WORLD TRADE ORGANIZATION

WT/DS397/RW

7 August 2015

(15-4049)

Page: 1/89

Original: English

EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

REPORT OF THE PANEL

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Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
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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 – Bed Linen (Article 21.5– India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
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 – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
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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 II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
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Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
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 – FSC (Article 21.5-EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, p. 4721

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US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act (Byrd Amendment))*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
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 – 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 – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US - Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Upland Cotton (Article 21.5 – Brazil)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997
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
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793

EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Title
Exhibit CHN-1	Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJEU L 29, 31 January 2009
Exhibit CHN-2	Notice regarding the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the *EC – Fasteners dispute* (DS397), OJEU C 66, 6 March 2012
Exhibit CHN-3	Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJEU L 275
Exhibit CHN-4	Index of the file in the review investigation concerning the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China
Exhibit CHN-5	Letter of the Commission to interested parties including the disclosure document concerning normal value, 30 May 2012
Exhibit CHN-6	Letter on behalf of Biao Wu to the Commission, 13 June 2012
Exhibit CHN-7	Letter on behalf of CCCME to the Commission, 19 June 2012
Exhibit CHN-8	Letter on behalf of Changshu to the Commission, 12 June 2012
Exhibit CHN-10	Letter on behalf of Ninbgo Jinding and Changshu to the Commission, 20 June 2012
Exhibit CHN-11	Email of the Commission concerning Biao Wu and CCCME, 26 June 2012
Exhibit CHN-12	Email of the Commission concerning Ningbo Jinding and Changshu, 21 June 2012
Exhibit CHN-13	Submission on behalf of Changshu, 25 June 2012
Exhibit CHN-14	Submission on behalf of Ningbo Jinding, 25 June 2012
Exhibit CHN-15	Letter of the Commission to interested parties, 5 July 2012
Exhibit CHN-17	Note for the file on the reclassification of normal value from one producer in India, 11 July 2012
Exhibit CHN-21	Letter on behalf of Biao Wu and CCCME to the Commission, 19 July 2012
Exhibit CHN-22	General Disclosure Document in the review investigation (R548) concerning anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China: implementation of the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the *EC – Fasteners dispute* (DS397), 31 July 2012
Exhibit CHN-23	Comments on behalf of CCCME and Biao Wu, 20 August 2012
Exhibit CHN-25	Emails exchanged between the Commission and Pooja Forge, 2 July 2012
Exhibit CHN-30	Report of the Hearing with the Commission of 11 July 2012, 18 July 2012
Exhibit CHN-33	Letter on behalf of Ningbo Jinding to the Commission, 13 June 2012
Exhibit CHN-34	Letter on behalf of Changshu to the Commission, 13 June 2012
Exhibit CHN-44	Calculations for Biao Wu
Exhibit CHN-45	Calculations for Ningbo Jinding
Exhibit CHN-46	Calculations for Changshu
Exhibit EU-1	Letter from the European Commission to Pooja Forge dated 6 December 2007
Exhibit EU-2	E-mail from Pooja Forge to the European Commission dated 3 July 2012
Exhibit EU-4	Covering letter to the general disclosure dated 31 July 2012
Exhibit EU-5	Letter from Ms JAKAS to the Panel dated 26 November 2014
Exhibit EU-6	Email exchanges between the European Commission and Pooja Forge during the review investigation in 2012 (BCI)
Exhibit EUR-7	Full index of the review investigation generated on 25 April 2013

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
DMSAL	Domestic sales listing
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
IA	Investigating authority
PCN	Product control number
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WA-WA	Weighted average to weighted average
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by China

1.1. On 30 October 2013, China requested consultations[1] with the European Union (EU) pursuant to Articles 21.5 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement) and paragraph 1 of the *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding* between China and the European Union[2] with respect to the issues identified below.

1.2. Consultations were held on 27 November 2013, but did not settle the dispute.

1.2 Panel establishment and composition

1.3. On 5 December 2013, China requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU, Article XXIII of the GATT 1994, Article 17 of the AD Agreement and paragraph 1 of the *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding between China and the European Union* with standard terms of reference.[3] At its meeting on 18 December 2013, the Dispute Settlement Body (DSB) referred this dispute, if possible, to the original panel in accordance with Article 21.5 of the DSU to examine the matter referred to the DSB by China in document WT/DS397/18.[4]

1.4. The Panel's 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 China in document WT/DS397/18 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5. On 17 March 2014, China requested the Director-General to determine the composition of the Panel pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.6. On 27 March 2014, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Jose Antonio Buencamino[5]

Members: Mr Michael Mulgrew
Mr Arie Reich

1.7. Japan and the United States reserved their rights to participate in the Panel proceedings as third parties.

[1] WT/DS397/17.
[2] WT/DS397/16.
[3] WT/DS397/18.
[4] See WT/DSB/M/340.
[5] Article 21.5 of the DSU provides that a compliance dispute shall be handled "wherever possible" through recourse to "the original panel". The Chairperson of the original Panel, Mr Luiz O. Baptista, was not available for these proceedings.

1.3 Panel proceedings

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures[6] and timetable on 5 May 2014. The timetable was further modified on 16 May 2014.

1.9. The Panel held its substantive meeting with the parties on 11-12 November 2014. A session with the third parties took place on 12 November 2014. The Panel issued its Interim Report to the parties on 6 March 2015. The Panel issued its Final Report to the parties on 4 May 2015.

2 FACTUAL ASPECTS

2.1. In these compliance proceedings initiated under Article 21.5 of the DSU, China challenges the consistency with the covered agreements of the measure taken by the European Union to comply with the DSB recommendations and rulings issued following the panel and Appellate Body reports in *EC – Fasteners (China)*.

2.2. On 26 January 2009, the European Union imposed, through Council Regulation (EC) No. 91/2009, definitive anti-dumping duties on imports of certain iron or steel fasteners originating in China. China challenged the imposition of such duties and initiated dispute settlement proceedings against the European Union. In the original dispute, China challenged two measures adopted by the European Union, namely 1) Article 9(5) of *Council Regulation (EC) No. 384/96 of 22 December 1995 on Protection against Dumped Imports from Countries not Members of the European Community, as amended* (Basic AD Regulation) with respect to the issue of the individual treatment of producers from non-market economies (NME) in anti-dumping investigations conducted by the European Union, and 2) *Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China*.

2.3. With respect to Article 9(5) of the Basic AD Regulation, the original panel found violations of various provisions of the AD Agreement, the GATT 1994 and the WTO Agreement. With respect to Council Regulation (EC) No. 91/2009 imposing definitive duties on fasteners from China, the original panel found certain violations of the AD Agreement.[7] It rejected certain claims and applied judicial economy with respect to others.[8] On appeal, the Appellate Body made mixed findings. The original panel's findings regarding Article 9(5) of the Basic Regulation were mainly upheld. As far as the claims regarding the fasteners investigation were concerned, the Appellate Body upheld some of the panel's findings and reversed others.[9]

2.4. With a view to implementing the DSB recommendations and rulings concerning Article 9(5) of the Basic Regulation, the European Union adopted Regulation (EU) no. 765/2012.[10] In relation to the implementation of the DSB recommendations and rulings regarding the fasteners investigation, the European Commission initiated an investigation (review investigation), pursuant to its WTO enabling Regulation[11], in order to "inform interested parties of the manner in which the [DSB's] findings in regard to the measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China [would] be taken into account".[12] In the notice initiating the review investigation, the Commission explained how it was planning to implement each aspect of the DSB recommendations and rulings.

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[6] See the Panel's Working Procedures in Annex A-1.
[7] Panel Report, *EC – Fasteners (China)*, para. 8.2.
[8] Ibid. paras. 8.3-8.4.
[9] Appellate Body Report, *EC – Fasteners (China)*, para. 624.
[10] OJ L 237, 3.9.2012.
[11] Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ L 201, 26.7.2001.
[12] Notice regarding the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the *EC – Fasteners dispute* (DS397), OJEU C 66, 6 March 2012 (notice of initiation of the review investigation), (Exhibit CHN-2), p. 66/29.

2.5. The review investigation was conducted by the Commission and its results were announced in the *Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China* (review regulation). The review regulation explains the determinations made by the Commission and comes to the conclusion that "the injurious dumping determined in the original investigation is confirmed". It therefore continues definitive duties on certain fasteners from China, at revised rates.[13]

2.6. In these compliance proceedings, China does not question the existence, or consistency with the covered agreements, of the EU's implementation of the DSB recommendations and rulings regarding Article 9(5) of the Basic Regulation. This dispute concerns exclusively China's claims concerning the conduct of the review investigation by the Commission. In these proceedings, China takes issue with the measure taken by the European Union to implement the DSB recommendations and rulings in relation to the anti-dumping duties on imports of certain iron or steel fasteners originating in China through the review regulation. China considers that the review regulation does not fully and correctly implement the DSB recommendations and rulings and that it is inconsistent with various provisions of the AD Agreement and of the GATT 1994.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests that the Panel find that:

a. The measures taken by the European Union to implement the recommendations and rulings of the DSB in relation to the AD duties on imports of certain iron or steel fasteners originating in China through Council Regulation (EU) No 924/2012 of 4 October 2012 are not consistent with:

   i. Article 6.5 of the AD Agreement since the European Union treated as confidential, information concerning the products sold by the Indian producer while such information had not been provided on a confidential basis and/or in the absence of good cause shown and Article 6.5.1 to the extent that the European Union failed to ensure that the Indian analogue producer provided a non-confidential summary of the information provided on an allegedly confidential basis in sufficient detail to enable a reasonable understanding of the substance of such information or establish that there were "exceptional circumstances" and provide a statement of reasons why, in such exceptional circumstances, summarization was not possible;

   ii. Articles 6.4 and 6.2 of the AD Agreement since the European Union failed to provide to the Chinese interested parties a full opportunity for the defence of their interests and because the European Union did not provide timely opportunities for them to see all information that was not confidential as defined in Article 6.5, that was relevant to defend their interests and that was used by the authorities in the AD investigation, with regard to the products sold by the Indian producer;

   iii. Article 6.1.2 of the AD Agreement because the evidence presented by the Indian producer concerning its products was not made available promptly to the Chinese interested parties participating in the investigation;

   iv. Article 2.4 of the AD Agreement because the European Union failed to indicate to the Chinese interested parties what information was necessary to ensure a fair comparison and, in particular, since the European Union failed to provide information on the products sold by the Indian producer which was used for the determination of the normal value and since it failed to indicate to the Chinese interested parties what information was necessary to substantiate their requests for adjustments;

   v. Article 2.4 of the AD Agreement because the European Union failed to ensure that the export price of standard fasteners manufactured by the Chinese exporters was not compared to the normal value of special fasteners;

[13] Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJEU L 275 (review regulation), (Exhibit CHN-3), recital 138.

vi. Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 because the European Union failed to make a fair comparison between the normal value and the export price, in particular in failing to make allowances for differences affecting price comparability, namely differences in taxation, differences in certain physical characteristics and other differences affecting price comparability;

vii. Articles 2.4 and 2.4.2 of the AD Agreement because the European Union failed to take into account all export transactions in determining the margin of dumping of each of the Chinese exporters concerned; and

viii. Articles 4.1 and 3.1 of the AD Agreement because the European Union re-defined the domestic industry by merely using the data of the EU producers which had come forward within the deadline laid down in paragraph 6(b)(i) of the Notice of Initiation of the original investigation and thereby failed to remedy the self-selection process imposed by its approach and to carry out an injury determination involving an objective examination.

b. The European Union has failed to comply with the recommendations and rulings of the DSB.

3.2. China also requests the Panel to recommend that the DSB request the European Union to bring its measures into conformity with its obligations under the AD Agreement and the GATT 1994.

3.3. The European Union requests that the Panel reject China's claims in this dispute in their entirety.

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 17 of the Working Procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Japan and the United States are reflected in their integrated executive summaries, provided in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annex D).

6 INTERIM REVIEW

6.1 Introduction

6.1. On 6 March 2015, we issued our interim report to the parties. In accordance with our working procedures, both parties submitted requests for the review of precise aspects of the interim report on 20 March 2015. On 1 April 2015, both parties also submitted their comments on each other's written requests. Neither party requested an additional meeting with the Panel.

6.2. Parties' requests and our treatment thereof are explained below. We have also corrected typographical and other non-substantive errors throughout the Report, including those identified by the parties, which are not referred to specifically below.

6.2 Parties' requests for changes to the interim report

6.3. China requests that paragraphs 1.3 and 2.6 be modified in order to accurately reflect China's panel request. The European Union has not commented on these requests. We have modified these two paragraphs in order to address China's concerns.

6.4. China requests the Panel to modify paragraph 7.9 in order to better reflect the facts. Specifically, China requests that the phrase "because Pooja Forge indicated that 'it was impossible to provide a meaningful summary of it without revealing sensitive business information'" be

deleted from this paragraph because it is not supported by evidence on the record. China also requests that the phrase "according to the European Union" be inserted in this paragraph in order to reflect the fact that the statement regarding the contents of the Pooja Forge's company brochure reflects the EU's allegation. The European Union disagrees with this request, noting that interim review is not the stage in panel proceedings to re-litigate factual issues and that granting China's request would raise due process concerns. Further, with respect to the first aspect of China's request, the European Union submits that the statement at issue is supported by evidence. With respect to the second aspect of China's request, the European Union notes that during the panel proceedings China did not contest the EU's statements regarding the contents of the company brochure and it even made references to the brochure as containing the type of information referred to in the EU's statement. As footnotes 25 and 26 show, the statements in paragraph 7.9 which China challenges reflect the EU's arguments in its first written submission. We have modified paragraph 7.9 in order to underline this.

6.5. China requests the Panel to modify paragraphs 7.11, 7.12, 7.35, 7.43, 7.99, 7.126, 7.150, 7.151, 7.171, 7.173, 7.175, 7.177, 7.210, 7.224, 7.225, 7.227, 7.232, 7.238, 7.243, 7.245, 7.254, 7.280 and 7.287 in order to better reflect China's arguments. The European Union argues that China's request concerning paragraph 7.99 should be rejected because China fails to indicate where in its submissions the requested additional language is found. We agree with the European Union that China does not identify where in its submissions the additional language that it requested the Panel to add to paragraph 7.99 is found. Further, we do not consider that the request serves to improve the summary of China's arguments. We therefore decline to make this change. The European Union objects to the proposed modifications to paragraphs 7.150, 7.151, 7.171, 7.173 and 7.177 because the Panel accurately reflects China's arguments in these paragraphs. We consider that the changes China requested to these five paragraphs are useful and have reflected them. The European Union contends that China's request to modify paragraph 7.175 should be rejected because it concerns the Panel's own conclusions that accurately reflect China's claim. China's comment on this paragraph has to do with the scope of China's claim regarding the types of fasteners. In the context of this claim, we understand China to challenge the Commission's treatment of fasteners sold to high-end users such as automotive producers, which were not made according to the customer's drawing, as opposed to such fasteners that were made according to the customer's drawing. We have modified paragraph 7.175 in order to clarify this. The European Union considers that China's request for the modification of paragraph 7.243 is also unwarranted but proposes an alternative modification should the Panel decide to modify this paragraph. In the EU's view, China's request for the modification of paragraph 7.245 is also unwarranted because in this paragraph the Panel sets out its own findings, rather than describing China's arguments. We have modified paragraphs 7.243 and 7.245 in order to reflect certain arguments raised in China's second written submission. The European Union has not commented on China's requests to modify the other paragraphs cited above in this paragraph. Taking into account China's specific comments, we have also modified paragraphs 7.11, 7.12, 7.35, 7.43, 7.126, 7.210, 7.224, 7.225, 7.227, 7.232, 7.238, 7.254, 7.280 and 7.287.

6.6. China requests that paragraphs 7.20 and 7.292 be modified in order to clarify that these paragraphs describe the EU's arguments. The European Union disagrees with the request to modify paragraph 7.20, noting that making this modification would be inconsistent with the Panel's drafting style generally in this Report and would necessitate modifications to other parts of the Report for the sake of consistency. Since paragraph 7.20 summarizes the EU's arguments, we have modified it in a way that underlines this. Contrary to the EU's argument, we do not consider that such a modification requires similar modifications to other parts of this Report. The European Union has not commented on the requested modification to paragraph 7.292. We have modified this paragraph.

6.7. China requests the Panel to modify paragraph 7.57 in order to better reflect the EU's arguments. The European Union has not commented on this request by China. We have modified this paragraph.

6.8. China requests the Panel to modify paragraphs 7.111, 7.112, 7.128 and 7.144 in order to better reflect the facts. The European Union maintains that China's request with respect to paragraphs 7.111 and 7.112 should be rejected because China did not dispute the relevant facts during the panel proceedings. Since Exhibit EU-6 shows that during the review investigation Pooja Forge submitted information regarding the coating of its products, we have modified paragraphs 7.9, 7.111, 7.112 and 7.114 in order to reflect this fact. The European Union does not

object to the requested modification to paragraph 7.128 aimed at clarifying China's own arguments. We have modified this paragraph. The European Union objects to the proposed modification to paragraph 7.144 on the basis that this paragraph describes the Panel's own reasoning. As argued by the European Union, the part of this paragraph that China requests the Panel to delete reflects the Panel's own reasoning. We therefore decline to make the requested modification.

6.9. The European Union requests the Panel to modify paragraph 7.9 in order to better reflect the EU's and China's arguments. China submits that this paragraph describes the relevant facts, not the parties' arguments, and asks the Panel to reject the EU's request. China adds that the textual addition requested by the European Union does not correctly describe China's arguments. We have modified paragraph 7.9 in order to provide further clarity with respect to the EU's arguments. However, we have not introduced the part of the requested modification concerning China's arguments because we believe the current version correctly reflects such arguments.

6.10. The European Union requests the Panel to modify paragraphs 7.14, 7.15, 7.16 and 7.91 in order to better reflect the EU's arguments. China requests the Panel to reject the modifications requested to paragraphs 7.14 and 7.15. We agree with the EU's suggestion and have modified these two paragraphs. China argues that no modification is needed to paragraph 7.16 but suggests an alternative modification should the Panel consider granting the EU's request. Since this paragraph contains the EU's arguments, we have modified this paragraph as requested by the European Union. China has not commented on the requested modification to paragraph 7.91. We agree with the EU's request and have modified this paragraph accordingly.

6.11. The European Union requests the Panel to modify paragraph 7.273 in order to address the EU's argument that there was nothing "inherently unfair" about the methodology used by the Commission in calculating dumping margins. China submits that the EU's argument about the lack of inherent unfairness is irrelevant to the Panel's assessment and that therefore the Panel should not make any changes to this paragraph. We have made the necessary modification to address this argument but found it more appropriate to add it to paragraph 7.275 of our Report.

6.12. The European Union requests the Panel to modify paragraph 7.283 in order to add certain aspects of the EU's arguments that are missing in this paragraph and then to address such aspects in the Panel's findings. China contends that this paragraph adequately addresses the EU's arguments regarding the domestic industry claim. However, should the Panel decide to modify this paragraph, China requests the Panel to also fully reflect the counterarguments raised by China in this regard. We have added the EU's arguments to paragraphs 7.283, 7.297 and 7.298 and assessed such arguments in paragraphs 7.297 and 7.298 of the Report. In paragraphs 7.297 and 7.298, we have also reflected China's relevant counterarguments.

6.13. Finally, the European Union requests the Panel to modify paragraph 7.287 in order to apply the test that the Panel itself developed for determining whether claims that could have been but were not raised in original panel proceedings are within this Panel's terms of reference. China maintains that there is no need to modify this paragraph because the concern identified by the European Union is already addressed in paragraph 7.290 of the Report. As the European Union notes, in paragraph 7.287, we state that "China could have raised the present claim as an additional argument under the domestic industry claim in the original proceedings". In paragraph 7.289, we note that the issue raised by China's claim regarding the Commission's domestic industry definition is whether or not the Commission complied with the DSB recommendations and rulings in defining the domestic industry in the review investigation and conclude that this issue "goes to the very heart of a compliance panel's task under Article 21.5 of the DSU and falls within our terms of reference". In paragraph 7.290 of the Report, we state that "[g]iven this, we do not consider relevant for our present inquiry whether or not China could have raised this claim during the original proceedings. However, assuming that China could have raised it in the original proceedings, we would still have found the claim to fall within our terms of reference given the decisive role that the contested statement in the original notice of initiation played in the Commission's definition of domestic industry in the review investigation." As China notes, this part of paragraph 7.290 applies to the present claim the test that we developed with respect to the issue of whether or not claims that could have been but were not raised in the original proceedings fall within our terms of reference in these compliance proceedings. We have, nevertheless, added one sentence to this paragraph in order to underline this.

7 FINDINGS

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

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the Vienna Convention on the Law of Treaties (Vienna Convention).

7.2. A number of WTO reports address the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty[14], and that the context of the treaty provisions also plays a role. It is also well established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[15] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement".[16]

7.3. Article 17.6(ii) of the AD Agreement also provides that if a panel finds that a provision of the AD Agreement admits of more than one permissible interpretation, it shall uphold a measure if it rests upon one of those interpretations.

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, that:

> [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.

7.5. The Appellate Body has explained that where a panel is reviewing an investigating authority's (IA) determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has 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 support the overall determination.[17] Furthermore, in addition to the obligation to conduct an objective assessment under Article 11 of the DSU, with respect to disputes that arise under the AD Agreement, Article 17.6(i) of the AD Agreement provides that:

> [I]n 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.

