be necessary in order to ensure that China understands that it should ensure that no such double counting occurs in the re-determination.

16. As set out in our First Written Submission, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations.

17. First, China states that: "It is difficult for China to rebut the arguments of Japan and the European Union, since they fail to mention the formulas that MOFCOM allegedly failed to disclose". The heart of the problem is that it is impossible for the European Union and Japan to set out the detail of matters that MOFCOM has not disclosed in the first place.

18. Second, the heart of the disagreement between the Parties is now crystal clear. China considers that Article 6.9 only covers the factual basis for inference, not the inferences themselves. We disagree for the reasons we have given before. Our conclusion is that China is simply wrong to assert that something loses its quality as a fact simply because it is inferred.

19. With respect to the injury determinations, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations.

20. With respect to China's argument that the complainants have acknowledged that the Product A import price in 2008 was confidential, we refer to our Response to Panel Question 73.

21. With respect to China's argument that there were only two domestic producers and this made disclosure of a range impossible, the European Union disagrees. Elsewhere in its submissions China expressly recognises the possibility of providing a range that does not consist of the minimum and maximum prices actually charged. This method would therefore have permitted China to provide a range.

22. Similarly, China's argument to the effect that each producer would have known the average domestic price of the other is not convincing, because it would not be possible for one producer to extract the average *weighted* domestic price of the other producer from the data.

23. Finally, the European Union does not agree with China that the question of whether or not there were other ways of providing the data whilst respecting confidentiality is irrelevant.

24. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the all others rate and the use of facts available.

25. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information

supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the injury and causation determinations. As the Appellate Body did in *China – GOES*, the Panel in the present case should not accept China's use of price change data in place of the data that actually are relevant to its determination that import prices "noticeabl[y]" undercut domestic prices.

26. Second, China also failed to satisfy its obligations under Articles 12.2 and 12.2.2 because with regard to its price comparison of imported and domestically produced Product C, China failed to provide any detail on how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis. The European Union recognizes that Article 12.2.2 requires an authority to pay due regard to confidentiality. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data or price ranges that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties, in line with what the Appellate Body stated in *China – GOES.*

III. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

27. The European Union claims that China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) in a manner that reasonably reflects the costs associated with the production and sale in the ordinary course of trade of Product B (DMV 304HCu).

28. We cannot agree with China that the fact that we have demonstrated that the calculation is based on aberrational sample transactions, without this being contested by China, is irrelevant. We cannot agree with China that the fact that the coefficients are not actual data pertaining to production and sales in the ordinary course of trade is irrelevant. We cannot agree with China that the fact that Table 6-5 was verified whilst Table 6-3 was not with respect to SG&A is irrelevant. We cannot agree with China that the fact that SMST repeatedly requested MOFCOM to disregard the SG&A in Table 6-3 and directed it instead to Table 6-5 is irrelevant. We cannot agree with China that the fact that China has sought to insert the term "this" into the translation of the disclosure document when it is not there is irrelevant. We cannot agree with China that the fact that China only now provides the information relevant to the calculation is irrelevant. We cannot agree with China that the reasonableness of the SG&A amounts used by China is irrelevant. And most of all, we cannot agree with China that the circumstances do not require it to re-visit the measure and correct the error, in good faith.

29. The position with respect to the coefficients is also clear. According to China, anything "used" by a firm is, by definition, actual data pertaining to production and sales in the ordinary course of trade; and in any event it is sufficient for the purposes of Article 2.2.2 if the amounts are based *in part* on actual data pertaining to production and sales in the ordinary course of trade. We have explained why we disagree with both of these assertions, which we think are obviously wrong.

30. No doubt if the European Union had written the entire provision out in its Panel Request (as well as expressly referring to Article 2.2.2), instead of simply providing a brief summary, in accordance with the terms of Article 6.2 of the DSU, we would now be facing an (equally unmeritorious) claim of failure to consult, pursuant to Article 4 of the DSU. China cannot profit from its totally inadequate disclosure in the municipal anti-dumping proceedings in order to engineer a situation where it can try to pressure Members back to square one (causing substantial additional delay).

31. To recall, the European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N).

32. Specifically, as we have already indicated with respect to costs of production, we note that Table 6-3 (DMV 310N (EU)) contains the cost of production of Product C per month. Table 4-2, Domestic (regional) Sales, cells K5 and K6 state that the two sales were made on 15 October 2010 and 17 November 2010 and were the only sales of Product C made in those months. Cells E18 and F18 of Table 6-3 (DMV 310N (EU)) demonstrate that the cost of production for those months

is about twice as high as the cost of production in April and May 2011. In April and May 2011 Product C was sold in representative quantities. We also note that in December 2010 two samples were delivered to customers. These samples were correctly excluded from the normal value by China. They represented the only product C produced in December 2010 and the cost of production is extremely high, as it is for the production of the samples of Product B.

IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

33. The European Union claims that China's determinations with respect to injury and causation are inconsistent with China's obligations under Article 3 of the Anti-Dumping Agreement, in particular Articles 3.1, 3.2, 3.4, and 3.5.

34. In the view of the EU, the term "price undercutting" poses two interpretative challenges: The first question to be addressed relates to what constitutes "price undercutting". The EU maintains that price undercutting, by definition, involves not just a "price differential" but also an element of "price effect". The second question is: *How* is an investigating authority required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports?

35. The key difference seems to be that China considers that any mere "price differential" amounts to a "price effect". The EU, on the other hand, considers that there may be situations where a mere "price differential" does not contain a "price effect". Therefore, the key interpretative question on this issue would be: Is it sufficient to simply establish a price differential? The European Union has adduced a number of reasons for its position. The most pertinent usage of the word "undercut" is: "To supplant […] by selling at lower prices". "To supplant" means "Chiefly of things: to take the place of, succeed to the position of, supersede". The European Union has already described in detail how the relevant sentence in Article 3.2 of the Anti-Dumping Agreement refers to "effect". Suffice it to say here that the sentence starts with the words "With regard to the effect of the dumped imports on prices" and hence clearly refers to three price effects, and not to two price effects (in the form of price depression/suppression) and a non-price effect.

36. A finding of "price undercutting" thus requires a finding of a price differential plus a finding of a price effect. There can be no price effect if there is no competitive relationship between the dumped imports and the domestic like product. There are other factors that may impact the finding of a price effect.

37. The European Union considers that in a case where an investigating authority has strong reasons to doubt the presence of undercutting, the investigating authority needs at least *to discuss* the evidence pointing to the absence of such effect.

38. As pointed out before, the European Union considers that China's analysis of the price effects of imported Product C is erroneous, and falls short of an objective examination, based on positive evidence. In the view of the European Union, China confuses two different types of analysis. The consideration that is undertaken pursuant to Article 2.6 of the Anti-Dumping Agreement is not identical with the requirement "under Article 3.2 of the Anti-Dumping Agreement […] to consider whether the prices are actually comparable".

39. The European Union argues that China improperly extended its price undercutting findings with respect to Products B and C to the whole industry to conclude that imports of HP-SSST products had a price undercutting effect on like domestic products.

40. China's arguments fall into two categories: On the one side, China argues that its alleged finding of "price correlation" justified such an extension. On the other side, China argued that there was evidence of substitutability of Product A by Products B and C.

41. As regards the price correlation argument, the EU addressed the essence of these arguments already in its Second Written Submission.

42. Turning to China's "substitutability" argument, given that we are in a trade context, what matters is *commercial substitutability* in the real world, not theoretical substitutability in a world where commercial aspects would not matter.

43. As regards China's impact analysis, the European Union refers back to its previous statements. Article 3.4 explicitly refers to a number of factors, and does not contain anything capable of supporting China's "on the one hand […] on the other hand"- distinction.

44. As regards Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the European Union refers back to its previous statements.

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ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

1. THE EUROPEAN UNION'S CLAIMS REGARDING MOFCOM'S DUMPING DETERMINATION

1.1 MOFCOM's determination of the SG&A and its consistency with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement

1. The bulk of the claims made by the European Union under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement are outside the Panel's terms of reference. In accordance with paragraph 8 of the Working Procedures of the Panels, China respectfully submits a request for preliminary ruling in this respect. The European Union's claims that are within the Panel's terms of reference are flawed by an incorrect depiction of the facts, as available to MOFCOM at the time it made its determination. MOFCOM used the SG&A amount that was reported by SMST in the *only table* of the questionnaire in which SMST was required to report the *actual unit SG&A amount for each specific grade* of the product under consideration, distinguishing between sales to the European Union and sales to China. SMST itself stated that these were the actual data for SG&A. Importantly, during the procedure SMST never requested that the SG&A data in Table 6-3 should not be used, nor did it submit an alternative per grade SG&A amount. The European Union's erroneous claim that MOFCOM did not explain the source of the SG&A amount may relate, *inter alia*, to a translation mistake in Exhibit EU–25 (BCI).

2. Moreover, MOFCOM simply could not use the SG&A data in Table 6-5, since this data was not broken down per grade. Also, SMST itself had reported the specific SG&A amount in Table 6-3 for EU sales, and MOFCOM was not allowed to disregard it without any valid ground.

3. The SG&A data used by MOFCOM must be considered actual, since, far from being "arbitrarily determined" by MOFCOM, the SG&A amount had been provided by SMST as actual data. As such, MOFCOM used "actual data of the exporter or producer under investigation" that related to the product at issue. Furthermore, the data were based on the records of SMST. The SG&A data in Table 6-3 had been reported by SMST, stating that "[t]he figures reported in Table 6-3 were taken from cost calculations for the individual orders of subject merchandise produced during the POI".

1.2 MOFCOM's dumping determination for SMST's sales of Grade C and its consistency with Article 2.4 of the Anti-Dumping Agreement

4. In order to ensure a fair comparison, MOFCOM opened the dialogue with SMST with the questionnaire, in which MOFCOM asked multiple questions on the products, prices, adjustments, costs, production processes and other relevant items and clearly informed SMST on how it should make a request for adjustment. All of SMST's answers and supporting documents provided in its questionnaire response, without any exception, demonstrated beyond any reasonable doubt that there were no physical differences that had an impact on price comparability between Grade C exported to China and Grade C sold domestically by SMST. During the investigation, SMST never informed MOFCOM that these answers in its questionnaire response were wrong, nor why this would have been the case. During the investigation, SMST never lodged any substantiated request in relation to a fair comparison concerning sales of Grade C, and therefore, the claim presented by the European Union must fail. SMST merely lodged several contradictory and incoherent statements concerning first, low volume sales and, second, low volumes sales of tubes with differences in diameter and, finally, just sales of tubes with differences in diameter.

5. Therefore, MOFCOM's decision against taking into account SMST's unsubstantiated statements presented subsequent to its questionnaire response, and to rather base its findings on the clear and consistent information contained in the questionnaire response, is consistent with China's obligations under Article 2.4 of the Anti-Dumping Agreement.

1.3 MOFCOM's determination of SMST's dumping margin, as consistent with Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

6. The European Union's claims under Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement relate to an alleged double-counting of administrative expenses. However, an examination of the facts makes it clear that there was simply no double-counting in the dumping margin determination.