7.6. The Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgement for that of the IA. A panel must limit its examination to the evidence that was before the IA during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[18] At the same time, a panel must not

[14] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.
[15] Appellate Body Report, *India – Patents (US)*, para. 45.
[16] Ibid. para. 46.
[17] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.
[18] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

simply defer to the conclusions of the IA; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[19]

7.1.3 Burden of Proof

7.7. The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.[20] China, as the complaining party in this dispute, must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements it cites, which the European Union must refute in order not to have the Panel rule against it. We also note that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[21] We recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.[22]

7.2 Alleged violations of Articles 6.5 and 6.5.1 of the AD Agreement

7.2.1 Legal provisions at issue

7.8. Articles 6.5 and 6.5.1 of the AD Agreement read:

> 6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.
>
> 6.5.1 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. (footnote omitted)

7.2.2 Relevant facts

7.9. We recall that in the original investigation, the Commission resorted to the so-called "analogue country" methodology in determining normal values because it considered China to be an NME. The Commission chose India as the analogue country and sent questionnaires to Indian companies producing the investigated product, i.e. fasteners. In the letter accompanying the questionnaire, the Commission confirmed that any information provided by the company would be treated as strictly confidential and reminded the company that, in any event, non-confidential summaries would need to be provided.[23] Two Indian producers cooperated and submitted questionnaire responses. Only one of these two companies, Pooja Forge, provided a response that contained sufficiently detailed data needed by the Commission in determining the normal value.[24] However, Pooja Forge's initial questionnaire response, submitted in March 2008, was not complete. It did not include a detailed domestic sales listing (DMSAL), nor did Pooja Forge fill out section B of the questionnaire concerning product description. A few weeks after the submission of Pooja Forge's questionnaire response, the Commission officials went to that company's premises in order to collect the missing information and to confirm its suitability as an analogue country

[19] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[21] Ibid.
[22] Appellate Body Report, *EC – Hormones*, paras. 98, 104.
[23] European Union's first written submission, para. 41; and Exhibit EU-1, p. 1.
[24] Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJEU L 29, 31 January 2009 (definitive regulation), (Exhibit CHN-1), recitals 86-91.

producer. During that verification visit, Pooja Forge provided the DMSAL file, which contained information on approximately 80,000 transactions. For each transaction, this file provided information such as prices, quantities, internal item codes and a product description text string. No non-confidential summary of the DMSAL file was provided because, the European Union argues, Pooja Forge indicated that "it was impossible to provide a meaningful summary of it without revealing sensitive business information".[25] During the verification visit, Pooja Forge also provided a non-confidential summary of its questionnaire response as well as a company brochure which, according to the European Union, contained information on product range, production process and other company sensitive details, such as production capacity and number of employees.[26] The present claim, as well as some of the other claims raised by China, which we examine below, takes issue with two pieces of information, namely, the list of Pooja Forge's products and the characteristics of such products. The information on the list of Pooja Forge's products was submitted in the DMSAL file presented during the verification visit. The information on the characteristics of such products was provided partly in the DMSAL file and partly through other documents submitted by Pooja Forge, such as its company brochure.[27] Certain information regarding product characteristics, namely, coating, was also presented to the Commission during the review investigation.[28]

7.2.3 Arguments of parties

7.2.3.1 China

7.10. China argues that the Commission acted inconsistently with Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products. China asserts that this information was neither by nature confidential nor submitted on a confidential basis and that no good cause was shown for its confidential treatment.

7.11. For both types of information, China contends that such information is routinely provided to potential customers and therefore cannot be by nature confidential.[29] China notes that the guidelines issued by the European Union on how to complete the non-confidential version of a questionnaire response define the "product catalogue" as non-confidential, which further proves that the information at issue could not be treated as confidential by nature.[30] As to whether the information was submitted on a confidential basis, China distinguishes between the list of products and the product characteristics. With regard to the list of products, China notes Pooja Forge's email to the Commission, dated 2 July 2012[31], indicating that Pooja Forge would not like to disclose its company details to interested parties, but contends that this cannot constitute a request for confidential treatment, nor the submission on a confidential basis. According to China, a party seeking confidential treatment for its information should at least identify the information for which such request is made.[32] With regard to product characteristics, China maintains that nothing on the record indicates that Pooja Forge requested confidential treatment for this information.[33] In any case, China argues, with regard to both types of information, that Pooja Forge failed to show good cause that would justify their confidential treatment.[34]

7.12. Should the Panel disagree with China's assertion that the EU's treatment of Pooja Forge's information as confidential was inconsistent with Article 6.5, China argues, in the alternative, that the European Union in any event violated Article 6.5.1 of the AD Agreement because the Commission failed to require Pooja Forge to provide a non-confidential summary of that

[25] European Union's first written submission, para. 41.
[26] Ibid.
[27] European Union's response to Panel question No. 9; and China's response to Panel question Nos. 3 and 9.
[28] Email exchanges between the European Commission and Pooja Forge during the review investigation in 2012 (BCI), (Exhibit EU-6).
[29] China's first written submission, para. 106.
[30] China's second written submission, para. 39.
[31] Emails exchanged between the Commission and Pooja Forge, 2 July 2012, (Exhibit CHN-25).
[32] China's first written submission, para. 107.
[33] China's first written submission, paras. 107 and 120; and China's second written submission, para. 42.
[34] China's first written submission, paras. 110, 114-117, 120; and China's second written submission, paras. 43-48.

information. With regard to the third sentence of Article 6.5.1, China also asserts that Pooja Forge failed to establish that there were exceptional circumstances that made summarization of confidential information impossible, and failed to provide a statement of reasons on that matter.[35]

7.2.3.2 European Union

7.13. The European Union submits that China is precluded from presenting this claim in these compliance proceedings because it was raised in the original proceedings and ultimately rejected by the Appellate Body.[36] In the original dispute, China brought a claim under Articles 6.5 and 6.5.1 of the AD Agreement with respect to the confidential treatment of all information provided in Pooja Forge's questionnaire response but only presented supporting evidence and arguments with respect to information regarding "product types". The panel made a finding of violation of Article 6.5 of the Agreement with regard to the information on product types. On appeal, the Appellate Body found that China had not substantiated its claim under Article 6.5 in a timely fashion, thus failing to observe the panel's working procedures and the requirement of due process of law, and reversed the panel's finding that the European Union had acted inconsistently with Article 6.5. In the EU's view, therefore, China should not be given a second chance to provide evidence and arguments that it failed to provide in the original proceedings.[37]

7.14. The European Union also requests the Panel to reject this claim on its merits. The European Union contends that the information submitted by Pooja Forge was properly treated as confidential pursuant to the requirements of Article 6.5. The European Union maintains that the information provided by Pooja Forge, concerning both the list and the characteristics of its products, was confidential by nature. With respect to the list of products, the European Union asserts that this is proprietary information. It is the kind of sensitive information that companies do not like to share with their competitors. Regarding product characteristics, the European Union posits that this information is by nature confidential because knowing the products sold in a market in detail would indicate which types of products a competitor could offer in that market. It would also show which product types are not sold in that market so that competitors can offer such products. In the EU's view, this also applies to the company brochure because the latter includes sensitive information about the company, such as its production process, production capacity and the number of employees.[38] The European Union also submits that, at the time of the original investigation as well as the review investigation, the Indian producer did not give its company brochure to anyone who was not its customer, since this would allow its competitors to see exactly what it made and how.[39]

7.15. In any case, the European Union argues that the information at issue was submitted by Pooja Forge on a confidential basis and that good cause was shown to justify confidential treatment of such information, as envisaged by Article 6.5.[40] In this regard, the European Union underlines the fact that Pooja Forge agreed to cooperate with the Commission in the original investigation as an analogue country producer on the condition that no company details would be disclosed to interested parties.[41] In the context of the verification visit that took place in April 2008, Pooja Forge requested Commission officials to maintain the confidentiality of the information on the list and characteristics of its products.[42] The company maintained the same position in the review investigation and told the Commission officials, through an email dated 2 July 2012, that it did not agree to the disclosure of any company details to interested parties. In another email, dated 3 July 2012[43], Pooja Forge pointed out that the list of products should not be disclosed because such disclosure would give an advantage to its competitors.

7.16. With respect to China's claim under Article 6.5.1 of the AD Agreement, the European Union contends that Pooja Forge provided the summary "fasteners" as a general summary contained in Pooja Forge's response to the questionnaire about its product range.[44] When this information was

[35] China's first written submission, paras. 123 and 129.
[36] European Union's first written submission, para. 40.
[37] Ibid. paras. 39-40; and European Union's second written submission, para. 15.
[38] European Union's first written submission, paras. 43-47.
[39] Ibid. para. 47.
[40] Ibid. paras. 49-53.
[41] Ibid. para. 41.
[42] European Union's response to Panel question No. 6; and Exhibit EU-5.
[43] E-mail from Pooja Forge to the European Commission dated 3 July 2012, (Exhibit EU-2).
[44] European Union's first written submission, para. 56.

first obtained from Pooja Forge in 2008, during the original investigation, Pooja Forge had expressed its views about the impossibility of summarising the information on the list and characteristics of its products in a way other than by means of this general summary.[45] After careful consideration, it seemed obvious to the Commission that, other than the general statement "fasteners", Pooja Forge could not provide another, more meaningful confidential summary of a list of 80,000 item codes relating to specific transactions as well as their product description text strings without either revealing internal company details or other sensitive market information to competitors.[46] Therefore, the European Union requests that the Panel also reject China's claim under Article 6.5.1.

7.2.4 Arguments of third parties

7.17. **Japan** recognizes the important balance that needs to be struck between providing interested parties in an anti-dumping investigation with adequate access to confidential information to enable them to defend their interests, and the need to protect the confidentiality of the information. In Japan's view, the good cause requirement of Article 6.5 of the AD Agreement aims to ensure that the avoidance of the risk of disclosure of confidential information is important enough to warrant non-disclosure. Japan contends that good cause must be determined objectively by the IA, and should not be based on the subjective considerations of the party submitting the information. Japan notes that the interested party submitting confidential information may provide evidence that the IA may use in determining whether there is good cause justifying confidential treatment. However, the ultimate determination in this regard has to be made by the IA. In making such a determination, the IA has to take into account not only the evidence provided by the interested party seeking confidential treatment, but also any other evidence submitted by other parties or obtained from other sources.[47] In Japan's view, the consideration of good cause should also appear on the investigation record. Japan considers that where the IA itself decides to treat information as confidential, it has to demonstrate that good cause exists for such treatment.[48] In order to decide whether good cause was shown in this review investigation, Japan invites the Panel to consider "whether there was any other way to disclose more specific information relating to possible differences in product comparability, while still protecting the confidential information".[49]

7.18. The **United States** disagrees with China's argument that information that is routinely provided to potential customers cannot be by nature confidential, as a categorical matter, for purposes of Article 6.5 of the Agreement. Article 6.5 contains no such carve out and there may be situations where information that is by nature confidential is provided to potential customers on the condition that it not be shared with others.[50] The United States, however, does not take a position as to whether or not the Commission acted consistently with the requirements of Article 6.5 in treating the information at issue as confidential in this review investigation. As for China's claim under Article 6.5.1 of the AD Agreement, the United States notes that this provision's requirement to provide non-confidential summaries only applies to information presented by "interested parties". China has not established that Pooja Forge was an interested party within the meaning of the AD Agreement. Article 6.11 of the AD Agreement provides a list of interested parties. In the view of the United States, Pooja Forge does not fall under any of the categories in that list. Because Pooja Forge was not an interested party, the Commission was not obliged to require that a non-confidential summary be provided for the confidential information submitted by Pooja Forge.[51]

7.2.5 Evaluation by the Panel

7.19. In our assessment of the present claim, we will first address the European Union's argument that China is precluded from raising this claim before this compliance Panel. We will only proceed with our assessment of the claim on the merits if we find that China is allowed to raise it in these proceedings.

[45] Ibid.
[46] Ibid.
[47] Japan's statement at the meeting of the Panel, para. 2.
[48] Ibid. para. 15.
[49] Ibid. para. 17.
[50] United States' written submission, para. 9.
[51] United States' written submission, paras. 13-17.

7.2.5.1 Terms of reference of the Panel

7.20. The European Union contends that China is precluded from raising this claim in these compliance proceedings because this claim was raised in the original dispute settlement proceedings and was ultimately rejected by the Appellate Body. The European Union notes that although China presented a broadly-defined claim under Article 6.5 of the AD Agreement before the original panel whereby it challenged the confidential treatment of "all information" presented in Pooja Forge's questionnaire response, it provided supporting evidence only with respect to part of that information, namely, "product types". The European Union recalls that the original panel noted this and assessed China's claim only with respect to the information on "product types". The European Union also underlines that, on appeal, the Appellate Body noted that China had not developed its Article 6.5 claim in a timely fashion before the original panel. In the EU's view, through the present claim, China is attempting to provide additional evidence and arguments with respect to the confidential treatment of information other than "product types", which it failed to provide in the original dispute. Citing the relevant WTO jurisprudence, including the Appellate Body report in *EC – Bed Linen (Article 21.5 – India)*, the European Union argues that China should not be given a "second chance" to make a case that it was supposed, but failed, to make in the original dispute.[52]

7.21. China disagrees with the European Union for four reasons. First, China asserts that the WTO jurisprudence relied upon by the European Union precludes the presentation before a compliance panel of the same claim against a component of the original measure that remained unchanged in the implementation phase and was not found to be WTO-inconsistent in the original dispute settlement proceedings. The present claim, however, does not challenge an unchanged component of the original measure. The original claim concerned information on "product types", whereas the present claim concerns information on the list and characteristics of Pooja Forge's products. Second, China could not have raised the present claim in the original proceedings because the Chinese producers became aware of the confidential treatment of information on the list and characteristics of Pooja Forge's products during the review investigation. Third, China argues that, if the Panel does not consider these two aspects to be new components, it should nevertheless conclude that these are "changed" components. Fourth, China submits that, differently from the *EC – Bed Linen (Article 21.5 – India)* case where the contested claim did not challenge an "inseparable" element of the measure taken to comply, in the present proceedings, the confidential treatment by the Commission of information on the list and characteristics of Pooja Forge's products represents an "integral" part of the measure taken to comply with the DSB rulings and recommendations after the original dispute.[53]

7.22. The function of a compliance panel is described in Article 21.5 of the DSU, which reads as follows in relevant part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

7.23. Article 21.5 states that a compliance proceeding under this provision may concern either the existence or the consistency with a covered agreement of measures taken to comply with DSB recommendations and rulings. That is, a complainant in a compliance proceeding may argue that the defendant has not taken any measures to comply with the DSB recommendations and rulings or that the measure taken to comply with such recommendations and rulings is inconsistent with the covered agreements.

7.24. It is now well established in WTO jurisprudence that the scope of the claims that may be raised in compliance proceedings is "not unbounded".[54] One limitation in the scope of such proceedings is the claims raised in the original dispute settlement proceedings with respect to which the complainant failed to make a *prima facie* case. Those claims cannot ordinarily be raised in compliance proceedings. The European Union contends that because China raised a claim under

[52] European Union's second written submission, paras. 14-17; and European Union's opening statement at the meeting of the Panel, paras. 7-9.
[53] China's second written submission, paras. 13-23.
[54] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.

Articles 6.5 and 6.5.1 in the original proceedings but failed to make a *prima facie* case thereon, this same claim cannot be raised before this compliance Panel. We note that this specific issue has been discussed in WTO jurisprudence, including in *EC – Bed Linen (Article 21.5 – India)* and *US – Upland Cotton (Article 21.5 – Brazil)*, which the parties also cite in their arguments regarding this jurisdictional issue. It is therefore useful to recall the gist of the Appellate Body's findings in these disputes on this particular issue.

7.25. In *EC – Bed Linen (Article 21.5 – India)*, one of the issues raised was whether or not a claim which had been raised in original proceedings, dismissed by the original panel and not appealed by the complainant, could be raised in compliance proceedings under Article 21.5 of the DSU. The compliance panel declined to rule on this claim, noting that doing so would open "[t]he possibility for manipulative or abusive litigation tactics[.]".[55] On appeal, the Appellate Body agreed with the compliance panel. In its analysis, the Appellate Body noted, *inter alia*, that, in this regard, there was no difference between a case where the original panel found that the complainant failed to make a *prima facie* case of violation or where it found that the challenged measure was not inconsistent with the WTO Agreement.[56]

7.26. In *US – Upland Cotton (Article 21.5 – Brazil)*, the original panel found that the complainant, Brazil, had shown a violation of the Agreement on Agriculture with respect to export credit guarantees provided to rice but that it had not made the same showing with respect to export credit guarantees provided to certain other agricultural goods; in doing so, the original panel did not analyse specifically Brazil's argument with respect to the guarantees other than those provided to rice.[57] On appeal, the Appellate Body found that the panel had erred in concluding that the export credit guarantees provided other than to rice were inconsistent with the United States' WTO obligations because it had not examined Brazil's arguments on these export credit guarantees.[58] The Appellate Body, however, did not complete the analysis because of the absence of uncontested facts on the record.[59] Brazil raised the same claim in the compliance proceedings. In a preliminary ruling issued at the request of the respondent, the United States, the compliance panel found this claim to be within its terms of reference because of the close nexus between the measure taken to comply and the measure that the contested claim challenged.[60] On appeal, the Appellate Body reiterated its finding in *EC – Bed Linen (Article 21.5 – India)* that a complainant that failed to make out a *prima facie* case in the original proceedings regarding an element of the original measure which remained unchanged in the implementation phase cannot re-litigate that claim before a compliance panel with respect to the same aspect of the measure.[61] However, the Appellate Body observed that the situation presented in *US – Upland Cotton (Article 21.5 – Brazil)* was different in that the disputed claim had not been resolved on its merits in the original proceedings because the Appellate Body had not completed the analysis. Therefore, according to the Appellate Body, allowing such a claim in compliance proceedings would not raise the due process concerns identified by the respondent.[62]

7.27. In the light of this jurisprudence, we must consider whether the present claim under Articles 6.5 and 6.5.1 of the AD Agreement is the same as the claim raised in the original proceedings under the same two provisions. If we find that these are the same claims, we will conclude that the present claim is outside our terms of reference and will refrain from addressing it on its merits. If, however, we conclude that these claims are not the same, the present claim will be within our terms of reference and we will proceed to make an assessment on the merits.

7.28. Turning to the facts that are relevant to our examination, we recall that China raised a claim under Articles 6.5 and 6.5.1 of the AD Agreement in the original proceedings. The scope of that claim was described by the original panel as follows:

> With respect to the non-confidential version of the Indian producer's questionnaire response, China alleges a violation of both Articles 6.5 and 6.5.1. China contends that the non-confidential version of the questionnaire response does not contain any information at all, particularly with respect to the product types on the basis of which

[55] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.43.
[56] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96.
[57] Panel Report, *US – Upland Cotton*, para. 7.881.
[58] Appellate Body Report, *US – Upland Cotton*, para. 692.
[59] Ibid. para. 693.
[60] Panel Report, *Upland Cotton (Article 21.5 – Brazil)*, paras. 9.19, 9.26-9.27.
[61] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.
[62] Ibid.

> the information was provided by this producer. China argues that the Commission erred by treating the information in this questionnaire response as confidential without good cause and thus acted inconsistently with Article 6.5 of the AD Agreement. If the Panel finds that the information was properly treated as confidential, China claims a violation of Article 6.5.1 of the AD Agreement …[63] (emphasis added)

7.29. The European Union argued before the original panel that China had dropped its Article 6.5 claim with respect to Pooja Forge's questionnaire response because China had not developed arguments in this regard in its first written submission. China clarified in its second written submission that it had not dropped this claim and provided its supporting arguments with respect to the claim. In response to questioning from the panel, the European Union stated that the way in which China had developed this claim violated the European Union's due process rights and the panel's working procedures.[64] The panel expressed concern over the way in which China had developed this claim but decided that, overall, the European Union had not been deprived of its due process rights; accordingly, it addressed the claim on its merits.[65] However, in terms of the scope of the claim, the panel noted that China's claim concerned all the information submitted in Pooja Forge's questionnaire response and that China had only presented evidence and arguments with respect to information concerning "product types". For this reason, the panel limited its substantive assessment of the claim under Article 6.5 to the information on product types.[66] The panel then noted that the Commission had treated the information about Pooja Forge's product types as confidential without a showing of good cause and found this to be in violation of Article 6.5. Having found a violation of Article 6.5, the panel refrained from making a finding under Article 6.5.1.[67] On appeal, the Appellate Body found that China had not substantiated its claim under Article 6.5 with respect to the "product type" information in the questionnaire because it had asserted it late in the proceedings and had failed to provide supporting arguments and evidence. Therefore, the Appellate Body concluded that the European Union was not called upon to respond to this claim. On this basis, the Appellate Body reversed the panel's finding that the European Union had acted inconsistently with Article 6.5.[68]

7.30. As noted above, in the original proceedings, the claim under Articles 6.5 and 6.5.1 of the AD Agreement was initially presented with respect to the confidential treatment of information in Pooja Forge's questionnaire response but was subsequently pursued only with respect to information on "product types". The EU's jurisdictional objection is based on the contention that the claim in the original proceedings concerned "all information" in Pooja Forge's "questionnaire response" and that therefore it also encompassed information on the list and characteristics of this company's products, which is the object of the present claim. We note, however, that, in terms of its object, the present claim is distinct from the original claim. The present claim concerns information on the "list and characteristics" of the products sold by Pooja Forge, whereas the original claim was presented with respect to the entirety of Pooja Forge's questionnaire response but was pursued only with respect to information on this company's product types. Indeed, China makes it clear that its claim does not challenge Pooja Forge's questionnaire response, but only the information on the list and characteristics of the company's products.[69]

7.31. Importantly, the information on the "list and characteristics" of Pooja Forge's products was not submitted in Pooja Forge's questionnaire response. It was submitted separately from the questionnaire response. Parties have no disagreement on this particular factual aspect. In this regard, we note the EU's statement that:

> Pooja Forge submitted the information regarding the "list of products" and the characteristics of the products sold in the Indian market during the IP in the DMSAL file during the verification visit that took place in April 2008 …
>
> With respect to other more general information about Pooja Forge's product range, the European Commission also obtained Pooja Forge's company brochure during its

[63] Panel Report, *EC – Fasteners (China)*, para. 7.510. (footnotes omitted)
[64] Ibid. paras. 7.519-7.521.
[65] Ibid. para. 7.522.
[66] Ibid. para. 7.524.
[67] Ibid. para. 7.525.
[68] Appellate Body Report, *EC – Fasteners (China)*, paras. 574-575.
[69] China's response to Panel question No. 5.

> verification visit. However, such information, as well as other information collected during the inspection by the European Commission, was not provided by Pooja Forge as part of its questionnaire response; rather, it was provided as part of the verification visit and thus placed on the confidential part of the investigation record.[70] (emphasis added)

7.32. In its first written submission, the European Union also clarifies that "[Pooja Forge's questionnaire response] did not contain a detailed domestic sales listing (DMSAL) file, nor did Pooja Forge fill out Section B (on product description) in its questionnaire response".[71]

7.33. As to when the information on the list of Pooja Forge's products was submitted, China also refers to the DMSAL file obtained during the verification visit in 2008. As for the information on product characteristics, China refers to the DMSAL file for certain characteristics, such as "diameter and length" and "type of fastener", and to other parts of the investigation file, such as certain emails and references to websites, for certain other characteristics, such as "type of coating" and "type of chrome".[72]

7.34. This clarifies that the information that the present claim under Articles 6.5 and 6.5.1 takes issue with was not part of Pooja Forge's questionnaire response, which was the object of the claim presented in the original proceedings. The EU's assertion is that the present claim was raised and rejected in the original proceedings. However, since the record shows that these two claims take issue with different types of information, in our view they cannot be the same. Consequently, allowing China to present the claim under Articles 6.5 and 6.5.1 in these proceedings would not prejudice the EU's due process rights, as it would not give China a second chance to argue a claim that was raised and rejected in the original proceedings.[73] On the basis of the foregoing, we find China's claim under Articles 6.5 and 6.5.1 to be within our terms of reference and therefore we will proceed with our assessment of that claim on its merits.

7.2.5.2 Assessment of the claim on the merits

7.35. China contends that the information on the list and characteristics of Pooja Forge's products was neither by nature confidential[74] nor submitted on a confidential basis.[75] Further, no good cause was shown to justify its confidential treatment.[76] Therefore, the Commission violated Article 6.5 of the AD Agreement by treating this information as confidential. The European Union asserts that the information at issue was by nature confidential[77] and was also submitted on a confidential basis[78] by Pooja Forge. The European Union also submits that Pooja Forge showed good cause[79] for the confidential treatment of this information, which the Commission assessed and accepted.[80] Therefore, the Commission did not act inconsistently with Article 6.5.

7.36. China's argument is two-tiered. China first alleges a violation of Article 6.5 of the AD Agreement on the grounds that the Commission erred in treating the information on the list

[70] European Union's response to Panel question No. 9.
[71] European Union's first written submission, para. 41.
[72] China's responses to Panel question Nos. 3 and 9.
[73] In addition to the fact that the two claims at issue are not the same, we note that, in the review investigation, a fair amount of exchange of views took place between the Commission and the Chinese producers with respect to the confidentiality of the information regarding the list and characteristics of Pooja Forge's products. These discussions between the Commission and the Chinese producers, which we cite in paragraphs 7.70-7.74 below, demonstrate that the issue of the disclosure of information regarding the list and characteristics of Pooja Forge's products constituted an important aspect of the review investigation. This, in turn, indicates that this particular issue was closely related to the debate regarding the consistency of the measure taken by the European Union to comply with the DSB recommendations and rulings following the original proceedings. In our view, this reinforces the view that the present claim falls within our terms of reference.
[74] China's first written submission, para. 106; and China's second written submission, paras. 25–40.
[75] China's first written submission, paras. 107 and 120; and China's second written submission, para. 42.
[76] China's first written submission, paras. 109–121; and China's second written submission, paras. 43-51.
[77] European Union's first written submission, paras. 43-48.
[78] Ibid. para. 49.
[79] Ibid. paras. 50-53.
[80] European Union's second written submission, para. 42.

and characteristics of Pooja Forge's products as confidential. China's second allegation is that should we find that the Commission's confidential treatment of that information was consistent with the requirements of Article 6.5, the Commission acted inconsistently with Article 6.5.1 by failing to ensure that Pooja Forge submitted a non-confidential summary in sufficient detail to permit a reasonable understanding of the information submitted in confidence. In terms of the order of our evaluation, we will first assess the alleged violation of Article 6.5. If we find a violation of Article 6.5, we will not address the alleged violation of Article 6.5.1. If, however, we do not find a violation of Article 6.5, we will evaluate the claim under Article 6.5.1.

7.37. We find it useful to start out by noting that there is no disagreement between the parties as to the applicability of the disciplines in Article 6.5 to the information submitted by Pooja Forge. The European Union does not submit that Article 6.5 does not apply to information submitted by Pooja Forge by virtue of that entity not being a "party" to the investigation. In fact, the European Union clearly states that, in its view, "the obligations under Article 6.5 of the AD Agreement also apply in the case of analogue country producers".[81]

7.38. China alleges a violation of Article 6.5 on two grounds: first, the information on the list and characteristics of Pooja Forge's products was neither by nature confidential nor submitted on a confidential basis; and, second, no good cause was shown to justify the confidential treatment of this information. These two aspects of the Article 6.5 claim are very closely related; indeed, in practice, they go hand in hand. When an interested party submits confidential information to an IA, it explains why the information is to be kept confidential. In turn, a showing of good cause naturally encompasses the underlying aspect that the information being submitted is confidential. Under the circumstances, we see no need to break the claim into the two components referred to by China and will assess this claim in a holistic fashion, with a focus on the more inclusive issue of good cause.

7.39. The European Union disagrees with China's allegation that good cause was not shown to justify the confidential treatment of the information on the list and characteristics of Pooja Forge's products. In support of this argument, the European Union states generally that disclosing such information could have given an advantage to Pooja Forge's competitors and could have caused adverse effects to the company.[82] In response to China's objection that such arguments represent *a posteriori* justification and that good cause must be shown by the party seeking confidential treatment, the European Union contends that the determination of good cause is the IA's task.[83] In this regard, the European Union relies on the Appellate Body's findings in the original dispute, particularly its statement that good cause "must be assessed and determined objectively by the investigating authority".[84]

7.40. We do not agree with the EU's interpretation of the Appellate Body's findings at issue. In the original proceedings in this dispute, the Appellate Body pointed out that the requirement to show good cause applies both to information that is by nature confidential and information submitted on a confidential basis. It also indicated that the good cause that has to be shown "must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information." The Appellate Body stressed that claim of good cause has to be assessed objectively by the IA and that it cannot be simply based on the subjective concerns raised by the party submitting the confidential information.[85] Importantly, the Appellate Body distinguished between the role of the party submitting confidential information and that of the IA:

> 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

[81] Ibid. para. 45.
[82] European Union's first written submission, paras. 50-54.
[83] European Union's second written submission, para. 40.
[84] Ibid. para. 39.
[85] Appellate Body Report, *EC – Fasteners (China)*, para. 537.

> 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". (footnote omitted, emphasis added)

7.41. We note that this interpretation makes a clear distinction between the role of a party seeking confidential treatment of information and that of the IA receiving such a request. It is for the IA to require the party submitting the confidential information to show good cause − that is, to show the reasons why the information deserves to be treated as confidential. Once the reasons have been provided by the submitting party, the IA is under an obligation to assess them objectively, and thereby determine whether the party has shown good cause for treating the information as confidential. We therefore disagree with the European Union that the determination of good cause lies with the IA. It is rather the assessment of good cause claimed by the submitting party that lies with the IA.

7.42. In support of its argument that Pooja Forge showed good cause to justify the confidential treatment of the information at issue, the European Union also refers[86] to an email from Pooja Forge, dated 3 July 2012, which reads:

> Kindly note that the list of the products sold by Pooja Forge cannot be provided because this information if disclosed, will give advantage to our competitor.[87]

7.43. China submits that this email should not be taken into consideration by the Panel because it was not part of the investigation record.[88] The European Union disagrees.[89] We recall that, pursuant to Article 17.5(ii) of the AD Agreement, we have to make our findings on the basis of the facts contained on the record of the investigation at issue. Following our meeting with the parties, we asked them a question in order to clarify this matter. In response, the European Union stated that this email was part of the confidential file, but not the public file. China submitted an index[90] of the review investigation dated 9 July 2012, which also includes the contents of the confidential file, but it does not list this email. The European Union submitted a full index of the review investigation dated 25 April 2013, which does list this email as a confidential document concerning the dumping aspect of the investigation submitted by Pooja Forge on 12 July 2012.[91]

7.44. There is no explanation on the record as to why this email was treated as confidential by the Commission. The European Union does not explain what information contained in this email was treated as confidential and on what basis. In fact, the email itself simply conveys Pooja Forge's assertion that disclosing its information would give an advantage to its competitors. Therefore, it is not clear to us why it was placed on the confidential file. It is clear, however, from the documents presented to the Panel that this email was not on the public file which the Chinese producers could have consulted. In our view, this is where the problem lies. Placing the email on the confidential file rather than the public one deprived the Chinese producers of the opportunity to know of this argument made by Pooja Forge and eventually to respond to it during the course of the review investigation. In any case, we also think that, in terms of its contents, the email does not seem to support the argument that Pooja Forge provided good cause to justify confidential treatment of Pooja Forge's information. It is no more than a bald assertion on the part of Pooja Forge.

7.45. We asked the European Union to explain to the Panel, on the basis of the record of the investigation at issue, the manner in which any confidentiality requirement by Pooja Forge was

[86] See, for instance, European Union's first written submission, para. 42.
[87] E-mail from Pooja Forge to the European Commission dated 3 July 2012, (Exhibit EU-2).
[88] See, for instance, China's second written submission, para. 46; and China's opening statement, para. 19.
[89] European Union's second written submission, paras. 43-44.
[90] Index of the file in the review investigation concerning the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, (Exhibit CHN-4).
[91] Full index of the review investigation generated on 25 April 2013, (Exhibit EUR-7), p. 2.

assessed by the Commission. In response, the European Union states that the investigation record does not contain "much" about this:

> To recall, the confidentiality of Pooja Forge's product range was a non-issue in the original investigation. The Chinese exporting producers never contested this aspect of the investigation; nor did China take issue with this aspect of the original investigation in the original panel proceedings. Hence, there is not much explicit reference to the European Commission's assessment of Pooja Forge's request in the file of the original investigation.[92]

7.46. In our view, this admission leaves no doubt that the Commission never performed "an objective assessment" on whether the information was confidential by nature or whether good cause had been shown to justify its confidential treatment as required under Article 6.5 and elaborated by the Appellate Body in the original proceedings. In our view, the duty to perform such an assessment was not dependent upon whether or not the underlying issue was contested by the Chinese producers in the investigation. Lack of such contestation by the Chinese parties could not be an excuse for the absence of any assessment by the Commission on this matter.

7.47. The European Union maintains, however, that because the issue of confidentiality did arise in the review investigation, the steps taken by the Commission in this respect in the review investigation are a good proxy of how this issue was treated during the original investigation. In this regard, the European Union refers to Pooja Forge's email dated 3 July 2012, which, as already noted, we do not consider sufficient to constitute an objective showing of good cause to justify confidential treatment of information.

7.48. Before leaving the issue of confidentiality, we would like to underline an inconsistency in the EU's arguments. While the EU's main argument under the present claim is that the information on the list and characteristics of Pooja Forge's products was confidential, in connection with China's claim under Articles 6.4 and 6.2, which we address below, the European Union maintains that some of this information was disclosed to the Chinese producers. For instance, the European Union contends[93] and, as noted in paragraph 7.74 below, the record shows that, through a letter dated 5 July 2012, the Commission provided the Chinese producers with information regarding the characteristics of Pooja Forge's products, in particular on coating and diameter. Similarly, as noted in paragraph 7.91 below, the European Union also asserts that through the final disclosure, the Commission disclosed information on the characteristics of Pooja Forge's products. In our view, these contradictions also undermine the EU's contention that the information at issue was confidential and that good cause was shown to keep it as confidential.

7.49. Before concluding our analysis of Article 6.5, we note that, as part of its argumentation under this claim, China submitted, in Exhibit CHN-51, a price list which purportedly belonged to Pooja Forge and was extracted from the public domain. This exhibit was first introduced during the Panel's substantive meeting with the parties and subsequently submitted in the attachment to the written version of China's oral statement. During the meeting and in its written comments on China's response to the Panel's question on this matter, the European Union expressed concern about the authenticity of this document and stated that it might have been obtained illegally and disclosed without Pooja Forge's permission. The European Union therefore requested that this document not be used in the context of WTO dispute settlement. The European Union added that, in any case, this exhibit did not support China's arguments under this claim.[94] In our evaluation of this claim, we did not use the price list presented in Exhibit CHN-51. We therefore need not, and do not, address the issue of the admissibility of this document as evidence in these proceedings.

7.2.5.2.1 Conclusion

7.50. On the basis of the foregoing, we find that the Commission failed to act consistently with Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products. Having found a violation of Article 6.5 with respect to the confidential treatment of this information, we need not, and do not,

[92] European Union's response to Panel question No. 6.b.
[93] European Union's first written submission, para. 184.
[94] European Union's comment on China's response to Panel question No. 2.

make a finding with respect to China's claim under Article 6.5.1 of the AD Agreement concerning the non-confidential summary of the same information.

7.51. We wish to note that by finding a violation of Article 6.5 of the AD Agreement with respect to the confidential treatment of the information regarding the list and characteristics of Pooja Forge's products, we do not necessarily say that such information was not of a confidential nature. In fact, the standard of review that we have to follow in these proceedings would not allow us to make such a conclusion since this would have been a *de novo* review. Our finding only indicates that, in according confidential treatment to this information, the Commission failed to observe the obligations set forth in Article 6.5. We should also note that, in light of our finding under this claim, where relevant in the following parts of this Report, we will consider the information on the list and characteristics of Pooja Forge's products as not requiring confidential treatment within the meaning of Article 6.5 of the Agreement.

7.3 Alleged violations of Articles 6.4 and 6.2 of the AD Agreement

7.3.1 Legal provisions at issue

7.52. Article 6.4 of the AD Agreement reads:

> 6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

7.53. Article 6.2 of the AD Agreement provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

7.54. Article 6.2 of the DSU provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.3.2 Arguments of parties

7.3.2.1 China

7.55. China submits that by failing to provide opportunities to the Chinese producers to see the information regarding the list and characteristics of products sold by Pooja Forge, which were used in the determination of the normal value, the European Union violated its obligation under Article 6.4 of the AD Agreement. In this regard, China notes the requirements on which this obligation is conditioned and argues that all those conditions were met in this case: first, the fact that the Chinese producers repeatedly requested to see the information concerning the lists and characteristics of Pooja Forge's products shows that they found such information to be "relevant" to the presentation of their cases; second, the information that the Chinese producers requested

to see was "not confidential" within the meaning of Article 6.5 of the Agreement; and third, the information at issue was "used" by the Commission in this review investigation.[95]

7.56. China argues that by failing to provide the Chinese producers with the information on the list and characteristics of Pooja Forge's products, the European Union also violated Article 6.2 of the Agreement. This aspect of China's claim is two-tiered. First, China contends that the violation of Article 6.4 also led to a violation of Article 6.2. Second, China maintains that, even if there is no violation of Article 6.4, the European Union in any case violated Article 6.2 by not allowing the Chinese producers to access information on the list and characteristics of Pooja Forge's products that the Chinese producers needed for the defence of their interests.[96]

7.3.2.2 European Union

7.57. The European Union raises two sets of jurisdictional objections to China's claim under Articles 6.4 and 6.2 of the AD Agreement. First, the European Union asserts that this claim could have been but was not raised by China in the original proceedings. In the EU's view, this claim pertains to an unchanged aspect of the original determination that was incorporated into the measure taken to comply with the DSB rulings and recommendations, and that it is separable from the measure taken to comply. Therefore, the European Union contends that this claim falls outside the Panel's terms of reference altogether.[97] Second, should we disagree with the first jurisdictional objection, the European Union asserts that China expanded the scope of the dispute in respect of this claim as far as the list of products is concerned. Specifically, the European Union contends that whereas in its panel request China raises the claim under Articles 6.4 and 6.2 "with regard to, *inter alia*, the products sold by the Indian producer", in its first written submission, China takes issue with Pooja Forge's internal company codes and product description text strings which, unless the internal reference to match the item codes is obtained from Pooja Forge, "do not say much" about the products sold by this company.[98] Therefore, argues the European Union, the Panel should refrain from addressing the part of China's claim that takes issue with the list of products.[99]

7.58. On the substance of China's claims, the European Union contends that the three conditions set forth in Article 6.4 that must be met in order to give rise to the obligation regarding information that interested parties must have timely opportunities to see, were not met in this review investigation. As for the first condition, namely the relevancy of the information, the European Union argues that a list of 80,000 transactions, including internal item codes and the company product description text strings, could not be relevant to the presentation of the Chinese producers' cases. In the EU's view, what was relevant was the information on the characteristics of the products sold by Pooja Forge, and which was used in the determination of the normal value. This information was disclosed by the Commission to these producers.[100] Second, the European Union maintains that the information at issue was confidential; therefore, it did not fall within the scope of the obligation set forth in Article 6.4.[101] Third, the Commission did not use all the raw data provided by Pooja Forge regarding its sales in India. For instance, it did not use the internal item codes. Whatever information the Commission used was disclosed to the Chinese producers. Specifically, the European Union notes that, together with the final disclosure, the Chinese producers received detailed dumping margin calculations where they could see the export transactions that were matched with the Indian producer's normal value.[102] For these reasons, the European Union requests the Panel to reject China's claim under Article 6.4.

7.59. On the basis of the same substantive arguments, the European Union also requests the Panel to reject China's claim under Article 6.2. In the EU's view, the Panel cannot find a violation

[95] China's first written submission, paras. 139-142.
[96] Ibid. paras. 150-154.
[97] European Union's response to Panel question No. 1.
[98] European Union's first written submission, para. 63; and European Union's second written submission, para. 60.
[99] European Union's first written submission, para. 63.
[100] Ibid. paras. 65-68.
[101] Ibid. para. 69.
[102] European Union's first written submission, paras. 70-71.

of Article 6.2 if it finds that there is no violation of Article 6.4, since the Article 6.2 claim is entirely consequential to the Article 6.4 claim.[103]

7.3.3 Arguments of third parties

7.60. The **United States** considers that the ability of an interested party to defend its interests in an anti-dumping investigation is particularly important with respect to the information on the calculation of the normal value and the price comparisons made by the IA. Article 6.4 requires an IA to provide access to all non-confidential information on the investigation file that an interested party finds relevant to the presentation of its case. Failure to observe this obligation would violate not only Article 6.4 but also Article 6.2 of the Agreement, which requires that interested parties be given a full opportunity for the defence of their interests.[104] The United States takes no position as to whether treating the information at issue as confidential was consistent with the requirements of Article 6.5. However, to the extent that such treatment was inconsistent with Article 6.5, the United States contends that it would have to be disclosed pursuant to Article 6.4.[105] The United States adds that even if the information provided by Pooja Forge could not be disclosed in full, if the Commission relied on that information and if the Chinese producers needed to see it in order to defend their interests, Article 6.2 required the Commission to adopt some sort of mechanism that would give the Chinese producers such an opportunity.[106]

7.3.4 Evaluation by the Panel

7.61. In our assessment of the present claim, we will first address the EU's jurisdictional objections. Specifically, we will first examine the EU's argument that this claim falls outside our terms of reference because it could have been but was not raised in the original proceedings. If we reject this objection, we will then assess the EU's second jurisdictional objection, namely that the part of China's claim regarding the list of Pooja Forge's products falls outside our terms of reference because it was not identified in China's panel request. We will then proceed with our assessment of the claim on its merits, the scope of which will depend upon our finding regarding the EU's second jurisdictional objection. If we reject the EU's second jurisdictional objection, our substantive assessment will cover information on both the list and characteristics of Pooja Forge's products. If, however, we accept that objection, our substantive assessment will cover only the information on the characteristics of those products.

7.3.4.1 Terms of reference of the Panel

7.62. As noted above, the European Union makes two jurisdictional objections. First, it argues that this claim falls outside our terms of reference altogether because it could have been but was not raised in the original proceedings, and it pertains to an unchanged aspect of the original measure and is separable from the measure taken to comply. Second, it contends that the part of the claim pertaining to the list of Pooja Forge's products falls outside our terms of reference because it was not identified in China's panel request. We will examine these two objections in turn.

7.3.4.1.1 Is this a claim that could have been but was not raised in the original proceedings?

7.63. In the EU's view, China's claim under Articles 6.4 and 6.2 pertains to unchanged aspects of the original measure which were incorporated into the measure taken to comply but which are separable from it; therefore, this claim falls outside this compliance Panel's terms of reference.[107]

7.64. We note that the jurisdictional issue that arose in *US – Zeroing (EC) (Article 21.5 – EC)* and which the Appellate Body addressed in its report was the extent to which new claims, i.e. claims not raised in original proceedings, may be raised in compliance proceedings. In the original proceedings of that dispute, which also concerned anti-dumping measures, the complainant raised

[103] European Union's second written submission, para. 68; and European Union's first written submission, paras. 73-74.
[104] United States' written submission, paras. 21-22.
[105] Ibid. para. 23.
[106] Ibid. para. 24.
[107] European Union's response to Panel question No. 1.

claims regarding the so-called "zeroing" methodology.[108] In the compliance proceedings, the complainant raised a claim regarding an alleged arithmetical error in the IA's dumping calculation, which was not related to zeroing, and which had not been raised in the original proceedings.[109] The compliance panel found that this claim was outside its terms of reference because it pertained to an unchanged aspect of the original measure and could have been but had not been raised in the original proceedings.[110]

7.65. The Appellate Body disagreed, noting that its jurisprudence on this matter, on which the panel had relied, "does not preclude raising new claims against measures taken to comply that incorporate unchanged aspects of original measures that could have been made, but were not made, in the original proceedings".[111] The Appellate Body noted that, in principle, claims that could have been but were not pursued in the original proceedings may not be brought in compliance proceedings. However, the Appellate Body stressed that this does not preclude bringing new claims against unchanged aspects of the original measure which are incorporated in the measure taken to comply and which are not separable from it.[112] According to the Appellate Body, therefore, the critical question for the compliance panel in that dispute was "whether the alleged arithmetical error was an integral part of the measure taken to comply".[113] However, because of a lack of factual findings by the panel and of undisputed evidence on the panel record, the Appellate Body was not able to complete the analysis of the complainant's claim in that dispute.[114]

7.66. The Appellate Body's reasoning applies to situations where the complainant brings a claim in compliance proceedings, which it could have brought but did not bring in original proceedings and that such claims challenge aspects of the measure taken to comply that are incorporated from the original measure. Where the measure taken to comply incorporates an aspect of the original measure which could have been but was not challenged in the original proceedings and such aspect is an integral part of the measure taken to comply, the Appellate Body's reasoning explains that claims may be brought against such aspect in compliance proceedings. If, however, that aspect of the original measure is not an integral part of the measure taken to comply, claims against such an aspect will fall outside the compliance panel's terms of reference.