7. Moreover, Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement cannot be construed as containing a requirement to accept all information provided during a verification visit. The fact that a verification visit's purpose may be "to verify information provided or to obtain further details" does not imply that an investigating authority is *compelled* to verify information provided or to obtain further details, let alone that it prescribes any approach that must be followed to pursue that objective. As such, Article 6.7 and Annex I of the Anti-Dumping Agreement leave a significant margin of discretion to investigating authorities. With respect to the alleged use of facts available, it suffices to say that MOFCOM simply did not rely on any SG&A amount in which there allegedly was a double-counting. Article 6.8 of the Anti-Dumping Agreement and Annex II are thus irrelevant to the case at hand, since MOFCOM did not make any determinations on the basis of "facts available".

2. CLAIMS REGARDING MOFCOM'S INJURY DETERMINATION

2.1 Consistency of MOFCOM's consideration of price effects with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

8. With respect to MOFCOM's consideration of the price effects of Grade C, MOFCOM did explain the methodology used to take into account the quantitative difference for the Grade C price effects consideration, contrary to the allegations made by Japan and the European Union. In any event, the argument made by Japan and the European Union blurs the lines between the substantive requirements laid down in Articles 3.1 and 3.2 and the procedural obligations set out in other provisions.

9. In addition, Japan and the European Union's claim is based on an incorrect understanding of the nature of the price undercutting consideration under Article 3.2 of the Anti-Dumping Agreement. The factual existence of price undercutting by the dumped imports is considered in itself to have an effect on domestic prices. A finding of price undercutting is a purely factual consideration, which only requires a comparison of prices. Thus, any factual circumstances other than the price difference that exists between the import price and domestic price of Grade C (for instance, the increase in the prices of domestic Grade C) are irrelevant for the price undercutting consideration. Moreover, Article 3.2 of the Anti-Dumping Agreement does not require an investigating authority to establish what caused the price undercutting (for instance, an increase of the domestic price or a decrease of the import price). Finally, the allegation that imports of Grade C were not in competition with the domestically produced Grade C is legally irrelevant and completely disregards MOFCOM's findings and in-depth analysis of this matter.

10. By claiming that MOFCOM improperly extended its conclusions concerning the price undercutting by Grade B and Grade C to the "domestic industry" "as a whole", Japan and the European Union misrepresent the nature of the price undercutting consideration in two main ways. First, they erroneously presume that the price undercutting consideration under Article 3.2 of the Anti-Dumping Agreement must be made with respect to the *domestic industry*, whereas it relates to the prices of the dumped imports as compared with the *price of a like product*. As such, the price effects consideration concerns the relationship between subject imports and a variable other than the domestic industry, that is, *domestic prices*. The assessment of the effects of the price undercutting on the domestic industry as a whole is relevant as to whether there is a causal link between the prices of the dumped imports and the impact on the domestic industry, in the *causation* analysis, not in the price undercutting consideration.

11. Second, considering that price undercutting had to be found with respect to the like product *as a whole* is at odds with the wording of Article 3.2 of the Anti-Dumping Agreement. A textual analysis, in particular with respect to the use of the indefinite article (as opposed to the abundant references to the concept of "like product" with use of the definite article in other

provisions), reveals that for the price undercutting consideration, the prices of the dumped imports must be compared with the prices of *some* like products. Moreover, the consideration under Article 3.2 of the Anti-Dumping Agreement focuses on price undercutting *by the prices of the dumped imports*. MOFCOM's consideration revealed that virtually all dumped imports were made at undercutting prices. Japan and the European Union's position is also at odds with the purpose of the price effects consideration, which will logically progress through the impact analysis towards the causation analysis.

12. In addition, far from being selective, MOFCOM's methodology on the basis of which it limited its price undercutting examination to "matching" models was objective and in line with Article 3.2.

2.2 Consistency of MOFCOM's analysis of the impact on the domestic industry with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. Any degree of "selectiveness" alleged to exist by Japan logically follows from the explicit requirements of the relevant provisions of the Anti-Dumping Agreement. Moreover, any differences between the approach under Article 3.2 and the approach under Article 3.4 may have to be assessed under Article 3.5 of the Anti-Dumping Agreement, which "links" both elements. In addition, Japan erroneously postulates that there existed a "segment of the domestic industry producing Products B and C" and a "segment of the domestic industry producing Product A" as well as a "domestic industry sector" per grade.

14. The European Union also claims that MOFCOM's impact analysis was improperly based on its flawed price effects analysis because the data relating to Grade A and Grade C are non-attribution factors. This reveals clearly that the European Union's argument concerns the non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement, or, at best, the causation analysis in general.

15. With respect to the evaluation of the margin of dumping, it is factually incorrect that MOFCOM did not evaluate this in the part of the Final Determination relating to the injury determination. In addition, similar to what was confirmed by case law for the evaluation of the "factors affecting prices", Article 3.4 does not as a general rule require an evaluation of the magnitude of the margin of dumping beyond the analysis of this factor as required by the provisions of the Anti-Dumping Agreement dealing specifically with the dumping margin. With respect to the conclusion reached by MOFCOM, the Final Determination provides a solid reflection of MOFCOM's reasoned evaluation of the weight and relevance of all factors. MOFCOM concluded that the weight and relevance of the positive factors fell short of those of the negative factors. This is something very different from the allegation that MOFCOM "disregarded" positive factors.

16. Finally, MOFCOM did not fail to examine whether subject imports provided explanatory force for the state of the domestic industry. The interpretation put forward by Japan creates an obligation that simply cannot be found in Article 3.4 of the Anti-Dumping Agreement. Moreover, a correct overview of the facts shows that MOFCOM properly examined the explanatory force, even under Japan's misguided interpretation.

2.3 The consistency of MOFCOM's causation determination with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

17. In its causation analysis, MOFCOM duly established a link between its price effects consideration and the impact analysis. The effects of price undercutting by the dumped imports on the domestic industry must be assessed by an investigating authority, *inter alia* taking into account how it defined the like product and the product concerned for the purposes of this investigation. MOFCOM had found in this respect that the three grades constitute a "single product" with correlation between their prices.

18. With respect to the importance attached to the market share, consistently with its finding under Article 3.2, MOFCOM stated as a first point in its causation analysis that imports of the subject products from the EU and Japan showed year-on-year declines. MOFCOM however continued its analysis and found that in order to assess the impact of the price undercutting by dumped imports on the domestic industry, it had to take into account the volume of imports made at undercutting prices. In line with the findings of the panel in *EC – Tube or Pipe Fittings*, MOFCOM

analyzed the key variables to derive an understanding about the impact of the price undercutting on the domestic industry, i.e. the quantity of sales at undercutting prices and the margin of undercutting. Contrary to allegations put forward by Japan and the European Union, Article 3.5 of the Anti-Dumping Agreement certainly allows an investigating authority to attach importance to the volume of imports. Indeed, an investigating authority is obliged to consider all relevant evidence.

19. Moreover, an analysis of MOFCOM's findings reveals that it was reasonable in concluding that the decline in apparent consumption and the capacity expansion did not break the causal link established between the dumped imports and the material injury. The conclusions reached by MOFCOM are reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and constitute meaningful explanations of the nature and extent of the injurious effects of reduced apparent consumption.

3. CLAIMS REGARDING MOFCOM'S DETERMINATION OF THE ALL OTHERS RATE

20. By means of the Initiation Notice and the different forms by which this was communicated, MOFCOM fulfilled its obligations under paragraph 1 of Annex II and was entitled to use facts available with respect to those exporters/producers that did not come forward and/or did not respond to the questionnaire. A very similar situation was addressed by the panel in *China – Broiler Products*, which explicitly dismissed Japan's misplaced reliance on the notion that MOFCOM could not substitute information with facts available, other than the information requested in the Initiation Notice. This conclusion is reinforced by the publication of the questionnaire on MOFCOM's website, which included a similar notice that if the information was not timely supplied, then facts available could be used. In view of the above, the claim must be rejected that MOFCOM failed to comply with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement.

21. As regards Article 6.4 of the Anti-Dumping Agreement, this alleged infringement must be dismissed, as the European Union does not present a *prima facie* case. The European Union limits its arguments under this provision to simply a bare reference to this provision.

22. The claim on the basis of Article 6.9 of the Anti-Dumping Agreement must equally fail since MOFCOM adequately disclosed the facts leading to the conclusion that the use of facts available was warranted (the failure of various interested parties to respond to the Initiation Notice by means of the registration form and/or the failure to respond to the questionnaire) as well as the facts used to determine the all others rate (the highest dumping margin of the Japanese responding companies for the all others rate for Japan, and it used the highest dumping margin of the EU responding companies for the all others rate for the European Union). Similar comments apply to the alleged violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

4. CLAIMS REGARDING MOFCOM'S DISCLOSURE DOCUMENTS AND FINAL DETERMINATION

23. The European Union fails to make a *prima facie* case for the alleged inconsistency with Article 6.4 because it fails to show that MOFCOM denied an interested party's request to see information used by the authorities.

24. Japan and the European Union's claims with respect to the dumping determinations under Article 6.9 of the Anti-Dumping Agreement are only supported by general allegations, which are not substantiated in any way by means of a specific reference to the disclosure documents. A complaining party may not simply submit evidence in the form of exhibits, accompanied by some general allegations and expect the panel to divine from it a claim of WTO-inconsistency. This implies that no *prima facie* case has been made. In any event, the examples provided by China demonstrate that the general allegations relied upon by Japan and the European Union are factually incorrect and that MOFCOM satisfied its obligations under Article 6.9.

25. Japan and the European Union's claims in relation to the injury and causation determinations must equally fail. With respect to Article 6.9, MOFCOM disclosed all "essential facts", and as concerned "essential facts" for which it was bound by confidentiality obligations, it provided sufficient non-confidential summaries, *inter alia* in the form of a range of the confidential margins. With respect to the claims under Articles 12.2 and 12.2.2, similarly, MOFCOM included all

"relevant information on the matters of fact" where appropriate, in the form of a proper non-confidential summary.

5. CLAIMS REGARDING MOFCOM'S TREATMENT OF CONFIDENTIAL INFORMATION

26. With respect to the alleged violation of Article 6.5 of the Anti-Dumping Agreement, the European Union fails to specify the documents for which it alleges that confidential treatment was improperly granted and fails to refer to the statements considered by MOFCOM as providing "good cause". Accordingly, it fails to make a *prima facie* case. In relation to Japan's claim, the facts of this case show that the Petitioners did not only request confidential treatment out of concern for the impact on the third parties' businesses. Rather, they provided several other reasons justifying the confidential treatment of the four appendices at issue. As such, their concern could not have been sufficiently addressed by withholding the names of the third parties. Moreover, in line with the Petitioners' request and as revealed by the non-confidential versions of the four appendices at issue, the confidential treatment did *not* concern the entirety of the four appendices at issue *on a blanket basis*. Rather, the non-confidential versions lodged by the Petitioners included a large part of the original text. MOFCOM acted consistently with Article 6.5 of the Anti-Dumping Agreement.