7.67. Applying this jurisprudence to the claim before us, we have to consider first whether the present claim is one that could have been but was not brought in the original proceedings. If we find that it could not have been brought in the original proceedings, we will conclude that this claim falls within our terms of reference. If we find that it could have been brought in the original proceedings, we will then determine whether this claim challenges an unchanged aspect of the original measure which has become an integral part of the measure taken to comply. If so, this claim will fall within our terms of reference, otherwise it will not.

7.68. In deciding whether this claim could have been brought by China in the original proceedings, we have to take into account the factual circumstances in the review investigation under which the claim was raised and examine to what extent such circumstances also existed in the original investigation. We recall that the obligations contained in Articles 6.4 and 6.2 concern the interested parties' right to see the information on the investigation file and to defend their interests on that basis. Such procedural obligations may be violated by an IA in respect of a request made by an interested party to see a particular piece of information, or to make a presentation on a particular issue. Such violations could occur multiple times during an investigation, depending on the piece of information that an interested party requests to see or the presentation that such a party wishes to make for the defence of its interests. Therefore, an assessment of whether or not two sets of claims raised under these two provisions are the same requires a comparison of the factual circumstances under which the relevant interested party made a request to use these procedural rights, which was denied by the IA. With this in mind, let us now turn to the facts before us.

[108] Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 8.243.
[109] Ibid. para. 8.238.
[110] Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 8.239.
[111] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427.
[112] Ibid. para. 432.
[113] Ibid. para. 434.
[114] Ibid. para. 439.

7.69. In the original proceedings, China presented a claim under Articles 6.4 and 6.2 challenging the Commission's failure to let Chinese producers see information regarding (i) Pooja Forge's product types; (ii) the Commission's normal value determinations; and (iii) the comparison between the normal value and the export price. With respect to the first aspect, the original panel found a violation of Articles 6.4 and 6.2.[115] With respect to the second and third aspects, the panel rejected China's claim.[116] On appeal, the Appellate Body upheld the original panel's finding of violation with respect to the first aspect.[117] Importantly, the scope of China's claim did not include the information on the list and characteristics of Pooja Forge's products in particular.

7.70. In the review investigation, the Commission took steps to implement the DSB recommendations and rulings stemming from the violations of Articles 6.4, 6.2 and 2.4 of the AD Agreement in connection with the Chinese producers' right to see the information on Pooja Forge's product types. The record shows that this triggered a series of communications between the Commission and the Chinese producers which seem to have given rise to the present claim.

7.71. The notice of initiation of the review investigation states, in this regard, that:

> [T]he Commission intends to re-disclose to all interested parties that participated in the fasteners investigation more precise information regarding the product characteristics which were found to be pertinent in the determination of the normal value that was used in the comparison with the product concerned.[118]

7.72. To this end, the Commission conveyed to the Chinese producers, through a letter dated 30 May 2012, information regarding the determination of normal values in the original investigation. The attachment to this letter explains the process of the determination of normal values. It describes the characteristics of product control numbers (PCN) on the basis of which the Commission initially requested information from interested parties and the reasons why the Indian producer was unable to present its information on the basis of such characteristics.[119]

7.73. Thereafter, the Chinese producers wrote to the Commission, arguing that the disclosure was insufficient and seeking further information, including regarding the Indian producer's products. A letter dated 12 June 2012, sent on behalf of two Chinese producers, asserts that "[t]he disclosure of 30 May 2012 ... does not provide any information whatsoever as regards the type of products of the Indian producer that were used for the determination of the dumping margin[]" and seeks more information on the "precise and detailed characteristics" of the product types sold by the Indian producer. This letter also makes more detailed and specific comments about "chrome" and "chrome on coating" used in such product types.[120] Another letter, dated 19 June 2012 and sent on behalf of China Chamber of Commerce for Import & Export Machinery & Electronic Products, complains, among other things, that "by merely disclosing the criteria used for creating the categories which were used to determine the normal value, the Commission fails to give the appropriate information to the parties on the products or product groups".[121]

7.74. In response to these letters, the Commission stated, in an email sent on 26 June 2012, that "the models" sold by the Indian cooperating producer were provided to the Commission on a confidential basis and could not be disclosed".[122] In subsequent letters addressed to the Commission, the Chinese producers underlined the difficulty of making requests for adjustments without having information about the products sold by the Indian producer and reiterated their request for further information about the characteristics of such products.[123] Following these

[115] Panel Report, *EC – Fasteners (China)*, paras. 7.494-7.495.
[116] Ibid. paras. 7.497 and 7.501.
[117] Appellate Body Report, *EC – Fasteners (China)*, para. 527.
[118] Notice of initiation of the review investigation, (Exhibit CHN-2), p. 30.
[119] Letter of the Commission to interested parties including the disclosure document concerning normal value, 30 May 2012 (Commission's letter of 30 May 2012), (Exhibit CHN-5).
[120] Letter on behalf of Changshu to the Commission, 12 June 2012 (Changshu letter), (Exhibit CHN-8), p. 5.
[121] Letter on behalf of CCCME to the Commission, 19 June 2012 (CCCME letter), (Exhibit CHN-7), p. 7.
[122] Email of the Commission concerning Biao Wu and CCCME, 26 June 2012 (Commission's email of 26 June 2012), (Exhibit CHN-11), para. 2.3.
[123] Submission on behalf of Changshu, 25 June 2012, (Exhibit CHN-13), pp. 2-3 and Submission on behalf of Ningbo Jinding, 25 June 2012, (Exhibit CHN-14), p. 2.

exchanges, the Commission, through a letter dated 5 July 2012, provided further information regarding the characteristics of Pooja Forge's products, in particular on coating and diameter.[124] The review regulation notes the fact that some exporting producers "requested further clarifications and information in order to be able to make a possible request for adjustments to their own dumping margin" with respect, among others, to "characteristics of the products sold by the Indian producer used for the determination of the normal value".[125] The review regulation states that "…for confidentiality reasons, it is not possible to disclose the exact types of model of screws and bolts sold by the Indian producer".[126]

7.75. In our view, these facts show that what gave rise to the present claim was the communications that were exchanged between the Commission and the Chinese producers with respect to access to information regarding characteristics of Pooja Forge's products. Such communications were triggered by the Commission's disclosure, through its letter dated 30 May 2012, of further information to the Chinese producers regarding the determination of normal values in the original investigation. As we note in paragraphs 7.112-7.114 below, in the original investigation, there were no discussions with respect to the Chinese producers' request to access information on the list and characteristics of Pooja Forge's products. As a result, no claim was raised in the original proceedings under Articles 6.4 and 6.2 with respect to the Chinese producers' right to access the mentioned information.

7.76. In this regard, we note the EU's statement that:

> The disclosure of the product types used for the normal value determinations of the Chinese interested parties (i.e. the revised PCNs) is indeed a new element of the measure taken to comply; in contrast, the information relating to Pooja Forge's products is an element that remained unchanged (the European Commission did not reopen it, no new evidence was provided by Pooja Forge and the confidential treatment remained the same) in the review investigation, and that the European Commission treated in a separable manner from the "product types" or "product grouping" discussion.[127] (emphasis added)

7.77. This statement confirms our understanding of the facts. The Commission had in its possession certain information on the list and characteristics of Pooja Forge's products. Part of such information, which had not been provided to the Chinese producers in the original investigation, was provided for the first time in the review investigation. As we noted above, it is this disclosure of new information that triggered further discussions between the Chinese producers and the Commission, which ultimately gave rise to the present claim.

7.78. If an interested party is not aware of the existence of certain information on the investigation record, it cannot make a request to see that information or make presentations on that basis to defend its interests. Naturally, no claim of violation of Articles 6.4 or 6.2 may be brought in connection with such information. We are persuaded therefore that the present claim does not challenge an aspect of the original measure which was incorporated into the measure taken to comply.

7.79. We also note that, in anti-dumping investigations, the disclosure of certain information may trigger further requests by interested parties to see other information on the record or to challenge certain aspects of the IA's determinations which they might not have been in a position to challenge in the absence of the disclosed information. This is what happened in this case. Following the Commission's disclosure of information on normal values, which was not disclosed in the original investigation, the Chinese producers made repeated requests to see the information on the list and characteristics of Pooja Forge's products, the rejection of which gave rise to the present claim. Therefore, we disagree with the EU's contention that this claim could have been but was not raised by China in the original proceedings.

[124] Letter of the Commission to interested parties, 5 July 2012, (Exhibit CHN-15).
[125] Review regulation, (Exhibit CHN-3), recitals 54 and 54(b).
[126] Ibid. recital 57.
[127] European Union's comment on China's response to Panel question No. 1.

7.80. On this basis, we reject the EU's first jurisdictional objection. In light of this finding, we need not, and do not, determine whether this claim challenges an unchanged aspect of the original measure which has become an integral part of the measure taken to comply.

7.3.4.1.2 Adequacy of China's panel request

7.81. The EU's second jurisdictional objection is that the aspect of China's claim pertaining to the list of Pooja Forge's products falls outside our terms of reference because it was not identified in China's panel request in these compliance proceedings. Specifically, the European Union contends that "item codes" and "product description text strings" are not covered by China's panel request. The European Union therefore submits that the Panel should limit its examination of the present claim to the characteristics of Pooja Forge's products.[128] China disagrees with the European Union, arguing that the wording of its panel request is sufficiently wide to cover the claim it raised under Articles 6.4 and 6.2.[129]

7.82. Article 7.1 of the DSU provides that a panel's terms of reference are determined by the complainant's panel request.[130] Therefore, the panel request identifies the claims that a panel has authority to examine and on which it may make findings.[131] According to Article 6.2 of the DSU, a panel request must identify *the specific measures at issue* and must provide a *brief summary of the legal basis of the complaint*. Together, these two elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU. It is important that the panel request include these elements for two reasons. First, it defines the scope of the dispute. Second, it serves the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.[132] Article 6.2 of the DSU also applies to compliance proceedings under Article 21.5 of the DSU, subject to the particularities of such proceedings.[133] In this regard, therefore, compliance proceedings are similar to original proceedings: the "matter" at issue in compliance proceedings consists of: (i) the specific measure at issue, as identified in the panel request; and (ii) the legal basis of the complaint, i.e. the claims, as set forth in the panel request.[134]

7.83. Turning now to China's panel request, we note that it reads in pertinent part:

> Articles 6.4 and 6.2 of the AD Agreement because the EU failed to provide to the Chinese interested parties a full opportunity for the defence of their interests and because the EU did not provide timely opportunities for them to see all information that was not confidential as defined in Article 6.5, that was relevant to defend their interests and that was used by the authority in the anti-dumping investigation with regard to, *inter alia*, the products sold by the Indian producer[][135] (italic in original, underlining added)

7.84. The panel request alleges violations of Articles 6.4 and 6.2 on the grounds that the European Union failed to provide the Chinese interested parties with an opportunity to see all information with regard to, *inter alia*, the products sold by Pooja Forge. Thus, the panel request clearly refers to information pertaining to the products sold by Pooja Forge. Further, the request refers to "all information" pertaining to such products.

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[128] European Union's response to Panel question No. 14.a.
[129] China's second written submission, para. 67.
[130] Article 7.1 of the DSU reads:
Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[131] Appellate Body Report, *EC – Selected Customs Matters*, para. 131.
[132] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 20.
[133] Appellate Body Report, *US – FSC (Article 21.5-EC II)*, para. 59.
[134] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.
[135] WT/DS397/18, p. 3.

7.85. The claim that China raised before this Panel pertains to the "list and the characteristics" of the products sold by Pooja Forge. The European Union argues that because of the alleged deficiency in China's panel request, the part of the present claim taking issue with "the list of products" is outside the Panel's terms of reference. That is, the European Union maintains that the reference to "all information" regarding the products sold by Pooja Forge did not suffice to put the European Union on notice that China's claim stemming from this part of the panel request could take issue with the list of the products sold by Pooja Forge. We consider that this argument represents an overly restrictive interpretation of China's panel request.[136] We find it reasonable that a complaining party can raise a claim regarding the list of products sold by a company if the complainant's panel request refers to "all information" regarding the products sold by that company.

7.86. On this basis, we also reject the EU's second jurisdictional objection and proceed with an assessment of China's claim on its merits.

7.3.4.2 Assessment of the claim on the merits

7.87. China's claim has two aspects - one under Article 6.4 and the other under Article 6.2 of the AD Agreement. In connection with Article 6.4 of the Agreement, China submits that the Commission violated this provision by failing to provide timely opportunities to the Chinese producers to see the information regarding the list and characteristics of Pooja Forge's products. We note at the outset that the information at issue here is the same information that is the object of China's claim under Articles 6.5 and 6.5.1, which we assessed above.

7.88. We recall that the obligation under Article 6.4 applies to information that meets three conditions: first, the information has to be relevant to the presentation of the interested parties' cases; second, it should not be confidential within the meaning of Article 6.5 of the Agreement; and third, it must have been used by the IA.[137] We have already found that there was no evidence before the Commission justifying confidential treatment of the information on the list and characteristics of Pooja Forge's products and thus that the Commission acted inconsistently with Article 6.5 of the Agreement in according confidential treatment to that information. Accordingly, for purposes of the present claim, we treat that information as not confidential within the meaning of Article 6.5. This means that the second condition is met.

7.89. With respect to the first condition, we recall that the question of whether or not information is relevant has to be answered from the perspective of the interested parties requesting to see the information, not from the IA's perspective.[138] In paragraphs 7.70-7.74 above, we cited the many instances where the Chinese producers requested to see the information on the list and characteristics of Pooja Forge's products and noted that such requests were not granted on the grounds of confidentiality. Indeed, the European Union does not contest that the Chinese producers did request to see the information at issue and that it was not provided to them. To us, these requests show that the Chinese producers found this information to be relevant to the presentation of their cases. Further, the nature of the information at issue underlines its relevance to the presentation of the Chinese producers' cases. These producers made repeated requests to see this information because it concerned the determination of their normal values, which, together with export prices, determined the dumping margins that the Commission would calculate for the Chinese producers. It goes without saying that dumping calculations are one of the most important aspects of an anti-dumping investigation. Thus, we consider that the first condition is also met.

7.90. Turning now to the third condition, we recall that whether information was "used" by the IA does not depend on whether the IA specifically relied on that information in its determinations. The information should be considered as having been used by the IA if it pertains to "a required step" in an anti-dumping investigation.[139] As we have mentioned, the information at issue had to do with the determination of normal values in the calculation of dumping margins for the Chinese

[136] In this regard, we note that the Appellate Body in *EC – Computer Equipment* found significant the use of the word "all" in the complainant's panel request, in finding certain claims to be within the panel's terms of reference. Appellate Body Report, *EC – Computer Equipment*, para. 72.

[137] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142.

[138] Ibid. para. 145.

[139] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147.

producers. Dumping calculations being one of the fundamental steps of an anti-dumping investigation, it seems clear to us that the information at issue was used by the Commission in this review investigation. In our view, therefore, the third condition is also met in this case.

7.91. Finally in this regard, we note the EU's argument that the information on the characteristics of Pooja Forge's products was disclosed to the Chinese producers.[140] The European Union refers to both the general and company-specific final disclosures made to the Chinese producers in order to satisfy the obligation set forth under Article 6.9 of the AD Agreement.[141] We note that Article 6.9 requires the disclosure of essential facts under consideration which form the basis for the decision whether to apply definitive measures. It requires that such disclosure take place "before a final determination is made". Hence, a disclosure under Article 6.9 occurs towards the end of an investigation, before the final decision is made. We therefore consider that the final disclosure was too late to afford the Chinese producers an appropriate opportunity to use the information in the presentation of their cases. In this sense, the Chinese producers were not provided with "timely opportunities" to see the information, as Article 6.4 requires. Nor does the European Union seek to argue that the final disclosure at issue was made to satisfy the requirements of Article 6.4. Hence this argument does not affect our assessment of this aspect of China's claim.

7.92. On the basis of the foregoing, we conclude that the Commission violated Article 6.4 of the AD Agreement by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, which information was not confidential within the meaning of Article 6.5, and which was relevant to the presentation of the Chinese producers' cases and used by the Commission.

7.93. The second aspect of China's claim concerns Article 6.2 of the AD Agreement. China argues that by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, the Commission violated the obligation set forth in Article 6.2 of the AD Agreement. China's argument in this regard is two-fold. First, China maintains that by violating Article 6.4, the Commission also violated Article 6.2. Second, independently from this consequential argument, China contends that failure to provide timely opportunities to see the information at issue was in violation of Article 6.2 on its own account.

7.94. We have found that the Commission violated Article 6.4 of the AD Agreement by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products. Accessing this information potentially would have allowed the Chinese producers to request adjustments to their normal values, determined on the basis of Pooja Forge's prices, or to their export prices. Therefore, we do not see how the Chinese producers could be considered to have had full opportunity to defend their interests, within the meaning of Article 6.2, without first seeing this information.

7.95. We recall the important link between the obligations under Articles 6.4 and 6.2, underlined by the Appellate Body in *EC – Tube or Pipe Fittings*:

> One of the stated objectives of the disclosure of information required under Article 6.4 is to allow interested parties "to prepare presentations on the basis of this information". The "presentations" referred to in Article 6.4, whether written or oral, logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests. Thus, by failing to disclose Exhibit EC-12 and thereby depriving the Brazilian exporter of an opportunity to present its defense, the European Communities did not act consistently with Article 6.2.[142]

7.96. Guided by the Appellate Body's finding, we find that by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products, the Commission also violated the obligation laid down in Article 6.2.

[140] European Union's first written submission, para. 66.
[141] Ibid. para. 81; and European Union's response to Panel question No. 18.a.
[142] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 149.

7.4 Alleged violation of Article 6.1.2 of the AD Agreement

7.4.1 Legal provisions at issue

7.97. Article 6.1.2 of the AD Agreement provides:

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

7.98. Article 6.11 of the AD Agreement reads:

> 6.11 For the purposes of this Agreement, "interested parties" shall include:
>
> i. an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
>
> ii. the government of the exporting Member; and
>
> iii. a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.
>
> This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties. (emphasis added)

7.4.2 Arguments of parties

7.4.2.1 China

7.99. China argues that by failing to ensure that the information provided by Pooja Forge concerning the list and characteristics of its products was made available promptly to the Chinese producers, the European Union acted inconsistently with the obligation set forth in Article 6.1.2 of the AD Agreement. China reiterates its view that the information regarding Pooja Forge's products sold in the Indian market was not confidential within the meaning of Article 6.5.[143] China maintains that Pooja Forge was an interested party in this investigation and that therefore the obligation set forth in Article 6.1.2 does apply to the information submitted by this company. In this regard, China acknowledges that producers in a third country do not appear in the list of interested parties in Article 6.11 of the AD Agreement. However, given that Pooja Forge actively participated in this investigation and provided a significant amount of information, it had an interest in the investigation and should therefore be considered as an interested party.[144]

7.100. China also maintains that by finding in the original proceedings that the obligation under Articles 6.5 and 6.5.1 apply to the information submitted by Pooja Forge, the Appellate Body meant that Pooja Forge should be treated as an "interested party".[145]

7.4.2.2 European Union

7.101. The European Union maintains that China's claim under Article 6.1.2 of the AD Agreement could have been but was not raised in the original proceedings. The European Union asserts that this claim relates to an unchanged aspect of the original determination that was incorporated into the measure taken to comply with the DSB rulings and recommendations, and that it is separable from the measure taken to comply. Therefore, the European Union contends that this claim falls outside the Panel's terms of reference.[146]

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[143] China's first written submission, para. 164; second written submission, para. 88.
[144] China's first written submission, paras. 165-169.
[145] China's response to Panel question No. 17.
[146] European Union's response to Panel question No. 1.

7.102. The European Union also disagrees with this claim on substance. The European Union contends that Pooja Forge was not an interested party in the review investigation at issue. In the EU's view, the Appellate Body in the original proceedings stated that the obligations set forth in Articles 6.5 and 6.5.1 apply to the information provided by Pooja Forge, not that Pooja was an "interested party" in the sense of Article 6.11 of the Agreement.[147] In the review investigation at issue, the Commission did not designate Pooja Forge as an interested party although it could have done so under Article 6.11 of the AD Agreement.[148] It follows that the obligation under Article 6.1.2 does not apply in respect of the information provided by Pooja Forge.

7.103. Further, the European Union reiterates that the information at issue was confidential and that therefore there was no obligation to make it available to the Chinese producers. It also repeats the argument that the information about the characteristics of Pooja Forge's products sold in the Indian market and which was used by the Commission in determining the normal value was disclosed to the Chinese producers.[149] Therefore, the European Union requests the Panel to reject this claim.

7.4.3 Arguments of third parties

7.104. The **United States** notes that transparency is an important element of anti-dumping proceedings and that it requires that all information on the record of a proceeding be made available to all interested parties. However, the United States does not share China's view that a party that submits information to the IA in the context of an anti-dumping investigation should be considered as an interested party for purposes of Article 6.1.2 of the AD Agreement. The United States argues that "a party that submits information to the IA" does not appear in the list of interested parties in Article 6.11 of the Agreement. The United States recognizes that Article 6.11 gives an IA discretion to treat as an interested party entities other than those listed therein, but argues that neither this provision nor the Appellate Body's interpretations cited by China oblige an IA to grant interested party status to entities that are not listed in Article 6.11.[150]

7.4.4 Evaluation by the Panel

7.105. In resolving this claim, we will first address the EU's procedural objection, followed, if necessary, by our assessment on the merits of the claim.