27. In relation to the claim under Article 6.5.1 of the Anti-Dumping Agreement, the Petitioners provided a broad range of details in the concerned non-confidential summaries and/or statements as to why summarization was not possible. With respect to the appendices the confidential treatment of which is challenged by Japan under Article 6.5, the non-confidential versions clearly disclose more than merely the final data, as alleged by Japan and the European Union, but also provide further summaries or even integral parts of the information contained in each original (confidential) report. They are certainly sufficiently detailed to provide a "reasonable understanding" of the substance of the information submitted in confidence. With respect to the Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, the translation provided by Japan and the European Union does not correctly reflect the original Chinese version. As a matter of fact, the column "Note and non-confidential summary" provides a statement of reasons as to why further summarization is not possible.

6. OTHER ISSUES

28. The European Union brings a request for the amendment of the BCI Procedures adopted by the Panels. China considers that the Panels have, after discussing the matter with the parties to the disputes, determined that additional protection was justified in this case and specified the form that this additional protection would take. Moreover, the BCI procedures are in line with Article 6.5 of the Anti-Dumping Agreement. As such, there is nothing WTO inconsistent about the content of the BCI Working Procedures as adopted by the Panels in accordance with Article 12.1 of the DSU and they do not need to be amended in this respect.

29. The European Union further requests that the Panel exercise its right to seek information, as well as to make a suggestion for implementation, pursuant to Articles 13.1 and 19.1 of the DSU respectively. While China does not call into question the Panel's discretion to decide whether or not to exercise its rights under Articles 13.1 and 19.1 of the DSU, it does not consider it appropriate to do so in this dispute.

30. China respectfully requests the Panels to amend paragraph 10 of the Working Procedures of the Panels, to ensure a more even-handed treatment of both the complainants and the defendant in this dispute with respect to the timeframe within which objections to translations should be raised.

7. CONCLUSION

31. For the reasons set forth in its submission, China requests that the Panel in DS454 and the Panel in DS460 reject the claims of respectively Japan and the European Union in their entirety and find that MOFCOM’s determinations in the underlying investigation were fully consistent with China’s obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX C-2

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

Mr. Chairman, distinguished Members of the Panels,

1. The People's Republic of China ("China") would like to thank you for agreeing to serve on these Panels. China also takes this occasion to thank the Secretariat for its valuable assistance. In this oral statement, China will briefly touch upon some key factual and legal issues in this dispute, leaving as much time as possible for answering any questions the Panels may have.

1. THE ANTI-DUMPING INVESTIGATION AT ISSUE

2. The single product under consideration includes three grades, with Grade A as the low-end grade and Grade B and Grade C as the high-end grades. On the import side, Grade B represented over 70% of the imports of the product under consideration, with Grade C making up the bulk or all of the remaining imports. The domestic industry produced and sold all three grades. However, sales of the low-end Grade A represented a large share of its sales since its ability to sell Grade B and Grade C was hampered by unfair competition from imports.

3. The dumped imports from Japan and the European Union still held a market share of around 50%, and their prices decreased year-on-year. The imports were found to be made at undercutting prices. Imports of Grade B (representing over 70% of total imports) were made at prices that were up to 28% lower than the domestic sales price. Imports of Grade C were found to be made at undercutting prices as well. For Grade A, it was not possible to compare prices because of the quantitative difference between imports and domestic sales in 2008 and the absence of import sales in other years. As such, there was price undercutting by all grades that were actually imported by Japan and the European Union in years other than 2008 (that is, Grade B and Grade C).

4. Faced with these imports at undercutting prices, the domestic industry was suffering injury. MOFCOM's analysis revealed the presence of a number of positive indicators, but its assessment showed that the negative indicators outweighed the positive factors.

5. In its assessment of the causal link, MOFCOM took into account that the import volume decreased, as revealed by the volume effects analysis. However, when assessing the impact of the price undercutting on the domestic industry, MOFCOM did take into consideration that the dumped imports made at undercutting prices still held significant market shares. The imports of Grade B and Grade C made it practically impossible for the domestic industry to sell the high-end grades of the product under consideration. The fall in the (undercutting) import price of the high-end grades resulted in a significant fall in the domestic sales price that the domestic industry managed to charge in these high-end grades. The fall in price of the imported high-end grades also impacted the sales price at which the domestic industry could sell the low-end product grade (Grade A).

2. KEY LEGAL ISSUES AT STAKE

6. One of the key elements vitiating the claims by Japan and the European Union is the failure to respect the inherently different nature of the inquiries under paragraphs 2, 3 and 5 of Article 3 of the Anti-Dumping Agreement and the relationship between those inquiries. Assessment of the WTO consistency of the different steps in an injury analysis, such as the price effects consideration and the impact assessment, should be made according to the obligations in the paragraph that governs such specific step. Japan and the European Union's claims, however, conflate those obligations contained in the specific paragraphs with one another or simply transpose the obligations contained in one paragraph to a different step in the injury analysis.

7. This is clearly revealed by the fact that Japan and the European Union allege that MOFCOM has erroneously extended its conclusion concerning price undercutting of Grade B and Grade C to the "domestic industry as a whole". A similar misunderstanding affects Japan's claim with respect to the impact assessment under Article 3.4 of the Anti-Dumping Agreement. Japan fails to

acknowledge that the focus of the price effects consideration and the impact assessment are inherently different. Considerations that may result from these differences, if any, need to be addressed in the causation analysis under Article 3.5 of the Anti-Dumping Agreement, not in the impact assessment under Article 3.4.

8. Another factor which undermines the position of Japan and the European Union is the apparent lack of understanding of the inherently different nature of a price undercutting consideration, on the one hand, and a price depression or suppression analysis, on the other hand.

9. China would like to stress once again the importance of assessing the European Union's dumping claims on the basis of a correct, complete and contemporaneous overview of the factual elements relating to these claims. This factual overview reveals that if any mistakes were made in relation to the dumping matters at stake, these were made by the EU exporter concerned, not by the investigating authority. Whether or not a different determination would have or should have been reached by MOFCOM in the absence of the mistakes by the EU exporter, is not an assessment to be made by the Panel. The Panel should assess the European Union's claims on the basis of an analysis of the record at the time of the determination.

3. THE EUROPEAN UNION'S RESPONSE TO CHINA'S REQUEST FOR PRELIMINARY RULING

10. In response to China's request for a preliminary ruling on the terms of reference, the European Union, instead of focusing on the procedural matter at stake, addresses a wide range of substantive aspects which are of no relevance whatsoever to the procedural question posed to the Panel. China notes that the response to China's request for a preliminary ruling is not the appropriate medium to raise additional substantive arguments.

11. Each of the four provisions listed in the European Union's request for the establishment of a panel contains multiple obligations. Where a provision contains only a single obligation, a simple reference to the provision may be a sufficient summary of the legal basis of the complaint. Where a provision, such as those at stake contains multiple obligations, a panel request may need to specify which of the obligations is being challenged. If so, it goes without saying that the obligations identified represent the totality of the claims before the panel under the provisions in question. This is the situation presently before the Panel in DS460. The summary of the legal basis of the complaint of the European Union is expressly limited, by the use of the words "in particular", to the obligations for the SG&A to (1) reflect the records of the exporter and (2) be based on actual data.

12. The arguments presented by the European Union in its response to the request for preliminary ruling must fail. No summary of the legal basis of the claims at stake was included in the panel request. Since the request for the establishment of a panel clearly limited the European Union's claims regarding the SG&A to two specific obligations, China obviously limited the preparation of its defence to these specific obligations. This precluded China from including arguments about other obligations in its first written submission. The absence of a legal summary of the basis of the complaint for the other claims raised by the European Union in its first written submission did not only result in a prejudice to China. As a result of this absence, the request for the establishment of the panel equally failed to fulfil its function of informing the third parties of the basis for the complaint and precluded WTO Members from assessing whether they had a substantial interest in the matter before the Panel.

13. In its response, the European Union includes a number of allegations which are irrelevant to the subject matter of the requested preliminary ruling. China will clarify once again in writing why the allegations of the European Union are factually incorrect. However, at this stage, China considers that the decision on the preliminary ruling should focus on the procedural matter at stake and not on the surprisingly confused substantive inaccuracies put forward by the European Union.

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

1. MOFCOM'S DETERMINATION OF THE SG&A AND ITS CONSISTENCY WITH ARTICLES 2.2, 2.2.1, 2.2.1.1 AND 2.2.2 OF THE ANTI-DUMPING AGREEMENT

1. The European Union's submissions during the Panel process leave it unclear as to exactly which claims the European Union is raising, how these claims relate to each other, and which arguments relate to which claims. The lack of any clarity and precision in relation to how the European Union is developing its claims in its first written submission, in any event, is of limited importance to the present dispute, given the high level of precision and clarity of the claims included in the European Union's request for the establishment of a panel. The latter expressly limits its claims under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement to the claims that the SG&A amounts "do not reflect the records and the actual data". The use of the word "in particular" makes this even clearer.

2. The request for the establishment of a panel by the European Union is thus, in the words of the panel in *US – Corrosion-Resistant Steel Sunset Review*, "not unclear and does not lack specificity: it is absolutely and clearly mute with respect to the issue of whether" the SG&A amounts, for instance, are based on data that pertain to "production and sales in the ordinary course of trade". As such, it is "insufficient on its face to provide the foundation sought by" the European Union.[1]

3. There are two claims within the Panel's terms of reference. First, the European Union claims that the SG&A amounts used by MOFCOM for the determination of SMST's constructed normal value for Grade B are not "based on actual data". China does not consider that it can be reasonably disputed that the SG&A amounts used by MOFCOM "built upon" or "construct upon" the costs of production. It also cannot be disputed that these costs of production are actual. As a result, it is clear that the SG&A amounts used by MOFCOM for the determination of the constructed normal value of Grade B of SMST were "based on" the cost of production and thus based on "actual data".

4. Whether or not the coefficients used are also actual data is irrelevant, since in any event, the SG&A amount were "based on" actual data. Article 2.2.2 does not require the SG&A amount to be actual data in itself. Nevertheless, for the sake of good order, China points out that the coefficients also constitute "actual data". The coefficients are "the internal rates used by SMST in preparing price/cost calculations for orders" and were used by SMST in its daily operations and, accordingly, are data that pertained to acts, existed in fact, are real, and were in existence at the time. Therefore, the coefficients are actual data. If figures used for constructed value determinations would no longer be considered to be based on actual data, as from the moment that they would be allocated on the basis of coefficients, this would have unwarranted systemic consequences.

5. Second, the European Union seems to claim that the SG&A amounts for Grade B in the EU market provided by SMST in table 6-3 are not based on SMST's records. The *New Shorter Oxford English Dictionary* defines "record" as "[…] knowledge or information preserved in writing, […] a written or otherwise permanently recorded account of a fact or event […] Also, a document […] on which such an account is recorded […]; in pl., a collection of such accounts, documents, etc.".[2] The production costs and the coefficients are clearly part of SMST's records in this sense.

2. MOFCOM'S DUMPING DETERMINATION FOR SMST'S SALES OF GRADE C AND ITS CONSISTENCY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

6. In line with its practice, MOFCOM used the product types (or "baskets of transactions") proposed by the exporter to minimize the need for adjustments by using. In addition, MOFCOM

[1] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para.7.53.
[2] The New Shorter Oxford English Dictionary, Exhibit CHN–15, Vol. II, p. 2506.

requested the exporters to make substantiated requests for adjustments for any differences that affect price comparability. The product types set by SMST and the absence of any need for adjustments as stated by SMST were the two parameters that MOFCOM relied upon to ensure a fair comparison. At no point during the investigation did SMST request to amend the product types (or the "basket of transactions") used for the determination of the normal value. SMST also never requested any adjustment. Assuming that physical differences affected price comparability, SMST failed to comply with its obligation "to make substantiated requests for "due allowance", whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability".[3] By contrast, MOFCOM fully complied with its obligation to ensure a fair comparison. A very similar claim was addressed in *EU – Footwear (China)* and the findings in that case show that no violation of Article 2.4 can be found in the present dispute.

7. This is true, even if assuming that SMST demonstrated that the physical differences identified in the course of the investigation affected price comparability. Moreover, in any event, SMST did not demonstrate that these physical differences affected price comparability. SMST demonstrated the existence of physical differences (that is, a differences in outer diameter). However, it did not even attempt to demonstrate that these differences affect price comparability. The European Union cannot point to a single piece of evidence submitted by SMST to demonstrate an impact on price comparability (which is a consideration separate from different prices).

3. MOFCOM'S DETERMINATION OF SMST'S DUMPING MARGIN IS CONSISTENT WITH ARTICLE 6.7 AND ANNEX I, PARAGRAPH 7 AND ARTICLE 6.8 AND ANNEX II, PARAGRAPHS 3 AND 6 OF THE ANTI-DUMPING AGREEMENT

8. The alleged double-counting issue is non-existent and the claims presented by the European Union thus lack any factual basis. In any event, Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement do not contain any obligation for an investigating authority to accept information, let alone any claim, presented to it during the verification visit. Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement relate to the situation in which determinations are made based on the facts available. MOFCOM simply did not rely on any alleged double-counting and, as such, did not make any determinations on the basis of the alleged facts available.

9. Moreover, in the absence of any double-counting, the alleged procedural violation did not and could not have had any adverse impact on the European Union, as there is no case of nullification or impairment of the European Union's rights. The facts of this case rebut the presumption of nullification or impairment laid down in Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

4. CLAIMS REGARDING MOFCOM'S PRICE UNDERCUTTING CONSIDERATION

4.1 The consistency of MOFCOM's consideration of price undercutting by imports of Grade C with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

10. While MOFCOM's finding of likeness does not necessarily imply that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration,[4] it does imply that there is "likeness" between the grade included in the basket of domestic goods that was explicitly found to be "like" the corresponding grade included within the scope of the product under consideration. In the present case, this is even more evident, in view of MOFCOM's finding that the corresponding grades are "basically identical" and "substitutable". The fact that the complainants did not challenge MOFCOM's findings relating to the competitive relationship under Article 2.6 of the Anti-Dumping Agreement results in the irrelevance of this aspect under Article 3.2. Japan and the European Union must take, as a given, the competitive relationship between the domestically produced Grade C and the imported Grade C.

11. Moreover, MOFCOM analyzed at length the competitive relationship between the imported grades and the corresponding domestically produced grades. This discussion was included in the Final Determination when addressing the like product determination, in relation to which the

[3] Panel Report, *EU – Footwear (China)*, para. 7.278.
[4] Panel Report, *China – X-Ray Equipment*, para. 7.65.

interested parties logically raised this issue. Obviously, "in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination".[5] In view of the complete absence of any discussion of MOFCOM's findings, it is clear that no *prima facie* case has been made by the complainants.

12. In view of the above, no finding can be made in this dispute that MOFCOM failed to properly establish the competitive relationship between imported Grade C and domestically produced Grade C. This is irrespective of whether or not the Panels consider that there should be "explanatory force" or that a price differential will always constitute an effect. In this respect, as addressed in previous submissions, China considers that Article 3.2 allows an investigating authority to find (or to presume conclusively) price undercutting in case the dumped import prices are below the comparable domestic prices. No additional "effect" consideration is required since price undercutting is in itself an effect. An important element reflecting the manifest unreasonableness of the complainants' interpretation is the disregard of the inherently different nature of a price undercutting consideration and a price depression/suppression consideration.

13. The complainants further rely on the allegation that the sales of Grade C were "outlier transactions". However, Japan and the European Union fail to provide any evidence for the alleged "outlier" nature of the sales of Grade C and, as such, do not substantiate their claims. Moreover, the outlier nature of sales may be relevant from the supply-side perspective, but this is not the case from the demand-side perspective (for the customer when making its purchasing decisions). Also, Article 3.2 provides no methodological guidance on how to consider price effects.[6]

4.2 The consistency with Articles 3.1 and 3.2 of the Anti-Dumping Agreement of MOFCOM's overall consideration of price undercutting by imports of the product under consideration

14. MOFCOM found a price correlation between the different grades making up the product under consideration and the domestic like product. On this basis, MOFCOM found that Grade A should not be excluded from the scope of the product under consideration. The price correlation and the effect of imports of Grade B and Grade C at undercutting prices on prices of Grade A is a matter of elementary economics. In order for dumped imports to have an effect on prices of like products, the dumped imports should be able to substitute the domestic like products. For MOFCOM's overall price undercutting consideration in the case at hand, the relevant question is thus whether or not the high-end grades (Grade B and Grade C) are capable of substituting the low-end grade (Grade A). The possibility to substitute the low-end grades by the high-end grades of HP-SSST is evident and was referred to during the investigation by interested parties, including the exporters.

15. Therefore, no violation can be found of Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to MOFCOM's overall price undercutting consideration. This is irrespective of whether or not price effects need to be considered for the like product "as a whole" as alleged by Japan and the European Union. In any event, Japan and the European Union's legal interpretation and reliance on the price effects on the like product "as a whole" are erroneous, as explained at length in China's previous submissions.

5. CONSISTENCY OF MOFCOM'S ANALYSIS OF THE IMPACT ON THE DOMESTIC INDUSTRY WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

16. The price undercutting by imports of Grade B and Grade C had an effect on prices of the domestically produced Grade A, given the substitutability and resulting price correlation between these three grades. As such, it is irrelevant as to whether an impact assessment should be carried out on any basis other than focusing on the domestic industry as a whole and/or should be accompanied by additional explanations in case price effects were considered on a per grade basis. This is because the circumstances that would allegedly lead to such additional inquiries are simply not present in the case at hand.

[5] Panel Reports, *US – Softwood Lumber VI*, para. 7.136, *US – Countervailing Duty Investigation on DRAMS*, footnote 264.

[6] See for instance Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.292; *EC – Fasteners (China)*, para. 7.328.

17. In any event, any alleged degree of "selectiveness" of MOFCOM's approach logically arises from the explicit requirements of the relevant provisions of the Anti-Dumping Agreement, rather than from any bias or attempt to inflate the chances of maximizing an affirmative finding of injury. MOFCOM considered price undercutting on a grade-by-grade basis, in line with its obligation under Article 3.2 of the Anti-Dumping Agreement to ensure comparability of the prices being compared. In its impact assessment, MOFCOM focused on the impact on the domestic industry as a whole, consistent with its obligation under Article 3.4 of the Anti-Dumping Agreement. In no way did MOFCOM determine its approach "depending on which approach would maximize the chance of finding injury to the domestic industry". This approach was furthermore in line with the logical progression of inquiry leading to an investigating authority's ultimate decision on whether or not dumped imports are causing injury to the domestic industry.

18. For the reasons explained in China's first written submission, MOFCOM's evaluation of the magnitude of the margin of dumping was sufficient for the purposes of Article 3.4 of the Anti-Dumping Agreement and MOFCOM properly found that the domestic industry was injured. Finally, MOFCOM did ensure the explanatory force, to the extent required. This is true even under Japan's erroneous interpretation. China's explanation in this respect is not an "post hoc attempt" but is rather taken from the Final Determination itself.

6. THE CONSISTENCY OF MOFCOM'S CAUSATION DETERMINATION WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

19. MOFCOM logically progressed its inquiry, starting from its product scope and like product findings, via its price effects consideration and impact assessment, leading towards this final conclusion under Article 3.5 of the Anti-Dumping Agreement.

20. When assessing the impact of price undercutting on the domestic industry, MOFCOM relied on the high market share of the dumped imports. This, however, does not imply that MOFCOM relied on a significant increase of dumped imports under Article 3.2 of the Anti-Dumping Agreement to find causation under Article 3.5. Indeed, a distinction must be made between MOFCOM's conclusion that there was no significant increase in the volume of the dumped imports under Article 3.2 of the Anti-Dumping Agreement and MOFCOM's reliance on the fact that dumped imports retained a high market share under Article 3.5. Article 3.5 of the Anti-Dumping Agreement certainly allows an investigating authority to attach importance to the volume of imports in this context. The appropriateness of MOFCOM's approach is also confirmed by the finding of the panel in *EC – Tube or Pipe Fittings*.[7]

21. A finding that imports decreased does not compel an investigation authority to conclude that the domestic industry did not suffer any material injury or that any injury suffered by the domestic industry could not be caused by the subject imports. Moreover, the present situation appears to be a textbook example of a case in which a causal link can be found, despite the lack of a significant increase in dumped imports.

22. MOFCOM's non-attribution analysis was consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The explanations provided by MOFCOM constitute "meaningful explanations of the nature and extent of the injurious effects"[8] of reduced apparent consumption. The complainants' allegations fail in relation to the irrelevance of trends in domestic demand for Grade A. Grade B and Grade C can substitute Grade A. Therefore, demand for Grade A is obviously a relevant consideration.

23. MOFCOM further made a reasonable conclusion that the effects of the expansion of capacity were not sufficient to break the causal link between dumped imports and material injury.

7. OTHER CLAIMS

24. With respect to claims raised by Japan and the European Union in relation to the all others rate, China considers that it complied with all its obligations in this respect. In relation to the consequential claims by the European Union, China points out that the alleged violations at the basis of these claims are inexistent. In any event, the European Union takes issue with the

[7] Panel Report, *EC – Tube or Pipe Fittings,* para. 7.277.
[8] Appellate Body Report, *US – Lamb*, para. 186.

particular "facts available" relied upon. This is a matter that should be assessed under paragraph 7 of Annex II, the only provision dealing with the substantive quality of the "facts available" that are relied upon. No claim is made under this provision. To the extent the European Union is requesting the Panel to make a finding of violation consequential to any alleged procedural violations, China points out that exactly because "it is in the nature of a procedural claim that one does not know what the substantive consequences may eventually be of remedying the procedural effect", a procedural claim cannot lead to a consequential finding of a substantive violation.

25. China has demonstrated, in considerable detail, that its disclosure documents and Final Determination are consistent with its obligations under Articles 6.4, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. With respect to the calculation methodology, China considers that the wording of Article 6.9 of the Anti-Dumping Agreement is clear, in the sense that it only covers "essential facts" and does not cover reasoning. In the context of Article 6.9, a "calculation methodology" forms part of the investigating authority's reasoning, and does not amount to a fact in any event. Japan appears to concede that the calculation methodology is "not entirely distinct from legal interpretation". This implies that the calculation methodology does not fall within the notion of "fact", since facts do not "have any overlap whatsoever with legal interpretation". The European Union's the position that inferences drawn from relied upon facts can still constitute "facts" for the purposes of Article 6.9 of the Anti-Dumping Agreement is contradicted by the findings of the panel in *EC – Salmon (Norway)*, which described a "fact" as "[a] thing assumed or alleged as a basis for inference".[9] Article 6.9 thus only covers the factual basis for inference, not the inferences themselves.