7.4.4.1 Is this a claim that could have been but was not raised in the original proceedings?

7.106. The European Union contends that China could have raised its claim under Article 6.1.2 in the original proceedings but did not do so. According to the European Union, this claim pertains to unchanged aspects of the original measure which were incorporated into the measure taken to comply but which are separable from it, and that therefore it falls outside this compliance Panel's terms of reference.[151]

7.107. The EU's jurisdictional objection is the same as that raised with respect to China's claim under Articles 6.4 and 6.2 of the AD Agreement, which we have assessed above. In order to avoid repetition, we incorporate by reference our understanding, in paragraphs 7.64-7.66 above, of the Appellate Body's findings in *US – Zeroing (EC) (Article 21.5 – EC)* and apply it *mutatis mutandis* to the EU's objection with respect to the present claim.

7.108. Applying the Appellate Body's jurisprudence to the claim before us, we have to first consider whether the present claim is one which could have been but was not brought in the original proceedings. If we find that it could not have been brought in the original proceedings, we will conclude that this claim falls within our terms of reference. If we find that it could have been brought in the original proceedings, we will then determine whether this claim challenges an unchanged aspect of the original measure which has become an integral part of the measure taken to comply. If so, this claim will fall within our terms of reference, otherwise it will not.

[147] European Union's first written submission, para. 78.
[148] European Union's second written submission, para. 76.
[149] European Union's first written submission, paras. 80-81.
[150] United States' written submission, paras. 25-30.
[151] European Union's response to Panel question No. 1.

7.109. China's claim is that the Commission violated Article 6.1.2 of the AD Agreement by not making the information submitted by Pooja Forge about the list and characteristics of its products available promptly to the Chinese producers. Article 6.1.2 stipulates that evidence presented in writing by one interested party has to be made available promptly to other interested parties participating in the investigation. However, this obligation is subject to the requirement to protect confidential information. Thus, Article 6.1.2 only requires the disclosure of non-confidential information presented by an interested party. Further, under Article 6.1.2, evidence presented in writing by an interested party has to be made available "promptly" to other interested parties participating in the investigation. Promptness implies that this obligation has to be fulfilled relatively quickly by the IA. We recall, for instance, that the panel in *Guatemala – Cement II* stated that a 20-day delay did not meet the promptness requirement of this provision.[152]

7.110. We also note that the obligation under Article 6.1.2 applies to "evidence presented in writing" by one interested party. Typically, interested parties present evidence in writing to the IA at different stages of an investigation and on different issues that are relevant to the IA's determinations. For instance, questionnaire responses are submitted by foreign producers within the deadline given by the IA; responses are also submitted to any supplementary questionnaires that the IA may send; domestic producers have to present in writing the information requested by the IA, which may or may not be sought by means of a questionnaire; other interested parties, such as producers and associations of producers, may also submit evidence in writing concerning various aspects of the investigation. In our view, the obligation under Article 6.1.2 applies on a submission-specific basis; this is only logical given the nature of such investigations, which usually involve several requests for information from several sources and at different times. In other words, each time evidence is submitted in writing to the IA, Article 6.1.2 requires that such evidence be made available "promptly" to other interested parties participating in the investigation.

7.111. In the present dispute, the evidence presented in writing which China argues was not made available to the Chinese producers is the information regarding the list and characteristics of Pooja Forge's products.[153] As noted in paragraph 7.9 above, the list of Pooja Forge's products was presented to the Commission in the DMSAL file provided during the verification visit conducted in 2008 in the context of the original investigation. As for the evidence regarding the characteristics of Pooja Forge's products, it was submitted in the DMSAL file and in certain other documents presented to the Commission during the original investigation and the review investigation. It is undisputed that these pieces of evidence were not made available to the Chinese producers during the original investigation or the review investigation.

7.112. With regard to the evidence concerning the list and characteristics of Pooja Forge's products that was submitted in the course of the original investigation, it should have been made available promptly after their presentation during that investigation, provided, of course, that the other conditions set forth in Article 6.1.2 were met. We note, however, that during the original investigation, the Chinese producers were not aware of this information. China maintains that the Chinese producers were informed of the presence of the information at issue through the explanation provided by the Commission in its note for the file dated 11 July 2012.[154]

7.113. This note does indeed suggest that certain information regarding Pooja Forge's products was being brought to the Chinese producers' attention for the first time. It reads in relevant parts:

> **Subject: Reclassification of normal value from one producer in India**
>
> The purpose of this note is to further explain the evolution of the classification of the normal value, based on the domestic sales of one producer in India.
>
> **1. ORIGINAL SUBMISSION**
>
> The company provided a domestic sales listing ('DMSAL') without PCNs. The only identifier of each sale was an Item Code, which was an internal code for each product, and a product description text string…

[152] Panel Report, *Guatemala – Cement II*, para. 8.142.
[153] China's response to Panel question No. 16.
[154] China's first written submission, para. 100.

...

4. COMMENTS TO THE FIRST DISCLOSURE

Interested parties made reference to the lack of comparison on the basis of coating, diameter and length of the fastener and argued that this might have an effect on the level of the normal value originally calculated.

4.1. Diameter and length

In the absence of the PCN, the Description text string of each transaction...was analysed to extract the diameter and length of the fastener sold:

...

To ensure matching between the normal value and the export price, we then ranged the diameter and length into three equal bands, as set out in the second disclosure letter of 5 July 2012:

...

4.2. Coating

It is clear from the example above that the product description text string does not include any information on the coating used by the Indian domestic producer.

The investigation file was therefore checked for any evidence of the type of coating, if any, used by the Indian producer for their [*sic*] sales of standard fasteners on their [*sic*] domestic market.

Confidential evidence in the file, verified at the premises of the Indian producer shows the use of electroplating (PCN type A) on standard fasteners on the domestic market and this was disclosed to all parties on July 5.

The website of the Indian producer Pooja Forge confirms the existence of their [*sic*] facilities for electroplating ....[155] (emphasis added)

7.114. The note starts by saying that its purpose is to further explain the evolution of the classification of the normal value, based on Pooja Forge's domestic sales. It also notes that interested parties took issue with the lack of comparison on the basis of such characteristics as coating, diameter and length of the fasteners and argued that these factors might affect the level of the normal value. It then provides information on such factors. This note suggests that information on product characteristics, such as diameter, length and coating was being provided to the Chinese producers for the first time in the investigative process. Indeed, the European Union also acknowledges that the information at issue was submitted during the original investigation and that it was only disclosed to the Chinese producers during the review investigation.[156] It follows that without the Chinese producers being aware of the information on the list and characteristics of Pooja Forge's products, China could not have brought a claim under Article 6.1.2 in the original proceedings to challenge the Commission's failure to provide that information promptly to the Chinese producers. We also recall that Pooja Forge provided information on coating during the review investigation.[157] China could not have brought a claim under Article 6.1.2 in the original proceedings with respect to the disclosure of this information.

7.115. On this basis, we find this claim to be within our terms of reference in these compliance proceedings and proceed with our assessment of the claim on its merits. In light of this finding, we

[155] Note for the file on the reclassification of normal value from one producer in India, 11 July 2012, (Exhibit CHN-17), pp. 1-3.

[156] European Union's response to Panel question No. 18.c.

[157] Email exchanges between the European Commission and Pooja Forge during the review investigation in 2012 (BCI), (Exhibit EU-6).

need not, and do not, determine whether this claim challenges an unchanged aspect of the original measure which has become an integral part of the measure taken to comply.

7.4.4.2 Assessment of the claim on its merits

7.116. China argues that the Commission violated Article 6.1.2 by not making the information on the list and characteristics of Pooja Forge's products available promptly to the Chinese producers. Underlying China's claim are the arguments that: (i) the information at issue was not confidential; and (ii) Pooja Forge was an interested party in the investigation at issue. The European Union disagrees with both arguments, contending that the information was confidential and that Pooja Forge was not an interested party in the investigation. As noted in paragraph 7.51 above, in light of our finding that the Commission violated Article 6.5 of the Agreement in treating the information on the list and characteristics of Pooja Forge's products as confidential, we are proceeding on the basis that it has not been established that this information had to be treated as confidential. Therefore, the only remaining issue is whether Pooja Forge was an interested party in the review investigation at issue. If we find that it was, we will find a violation of Article 6.1.2; otherwise we will reject China's claim.

7.117. We recall that Article 6.11 of the AD Agreement defines "interested party" for purposes of the AD Agreement. The definition consists of two parts. The first part, which stipulates what "interested parties shall include" for purposes of the AD Agreement, contains a list of entities that an IA must treat as an interested party, by virtue of the use of the word "shall". The word "include" in the chapeau indicates that this list is not exhaustive. The second part of Article 6.11 is permissive; it stipulates that a Member is not precluded from allowing entities other than those explicitly listed in the first part of the provision to be included as interested parties in a given investigation.

7.118. There is no dispute between the parties that Pooja Forge, an analogue country producer, is not one of the entities listed in the first part of Article 6.11. China submits, however, that, given its active participation in the investigation, and the significant amount of information it provided, Pooja Forge was an interested party in this investigation. We note that the second part of Article 6.11 does not state that a party that submits significant information to the IA or that participates actively in an investigation automatically becomes an "interested party". Rather, it conditions the acquisition of "interested party" status on a decision by the IA.

7.119. In stating that Members are not precluded from allowing other domestic or foreign parties not mentioned in the earlier part of Article 6.11 to be included as interested parties, the second part of Article 6.11 implies in our view that if an IA so wishes, it may allow an entity, such as an analogue country producer or another party, to participate in an investigation as an interested party. Although not stated explicitly in Article 6.11, it is logical to assume that such decision normally would be made at the request of the party in question. Arguably, such party would request to be included as an interested party in a given investigation if it expects to be affected by the outcome of the investigation. This is because gaining "interested party" status creates not only obligations, but also rights for such parties. One obligation that the Agreement imposes on interested parties is the preparation of a non-confidential summary of confidential information presented to the IA. Similarly, when the IA requests information from an interested party, the latter must provide it; otherwise, the consequences laid down in Article 6.8 of the Agreement will follow. As for the rights that stem from "interested party" status, we note, among others, the right to have a full opportunity for the defence of its interests under Article 6.2, and the right to see the non-confidential information on the investigation file, pursuant to Article 6.4. To us, this shows that the decision to allow a party not specifically listed in Article 6.11 to be included as an interested party is an important one such that it is likely to appear on the investigation record. This was not the case in the dispute before us. Nowhere in the record is it indicated that the Commission decided to include Pooja Forge as an "interested party" in this investigation. We therefore find that Pooja Forge was not an "interested party" in this investigation and therefore the obligation set forth under Article 6.1.2 of the Agreement did not arise with respect to the evidence provided by this company.

7.120. China asserts that, in connection with its assessment of China's claim under Articles 6.5 and 6.5.1 in the original proceedings, the Appellate Body found that Pooja Forge was an "interested party" in the original investigation. China argues, however, that the Appellate Body did

so implicitly, not explicitly.[158] In this regard, China refers to the following findings in paragraph 540 of the Appellate Body's report:

> … Article 6.5 does not limit the protection afforded to sensitive information to the "interested parties" expressly listed under Article 6.11 of the *Anti-Dumping Agreement*. In our view, the term "parties to an investigation" refers to any person who takes part or is implicated in the investigation. Moreover, Article 6.11 does not contain an exhaustive list of "interested parties", but states that "'interested parties' shall *include*" the persons or groups listed in that Article. In our view, the persons expressly listed in Article 6.11 are those who are in every case considered to be "interested parties", but are not the only persons who may be considered "interested parties" in a particular investigation. We do not believe that an investigating authority is relieved of its obligations under Article 6.5 merely because a participant in the investigation does not appear on the list of "interested parties" in Article 6.11.[780] Rather, once "good cause" is shown, confidential treatment of sensitive information must be afforded to any party who takes part or is implicated in the investigation or in the provision of information to an authority. Pursuant to Article 6.5 such parties include persons supplying information, persons from whom confidential information is acquired, and parties to an investigation.
>
> ———————————
>
> [780] … In our view, the decision by the Commission to determine normal value based on information from an analogue country producer, and the participation of Pooja Forge in the investigation, require that Pooja Forge be afforded the protection of sensitive information upon "good cause" shown and the obligations of both Articles 6.5 and 6.5.1 apply.[159] (two footnotes omitted, emphasis added)

7.121. With respect to the findings in the body of paragraph 540 of the Appellate Body's report, China maintains that by noting that parties other than those listed in Article 6.11 may also be considered as interested parties, the Appellate Body "appears to take the view that this was the case of Pooja Forge in the fasteners investigation".[160] We disagree. First, the Appellate Body's statement merely repeats what the second part of Article 6.11 of the AD Agreement stipulates. Second, we note that the Appellate Body makes this statement, *en passant*, as part of its reasoning regarding the scope of the obligation set forth in Article 6.5 of the Agreement, which concerns the protection of confidential information.

7.122. China points to the Appellate Body's statement in footnote 780 above and argues that through this statement, "the Appellate Body confirmed that Pooja Forge should be treated as an 'interested party' although not listed on the list of Article 6.11".[161] We do not read the Appellate Body's finding in the same way. Again, the Appellate Body's statement in this footnote concerns the scope of the obligation under Article 6.5, not the issue of whether or not Pooja Forge was an interested party in the original investigation. All that the Appellate Body says is that the Commission had to accord the protection provided for in Articles 6.5 and 6.5.1 of the AD Agreement to the information provided by Pooja Forge. In our view, this statement alone does not suffice to conclude that Pooja Forge was an interested party in the original investigation, or that the Appellate Body considered that it was.

7.123. On the basis of the foregoing, we reject China's claim under Article 6.1.2 of the AD Agreement on substance.

7.5 Alleged violation of Article 2.4 of the AD Agreement: failure to provide information to enable Chinese exporters to request adjustments

7.5.1 Legal provision at issue

7.124. Article 2.4 of the AD Agreement reads in relevant part:

[158] China's response to Panel question No. 17.
[159] Appellate Body Report, *EC – Fasteners (China)*, para. 540.
[160] China's response to Panel question No. 17.
[161] Ibid.

> 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)

7.5.2 Arguments of parties

7.5.2.1 China

7.125. China argues that by failing to provide the Chinese producers with the information concerning the characteristics of the products sold by Pooja Forge in the Indian market, the Commission violated Article 2.4 of the AD Agreement. In this regard, China distinguishes between two types of product characteristics, namely, (i) characteristics affecting price comparability identified in the original PCNs and which have been partially taken into account by the Commission, and (ii) characteristics affecting price comparability not identified in the original PCNs and which have not been taken into account by the Commission.

7.126. As far as product characteristics that were identified in the original PCNs and partially taken into account by the Commission are concerned, China cites four specific characteristics, namely, (i) diameter and length, (ii) types of fasteners, (iii) coating, and (iv) chrome. With respect to diameter and length, China contends that in the review investigation the Commission initially indicated that it would not take diameter and length into account because this characteristic was not considered to be relevant to the price comparison. Later, however, the Commission indicated that it extracted this information from the text string of sales coding provided by Pooja Forge, and took it into account in the determination of normal value. China notes that the Commission took diameter and length into account in terms of ranges, as opposed to actual numbers, and argues that it should have taken them into account fully. China also maintains that the Commission should have provided this information in full to the Chinese producers because this was essential for these producers to substantiate their requests for adjustments.[162] With respect to types of fasteners, China argues that the information provided by Pooja Forge included types of fasteners sold by this company in the Indian market but that such information was not provided to the Chinese producers, in violation of Article 2.4. China emphasises that such information was essential for the Chinese exporters to be in a position to request adjustments and to substantiate their requests for adjustments.[163] China also argues that the Commission noted that the information provided by Pooja Forge indicated that adjustments may be needed for the differences between various types of fasteners.[164] China further argues that the categorisation according to type of fasteners on the basis of CN codes is insufficient, as within a single CN code, significant differences may exist.[165] With regard to coating, China argues that, in the review investigation, the Commission initially indicated that Pooja Forge had not provided any information on the type of coating. Later, however, it pointed out that Pooja Forge's products used for the determination of the normal value had two types of coating, namely, type A or type B. Subsequently, the Commission stated that Pooja Forge's domestic sales of standard fasteners were electroplated, i.e. that they had type A coating. Chinese producers requested to see the information on the basis of which the Commission came to this conclusion, which the Commission did not allow. China argues that failure to provide this information violated Article 2.4.[166] With respect to chrome, China maintains that, in the review investigation, the Commission initially provided no information regarding chrome, stating that there was no indication of a difference with regard to this factor. Later, however, the Commission stated that the information on chrome had been clarified and that the fasteners that Pooja Forge sold in the Indian market contained chrome Cr3. China argues that

[162] China's first written submission, paras. 190-194.
[163] China's second written submission, para. 116.
[164] China's first written submission, paras. 195-203.
[165] Ibid. paras. 350-355.
[166] China's first written submission, paras. 204-205.

the Commission came to this conclusion regarding chrome without providing any information in this regard to the Chinese producers and that this violates Article 2.4.[167]

7.127. As for product characteristics not identified in the original PCNs, China argues that two Chinese producers informed the Commission that some product characteristics other than those included in the original PCNs could affect price comparability, asked that these differences be taken into account, and asked that the Commission indicate what kind of further evidence it required regarding these factors in order to ensure a fair comparison. The factors raised by the Chinese producers were traceability; ISO 9000; unit of defective rate; and hardness, bending, strength impact toughness, friction coefficient.[168] The Commission rejected the Chinese producers' requests for adjustments on the basis that the requesting Chinese producers had not shown that these factors affected price comparability.[169] In China's view, however, in the absence of information about the actual characteristics of the products sold by Pooja Forge, the Chinese producers were not in a position to identify which one of these factors affected price comparability. China claims that, in respect of these factors, the Commission violated Article 2.4 in two ways: (i) by failing to inform the Chinese producers on whether any of these factors were present in the products sold by Pooja Forge, and if so to what extent, and (ii) by not providing further information to the Chinese producers in order to enable them to substantiate their requests for adjustments with regard to these factors.[170]

7.128. China also contends that the Commission did not provide the Chinese producers with information regarding characteristics of Pooja Forge's products other than those reflected in the PCNs. For instance, China submits that the Chinese producers "did not know if there were fasteners complying with traceability requirements or with lower defective rates".[171] Therefore, these producers were not in a position to know whether adjustments could be requested for any other characteristic.[172]

7.129. China adds that by failing to indicate to the Chinese exporters the information that their requests should contain, the Commission acted inconsistently with Article 2.4. Further, the Commission imposed an undue burden on the Chinese producers by rejecting their requests for adjustments on the grounds that they were not based on evidence.[173]

7.5.2.2 European Union

7.130. The European Union argues that Article 2.4 only requires that interested parties be informed of the approach adopted by an IA on fair comparison, but does not require the disclosure of raw data provided by an interested party. Nor does it require the disclosure of confidential information.[174] The European Union contends that, in the review investigation at issue, the Commission engaged in an extensive dialogue with the Chinese producers, which led to detailed product categories that took into consideration many of the suggestions made by such producers. Further, information on the characteristics of the products used in the dumping determination and information on Pooja Forge's sales of such product categories were made available to the Chinese producers.[175] The dialogue maintained with the Chinese producers informed them of product categories used in the dumping determination.[176] Further, together with the final disclosure, the Chinese producers received detailed dumping calculations which allowed them to see their export transactions that were matched with the normal value determined on the basis of Pooja Forge's sales. Chinese producers were given three weeks to comment on the disclosure and were also given the opportunity to request adjustments.[177] Thus, the European Union concludes that it complied with its obligations under Article 2.4.

[167] Ibid. paras. 206-208.
[168] Ibid. para. 209.
[169] Ibid. para. 213.
[170] Ibid. paras. 217-219.
[171] China's response to Panel question No. 23.
[172] Ibid.
[173] China's second written submission, para. 128.
[174] European Union's first written submission, para. 94.
[175] Ibid. para. 95.
[176] Ibid. para. 100.
[177] European Union's first written submission, para. 104.

7.131. In response to China's arguments regarding product characteristics that were included in the original PCNs, the European Union submits that an IA is not required "to permit interested parties to satisfy themselves of the accuracy of the information provided by other interested parties or entities".[178] It is the IA's task to satisfy itself as to the accuracy of the information provided by interested parties and on which the IA bases its determinations.[179] Further, the European Union notes that the actual sales information presented by Pooja Forge was confidential.[180]

7.132. As for product characteristics not identified in the original PCNs, the European Union states that the Commission did review the information received from the Chinese producers regarding these factors and explained, consistently with the requirements of Article 2.4, why those requests were rejected. Specifically, the Commission concluded that the requesting Chinese producers had not shown how these alleged factors affected price comparability. The European Union notes that Article 2.4 does not require an adjustment for all differences, but only for those that affect price comparability.[181]

7.5.3 Arguments of third parties

7.133. The **United States** submits that Article 2.4 of the AD Agreement requires an IA to solicit information regarding what differences in physical characteristics affect price comparability. In the view of the United States, the transparency requirements of Article 6 of the Agreement, reinforced by the last sentence of Article 2.4, require an IA to exercise transparency with respect to the products used in the determination of normal value, the considered physical differences between such products, and the way in which such differences have been taken into consideration. Failure to provide information regarding the products and transactions used for the normal value determination would deprive the interested parties of their right to defend their interests. Thus, the United States maintains that, to the extent the Commission failed to provide Chinese producers with information on the full range of product characteristics considered in the price comparisons, the European Union acted inconsistently with the obligation set forth in Article 2.4.[182]

7.5.4 Evaluation by the Panel

7.134. China asserts that the Commission violated Article 2.4 of the AD Agreement by failing to provide to the Chinese producers information on the characteristics of Pooja Forge's products which was used for the calculation of the normal values in the review investigation at issue and therefore failed to implement the DSB recommendations and rulings. The specific basis of this claim is the last sentence of Article 2.4, which stipulates that "[t]he 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".[183] China identifies two types of information that the Commission allegedly failed to provide: (i) characteristics identified in the original PCNs and which have been partially taken into account by the Commission, and (ii) characteristics affecting price comparability not identified in the original PCNs and which have not been taken into account by the Commission.