26. MOFCOM's treatment of confidential information submitted by the Petitioners was consistent with China's obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. In this respect, the Anti-Dumping Agreement imposes no obligation on an investigating authority to explain why it considers that confidential treatment is warranted. Moreover, Japan and the European Union are both mistaken in claiming that the potential disruption of the third parties' businesses could have been sufficiently addressed by withholding their names. Such approach would not have addressed the concerns of the Petitioners or the third parties in question regarding the full disclosure of the four concerned appendices, as is evident on the face of the Petitioners' request for confidential treatment.

27. The Petitioners provided detailed and adequate non-confidential summaries of the four appendices at issue, explaining the content of the reports, including information and data. Regarding the other 32 additional Appendices to the Petitioners' Supplemental Evidence of 1 March 2012, a description of the information contained therein is provided. A statement is also provided as to why summarization of the content of those appendices was not possible, due to confidentiality considerations with regard to business secrets.

8. CONCLUSION

28. For the reasons set forth in its submissions, China requests that the Panel in DS454 and the Panel in DS460 reject the claims of respectively Japan and the European Union in their entirety and find that MOFCOM's determinations in the underlying investigation were fully consistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994.

[9] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

ANNEX C-4

EXECUTIVE SUMMARY OF THE STATEMENTS OF
CHINA AT THE SECOND PANEL MEETING

1. MOFCOM'S OVERALL PRICE UNDERCUTTING CONSIDERATION

1. The consistency of MOFCOM's grade-by-grade price undercutting consideration with WTO law is confirmed by the use of the indefinite article in relation to the concept of "like product" in Articles 3.1 and 3.2. Regarding the complainants' reliance on the definite article before "domestic market", Article 3.1 does not speak about the effect of the dumped import on *the* domestic market, but on the effect on *prices* in that domestic market. The reference to "the" domestic market clarifies that these "prices" referred to by an indefinite article must relate to "the" domestic market for like products. China's interpretation is also in line with the role that the price undercutting consideration plays in the logical progression of inquiry leading towards a possible affirmative finding of injury caused by dumped imports. The consideration under Article 3.2 must allow an investigating authority to understand the undercutting that occurs and the frequency and magnitude of that undercutting. This will enable it to logically progress its inquiry towards an assessment of the extent of the impact of price undercutting on the domestic industry under Article 3.5, taking into account the nature of the injury found to exist under Article 3.4.[1]

2. Even if assuming that somehow, an investigating authority would be required under Article 3.2 to find price undercutting for the like product as a whole (*quod non*), no violation can be found in the case at hand because of the substitutability of Grade A by Grade B and/or Grade C and the resulting price correlation. The potential to substitute as well as the actual occurrence of substitution was referred to several times by the Japanese exporter SMI itself.

2. MOFCOM'S PRICE UNDERCUTTING CONSIDERATION OF GRADE C

3. Any price differential that is found between comparable products will constitute price undercutting for the purposes of Article 3.2 and will constitute an effect as such. The wording of Article 3.2 supports such position; that is, in order to find price undercutting, it suffices to find a price differential between comparable products.

4. Japan and the European Union read the Appellate Body's findings in *China – GOES* in isolation of the qualifications given by the Appellate Body. The Appellate Body explicitly found that for price undercutting, the inquiry as to the "effect" consists of a price comparison - "a comparison be made between the two" - without any need for an additional inquiry. Even if assuming that any additional inquiry as to the "effect" was actually required (*quod non*), the arguments relied upon by the complainants cannot lead to a finding of violation because of MOFCOM's extensive assessment of the competitive relationship in its like product assessment.

5. China is not claiming that a likeness finding implies that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration. Rather, China is stating that an explicit finding of likeness between the imported grades with their corresponding domestic grades implies that domestic Grade C is "like", and thus in competition with, the imported Grade C. Products for which the prices are comparable for the purposes of Article 3.2 are a subset of like products. Like products are in turn a subset of competitive products, as found by the Appellate Body in *Korea – Taxes on Alcoholic Beverages*. China is thus not arguing that a finding that products are "like" will always suffice to ensure price comparability, as the complainants attempt to portray China's arguments. However, to the extent that the complainants consider that there was a lack of price comparability under Article 3.2 in the present dispute, this claim is actually based on an alleged lack of competitive relationship. Given the specific likeness finding for domestic Grade C and imported Grade C, these cannot be considered as not comparable for the purpose of Article 3.2 because of an alleged absence of a competitive relationship.

[1] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.277.

3. SG&A DATA FOR SMST'S NORMAL VALUE FOR GRADE B

6. In relation to the terms of reference matter, China is not taking issue with the European Union for failing to cite the full wording of the relevant provisions. Rather, China takes issue with the European Union's attempt to raise additional claims after it had explicitly limited its panel request to an alleged inconsistency in relation to two specific obligations.

7. The irrelevance of the European Union's artificial distinction between the "actual data" reference in Article 2.2.2 and the "actual amounts" reference in Article 2.2.2(ii) is clear from the findings of the panel in that case (*EC – Bed Linen*).[2] The European Union further misrepresents the panel's findings in *US – Corrosion-Resistant Steel Sunset Review*, while the parallels between these two cases are striking:[3] although the two claims - actual data and ordinary course of trade - may have the same legal basis - Article 2.2.2 - the European Union expressly limited its panel request to the actual data requirement. The panel in that dispute also stated that "we do not believe it is necessary to examine the issue of prejudice to the United States by any alleged "lack of specificity" in the Panel request".[4] Furthermore, the European Union reprimands China for allegedly disclosing the content of the consultations. In addition to being contrary to established case law, it is the European Union's own first written submission that mentions several times that China disclosed the exact number and the source during the consultations.

8. With respect to the claims within the Panel's terms of reference, Article 2.2.2 requires SG&A to be "based on" actual data. It cannot seriously be disputed that the SG&A amounts used by MOFCOM are in fact "founded" on, "built upon" or are "supported by" the costs of production.[5] It also cannot be disputed that these costs of production are "actual" in that these "existed in act or in fact" and were "in existence at the time".

4. FAIR COMPARISON FOR SMST'S DUMPING DETERMINATION FOR GRADE C

9. The European Union is claiming that in the circumstances of the present case, without any evidence of impact on price comparability and in the absence of any request to do so, an investigating authority must spontaneously amend the product types used. In particular, the European Union claims that when "an exporter has presented evidence of differences in physical characteristics and prices, an investigating authority" must amend the product types to ensure that the products sold on the domestic market with differences are not used to calculate normal value.[6]

10. In extending findings under Article 3.2 to the fair comparison requirement under Article 2.4, the European Union refers to the Appellate Body's findings in *EC – Fasteners*.[7] Interestingly, these findings confirm the discretion of an investigating authority as to the methodology it follows to ensure fair comparison. Further confirmation can be found in the panel's findings in *EC – Footwear*.[8] In that dispute, the panel dismissed the position that the product types or "basket" definitions should reflect "all the characteristics of the product which may have affected price comparability". China considers that the use of the product types submitted by SMST is an important element in determining MOFCOM's compliance with Article 2.4. China does, however, consider that it is not possible to exclude certain products from the scope of the investigation on the basis of Article 2.4.

11. SMST never demonstrated any impact of the alleged physical differences on price comparability. The European Union seems to argue that an investigating authority should spontaneously analyze all data received and carry out several calculations to identify possible differences in costs of production, even if it has not been directed to this data or the required calculations by the exporter. This would inevitably impose an unreasonable burden on investigating authorities.

[2] Panel Report, *EC – Bed Linen*, para. 6.99.
[3] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53.
[4] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53.
[5] Appellate Body Report, *EC – Hormones*, para. 163.
[6] European Union's second written submission, para. 127.
[7] European Union's second written submission, footnote 148.
[8] Panel Report, *EC* – Footwear, paras. 7.280 – 7.283.

5. OTHER CLAIMS

12. With respect to the dumping disclosure, it is not sufficient for the complainants to "point to the fact that they do not disclose the essential facts". A decision by the complainants to remain silent about China's submissions cannot result in a finding of violation, especially as China rebutted these general statements in specific terms. The methodology of MOFCOM's disclosure did permit interested parties to understand how the calculation had been made (see for instance SMST's comments on the Preliminary Dumping Disclosure (Exhibit EU-19 (BCI)), paragraphs 3 to 4).

13. In relation to the injury disclosure and final determination, with respect to those grades and time periods for which no price comparisons were made in the absence of domestic sales or imports, there was no price differential information. As such, the information on import prices could not have led to a contrary outcome in the price undercutting consideration. Regarding confidential information that may have required disclosure, an appropriate non-confidential summary may take the form of "a non-confidential range [of] the percentage difference between the average unit values", which is exactly what MOFCOM did in the present case.[9]

14. Regarding MOFCOM's use of facts available for the "all others rate", compliance should be assessed with respect to the exporters existing at the time, and not with respect to exporters that did not exist at the time when the measures were adopted, and who may or may not have subsequently come into existence. Japan further invokes for the first time, in paragraphs 76 to 81 of its second written submission, a violation of Paragraph 7 of Annex II. China is concerned by this claim, as it is clearly outside the Panel's terms of reference.

15. China recalls that the prospective nature of the WTO dispute settlement system precludes a suggestion such as the one requested by the European Union, since Article 19.1 of the DSU simply requires that a measure is brought into compliance, not that any preceding non-compliance is restored.

16. With respect to a number of claims, the complainants have developed their arguments in different ways and/or have engaged in a more detailed analysis than the other complainant. As a result, for those claims, China considers it appropriate that the findings of each of the Panels are set out separately, taking into account that it is for each complainant separately to make a *prima facie* case.

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[9] China's first written submission, paras. 685 and 692.

ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

THIRD-PARTY STATEMENT OF THE REPUBLIC OF KOREA

1. On behalf of the Republic of Korea, I first would like to extend my sincere gratitude to the members of the Panel for providing us a chance to present our view on the issues that we think are important in this case. This anti-dumping case casts some serious questions with respect to the anti-dumping investigations procedure which may affect the defending rights of the exporters and ultimately the final determinations by the authorities. We hope the Panel guides us through this case with wisdom as to how the investigating authorities should conduct their anti-dumping investigations.

2. Among various issues, Korea would like to raise two issues which are (1) When can the investigating authorities determine the dumping margin on the basis of facts available for all other companies and (2) When does the burden of proof with regard to the fair comparison obligation under Article 2.4 of the AD Agreement shift to exporters from the investigating authorities. Korea will discuss the two issues in order.

When can investigating authorities determine the dumping margin on the basis of facts available under Article 6.8 of the AD Agreement for all other companies

3. The European Union claimed that the use of facts available is permitted in the calculation of an all others rate, provided that some efforts are made in terms of seeking to identify other firms or specifying the consequences of not providing information. Korea agrees with the European Union on that in order to apply facts available for calculating dumping margin, certain conditions must be met under Article 6.8 and Annex II of the AD Agreement.

4. Furthermore, Korea would like to emphasize that the dumping margin for those firms which were willing to be investigated but were excluded from the sample group according to Article 6.10 of the AD Agreement should be calculated in accordance with Article 9.4 of the AD Agreement.

5. We hope the Panel could shed light on the requirements for the authorities to calculate dumping margin with facts available, and the firms to which such dumping margins could be applied.

When does the burden of proof or fair comparison obligation under Article 2.4 of the AD Agreement shift to exporters from the investigating authorities

6. European Union claims that in calculating normal value for model Product C according to Table 1 on page 4 of its First Written Submission, China reflected the value of goods that were different from the goods sold for export to China. China responds that, although it is true that under Article 2.4 of the AD Agreement the obligation to ensure a fair comparison lies on the investigating authorities and not the exporters, exporters also have an important role to play in the process and since the SMST did not raise any issue on prices between Product C and the goods incorrectly compared, the investigating authorities cannot be deemed to have breached Article 2.4 of the AD Agreement.

7. According to the European Union, the compared goods are much thinner than Product C and their usages are different. While Product C is used in a primary boiler system, incorrectly compared goods cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves.

8. We believe that the burden under Article 2.4 of the AD Agreement to ensure a fair comparison does not shift to the exporters just because the exporters did not claim that there is a price difference between the export product and the product under authority's consideration for calculating the normal value. Especially, the last sentence of Article 2.4 of the AD Agreement states 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.

9. In this case, all the Parties agree that the SMST has claimed the difference in physical characteristics between the export product and the product considered for calculating the normal value. If such a factual claim was raised at the time of the investigation, through which an investigating authority could have thrown suspicion on the issue of fair comparison, the investigating authority should have evaluated further to determine whether the product it has chosen for the comparison was appropriate, and if it did not, the investigating authority's obligation of fair comparison under Article 2.4 of the AD Agreement could not be deemed to have been released.

10. We hope the Panel to provide us with a criterion that is applicable in determining the moment when the fair comparison obligation of the investigating authorities under Article 2.4 of the AD Agreement shifts to exporters.

ANNEX D-2

THIRD-PARTY STATEMENT OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you, Mr. Chairman and Members of the Panel. The Kingdom of Saudi Arabia would like to take this opportunity to provide its views on the proper interpretation of the Anti-Dumping Agreement. In particular, the Kingdom will address: (i) the use of recorded costs in dumping margin calculations; (ii) the "fair comparison" obligation; and (iii) the injury determination's "logical progression".

II. AN INVESTIGATING AUTHORITY IS OBLIGATED TO ACCEPT AN EXPORTER'S RECORDED COSTS EXCEPT IN LIMITED CIRCUMSTANCES

2. First, Article 2.2.1.1 of the Anti-Dumping Agreement imposes a "positive obligation"[1] on an investigating authority to use an exporter's recorded costs subject *only* to the two conditions stated in that provision. There is no other basis to reject exporters' costs, and WTO panels have consistently held that an investigating authority is required to use recorded costs if these two conditions are met.[2] This obligation rests solely on the investigating authority and applies to all of Article 2.2.

3. The two conditions are provided in the first sentence of Article 2.2.1.1. The first condition is that the exporter's records are "in accordance with the generally accepted accounting principles of the exporting country".

4. The second condition is that these records "reasonably reflect the costs associated with the production and sale of the product under consideration". The second condition is met where there is a sufficiently close relationship between the recorded cost and the actual cost to the company for the production and sale of the product at issue.[3] The phrase "reasonably reflect" does not permit an investigating authority to substitute its subjective preference as to the recording of an exporter's costs, nor does the phrase permit the authority to question whether the costs recorded are "reasonable". Instead, "the test for determining whether a cost can be used in the calculation of 'cost of production'" is simply "whether it is 'associated with the production and sale' of the like product".[4] Thus, for example, the Panel in *US – Softwood Lumber V* stated that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the *market value* of those [costs]"; to accept this premise "would require [the Panel] to read into the text words which are simply not there".[5]

III. A "FAIR COMPARISON" REQUIRES COMPARABILITY OF THE EXPORT PRICE AND ITS PARTICULAR NORMAL VALUE

5. Next, the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement obligates an investigating authority to ensure comparability between an investigated product's export price and normal value. The Kingdom wishes to highlight several aspects of the required "comparison" for the Panel's consideration.

6. First, a proper definition of "like product" is necessary to ensure that a price comparison is "fair". Article 2.1 of the Anti-Dumping Agreement requires that the determination of dumping be a comparison of the export price to the domestic price of a "like product". Article 2.6 defines "like

[1] Panel Report, *US – Softwood Lumber V*, para. 7.237.

[2] See, e.g., Panel Reports, *EC – Salmon (Norway)*, para. 7.483 and *US – Softwood Lumber V*, para. 7.23.

[3] Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, paras. 7.393, 7.423; see also Panel Report, *EC – Salmon (Norway)*, para. 7.483.

[4] Panel Report, *EC – Salmon (Norway)*, para. 7.483.

[5] Panel Report, *US – Softwood Lumber V*, para. 7.321 and fn. 446 (citing Appellate Body Report, *India – Quantitative Restrictions*, para. 94). (emphasis original)

product" as "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The phrases "alike in all respects" and "closely resembling" show that the adjusted values that form the basis for a determination of dumping should depart as little as possible from actual prices in the markets at issue.

7. Second, "normal value" must be specific to the exported product and its unique product and pricing characteristics. In defining dumping of an exported product, Article 2.1 refers to "its" normal value; Article 2.4 refers twice to "the" normal value. The consistent use of the possessive or the definite article in referring to "normal value" is intentional: the Anti-Dumping Agreement requires an investigating authority to determine the normal value, of a particular "like product", that most closely reflects the unique characteristics and pricing structure of the particular exported product.

8. Third, the comparison contemplated by Article 2.4 is a comparison of two values that are defined in relation to each other. This follows from the text of Article 2: a determination of dumping requires "price comparability". Although this term is a unitary concept like "fair comparison", the consistent use of "comparability" or "comparable" in conjunction with "price" is significant.

9. Article 2 repeatedly emphasizes the comparability of two interrelated values. Article 2.1 defines dumping as the situation in which a product's export price is "less than the comparable price" of the like product consumed in the exporter's home market. Article 2.2 permits an investigating authority to depart from the like product's home-market sales prices where "such sales do not permit a proper comparison" and to use a "comparison with a comparable price of the like product" exported to a third country. Footnote 2 refers to the need for a "proper comparison", and Article 2.5, which addresses shipments through an intermediate country, underscores an investigating authority's obligation to base the dumping determination on a "comparable price". Finally, the language of Article 2.4, and the emphasis on the "comparison" throughout, underscores the importance of ensuring that a dumping calculation accounts for all differences that affect price comparability. This exercise, which is required by the text of Article 2.4, does not permit an investigating authority to ignore any similarity or difference that might affect "comparability".

10. The jurisprudence therefore has established that artificially modifying the prices of certain export transactions is not a "fair comparison"[6]. This principle should be equally applicable to normal value because both it and export price affect price comparability, which is the core objective of the dumping calculation. As such, an impermissible price comparison may result, for example, from using values other than the exporter's own prices to establish normal value, from comparing products that are too different to be considered "like", or from adjusting only one value for factors that affect both the normal value and the export price equally.

IV. AN INVESTIGATING AUTHORITY IS REQUIRED TO DETERMINE INJURY BASED ON A "LOGICAL PROGRESSION" OF ANALYSIS

11. Finally, on the subject of injury, the Kingdom is of the view that an investigating authority's determination under Article 3 of the Anti-Dumping Agreement must establish a logical progression of analysis among its "essential components" in order to constitute the requisite "objective examination" of "positive evidence".

12. Article 3.1 lists the injury determination's three "essential components". The subsequent paragraphs of Article 3 elaborate on these components, their relationship with each other, and how they must fit into the "overall framework of an injury determination".[7] The sequential analysis contemplated by Article 3 and its repeated emphasis on the "same imports" establish that the injury components are "closely interrelated"[8] and work together to produce a "logical" conclusion about whether subject imports caused material injury to the domestic industry. As the Appellate Body has stated, the various provisions of Article 3 "contemplate a logical progression of

[6] See Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[7] Appellate Body Report, *China – GOES*, paras. 127-128.
[8] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

inquiry leading to an investigating authority's ultimate injury and causation determination".[9] This inquiry entails sequential analyses of subject imports' volume effects and price effects under Article 3.2 and then their impact on the domestic industry under Article 3.4. Finally, under Article 3.5, these elements are "linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated".[10]

13. Although an investigating authority enjoys discretion as to the methodologies employed to determine injury under Article 3, its examination of the impact of subject imports on the domestic industry under Article 3.4 will constitute an "objective examination" only where it logically progresses from the assessment of those imports' volume effects and price effects under Article 3.2. This follows from three requirements of Article 3, which establish an analytical and evidentiary linkage between Articles 3.2 and 3.4.

14. First, the text of Article 3 states that an investigating authority is required to examine the same group of dumped imports under Articles 3.2 and 3.4. The Appellate Body has recognized and confirmed this point.[11]

15. Second, Article 3.4 requires an investigating authority to examine the same dumped imports as were considered under Article 3.2 in order to properly assess whether those imports have "explanatory force … for the state of the domestic industry".[12] Thus, an investigating authority "must derive an understanding"[13] of the impact of the subject imports – the same imports that have been found under Article 3.2 to have produced volume and price effects – on the domestic industry in that market.

16. Third, the investigating authority's examination of the "explanatory force" of the dumped imports for the state of the domestic industry will constitute an "objective examination" only where it represents a "logical progression" from the examination of those same imports' volume effects and price effects under Article 3.2.[14] The inquiry under Article 3.4 complements and conforms to the analyses carried out under Article 3.2 in order to produce the ultimate conclusion on causation under Article 3.5. This analysis necessarily involves a linkage between the identified volume and price effects and the state of the domestic industry. Indeed, the Panel in *China – Broiler Products* noted that the examination of the situation of the domestic industry under Article 3.4 is "inextricably linked" to the "earlier examination of the price effects of subject imports" under Article 3.2. The Panel therefore ruled that implementation of the Panel's findings with respect to Article 3.2 would require the reexamination of the original determination concerning the impact of subject imports on the domestic industry under Article 3.4.[15]

V. CONCLUSION

17. Mr. Chairman, this concludes the Kingdom's statement. I thank you for your attention.

[9] Appellate Body Report, *China – GOES*, para. 128.
[10] Ibid.
[11] Appellate Body Report, *China – GOES*, para. 127.
[12] Ibid. para. 149. See also Panel Reports, *China – X-Ray Equipment*, para. 7.254; and *China – Broiler Products*, fn. 822.
[13] Appellate Body Report, *China – GOES*, para. 149.
[14] Appellate Body Report, *China – GOES*, para. 149.
[15] Panel Report, *China – Broiler Products*, para. 7.555.