7.135. We note that in its argumentation under this claim China draws heavily on the Appellate Body's findings in the original proceedings and requests this Panel to find a violation of Article 2.4 by following that reasoning. We therefore find it useful to start our evaluation of the present claim with a brief summary of how China's claim under Article 2.4 was evaluated by the panel and the Appellate Body in the original proceedings. We will then identify the relevant facts from the review investigation and finally decide the extent to which, if at all, the Appellate Body's findings in the original proceedings are pertinent to our assessment of the present claim.

[178] Ibid. para. 110.
[179] Ibid. para. 111.
[180] Ibid. para. 113; second written submission, para. 107.
[181] European Union's first written submission, paras. 115-116.
[182] United States' written submission, paras. 36-39.
[183] See, for instance, China's second written submission, para. 125: "... China takes issue with the failure of the Commission to provide to the Chinese exporters the necessary information in particular in light of the requirement of the last sentence of Article 2.4 of the AD Agreement ...".

7.136. In the original investigation, the Commission requested dumping-related information from Pooja Forge and from the Chinese producers on the basis of PCNs which included six characteristics, namely type of fasteners (by CN code), strength/hardness, coating, presence of chrome on coating, diameter, and length/thickness. However, Pooja Forge did not provide its information on the basis of such PCNs. For this reason, the Commission used what it called "product types" in comparing the normal value with the export price. "Product types" were defined by two factors, namely, strength class and the distinction between standard and special fasteners.[184] The remaining factors in the original PCNs were not taken into consideration in the price comparison.

7.137. In the original dispute settlement proceedings, China brought a claim under Article 6.4, arguing, among other things, that the Commission had violated this provision by not allowing the Chinese producers to see the information on the record regarding the product types sold by Pooja Forge until very late in the process.[185] The original panel found a violation of Article 6.4 on the grounds that the Commission had failed to give the Chinese producers a timely opportunity to see this information.[186] China also raised a claim under Article 2.4, arguing, among other things, that the Commission had failed to consider whether adjustments needed to be made for elements of the PCNs which were not reflected in the "product types" used in price comparisons. The interim review section of the panel's final report shows that, in its interim report, the original panel rejected this claim on the grounds that during the original investigation, none of the Chinese producers had required adjustments with respect to factors other than the two factors included in "product types", which affected price comparability within the meaning of Article 2.4 of the AD Agreement.[187]

7.138. In its comments on the interim report, China argued that the panel had failed to take into consideration China's argument, under the last sentence of Article 2.4, that the Commission had erred by not informing the interested parties of the comparison method used and of the fact that the comparison was no longer made on the basis of the PCNs but on the basis of other product characteristics.[188] The original panel disagreed, noting that this argument had been raised by China in connection with its claims under Articles 6.2, 6.4, 6.5 and 6.9 of the AD Agreement and had already been addressed by the panel in that context.[189] China appealed this finding by the original panel. The Appellate Body observed that China had not raised a separate *claim* under the last sentence of Article 2.4, but only an *argument* in support of its claim that the European Commission had failed to conduct a fair comparison under Article 2.4. The Appellate Body nevertheless faulted the original panel for having failed to address China's *argument* under the last sentence of Article 2.4 in the light of its findings under Article 6.4:

> [W]e nonetheless consider that, in the light of its findings under Article 6.4 of the *Anti-Dumping Agreement*, the Panel should have considered China's argument under the last sentence of Article 2.4 of the *Anti-Dumping Agreement* in reaching its finding. As discussed above, Article 2.4 obliges investigating authorities to indicate to the parties what information is necessary to ensure a fair comparison and requires an investigating authority, at a minimum, to inform the parties of the products or product groups used for purposes of the price comparison. This will then allow the parties to decide whether a request for adjustment regarding any differences affecting price comparability should be made.[190] (emphasis added)
>
> [T]he Panel correctly found, in its analysis under Article 6.4, that, without knowing what "product types" were used by the Commission, "it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison." Thus, the facts of the case indicate that, because the Commission did not clearly indicate the product types used for purposes of price comparisons until very late in the proceedings, the European Union acted inconsistently with its obligations under Article 2.4 by depriving the Chinese producers

[184] Panel Report, *EC – Fasteners (China)*, para. 7.293.
[185] Ibid. para. 7.484.
[186] Ibid. para. 7.494.
[187] Ibid. para. 7.306.
[188] Ibid. para. 6.96.
[189] Ibid. para. 6.98.
[190] Appellate Body Report, *EC – Fasteners (China)*, para. 512.

> of the ability to request adjustments for differences that could have affected price comparability. (footnote ommitted)[191]
>
> The Panel found, however, that the European Union acted consistently with Article 2.4 of the *Anti-Dumping Agreement*. In so finding, the Panel analyzed China's claim under Article 2.4 in isolation from its analysis under Article 6.4 of that Agreement.[192] (emphasis added)

7.139. Turning to the facts presented in the review investigation at issue, we note that the Commission initially intended to base its dumping determination on the same two factors used in the original investigation, namely strength class and the distinction between standard and special fasteners. However, following the Chinese producers' comments and requests to see further information regarding Pooja Forge's products, the Commission used the so-called "revised PCNs" which were based on the following product characteristics: standard/special, strength class, coating, diameter (per ranges) and length (per ranges).[193] The composition of such revised PCNs was communicated to the Chinese producers. However, as noted in paragraphs 7.70-7.74 above in connection with China's claim under Article 6.5 of the AD Agreement, the Commission rejected the Chinese producers' repeated requests to see the information regarding the characteristics of Pooja Forge's products. Thus, although the Chinese producers knew the basis on which the Commission grouped the products on the normal value and the export price sides in comparing prices, they did not know the specific product types of Pooja Forge with which their own product types were being compared.

7.140. We note that the facts underlying the present claim as well as the claim under Article 6.4, which we evaluated above, are very similar to the facts that underlay China's claims under Articles 6.4 and 2.4 in the original proceedings. Whereas in the original proceedings China based these claims on the Commission's failure to let the Chinese producers see the information regarding the "product types" of Pooja Forge, in these proceedings the claims under these two provisions are based on a similar contention, namely that the Commission did not provide the Chinese producers with information on the "characteristics" of Pooja Forge's products. Mindful of the Appellate Body's guidance referred to above, we turn now to examine China's claim under the last sentence of Article 2.4 in light of our findings with respect to the claim under Article 6.4.

7.141. Above, we have found that the Commission violated Article 6.4 of the AD Agreement by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products. Although the Chinese producers knew which product characteristics the Commission took into consideration in comparing the normal value with the export price, they did not know which specific product types were being compared with one another. Therefore, they were not in a position to know whether the product types were grouped consistently with the revised PCNs established by the Commission. Nor were they in a position to know whether, in light of the product types that were being compared, there were factors other than those included in the revised PCNs which could have justified further adjustments. In the review investigation, the Commission used revised PCNs, which contained more product characteristics compared to product types used in the original investigation. The fact remained, however, that the Chinese producers were still left in the dark with respect to the characteristics of the product types that were actually being compared.

7.142. In our view, this runs counter to the obligation set forth in the last sentence of Article 2.4. We recall that the last sentence of Article 2.4 adds a procedural requirement to the obligation to make a fair comparison. Whereas the exporters have to substantiate their requests for adjustments, the IA has first to "tell the parties what information the authority will need in order to ensure a fair comparison".[194] As the Appellate Body made clear, the IA has to inform the interested parties, at a minimum, of the product groups on the basis of which it will make the price comparisons.[195] By failing to provide the Chinese producers with the information regarding the characteristics of Pooja Forge's products which were used in determining the normal value and which were then compared with the products of the Chinese producers, the Commission deprived

[191] Appellate Body Report, *EC – Fasteners (China)*, para. 513.
[192] Ibid. para. 514.
[193] Review regulation, (Exhibit CHN-3), recital 43.
[194] Appellate Body Report, *EC – Fasteners (China)*, para. 489.
[195] Ibid. para. 490.

these producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4. This, in our view, is inconsistent with the obligation set forth in the last sentence of Article 2.4. We do not see how the Chinese producers could have made requests for adjustments without having adequate knowledge of the product types with which their own products were being compared by the Commission.

7.143. The European Union maintains that this information was provided to the Chinese producers through the Commission's final disclosure. Specifically, the European Union contends that, together with the final disclosure, the Chinese exporters received detailed dumping calculations in which they saw the export transactions that matched with Pooja Forge's normal value. The European Union argues further that:

> As can be seen in those calculations, the European Commission disclosed the characteristics of the products sold by Pooja Forge and which were used for the normal value determination of each Chinese exporter. To recall, those transactions were organised by reference to the simplified PCNs used for the purpose of making the dumping determination, including six letters (i.e., coating, codes A to N; chrome yes or no, codes P – Q; type of fastener, codes PCN 0 to 9; strength, codes A to Y; diameter, codes S, M and L; and length, codes S, M and L). When there was a match between export transactions and domestic transactions, this was indicated in the dumping calculation. Then, by looking into the specific PCN for those transactions (e.g. AP4GSS), the Chinese exporters could see that Pooja Forge had sold e.g. a standard hexagon socket head screw, with chrome, with a strength class of 8.8 and small diameter and length. Thus, the Chinese exporters knew about the characteristics of the products sold by Pooja Forge. The Chinese exporters were given three weeks to make comments on the disclosure, including the possibility of asking for adjustments.[196] (footnote omitted, emphasis added)

7.144. We have looked at the disclosure documents referred to by the European Union.[197] As China also argues[198], however, such disclosures indicate the PCN characteristics of the products that were matched on the normal value and export price sides but do not indicate which models were being compared. To follow on the EU's example, underlined in the above quote, the disclosure did indicate that Pooja Forge had sold e.g. a standard hexagon socket head screw, with chrome, with a strength class of 8.8 and small diameter and length. Contrary to what the European Union asserts, however, this does not show the characteristics of Pooja Forge's product with which the products of the Chinese producers were compared. It only shows how a particular product compares to each of the PCN characteristics taken into account in categorizing different product types. It does not show what particular model of Pooja Forge's products was being compared with what model sold by the Chinese producers. Without seeing such product types, and understanding their characteristics, the Chinese producers could not, in our view, have had a meaningful opportunity to request adjustments. Further, we do not consider that the information provided in the final disclosure, which conveys the essential facts under consideration with respect to the decision to impose definitive measures, and which therefore is sent to interested parties towards the end of an investigation, satisfies the requirements of Article 2.4. The Appellate Body has made clear that Article 2.4 imposes an obligation on the IA "to tell the parties what information the authority *will* need in order to ensure a fair comparison"[199], not what information it has used.

7.145. With respect to the EU's argument that the information at issue was confidential, we recall our finding in paragraph 7.50 above that the Commission's confidential treatment of Pooja Forge's information was inconsistent with Article 6.5 of the AD Agreement. We therefore also reject the EU's confidentiality argument in connection with the present claim.[200]

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[196] European Union's second written submission, para. 65.

[197] Calculations for Biao Wu, (Exhibit CHN-44); calculations for Ningbo Jinding, (Exhibit CHN-45); and calculations for Changshu, (Exhibit CHN-46).

[198] See, for instance, China's second written submission, paras. 109-110.

[199] Appellate Body Report, *EC – Fasteners (China)*, para. 489 (emphasis added).

[200] We note, however, that even if the information were confidential, the obligation under Article 2.4 would still have required the IA to make some disclosure to the interested parties in order to allow them to make informed decisions about the issue of adjustments. Such disclosure would be subject to the obligations

7.146. We note that in developing its arguments under this claim, China gave a detailed account of specific product characteristics, both those included in the original PCNs and those that were not included, in respect of which the Chinese producers requested information which the Commission failed to provide. We see these arguments as specific examples of the Commission's failure generally to provide information regarding the characteristics of Pooja Forge's products. Because we have found as a matter of fact that the Commission refused the Chinese producers' requests to access information regarding the characteristics of Pooja Forge's products and that the information provided in this regard was limited to what was in the final disclosure, we need not, and do not, review China's arguments with respect to the Commission's failure to provide information regarding each of the characteristics of Pooja Forge's products.

7.147. We also note that in presenting such arguments, China sometimes contends that the Commission failed to make certain adjustments that it had to make, or that the way it made certain adjustments was not appropriate. For instance, with respect to "diameter and length", China asserts that the Commission did not take these characteristics fully into account.[201] Because such assertions concern the actual adjustments made by the Commission, or lack thereof, we have not taken them into consideration in the context of the present claim, which concerns the Commission's alleged failure to provide information regarding the characteristics of Pooja Forge's products as required under the last sentence of Article 2.4. We note that the issue of the adjustments that allegedly had to be made but were not made is raised under China's last claim under Article 2.4, which we examine below.

7.148. On this basis, we conclude that the Commission violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue.

7.149. We would like to underline, however, that our finding of violation under this claim is made in the context of a very particular factual situation. In the investigation at issue, the Commission used the so-called analogue country methodology in determining normal values for the Chinese producers because the European Union considered China to be an NME. The Commission determined the normal values of the Chinese producers on the basis of the prices of Pooja Forge, the analogue country producer selected for this purpose. This aspect makes this investigation very different from a typical anti-dumping investigation. In a normal investigation where the normal value is based on the foreign producer's own prices, the latter can participate meaningfully in the dialogue envisaged under Article 2.4 aiming to ensure a fair comparison between the normal value and the export price. In such an investigation, the foreign producer is well positioned to make informed decisions about the adjustments that it deems necessary for a fair comparison. By contrast, in an investigation, such as the one before us, where the normal value information is obtained from a third source, an issue arises as to the foreign producer's access to that information. Fair comparison is to be carried out between two prices, namely the normal value and the export price. Where the IA uses the analogue country methodology, the foreign exporter will be left in the dark to the extent it does not have access to the normal value information. The IA's task in such an investigation is to find ways to disclose as much information on normal value as the foreign producer would need in order to meaningfully participate in the fair comparison process. In other words, the IA has to endeavour to put the foreign producer on an equal footing with a producer in a normal investigation in terms of access to the information on the basis of which requests for adjustments may be formulated. Failure to do so would preclude the exchange of information from taking place and would frustrate the purpose of Article 2.4, which is to ensure fair comparison between the normal value and the export price. We would also like to underline, however, that our findings under this claim should not be interpreted to mean that the last sentence of Article 2.4 requires an IA to suggest to exporters differences in respect of which they may require adjustments. That would have blurred the line between the responsibilities of an IA and the interested parties, in particular foreign producers, in the process of making a fair comparison. We only find that, given the particular factual circumstances presented in this review investigation, the Commission failed to observe the obligation under the last sentence of Article 2.4.

set forth in Articles 6.5 and 6.5.1 of the AD Agreement regarding the treatment of confidential information and the preparation of non-confidential summaries of such information.

[201] China's first written submission, para. 192.

7.6 Alleged violation of Article 2.4 of the AD Agreement: failure to ensure that price comparisons were made on the basis of same types of fasteners

7.6.1 Arguments of parties

7.6.1.1 China

7.150. China submits that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to ensure that the export price of standard fasteners sold by Chinese producers to the European Union was compared to the normal value of standard fasteners sold by Pooja Forge, in the calculation of dumping margins for the Chinese producers.[202] China's claim has two aspects. First, China contends that the Commission failed to consider as "special" those fasteners destined for high-end applications and which were not made according to a customer drawing.[203] Second, China maintains that the Commission did not act objectively in assessing the accuracy of the lists of standard and special fasteners provided by Pooja Forge.[204]

7.151. Regarding the first aspect of its claim, China argues that the Commission should have treated as "special" fasteners destined for high-end applications and which were not made according to a customer drawing, but failed to do so.[205] China also asserts that the Commission, in its communications with the Chinese producers in the course of the review investigation, made ambiguous and inconsistent statements on whether or not fasteners sold to high-end users, in particular the automotive industry, which were not based on special customer drawing, were considered as standard or special fasteners in the determination of the normal value.[206] China recognizes that the review regulation indicates that the fasteners that Pooja Forge sold to the automotive industry which were not based on a customer drawing were considered as special fasteners and were not taken into account in the determination of the normal value, but asserts that these are *a posteriori* justifications provided by the Commission and have no basis.[207]

7.152. Regarding the second aspect of its claim, China contends that on the basis of the evidence on the record, the Commission could not reasonably and objectively have concluded that the lists of standard and special fasteners provided by Pooja Forge were accurate. Specifically, China argues that the Commission could not have concluded that the distinction between standard and special fasteners used in the lists provided by Pooja Forge corresponded to the distinction that the Commission followed in this review investigation. China notes the part of the review regulation indicating that the distinction reflected in the lists provided by Pooja Forge was based solely on whether or not the fasteners were made pursuant to a customer drawing, and that the Commission was unable to conduct an on-the-spot verification of these lists. Although the review regulation states that the Commission conducted walk-through tests and checked the split of the sales listings provided by Pooja Forge against an average price level of the split, China submits that such tests did not suffice to confirm the accuracy of those lists.[208]

7.6.1.2 European Union

7.153. The European Union notes that China raised this claim, albeit in the injury context, in the original dispute, which was rejected by the original panel. In the EU's view, the fact that in the original dispute this claim was raised in the injury context is immaterial because the underlying issue, i.e. the distinction between standard and special fasteners, is the same. The European Union maintains that the issue of the distinction between standard and special fasteners represents an inseparable element of the original measure that did not change during the review investigation. The European Union also submits that China could have raised this issue in the original dispute in connection with the Commission's dumping determination, but did not do so. The European Union

[202] China's first written submission, para. 222.
[203] Ibid. para. 257.
[204] Ibid. para. 256.
[205] Ibid. para. 270.
[206] Ibid. paras. 233-249.
[207] Ibid. paras. 272-280.
[208] Ibid. paras. 285-287.

notes that a complainant ordinarily would not be allowed to raise before a compliance panel claims that it could have but did not raise in original proceedings.[209]

7.154. On substance, the European Union disagrees with both aspects of China's claim. Regarding the first aspect, the European Union recalls that in the original investigation, the original PCNs did not include the distinction between standard and special fasteners. This distinction was later raised by the Chinese producers and the Commission took it into account because it was considered to affect price comparability. As stated in the final determination in the original investigation, "customer drawing" was taken as the basic difference between special and standard fasteners. Thus, special fasteners were fasteners "on demand", whereas standard fasteners were those that met general industry standards. Where fasteners produced at the request of a customer also met general industry standards, they were considered as special fasteners and were not taken into consideration in the dumping margin calculations.[210] The Commission followed the same approach in the review investigation. The European Union maintains that in the review investigation, there was no ambiguity about the distinction between standard and special fasteners. The review regulation makes it very clear that Pooja Forge split its domestic sales into standard and special fasteners, based on whether or not they were manufactured to a customer drawing. In the EU's view, therefore, China's claim is based on speculation and lacks a basis on the record.[211]

7.155. Regarding the second aspect of China's claim, the European Union contends that the Commission took the steps necessary to verify the accuracy of the sales listings provided by Pooja Forge in order to ensure that special fasteners were not improperly included in the list of standard fasteners. Since the fasteners sold to the automotive industry are significantly more expensive than standard fasteners, the Commission also checked the split between standard and special fasteners against the average price level, again to ensure that no special fasteners were included in the sales list of standard fasteners. The European Union notes that the AD Agreement does not require an on-the-spot verification of the information submitted. The European Union adds that the Commission did not simply accept the information provided by Pooja Forge at face value, but checked that information by a number of walk-through tests, as explained in the review regulation.[212]

7.6.2 Arguments of third parties

7.156. The **United States** recalls that Article 2.4 of the AD Agreement requires an IA to inform the interested parties of the products and transactions at issue so that they can provide relevant information and arguments in response. Citing the Appellate Body decision in the original dispute, the United States maintains that an IA must communicate to the parties, in a clear manner, what information their requests for adjustments should contain. Failure to provide clarity on this aspect may prevent the interested parties from defending their interests. Without taking any position about the merits of China's factual allegations, the United States presents the view that "a mere statement by an investigating authority that a certain product grouping is defined the same in both markets, without providing further information, is likely to be inconsistent with the requirements of Article 2.4".[213]

7.6.3 Evaluation by the Panel

7.157. In resolving this claim, we will first address the EU's terms of reference objection. We will proceed with an assessment of the claim on the merits only if we find it to be within our terms of reference.

7.6.3.1 Terms of reference of the Panel

7.158. The European Union argues that this claim is outside our terms of reference. Early in these proceedings, the European Union based this assertion on the fact that this claim repeated a claim

[209] European Union's first written submission, para. 147 and footnote 110; second written submission, para. 118.
[210] European Union's first written submission, paras. 123 and 125.
[211] Ibid. para. 134.
[212] Ibid. paras. 149-150 and 153.
[213] United States' written submission, para. 45.

that was raised and rejected in the original proceedings.[214] Later in the process, the European Union also argued that this claim could have been but was not raised in the original proceedings.

7.159. As noted in paragraphs 7.24-7.26 above, WTO jurisprudence suggests that claims raised in original proceedings, which respect to which the complainant failed to make a *prima facie* case, may not ordinarily be raised in compliance proceedings. In the original proceedings in this dispute, China raised a claim challenging the distinction between standard and special fasteners in the context of the Commission's price undercutting determination. Under this claim, China argued that the Commission had violated Articles 3.2 and 3.1 of the AD Agreement by failing to take into consideration the fact that all Chinese standard fasteners which were "basic standard fasteners" simply met the relevant industry standards, whereas an important part of the standard fasteners produced by the EU producers were "standard-plus fasteners" which, in addition to meeting the relevant industry standards, also met specific customer requirements.[215] The original panel rejected this claim on the grounds that China failed to show that this was indeed how the Commission had made its price undercutting determination.[216]

7.160. The present claim challenges the Commission's dumping determinations. China argues that the Commission failed to compare the prices of Chinese standard fasteners exported to the European Union with the standard fasteners sold by Pooja Forge in the Indian market. By contrast, the claim in the original proceedings challenged the Commission's injury determination, in particular its assessment of the effects of dumped imports on the prices of the domestic industry in the European Union. The object of that claim was the alleged differences between fasteners exported by China to the European Union and those produced by the EU producers. These two claims are legally different in that one concerns the Commission's dumping determination and the other its injury determination. They are also different factually because they take issue with the alleged differences between different sets of fasteners. Given these important legal and factual differences, we do not consider these two to be the same claims and therefore reject the EU's first argument regarding our terms of reference.

7.161. The EU's second argument with respect to our terms of reference is that China could have raised the present claim in the original proceedings, but chose not to do so. In this regard, the European Union submits that the Commission followed the same approach in distinguishing between standard and special fasteners in the context of its injury and dumping determinations. The European Union contends that, since in the original proceedings China only brought a claim challenging this distinction in the injury context and it did not appeal the original panel's finding rejecting that claim, it "could legitimately understand that China was not contesting the validity of using the same approach in any measure taken to comply".[217]

7.162. In paragraphs 7.64-7.66 above, we have discussed the Appellate Body's findings in *US – Zeroing (EC) (Article 21.5 – EC)* on the issue of whether a claim that could have been but was not raised in original dispute settlement proceedings may be raised before a compliance panel. As noted above, in resolving this issue, we have to first consider whether the present claim is one which could have been but was not brought in the original proceedings. If we find that it could not have been brought in the original proceedings, we will conclude that this claim falls within our terms of reference. If we find that it could have been brought in the original proceedings, we will then determine whether this claim challenges an unchanged aspect of the original measure which has become an integral part of the measure taken to comply. If so, this claim will fall within our terms of reference, otherwise it will not.

7.163. As noted in paragraph 7.68 above, in examining whether the present claim could have been brought by China in the original proceedings, we will take into account the factual circumstances in the review investigation under which the claim was raised and examine the extent to which such circumstances also existed in the original investigation. In this respect, although the European Union contends that the distinction between standard and special fasteners in the dumping context was known to the Chinese producers during the original investigation, it

[214] See, for instance, European Union's first written submission, para. 147; second written submission, para. 116.
[215] Panel Report, *EC – Fasteners (China)*, paras. 7.314 and 7.330.
[216] Ibid. para. 7.332.
[217] European Union's response to Panel question No. 1.

has not submitted any proof of such knowledge, or any evidence that a discussion took place between the Commission and the Chinese interested parties in the original investigation on this particular issue. In the review investigation, however, the evidence demonstrates that this issue became controversial, and triggered many exchanges between the Commission and the Chinese producers.

7.164. The notice of initiation of the review investigation states that:

> [T]he Commission intends to re-disclose to all interested parties that participated in the fasteners investigation more precise information regarding the product characteristics which were found to be pertinent in the determination of the normal value that was used in the comparison with the product concerned.[218]

7.165. To this end, the Commission conveyed to the Chinese producers, through a letter dated 30 May 2012, information regarding the determination of normal values in the original investigation. In this regard, this letter states:

> **3. DETERMINATION OF NORMAL VALUE**
>
> Normal value was determined based on the prices of the product concerned on the domestic market of India…
>
> [The analogue country producers] provided data on their domestic sales during the investigation period but without the full PCN requested. They however were able to identify the strength class of the fastener sold, and also whether that fastener was 'standard' or 'special' as defined in the final Regulation.
>
> The need to distinguish between standard and special fasteners had not been identified at the start of the investigation when the PCN had been created. It therefore does not appear in the list of characteristics in point 1 above. However the Commission noted that this distinction affected price comparability and therefore this data was requested from the Indian producer and was provided.[219] (footnote omitted)

7.166. Through a letter dated 12 June 2012, two Chinese producers responded to the Commission's letter and stated:

> However, it is unclear what was considered to be a 'standard' fastener and what was considered to be a 'special' fastener. The disclosure of 30 May 2012 refers to the fact that the cooperating producer in the analogue country was able to identify *"whether that [sic] fasteners was 'standard' or 'special' as defined in the final Regulation"*. Unfortunately, the final Regulation does not seem to clarify on the basis of which criteria fasteners were classified as either 'standard' or 'special'. This is, however, necessary to assess whether or not allowances should be made. Therefore, can the Commission please explain in a detailed way how the distinction between special and standard fasteners were made and which elements were taken into account in this distinction?
>
> Our clients are not even in a position to assess whether or not their own products are special or standard. Can the Commission please inform us of how the exported product of Changshu City Standard Parts Factory and Changshu British Shanghai International Fasteners Co. were considered (standard or special)?[220] (emphasis in original)

7.167. Other Chinese producers also reacted to the Commission's letter of 30 May and sought clarification with respect to the distinction between standard and special fasteners:

[218] Notice of initiation of the review investigation, (Exhibit CHN-2), p. 30.
[219] Commission's letter of 30 May 2012, (Exhibit CHN-5), p. 2.
[220] Changshu letter, (Exhibit CHN-8), p. 4.

> [T]he Commission should provide a detailed explanation of how it has distinguished special from standard fasteners. Which criteria have been taken into account?[221]
>
> Were the automobile fasteners manufactured by the Indian producer considered as special or standard fasteners …?[222]

7.168. On 21 June 2012, the Commission replied by email:

> "[S]pecial" fasteners have to conform to a particular user's design and/or requirements and are used in sectors such as the automotive, chemical and other high end industries … Nonetheless, in order to ensure a fair price comparison, these fasteners destined to industrial high end applications such as the automotive, earth moving, engineering, chemicals, etc. were considered as specials and not compared with the standard fasteners exported by your clients.[223]

7.169. These discussions between the Commission and the Chinese interested parties continued through the review investigation, including the hearing meetings. The review regulation also contains many references to the discussions between the Commission and the Chinese producers on this particular issue. Such references include the following:

> The statement made by the said parties according to which the Commission stated that 'the split of the normal value between special and standard fasteners was carried out, inter alia, on the basis of the names of the customers', is therefore incomplete as more information regarding this issue has been provided as mentioned in the recital below.[224]
>
> On the difference between standard and special fasteners, the Commission's note of 13 July 2012 explained that 'it cannot be excluded that the automotive industry also uses standard fasteners for certain applications'. Some parties argued that the Commission considered that automotive fasteners could also have been regarded as standard. Such allegation is unfounded.[225]
>
> The Chinese Chamber of Commerce and a Chinese exporting producer made similar claims as above regarding the possible inclusion of fasteners destined to the automotive sector in the normal value and, in addition, alleged that …[226]
>
> With regard to the claim concerning the absence of verification of the split made by the Indian producer, the Commission verified the sales listing through …[227]
>
> In particular the exporting producers raised the following issues:
>
> (a) the methodology by which the Indian producer had split its domestic sales into standard and special;
>
> (b) in the event that some fasteners sold to the automotive industry were considered as standard fasteners, an 'important adjustment' would be warranted;[228]
>
> The Commission is thus confident that standard fasteners destined to the automotive industry were not included in the list of standard fasteners …[229]

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[221] Letter on behalf of Biao Wu to the Commission (Biao Wu's letter), 13 June 2012, (Exhibit CHN-6), p. 3.

[222] Letter on behalf of Ninbgo Jinding and Changshu to the Commission, 20 June 2012, (Exhibit CHN-10), p. 3.

[223] Email of the Commission concerning Ningbo Jinding and Changshu, 21 June 2012, (Exhibit CHN-12), p. 1.

[224] Review regulation, (Exhibit CHN-3), recital 46.

[225] Ibid. recital 47.

[226] Ibid. recital 48.

[227] Ibid. recital 49.

[228] Ibid. recital 76.

> The Commission considers that the information available in the file is sufficiently reliable to ensure that only standard fasteners were used for the determination of the normal value used for the comparison with the export prices of the said Chinese exporter.[230]

7.170. Thus, the record shows that the issue of the distinction between standard and special fasteners in the context of the Commission's dumping determinations was an important aspect of the review investigation. In fact, these communications demonstrate that the Chinese producers asked for, and the Commission provided, additional information regarding the distinction between standard and special fasteners in the dumping context. This, in turn, indicates that this particular issue was closely related to the debate regarding the consistency of the measure taken by the European Union to comply with the DSB recommendations and rulings following the original proceedings. We also find it important that, as discussed below, one of China's main arguments on the merits of this claim is an alleged lack of clarity regarding the distinction made between standard and special fasteners in the dumping context. The Chinese producers asked various questions to the Commission regarding the criterion on the basis of which the Commission distinguished standard fasteners from special fasteners because they found this to be unclear. This reinforces our observation that the issue of the distinction between standard and special fasteners in the context of the Commission's dumping determinations was critical to the review investigation.

7.171. We recall that the gist of China's claim is that the Commission treated as "standard" those fasteners destined for high-end applications and which were not made according to a customer drawing, and therefore compared their prices with the prices of the standard fasteners exported to the European Union by the Chinese producers. We note that the record does not show any discussion that took place on this particular issue during the original investigation. In the review investigation, however, the Commission disclosed information about this distinction which triggered considerable exchange between the Commission and the Chinese producers. Given these facts, we do not see how China could have brought a claim on this issue in the original proceedings. We therefore conclude that the present claim falls within our terms of reference and proceed with the assessment of the claim on the merits. In light of this finding, we need not, and do not, determine whether this claim challenges an unchanged aspect of the original measure which has become an integral part of the measure taken to comply.

7.6.3.2 Assessment of the claim on the merits

7.172. We recall that in the original investigation the Commission requested dumping-related information from Pooja Forge and from the Chinese producers on the basis of PCNs which included six characteristics. The distinction between standard and special fasteners was not one of these characteristics. However, Pooja Forge did not provide its information on the basis of such PCNs. For this reason, the Commission used what it called "product types" in comparing the normal value with the export price. "Product types" were defined by two factors, namely, strength class and the distinction between standard and special fasteners. The reason why the distinction between standard and special fasteners was taken into consideration was because the Commission found this factor to affect price comparability.[231] Because the comparison in the dumping context - that is, between Pooja Forge's prices and those of the Chinese producers - was going to take into account the distinction between standard and special fasteners, the Commission asked Pooja Forge to provide two DMSAL files, one reporting its sales of standard fasteners and the other reporting its sales of special fasteners.

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[229] Review regulation, (Exhibit CHN-3), recital 78.

[230] Ibid. recital 99.

[231] In this regard, the definitive regulation states, in relevant part:

> Although the distinction between standard and special fasteners was not originally part of the product type classification (product control numbers or PCN) used in the investigation, it was decided after the adversarial meeting that it should be added to the product characteristics being considered for the dumping and injury margin calculations. Given that the vast majority of the exports of the product concerned by the investigated companies were of standard products, this means that in most cases the comparison made are [*sic*] between standard products produced in the PRC, the analogue country and the Community. Definitive regulation, (Exhibit CHN-1), recital 51.

7.173. China claims that the Commission failed to ensure that it compared the prices of standard fasteners sold by Pooja Forge with the prices of standard fasteners exported by the Chinese producers to the European Union. China's assertion focuses on the Commission's treatment of a specific type of fastener in determining normal values on the basis of Pooja Forge's data, namely fasteners destined for high-end applications and which were not made according to a customer drawing.

7.174. We understand from the arguments of the parties that, sometimes, a high-end user such as an automotive producer may order fasteners which, according to the definition referred to above, would be considered as "standard". This may occur in two different ways. First, the high-end user may order standard fasteners but ask that there be fewer variations within the products ordered. In this case, the customer makes a specific order for standard fasteners that conform to certain industry standards, instead of buying them from the producer's stock of that particular type of fastener. The producer produces the fasteners ordered and verifies that there are no variations from the relevant standard or fewer variations than what is allowed under the relevant industry norms. In other words, the fasteners sold are standard fasteners but the producer incurs additional costs because of eliminating, or limiting beyond what is allowed under the relevant industry norms, the variations from the standard at issue.[232] Second, a high-end user may buy standard fasteners without any additional requirements whatsoever. Our understanding is that the only factor that distinguishes such sales is the fact that the buyer is a high-end user, such as an automotive producer, rather than a traditional buyer of fasteners, such as one who engages in construction.

7.175. China's claim does not concern the fasteners described in the first situation above, namely fasteners sold to high-end users such as automotive producers, which met the customer's additional requirements. Rather, China argues that the fasteners sold to high-end users such as automotive producers in the second situation described above were not treated as "special" - although in China's view they should have been - and were taken into account in determining the normal values for the Chinese producers. In China's view, this is of paramount importance because such fasteners are more expensive than standard fasteners exported to the European Union by the Chinese producers.[233] It follows that if such fasteners were treated as "standard" and taken into consideration in determining the normal values, this would increase the resulting dumping margins. The treatment by the Commission of this type of fasteners is the focus of the present claim.

7.176. We recall that under this claim China presents two main arguments, namely (i) that the Commission failed to consider as "special" those fasteners sold to high-end users and which were not made according to a customer drawing, and (ii) that the Commission did not act objectively in assessing the accuracy of the lists of standard and special fasteners provided by Pooja Forge. Below, we examine these two arguments in turn.

7.6.3.2.1 The Commission's treatment of fasteners sold to high-end users and which were not made to a customer drawing

7.177. China contends that the Commission should have treated as "special" those fasteners destined for high-end applications such as automotive fasteners and which were not made to a customer drawing, but failed to do so. This argument challenges the way the Commission made the distinction between standard and special fasteners.

7.178. We note that the definitive regulation defines standard versus special fasteners as follows:

> Standard products are described in detail by industry standards such as, for example, Deutsches Institut für Normung (DIN) or German Institute for Standardisation standards. These standards ensure that the products manufactured by different suppliers in different countries are essentially interchangeable from a user point of view. Special fasteners, on the other hand, conform to a particular user's design and/or requirements. It is also generally recognised that special fasteners tend to be used in more demanding applications such as the automotive, chemical and other

[232] European Union's response to Panel question No. 33.a.
[233] China's first written submission, para. 265.

> industries and are, on average, significantly more expensive to produce and sell than standard fasteners.[234]

7.179. Thus, the definitive regulation clarifies that the distinction between standard and special fasteners was made on the basis of whether a fastener conformed to the relevant industry standards or whether it met the customers' special design or other requirements. Put simply, a "standard fastener" is one that conforms to the relevant industry standards, whereas a "special fastener" is one that meets a particular customer's requirements. Standard fasteners are made to stock and not on specific request of a customer. When an order is received for standard fasteners, such fasteners are taken from the stock, packaged and shipped to the customer. Special fasteners are made on request, when a customer submits its own drawing or a particular specification, which the producer will have to follow.[235] This distinction between standard and special fasteners was maintained in the review investigation.[236]

7.180. In its opening statement at the Panel's meeting with the parties, China presented arguments that challenge the distinction between standard and special fasteners used by the Commission:

> China submits that the fact that the existence of a customer drawing was the sole criterion clearly shows that the European Union has excluded high-end fasteners that were not made according to a customer drawing from the group of special fasteners.[237]

> China's argument is that the categorization of special fasteners on the sole basis of the existence of a customer drawing is improper, as it fails to ensure that all sales of special fasteners are excluded from Pooja Forge's domestic sales of standard fasteners. The sole criterion of the existence of a customer drawing fails to properly categorize as special fasteners those that are used in high-end applications, such as the automotive industry, but which are not made according to a customer drawing.[238]

7.181. However, China has not explained to the Panel why a definition of standard fasteners based on the existence of a customer's drawing is inconsistent with the obligation to conduct a fair comparison between the normal value and the export price set forth under Article 2.4 of the AD Agreement. China implies that the definition of a special fastener should include criteria other than the presence of a customer's drawing, but it does not explain what such criteria should be.

7.182. In the circumstances of the investigation at issue, we do not see any reason to find that the Commission acted in a non-objective or biased manner in adopting a definition that uses the existence of a customer drawing as the distinguishing criterion between standard and special fasteners. China has not explained to us why standard fasteners, which are not made to a customer drawing, should be treated as "special" when sold to a high-end user such as an automotive maker. The mere fact that the seller charges a higher price when selling such standard fasteners to automotive producers does not in our view transform a standard fastener into a special one. We note that it is not uncommon in the business world to charge different prices to different buyers for the same product. Such price differentiation does not necessarily render the products sold different from one another. We also note that under China's interpretation, the same fasteners would be considered as "standard" when sold to someone engaged in construction but "special" when sold to an automotive producer. We are not persuaded by this argument.

7.183. China also contends that, in the review investigation, the Commission's explanations regarding the distinction between standard and special fasteners were ambiguous. To support this argument, China refers to various communications from the Commission which allegedly were inconsistent with one another.[239] From such alleged ambiguities, China concludes that the Commission failed "to ensure that fasteners destined for high-end applications but not made

[234] Definitive regulation, (Exhibit CHN-1), recital 50.
[235] European Union's response to Panel question No. 33.a.
[236] Review regulation, (Exhibit CHN-3), recitals 32, 33, 45 and 47.
[237] China's opening statement, para. 50.
[238] Ibid. para. 52.
[239] China's first written submission, paras. 232-252 and 261-270.

according to a customer drawing were considered by the parties to the investigation, in particular by Pooja Forge, as 'special' fasteners".[240]

7.184. We do not agree. The record shows that during the review investigation, the Commission explained how it distinguished between standard and special fasteners. In this regard, the review regulation states in relevant part:

> (47) On the difference between standard and special fasteners, the Commission's note of 13 July 2012 explained that 'it cannot be excluded that the automotive industry also uses standard fasteners for certain applications'. Some parties argued that the Commission considered that automotive fasteners could also have been regarded as standard. Such allegation is unfounded. As is clearly explained in that note, the Commission's statement was made in the absence of a customer list from the Indian producer. However, as established in the original investigation and further explained in section 2.7 below, for quality and commercial reasons, automotive producers always order fasteners which are custom designed in order to comply with that industry's ISO requirements. Therefore, all fasteners destined for the automotive sector that [*sic*] are considered as 'special' products by fasteners producers, including in India, according to information found on the websites of Indian automotive producers. Since the Indian producer clearly defined as 'special fasteners' all parts manufactured to a custom design, the Commission considers that standard fasteners destined to the automotive industry were not included in the list of standard fasteners provided during the original investigation.[241] (emphasis added)

7.185. The review regulation addresses the specific argument made by the Chinese producers that the Commission might have treated as "standard" fasteners sold to automotive producers and explains why such argument is misplaced. The regulation conveys the Commission's finding that automotive producers always order fasteners which are custom designed and that therefore they are considered as "special" fasteners. It follows that Pooja Forge's sales that the Commission took into account in determining normal values for the Chinese producers did not include fasteners sold to automotive producers.

7.186. China submits that this explanation "is an *a posteriori* justification provided by the Commission in order to address the arguments raised by the interested parties during the review investigation". China finds this to be inconsistent with an IA's obligation to act in an even-handed manner.[242] We are puzzled by this argument. First, we note that an IA is under an obligation to address the pertinent arguments made by interested parties on the IA's determinations made in an investigation.[243] Second, in terms of its timing, we do not see the review regulation as a determination that post-dates the review investigation. Indeed, it was probably the most important step in the review investigation in that it explains in detail the Commission's determinations and their underpinnings. In any case, we note that the Commission's final disclosure issued pursuant to Article 6.9 of the AD Agreement, more than two months before the review regulation, also contained, almost verbatim, the same explanations about the distinction between standard and special fasteners that were found in the part of the review regulation that we have quoted above.[244] The Chinese interested parties were given almost three weeks to

[240] China's first written submission, para. 271.
[241] Review regulation, (Exhibit CHN-3), recital 47.
[242] China's first written submission, para. 273.
[243] We note in this regard that Article 12.2.2 of the AD Agreement requires that the notice of final determination contain "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". We also note the finding by the panel in *EC – Salmon (Norway)* underlining the IA's obligation to take into account comments and information submitted by interested parties after a final disclosure under Article 6.9 of the Agreement and the fact that the IA may issue a definitive determination which differs from the final disclosure. Panel Report, *EC – Salmon (Norway)*, para. 7.799.
[244] General Disclosure Document in the review investigation (R548) concerning anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China: implementation of the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the *EC – Fasteners dispute* (DS397), 31 July 2012 (final disclosure), (Exhibit CHN-22), pp. 12-13.

comment on such disclosure.[245] This, in our view, puts paid to the argument that the Commission's explanations in the review regulation constituted *a posteriori* justification.

7.187. Finally, we also note that, under the present claim, China challenges the consistency with Article 2.4 of the Commission's definition, albeit without showing why such definition is inconsistent with that provision. To us, the very fact that China challenges the WTO-consistency of the Commission's definition shows that such definition was explained to the Chinese producers in the investigation at issue and that they understood its contours. Whether or not that definition was properly applied by the Commission to Pooja Forge's sales is another issue, to which we now turn.

7.6.3.2.2 The Commission's assessment of the accuracy of the lists of standard and special fasteners provided by Pooja Forge

7.188. China maintains that on the basis of what was on the record, the Commission could not conclude that the lists of standard and special fasteners provided by Pooja Forge were accurate. Put differently, China claims that "the Commission could not reasonably and objectively conclude that the lists of standard and of special fasteners provided by Pooja Forge ... included respectively only standard and special fasteners as defined for the purposes of the investigation".[246] In making this argument, China points to the failure of the Commission to conduct an on-the-spot verification to verify the lists provided by Pooja Forge. China recognizes that the Commission took two initiatives with a view to verifying the lists at issue: (i) it conducted walk-through tests, and (ii) it checked the split made by Pooja Forge against average price levels. China contends, however, that these steps did not suffice to verify the accuracy of Pooja Forge's lists. We disagree with China, for the reasons explained below.