ANNEX D-3

THIRD-PARTY STATEMENT OF TURKEY

TABLE OF CASES

Short Name	Full Citation
US – DRAMS (Panel)	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
Thailand – H Beams (AB)	Appellate Body Report, *Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steal and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 29 November 2005
Mexico – Pipes and Tubes AD Duties (Panel)	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS184/AB/R, adopted 24 July 2007
EC – Fasteners (Panel)	Panel Report, *European Communities-Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners*, WT/DS397/R, adopted 29 September 2010
EC – Fasteners (AB)	Appellate Body Report, *Communities-Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners*, WT/DS397/R/AB, adopted 28 July 2011
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel From The United States*, WT/DS414/R, adopted 16 November 2012
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel From The United States*, WT/DS414/AB/R, adopted 16 November 2012
China – Broiler Products (Panel)	Panel Report, *Anti-Dumping and Countervailing Duty Measures on Broiler Products From The United States*, WT/DS427/R, adopted 25 September 2013

I. INTRODUCTION

Mr. Chairman, Distinguished Members of the Panel,

1. The Republic of Turkey (hereinafter referred to as "Turkey") would like to thank the Panel for the opportunity to present her views in this proceeding on the dispute among the People's Republic of China (hereinafter referred to as China), the European Union (hereinafter referred to as the EU) and Japan.

2. Turkey would like submit its third party opinion due its interest on the correct and coherent interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the "ADA").

3. In this statement Turkey will focus on two issues: Whether paragraph 1 of Article 3 of the ADA envisages hierarchy among the paragraphs 2, 4 and 5 in course of an injury and causation analysis; and the legal interpretation of the phrase "*best endeavor*" within the context of the use of "*facts available*" based findings vis-à-vis "*unknown exporters*".

II. THE QUESTION CONCERNING "LOGICAL PROGRESSION" IN ANALYSIS ON INJURY AND CAUSATION IN DUMPING INVESTIGATIONS

Mr. Chairman,

4. As underlined numerous times in Panel[1] and Appellate Body Reports[2], Article 3.1 of the ADA acts like a chapeau of the remaining paragraphs of Article 3 putting the investigating authority under the responsibility to undertake its injury/causation examination objectively by relying on positive evidence. The investigating authority has to act in accordance with the overarching principles of Article 3.1 every time it assesses the volume and trend of dumped imports; evaluates the price effect of these imports on the domestic industry and analysis the impact of dumped imports on the state of the domestic industry.

5. Article 3.1 reads as follows;

> "A determination of injury for the purpose of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for the like products, and *(b)* the *consequent* impact of *these* imports on domestic producers of such products. *(emphasis added)*

6. The EU and Japan highlight in their written submission that the word "*consequent*" bridges the evaluation on the volume and price effect of the dumped imports with the conclusions on impact of such imports on the economic performance of the domestic producers.[3] It is understood from this statement that the investigating authority is obliged to show initially the absolute or relative increase of volume of dumped imports and the adverse price effect of these imports before moving to establish the negative impact of these imports on the economic indicators of the domestic industry.

7. Turkey acknowledges that this pattern of evaluation is frequently used by investigating authorities in their analysis of injury and causation. Turkey's concern, however, does not relate to whether such an approach is warranted under Article 3 but to the question whether this system, named as "*logical progression*", paves way to a legal obligation that confines the investigating authority to stop its injury and causation analysis in the event that the authority concludes that there is no absolute/relative increase in the volume of dumped imports and/or no price undercutting, depression or suppression caused by dumped imports. Is the authority blocked to proceed to the next stage of the assessment, namely the analysis of the economic state of the domestic industry, if it finds that paragraph 2 of Article 3 is not legally satisfied?

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[1] Panel Report, *Mexico – Pipes and Tubes AD Duties,* para. 7.247; Panel Report, *EC – Fasteners*, para. 7.323.

[2] AB Report, *Thailand – H Beams*, para. 106; AB Report, *EC – Fasteners*, para. 414;AB Report, *China – GOES*, para. 126.

[3] EU's first written submission, para. 218; Japan's first written submission, para. 121.

8. Turkey's position is not affirmative on this issue. As underscored by the Appellate Body[4] the injury analysis should be an exercise of the cross-consideration of the volume of the dumped imports; the price effect of the dumped imports on the prices of the domestic producers and evaluation of the economic state of the domestic industry. In that framework, our legal interpretation does not point out an obligation to follow a hierarchy or sequence among these components of injury analysis.

9. Often, the investigating authorities begin their injury analysis by evaluating the volume and price trend of the product under consideration originating in the country under investigation. Assessment on the price effect of imports and the state of the domestic industry comes at the second phase. Such a pattern, however, should not lead to the conclusion that the investigating authority is legally bound to pass first the stage concerning the volume and price effect of dumped imports to proceed to the coming phases of the injury analysis.

10. As clearly identified in the first sentence of paragraph 5 of Article 3 the essence of causality should be the negative effects of dumped imports on the domestic industry, through the act of dumping, as set forth in paragraphs 2 and 4 of Article 3. The examination should include all relevant evidence before the authorities including those that weaken the causality between dumped imports and injury incurred by the domestic industry. Furthermore the investigating authority is also obliged to focus on known factors other than the influence of dumped imports to identify whether these factors erode the link between dumping and injury.

11. To concentrate on "other factors" the investigating authority has to finish first its evaluation on the "primary factors" which relate to the impact of dumped imports. Without finishing its work on the "main factors" causing injury, how can the authority evaluate "other known factors" as formulated in paragraph 5 of Article 3? Turkey conceives that the legal mechanics of paragraph 5 requires the authority to undertake a full-fledge examination of different parts of the injury analysis without keeping any relevant information out of the scope.

12. Nevertheless, this legal interpretation should not be comprehended as that the authority is obliged to continue the investigation even though it identifies that there is no significant increase in imports; no adverse price affect or no erosion in the economic parameters of the domestic industry. What Turkey underscores is that the authority should complete its examination comprehensively, by including all aspects of the injury analysis, before reaching the conclusion that it terminates the investigation due to the absence of legal requirements as stipulated in paragraph 2 and 4 of Article 3.

13. In light of the principles stipulated in paragraph 1 and 5 of Article 3, Turkey would like to emphasize once more that injury-causality analysis should be undertaken with a comprehensive approach without singling out any significant, verifiable and objective factor that may weaken or strengthen the injury determination and causation analysis between dumped imports and injury.

III. THE NOTION OF "BEST ENDEVOUR" CONCERNING THE USE "FACT AVAILABLE" IN "ALL OTHERS" RATE

14. The question whether the investigating authority has the discretion to use "facts available" based calculations and findings vis-à-vis unknown exporters was one of the heavily addressed issues in panels *China – GOES*[5] and *China-Broiler Products*.[6]

15. Considering the time-limits, Turkey will not reiterate her position on this issue but would like to stress that She is in line with the latest ruling in the WTO case law pointing out that it will be difficult for a member to determine an appropriate anti-dumping margin for certain unknown producers/exporters and apply an anti-dumping measure if "facts available" based calculations cannot be used for "unknown" producers/exporters.[7]

16. Turkey, however, would like to share briefly her position concerning the threshold of "best endeavor" that the investigation authority has to pass to conclude that all effort was shown to identify unknown producer/exporters, importers and other interested parties.

[4] AB Report, *China – GOES*, para. 127.
[5] Panel Report, *China – GOES*, paras. 7.384-7.386.
[6] Panel Report, *China – Broiler Products*, para. 7.305.
[7] Panel Report, *China – Broiler Products*, para. 7.305.

17. Pursuant to paragraph 1 of Article 6 of the ADA all interested parties in an anti-dumping investigation shall be given notice of the information required and ample opportunity to present in writing all evidence which they consider is relevant. Furthermore, as requested in paragraph 1 of Annex II of the ADA the information required from any interested party should be in specific detail and the interested party should be informed on possible consequences if the desired information is not supplied in reasonable time.

18. Even though there are certain clear-cut rules on the content of the communication, neither paragraph 8 of Article 6 nor Annex II of the ADA shed light on the form of the requested information or the medium of communication the investigation authority should use.[8] Such components of the investigation are left to the discretion of the investigating authority which is obliged to act in goodwill and respect due process rules as well as defense rights of the interested parties in context of Article 6 of the ADA.

19. In practice, it is known that the starting point for the investigating authority to identify foreign producer/exporters is the petition itself. In most cases the authority expects the petitioning domestic industry to come up with the identities of the foreign producers/exporters because of the assumption that these domestic producers would possess the most accurate information on the market, their competitors and pricing trends. At this stage the investigating authority will be under the legal obligation to check the adequacy and accuracy of the information in line with paragraph 6 of Article 6 of the ADA. As addressed by the WTO jurisprudence, however, such an obligation is not absolute and the investigating authority has the leeway to satisfy as to the accuracy and adequacy of the information in a number of ways without resorting to some type of formal verification. In that manner, relying on the reputation of the source is considered as one of these ways. In line with WTO case law there is no expectation of the verification of the accuracy of each piece of information which would render the investigation unmanageable[9]. Nevertheless, Turkey understands that the investigating authority has to show the utmost caution on the accuracy and adequacy of the submitted information as expected from an objective and even-handed authority.

20. Except the foreign companies shown in the petition, the question whether the authority has to pin point each and every foreign producer/exporter that exported the subject merchandise in the period of investigation is the essence of the discussion on "best endeavor". In light of the latest rulings in WTO jurisprudence[10] Turkey maintains that even though the authority is under the obligation to check the accuracy of the submitted information and extend its examination if it is not fully satisfied with the submitted information; there is no legal obligation to further its works to such extremes to identify each unknown producer/exporter.

21. As a matter of fact, in investigations where the industry is fragmented on both importer and exporter side the investigating authority should not be held legally responsible for not directly communicating[11] to each and every producer/exporter or not showing the highest enthusiasm to get in touch with these exporters. Furthermore, considering the textual reading of Article 5, 6 and Annex II of the ADA as well as the recent holdings in WTO case law, in such cases, it would be unreasonable to conclude that the authority has no discretion to use facts available based findings vis-à-vis unknown exporters for the reason that it did not display the best endeavor to contact them. As accurately pointed out, the investigating authority will not be in the position to draw a line between two types of "unknown" producers/exporters, namely those who exist and are exporting but refuse to appear and those who are not exporting in period of investigation.[12]

22. To summarize, Turkey would like to stress that the margins of the "best endeavor" to identify unknown producer/exporters, importers and other interested parties should be evaluated within the merits of each case before reaching a conclusion that the investigating authority was well warranted to rely on "fact available" based calculations and findings vis-à-vis these producer/exporters.

[8] Panel Report, *China – Broiler Products*, para. 7.301; Panel Report, *China – GOES*, para. 7.386.
[9] Panel Report, *US – DRAMS*, para. 6.78.
[10] Appellate Body Report, *Mexico – Rice*, para. 251; Panel Report, *China – Broiler Products*, para. 7.302.
[11] Panel Report, *China – Broiler Products*, para. 7.304.
[12] Panel Report, *China – Broiler Products*, footnote 498.

IV. CONCLUSION

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

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. PROCEDURAL AND TRANSPARENCY REQUIREMENTS OF GATT ARTICLE 6

a. Designation of Confidential Information and Requirement for Public Summaries under Articles 6.5 and 6.5.1 of the AD Agreement

1. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that the parties to an investigation must be given a full and fair opportunity to see relevant information and to defend their interests. At the same time, investigative authorities may need to protect confidential information. Indeed, in AD investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities, upon good cause shown, to ensure the confidential treatment of such information. Article 6.5.1 balances the need to protect such information against the disclosure requirements of other Article 6 provisions. It provides that an investigating authority, if it accepts confidential information, must provide or otherwise assure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries of that information, significant prejudice to the ability of companies and Members to defend their interests could occur.

b. Acceptance of Certain Information Presented during Verification

2. The main purpose of "on-the-spot investigation" conducted pursuant to AD Article 6.7 is to verify the information already submitted or obtain further detail. On-the-spot investigations are not opportunities for interested parties to submit a significant amount of new information.

3. The United States notes that Paragraph 7 of Annex I provides that a firm is entitled to prepare for the on-the-spot investigation and contemplates that an investigating authority may request that a firm provide additional information, including potentially minor corrections or clarifications to information already submitted.

4. With respect to what must be accepted by the investigating authority, Article 6.8 and Annex II provide that an investigating authority may make determinations on the basis of facts available when information is not submitted in a reasonable time. The investigating authority is not required to use information in circumstances including when the information is submitted in an untimely fashion and when its acceptance would cause difficulties in the conduct of the investigation. Accordingly, whether any information proffered at verification should be accepted will be a fact-specific inquiry.

c. Alleged Inadequate Disclosure and Failure to Inform Parties of the Essential Facts under Consideration in Violation of AD Articles 6.4 and 6.9

5. The United States recalls that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States agrees with the EU that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. The United States agrees that there is no "disclosure" of confidential information within the meaning of Article 6.5 if the investigating authority is providing the confidential information only to the party that submitted it. To the extent that there may be aspects of the calculation that may not be able to be disclosed because they contain another interested party's confidential information, the second clause of Article 6.4 explicitly excludes from the disclosure requirements such information treated as confidential under Article 6.5.

6. With respect to Article 6.9, the United States notes that the calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating

authority's imposition of final measures. Without such information, no affirmative determination could be made and no definitive duties could be imposed. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

7. Furthermore, with respect to the determination of the existence and margin of dumping, the investigating authority must disclose the data used in: (1) the determination of normal value (including constructed value); (2) the determination of export price; (3) the sales that were used in the comparison between normal value and export prices; (4) any adjustments for differences which affect price comparability; and (5) the formulas that were applied to the data. All of these would be "essential" facts within the meaning of Article 6.9.

8. Contrary to China's arguments, the fact that a party has provided information to the investigating authority does not mean that the exporter knows with certainty which of that information will be used and in what capacity. Moreover, China's claim that all that is required is a summary of the essential facts is a misreading of Article 6.9, which require that an investigating authority provide the essential facts underlying its determination and not merely a stated conclusion based on these facts.

9. For injury determination, the United States notes that Article 6.9 considers information on the price levels for domestically produced products and comparison between the prices for this product and the imports under consideration to be essential facts for price effect findings.

d. Use of Facts Available to Determine the Dumping Margins with respect to All Other Companies in Alleged Breach of Article 6.8 and Paragraph 1 of Annex II

10. The United States recalls that Article 6.8 establishes that an investigating authority may only resort to facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. An investigating authority may not assign a margin based on facts available when the authority has not requested the information in the first place. Thus, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. In other words, exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.

11. Article 6.8 should be read together with paragraph 1 of Annex II, which requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use facts available. These provisions together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.

II. ALLEGED FAILURE TO SET FORTH OR OTHERWISE MAKE AVAILABLE IN SUFFICIENT DETAIL CERTAIN FINDINGS AND CONCLUSIONS WITH RESPECT TO THE ALL OTHERS RATE AND THE INJURY DETERMINATION IN VIOLATION OF AD ARTICLES 12.2 AND 12.2.2

12. With respect to the dumping determination, Article 12.2 provides that, in a preliminary or final determination, the investigating authority must provide notice or a separate report setting out "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Article 12.2.2 further provides that for a final determination, an investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".

13. The factual and legal bases for the investigative authority to resort to facts available with respect to all other exporters that it did not examine constitute material issues of fact and law considered. These issues go to the very heart of the determination of what margin to apply to unexamined exporters. Consequently, Article 12.2 requires that the investigative authority provide in sufficient detail the findings and conclusions that lead to application of facts available. Similarly, Article 12.2.2 requires, among other things, the that the investigative authority provide "all

relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculations of the "all others" rate.

14. With respect to the injury determination, the United States notes the that, pursuant to Article 12.2.2, any facts related to the price comparisons of the subject imports and domestic products are relevant information on the matters of fact that an investigating authority should disclose in its final determination.

III. ALLEGED BREACH OF ARTICLE 2 OF THE AD AGREEMENT IN THE CALCULATION OF DUMPING MARGINS

a. Determinations of SG&A Costs Should be Based, Whenever Possible, on Sales Made in the Ordinary Course of Trade Pursuant to AD Article 2.2.2

15. Article 2.2.2 provides that an investigating authority should, where possible, base SG&A and profit on sale of the like product made in the ordinary course of trade. If, and only if, such sales in the ordinary course of trade are unavailable, Article 2.2.2 then provides alternative methodologies for determining SG&A and profit.

16. The EU argues that MOFCOM breached Article 2.2.2 because it based SG&A on certain sample sales and these sales were outside the ordinary course of trade. However, there are many reasons to find a normal value sales transaction not in the ordinary course of trade. The AD Agreement does not require an investigating authority to treat all sample sales as outside the ordinary course of trade. Instead, the investigating authority must evaluate the record evidence to determine whether it supports finding that the sample sale was concluded on terms and conditions that are incompatible with normal commercial practice for sales of the like product, in the market in question, at the relevant time.

b. Investigating Authorities Shall Normally Calculate Cost on the Basis of Records Kept by the Exporters When the Costs are in Accordance with Generally Accepted Accounting Principles (GAAP) and Reasonably Reflect Cost Pursuant to AD Article 2.2.1.1

17. The United States considers Article 2.2.1.1 to require an investigating authority to normally calculate costs on the basis of records kept by an exporter or producer's books and provided that the books and records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. If the evidence in this dispute establishes that the records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration, MOFCOM would have been obligated to use those records pursuant to Article 2.2.1.1 or obligated to provide a reason supported by the record evidence to depart from the "normal" methodology provided for in Article 2.2.1.1.

c. An Investigating Authority Should Conduct Model Matching to Ensure a Fair Comparison Pursuant to AD Article 2.4

18. Article 2.4 sets forth the overarching obligation of an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. A fair comparison requires the investigating authority to strive to compare similar products as well as transactions. In finding the correct set of products to compare, the investigating authority must conduct an exercise such as a model matching exercise. When subject merchandise consists of two or more significantly diverse product models, investigating authorities will match foreign-like products and home-market products using model match criteria to assure accurate price comparisons within but not across relevant product categories. Because model matching ensures that only sales of products with similar physical characteristics are compared to each other or necessary adjustments for the differences are made, some sort of model matching exercise is an essential component of establishing a fair comparison.

19. Generally, the investigating authority has the obligation to seek information regarding differences in physical characteristics that may affect price comparability in order to make a fair comparison. The investigating authority can fulfill this obligation by asking parties to: 1) identify and explain the differences in physical characteristics and 2) identify which of those differences in

physical characteristics may affect price comparability. If an investigating authority sought such information, but an exporter or producer merely identified differences in physical characteristics between the products at issue without claiming that those differences affected price, then the investigating authority need not independently undertake an analysis of the differences in physical characteristics to determine whether they affected price comparability.

IV. INJURY DETERMINATION

a. Evaluation of the Margin of Dumping

20. The United States notes that Articles 3.1 and 3.4 do not require an authority to evaluate the *significance* of dumping margins. Neither article requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way.

b. Import Volumes and Causation Determinations

21. With regard to Article 3.2, the United States disagrees with EU and Japan to the extent they assert that an authority may not attach significance to the fact that imports "retain" a significant share of the market over the period. Although Article 3.2 does specify that an authority "shall consider whether there has been a significant increase in dumped imports", either on an absolute or relative basis, it does not expressly or implicitly prevent an authority from considering in its analysis the fact that imports have a significant market share level. In a situation in which significant volumes of subject imports are having a significant adverse impact on domestic prices, the existence of significant import volumes or market share is obviously one item of "relevant evidence" that an authority may want to consider in its Article 3.5 analysis.

c. Application of Provisional Measures for a Period Exceeding Four Months

22. The text of Article 7.4 provides that without request from a sufficient percentage of exporters or the imposition of a lesser duty, an investigating authority may not impose provisional measures for a period exceeding four months. To the extent that MOFCOM applied provisional measures for six months without a request by exporters representing a significant percentage of the trade involved and without MOFCOM examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the United States agrees that China breached Article 7.4.

d. The EU's Proposed Amendments to the BCI Procedures and the Request that the Panel Seek Confidential Information Pursuant to DSU Article 13.1

23. Article 6.5 expressly provides 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. No provision of the AD Agreement or the DSU creates an exception that would permit information that the investigating authority accepted as confidential in the underlying investigation be disclosed within the context of a WTO proceeding without the specific permission of the party submitting that information to the investigating authority.

24. Protecting confidential information, including by securing the specific permission of the party submitting the information, is crucial to the proper functioning of trade remedy proceedings. If the protections in Article 6.5 were treated as non-applicable in the context of a dispute, parties could be deterred from disclosing confidential information to investigating authorities, potentially impeding or frustrating the proceeding. It is also important to recognize that confidential information often raises significant domestic sensitivities. For example, in order to ensure confidential information stays properly protected, consistent with WTO obligations, Members may have domestic legal provisions that impose penalties, including criminal penalties, on government officials that disclose such information without authorization. The Panel should not request that a party supply BCI information from the underlying proceeding absent the specific permission of the party that submitted it.

V. THE PANEL'S TERMS OF REFERENCE

a. Sufficiency of a Panel Request Assessed in Light of the Disclosure Afforded to the Interested Member and the Discussion during the Administrative Proceedings

25. The level of disclosure provided in the underlying proceeding can affect the sufficiency of a complaining Member's panel request. Compliance with DSU Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances". Such circumstances would include the level of disclosure provided in the underlying proceeding.

26. In contrast, the United States disagrees that the sufficiency of a panel request must be assessed in the light of the discussion between the investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue. The argumentation at the administrative proceeding level is not relevant in evaluating the sufficiency of a panel request. Using the issues raised before the investigating authorities during the administrative proceedings would be contrary to DSU Article 6.2, which requires a Member to present the problem clearly to the responding party and other Members (including those deciding whether to become third parties). It is not enough that a Member is aware of the possible universe of issues which may be raised as claims before a panel; the specific issue must be made clear in the panel request. A responding party and other Members are entitled to a clear presentation of the problem. They are not required to guess.

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WORLD TRADE ORGANIZATION

WT/DS454/R/Corr.1
WT/DS460/R/Corr.1

17 September 2015

(15-4757)

CHINA — MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN

CHINA — MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM THE EUROPEAN UNION

REPORTS OF THE PANELS

Corrigendum

Please note that in the original reports WT/DS454/R and WT/DS460/R, paragraph 8.9 should read as follows:

8.9 Consistent with our terms of reference, we find that the **Article 2.2** claim advanced by the European Union in its first written submission falls outside our terms of reference. We also find that the Article 2.2.1.1 claims advanced by the European Union in its first written submission pertaining to MOFCOM's use of data that allegedly were not in accordance with GAAP, did not reasonably reflect the costs associated with the product under consideration, and were historically utilized by SMST, fall outside our terms of reference.

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