7.189. The record shows that the Commission conducted a series of walk-through tests in order to verify the accuracy of the two lists provided by Pooja Forge. The European Union describes a walk-through test as follows:

> A "walk-through" test is an in-depth verification of the accuracy of the information provided on a transaction by transaction sales listing, by testing the sales information on one line of this listing against the different documents relating to that particular sale. A "walk-through" test involves the selection of a sample of invoices and examining the original documents that "walk" the European Commission "through" the process of sale. For example for a domestic sale contained in the listing, we would expect to see a contract or purchase order; price negotiation; production or stock order; stock movements; packaging; handling and shipping and finally payment. A significant number of lines are checked through this test until the investigating authority is satisfied of the accuracy of the information provided.[247]

7.190. Hence, a walk-through test seems to be a process that allows the Commission to verify the accuracy of a range of documents pertaining to a group of sales that are selected from among the entirety of the sales reported by a given company. China does not dispute the fact that the Commission did carry out walk-through tests in order to verify the accuracy of Pooja Forge's lists. China's argument is that such a test would not allow the Commission to verify the accuracy of the information provided by Pooja Forge. We do not see why this would be the case.

7.191. It is common knowledge that anti-dumping investigations often entail the collection of information pertaining to thousands of sales made by the companies involved, be it on the dumping or the injury side of the investigation. Article 6.6 of the AD Agreement generally requires an IA to "satisfy [itself] as to the accuracy of the information supplied by interested parties upon which [its] findings are based." Article 6.7 provides that an IA may conduct an on-the-spot verification "[i]n order to verify information provided or to obtain further details". This provision does not oblige an IA to conduct on-the-spot verifications in order to verify information provided by interested parties. The general obligation laid down in Article 6.6 is that an IA must ensure that the information on which it bases its findings is accurate. The Agreement does not prescribe specific ways in which this general obligation has to be observed. It is now well settled in WTO

[245] The final disclosure was dated 31 July 2012 and interested parties had until 20 August 2012 to present their comments. See, covering letter to the general disclosure dated 31 July 2012, (Exhibit EU-4), p. 2.
[246] China's first written submission, para. 284.
[247] European Union's response to Panel question No. 32.

case law that "[w]hile such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfil its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based".[248] On-the-spot verification is one but by no means the only way in which an IA may verify the accuracy of the information provided by interested parties. China does not argue otherwise but contends that in this investigation, the Commission should have conducted an on-the-spot verification. However, in light of the facts on the record and the explanation by the European Union of what a walk-through test entails, we see no reason that would compel such a conclusion. We are not persuaded that in the investigation at issue, conducting walk-through tests in order to verify the accuracy of the information provided by Pooja Forge was incompatible with what would have been expected from an objective an unbiased IA.

7.192. As noted above, the record shows that, in addition to walk-through tests, the Commission also conducted a price analysis in an effort to verify the accuracy of the lists provided by Pooja Forge. The review regulation provides in this regard that:

> With regard to the claim concerning the absence of verification of the split made by the Indian producer, the Commission verified the sales listing through a number of 'walk-through' tests (i.e. in-depth verification of a sample of sales transactions included in the sales listing in order to verify its accuracy) as per standard verification practices. In addition, the subsequent split of that sales listing provided by the Indian producer was checked against an average price level of the split as explained in the said note. Therefore, the allegation that the Commission took at face value the data provided by the Indian producer is not founded.[249]

7.193. China posits that an average price check would not ensure that the export price of standard fasteners was not compared to the normal value of special fasteners. The reason for this, argues China, is that "[a]n average price check does not allow for the detection of special fasteners of which the price is low as the result of other product characteristics".[250] China adds that "[i]t is perfectly possible that the sales listing of 'standard' fasteners contain fasteners which in fact should have been included in the listing of 'special' fasteners".[251] China also asserts that an average price check "offers no conclusive evidence that all the fasteners labelled as standard were indeed standard fasteners".[252] We agree with these views in the abstract. By its nature, an average price check cannot verify that each and every transaction included in the list of special fasteners indeed pertains to a special fastener and that each and every transaction included in the list of standard fasteners pertains to a standard fastener. We are not aware of any provision in the AD Agreement which requires such conclusive evidence from an IA in a case like this. Nor would such a showing have been possible or practicable given the particularly high number of sales transactions involved in this investigation.[253] The issue here is whether or not the steps taken by the Commission to verify the accuracy of the sales lists provided by Pooja Forge represented an unbiased and objective evaluation of facts as required under Article 17.6(i) of the AD Agreement. China has not shown to us that this was not the case. In our view, an average price check, in addition to the walk-through tests conducted, would only enhance the quality of the verification made by the Commission. We therefore reject China's argument that the Commission failed to objectively assess the accuracy of the sales lists provided by Pooja Forge.

7.6.3.2.3 Conclusion

7.194. In light of our findings above, we reject China's claim under Article 2.4 of the AD Agreement that the Commission failed to compare the prices of standard fasteners with the prices of standard fasteners in calculating dumping margins for the Chinese producers in the review investigation at issue.

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[248] Panel Report, *Argentina – Ceramic Tiles*, footnote 65. We also note the similar finding made by the panel in *Egypt – Steel Rebar*. Panel Report, *Egypt – Steel Rebar*, paras. 7.326-7.327.

[249] Review regulation, (Exhibit CHN-3),recital 49.

[250] China's first written submission, para. 290.

[251] Ibid. para. 290.

[252] China's response to Panel question No. 28.

[253] The European Union argues that Pooja Forge reported 80,000 sales transactions in the DMSAL file. See, for instance, European Union's first written submission, para. 41. China has not disagreed with this statement.

7.195. China asked the Panel to exercise its fact-seeking power under Article 13 of the DSU to request the European Union to provide a copy of Pooja Forge's DMSAL file, and other information, used to distinguish between standard and special fasteners and to verify the accuracy of the split made by Pooja Forge.[254] We did not make such a request because we did not find it necessary to consult the mentioned file or other information in our evaluation of China's claim.

7.7 Alleged violation of Article 2.4 of the AD Agreement: failure to make adjustments for differences that affect price comparability

7.7.1 Arguments of parties

7.7.1.1 China

7.196. China asserts that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to make adjustments for certain factors that affected price comparability. Specifically, China takes issue with three differences that allegedly affected price comparability and that were not taken into account by the Commission: (i) differences in taxation, (ii) differences in physical characteristics, and (iii) certain other differences.

7.197. First, with respect to differences in taxation, China notes that Pooja Forge imported 80% of its raw material - wire rod - and paid import duties and other indirect taxes on such imports. The Chinese producers, however, bought their wire rod from the domestic market. These Chinese producers asked the Commission to make an adjustment to the normal value for this difference, but the Commission declined to do so on the grounds that the Chinese producers had not provided evidence showing that exports of fasteners from China to the European Union would benefit from a non-collection or refund of import charges on imports of wire rod. China contends that these explanations are not relevant where the normal value is established on the basis of the prices of an analogue country producer.[255] Under Chinese law, Chinese producers of fasteners could benefit from a duty drawback had they imported their raw materials. Similarly, Indian law would have allowed Indian fasteners producers to request duty drawback for the imports of wire rod when they exported fasteners.[256] China therefore argues that, by choosing an analogue country producer that imported most of its raw materials and incurred significant import duties and other indirect taxes, and by not making an adjustment to account for this difference, the Commission failed to make a fair comparison as required under Article 2.4.[257]

7.198. Second, with respect to differences in physical characteristics, China argues that, during the review investigation, Chinese producers demonstrated to the Commission that all characteristics which were included in the original PCNs, as well as others which were not included in the PCNs, affected price comparability and asked that adjustments be made for them. The Commission failed to make such adjustments, in violation of the fair comparison obligation set forth in Article 2.4.[258] As regards the differences in physical characteristics that were reflected in the PCNs, China refers specifically to coating, chrome, diameter and length and types of fasteners, and argues that, with respect to each of these characteristics, the Commission should have made the necessary adjustments. Regarding coating, China takes issue with the Commission's determination that all fasteners produced by Pooja Forge were electroplated. This determination was based on confidential evidence on the investigation file and information posted on Pooja Forge's website. China submits that this did not represent a proper establishment of facts and an objective and unbiased evaluation thereof.[259] With regard to chrome, China argues similarly that the Commission's determination that only chrome Cr3 was used in the fasteners manufactured by Pooja Forge did not represent a proper establishment of facts and an objective and unbiased evaluation thereof.[260] Regarding diameter and length, China contends that the Commission took these differences only partially into account by grouping fasteners on the basis of ranges rather than per specific diameter and length.[261] With regard to types of fasteners, China

[254] China's opening statement, para. 55.
[255] China's first written submission, para. 324.
[256] Ibid. para. 325.
[257] Ibid. paras. 326-327.
[258] Ibid. paras. 339-340.
[259] Ibid. paras. 342-345.
[260] Ibid. paras. 346-347.
[261] Ibid. para. 348.

maintains that the way the Commission took this difference into account was not satisfactory for two reasons: first, because the Commission failed to take into account the different characteristics of fasteners that fall within the same CN code; and second, because it made this adjustment on the basis of differences between the types of fasteners sold in the EU market.[262]

7.199. As regards the differences in physical characteristics that were not reflected in the original PCNs, China maintains that, during the review investigation, the Chinese producers argued before the Commission that certain factors other than those reflected in the PCNs, such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient, affected price comparability but that they could not further substantiate their requests in this regard without information about the products of the Indian producer, Pooja Forge. The Commission rejected these requests on the grounds that they were not substantiated by evidence. China asserts that such rejection violated Article 2.4 because, by requiring the Chinese producers to substantiate their requests for these adjustments without first giving them sufficient information about the products sold by Pooja Forge, the Commission imposed an undue burden on these producers.[263]

7.200. Third, with respect to certain other differences, China argues that, during the review investigation, the Chinese producers argued before the Commission that the differences with regard to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity", affected price comparability, and requested that adjustments be made to the normal value for such differences.[264] The Commission declined these requests on two grounds, namely, (i) that the EU's Basic Regulation referred to prices, as opposed to costs, in respect of adjustments, and that the Chinese producers did not present evidence showing that these differences affected price comparability; and (ii) that in investigations against NMEs, the costs and prices of producers in functioning market economies were used in the determination of normal values.[265] With respect to the first ground, China argues that the Chinese producers did provide some evidence regarding the alleged differences and that they could not further substantiate their requests because they did not have sufficient information about the characteristics of the fasteners produced by Pooja Forge.[266] China also adds that it is the EU's practice, in investigations against NMEs, to make adjustments to the normal value calculated on the basis of the prices of analogue country producers, to account for the comparative advantages enjoyed by NME producers subject to the investigation.[267] With respect to the second ground, China submits that the adjustments that the Chinese producers requested did not pertain to their own prices, but to the prices of the Indian producer. China further argues that China's status as an NME is irrelevant to the Commission's obligation under Article 2.4 of the Agreement to make a fair comparison between the normal value and the export price.[268]

7.7.1.2 European Union

7.201. The European Union argues as a general matter that the Commission evaluated the Chinese producers' requests for adjustments for alleged differences in taxation, physical characteristics and certain other differences, and rejected them because the Chinese producers failed to provide evidence showing that such differences affected price comparability, as required under Article 2.4.[269] The European Union then presents counter arguments to the three main aspects of China's claim.

7.202. First, with respect to the alleged differences in taxation, the European Union asserts that the Commission examined the Chinese producers' request for an adjustment for this factor and rejected it because these producers did not submit evidence showing that Chinese exporters of fasteners to the European Union would benefit from a non-collection or refund of import charges for the imports of raw materials, i.e. wire rod.[270] The European Union also points out that the fact that the Chinese producers do not import the raw materials and do not pay import charges on

[262] China's first written submission, paras. 350-355.
[263] Ibid. paras. 356-358.
[264] Ibid. paras. 259-364.
[265] Ibid. para. 377.
[266] Ibid. paras. 378 and 383.
[267] Ibid. para. 380.
[268] Ibid. para. 390.
[269] European Union's first written submission, para. 167.
[270] Ibid. paras. 168-169.

them is one of the main reasons why market economy status could not be extended to the Chinese producers in the fasteners investigation.[271] For the European Union, the fact that the Chinese producers do not pay import charges on their imports of raw materials is immaterial to the question of adjustments.[272]

7.203. Second, with respect to alleged differences in physical characteristics, the European Union contends that China has failed to show that the Commission's decision to reject these requests for adjustments was unreasonable or biased or that the Commission did not engage in an active and substantive dialogue with the Chinese producers in this regard.[273] In the EU's view, Article 2.4 does not impose any particular evidentiary burden on an IA, and therefore the latter is entitled to rely on the information provided by the relevant interested parties and make determinations on that basis.[274] As far as the differences in physical characteristics that were reflected in the PCNs are concerned, the European Union argues, with respect to the alleged difference concerning coating, that the Indian producer stated, in an email addressed to the Commission, that it used only electroplating on its standard fasteners. It also notes in this regard that the AD Agreement does not impose a verification obligation on an IA and that China has not raised a claim under Article 6.6 of the Agreement concerning an IA's obligation to satisfy itself about the accuracy of the information provided by interested parties on which the IA's findings are based.[275] With regard to chrome, the European Union submits that the Commission examined the information available in order to address the Chinese producers' claim regarding alleged differences in chrome, and relied on the information provided in Pooja Forge's questionnaire response, which was corroborated by other sources. This information showed that Pooja Forge used only chrome Cr3, and not the more expensive chrome VI, in its standard fasteners.[276] Regarding diameter and length, the European Union asserts that the fact that prices of products falling within a certain range may differ does not necessarily preclude an IA from using ranges in distinguishing different product types in the context of price comparisons under Article 2.4.[277] With respect to types of fasteners, the European Union argues that it was at the request of the Chinese producers that the Commission decided to distinguish between different types of fasteners in making a fair comparison between the normal value and the export price. Since Pooja Forge had not provided CN code information about its products, the Commission made the distinction between standard and special fasteners on the basis of an alternative methodology, looking at the fasteners sold in the EU market. In the EU's view, China's argument that the Commission failed to take into account the different characteristics of fasteners that fall within the same CN code seeks to impose an unreasonable burden on the IA. The European Union adds that the Chinese producers did not submit evidence during the review investigation showing that the general price differences used to distinguish between standard and special fasteners were inaccurate or inappropriate.[278]

7.204. Regarding the differences in physical characteristics that were not reflected in the PCNs, such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient, the European Union first underlines that this aspect of the claim could have been but was not raised by China during the original proceedings. It is therefore inappropriate for China to raise this in these compliance proceedings. The European Union does not present this as a procedural objection. However, it notes that, because jurisdiction is a matter for the Panel to examine on its own initiative, the European Union would not object if the Panel concluded that this aspect of China's claim could not be raised in these proceedings.[279] On substance, the European Union maintains that an interested party has to demonstrate under Article 2.4 the existence or absence of product features that affect price comparability when comparing the normal value with the export price. The Chinese producers did not do this and the Commission rightly rejected their request for lack of substantiation. China has not shown before this Panel that such rejection was not objective and unbiased.[280]

[271] European Union's first written submission, para. 169.
[272] Ibid. para. 172.
[273] Ibid. para. 178.
[274] Ibid. para. 182.
[275] Ibid. para. 184.
[276] Ibid. para. 186.
[277] Ibid. para. 187.
[278] Ibid. paras. 188-189.
[279] European Union's second written submission, para. 156.
[280] European Union's first written submission, para. 192.

7.205. Third, with respect to certain other differences alleged by China, namely "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity", the European Union maintains that this aspect of the claim could have been but was not raised by China during the original proceedings.[281] On substance, the European Union underlines that raw materials and energy distortions are among the typical features of an NME.[282] The European Union contends that the Chinese producers failed to substantiate their requests for adjustments for these alleged differences and the Commission rejected such requests. The European Union again argues that such rejection represented an objective and unbiased assessment on the part of the Commission.[283] The European Union asserts that, under Article 2.4, the burden to substantiate a request for an adjustment lies with the requesting interested party, whereas, through this claim, China seeks to switch that burden to the IA.[284] The European Union adds that this aspect of China's claim suggests that the Commission should have assumed that the analogue country producer, Pooja Forge, used more or less the same production factors as the Chinese exporters. This, in the EU's view, seeks to undo the recourse to the analogue country methodology.[285]

7.7.2 Arguments of third parties

7.206. The **United States** notes that, as underlined by the Appellate Body in *US – Hot-Rolled Steel*, the obligation to ensure fair comparison under Article 2.4 is on the IA, not the foreign producers. However, interested parties are under an obligation to support their requests for adjustments for differences that affect price comparability. Without taking any position on whether necessary adjustments were made in the review investigation at issue, the United States argues that to the extent that any such differences were demonstrated to affect price comparability, the Commission was obliged under Article 2.4 to make the necessary adjustments. The United States adds, however, that the Commission was under no such obligation with regard to requests for adjustments in respect of differences that were not demonstrated to affect price comparability.[286]

7.207. As far as the aspect of the claim regarding certain other differences is concerned, the United States notes that this aspect does not concern the obligation set forth in Article 2.4. Rather, it raises the issue of whether India was an appropriate analogue country. Whereas the underlying concern in Article 2.4 is "price comparability", this aspect of China's claim pertains to alleged differences in costs. In this regard, the United States agrees with the European Union that in investigations against NMEs, it is appropriate not to base normal value on prices charged in the domestic market of the exporting country because of, *inter alia*, distorted raw material prices and that when such an approach is followed, such as in the investigation at issue here, it would be inappropriate to make adjustments for alleged differences in costs. The United States finds China's argument to be 'fundamentally circular' and contends that such an argument disregards the purpose of not relying on the prices of NME producers in determining normal value.[287]

7.7.3 Evaluation by the Panel

7.208. China maintains that the Commission violated Article 2.4 of the AD Agreement by failing to make adjustments for three types of differences that allegedly affected price comparability: (i) differences in taxation, (ii) differences in physical characteristics, and (iii) certain other differences. We will examine each of these three allegations in turn.

7.7.3.1 Differences in taxation

7.209. China notes that whereas Pooja Forge imported 80% of wire rod, the raw material it needed to produce fasteners, the Chinese producers bought their wire rod from the Chinese market. Since Pooja Forge paid import duties and other indirect taxes on its imports of wire rod, which the Chinese producers did not have to pay, China argues that the Commission should have made an adjustment to the normal value in order to account for this difference affecting price comparability. By failing to do so, argues China, the Commission violated the fair comparison

[281] European Union's response to Panel question No. 37.b.
[282] European Union's first written submission, para. 193.
[283] Ibid. paras. 195 and 200.
[284] Ibid. para. 198.
[285] European Union's second written submission, para. 163.
[286] Unites States' written submission, paras. 48-51.
[287] United States' statement at the meeting of the Panel, paras. 22-24.

obligation set forth in Article 2.4 of the Agreement. The European Union disagrees, arguing that China's argument effectively aims to undo the effect of the analogue country methodology, an issue which is not part of this dispute. Moreover, the European Union maintains that the Commission was not required to make an adjustment to the normal value for alleged differences in taxation because the Chinese producers failed to demonstrate to the Commission that this was a difference that affected price comparability.

7.210. Turning to the relevant facts, we note that the Commission's final disclosure states that Pooja Forge paid "the basic customs duty (5% of assessable value) and the Customs Education Cess (3% of the basic customs duty value plus the CVD amount)" on the raw material that it imported.[288] China notes that the CVD amount exceeded 20% of the customs value which resulted in total import duties ranging between 26 and 30% of the customs value during the period of investigation.[289] During the review investigation, the Chinese producers argued that they did not import their raw material and therefore did not pay such duties, and that therefore the Commission should make an adjustment for this difference that affected price comparability. Following the Commission's letter dated 30 May 2012, in which further information was disclosed regarding Pooja Forge's products, one Chinese producer wrote to the Commission to argue that:

> The annual reports (see Annexes 1 and 2) reveal that the Indian producer during the IP imported 80% of raw materials (wire rod) from abroad. This relates to the fact that the Indian producer had, in order to produce the fasteners with the particular physical characteristics it is producing, to use particular types of wire rod. Our client, by contrast, purchased its raw materials for the production of fasteners with different physical characteristics, on the domestic market.
>
> Obviously, this results in additional costs that are being incurred by the Indian producer (for instance, freight and import duty) that are not born [*sic*] by our client. This is thus a difference that affects price comparability.
>
> With a view to ensuring a fair comparison, the normal value should thus be adjusted to account for the difference between the Indian domestic price of wire rod and the purchase price paid by the Indian producer during the IP. On the basis of the comparison included in Annex 3, the normal value should be lowered by 7.026 Rupee per ton.[290] (emphasis added)

7.211. The Commission replied by email:

> Please note [*sic*] import duties on raw material purchased outside the analogue country have been taken into account as per standard practice, and the normal value was based on net invoiced prices.[291]

7.212. This issue was also raised by the Chinese interested parties during the hearing that took place on 11 July 2012, to which the Commission officials' reaction was that "[t]he starting point would be for parties to claim an adjustment as to the extent to which export prices are not compared on a comparable level".[292]

7.213. Through a letter dated 19 July 2012, Chinese interested parties argued that whereas in China exporters of fasteners would have obtained an import duty refund for the raw materials imported from outside, the same was not the case in India and that therefore an adjustment had to be made to the normal value to account for this difference affecting price comparability:

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[288] Final disclosure, (Exhibit CHN-22), recital 78.

[289] China's second written submission, paras. 203-204.

[290] Letter on behalf of Ningbo Jinding to the Commission, 13 June 2012 (Ningbo Jinding's letter of 13 June 2012), (Exhibit CHN-33), p. 5. The same issue was raised by another Chinese producer and by the China Chamber of Commerce for Import & Export Machinery & Electronic Products. See, Letter on behalf of Changshu to the Commission, 13 June 2012 (Changshu's letter of 13 June 2012), (Exhibit CHN-34), p. 5 and CCCME letter, (Exhibit CHN-7), p. 8.

[291] Commission's email of 26 June 2012), (Exhibit CHN-11).

[292] Report of the Hearing with the Commission of 11 July 2012, 18 July 2012 (hearing report), (Exhibit CHN-30), p. 9.

> Article 2(10)(c) of the Basic Anti-Dumping Regulation provides that an adjustment to normal value must be made corresponding to the amount of import charges or indirect taxes which are applicable to materials incorporated in the like product when it is intended for consumption in the exporting country but which are not collected or remitted when the product is exported[.]
>
> Chinese producers who export fasteners from China obtain an import duty refund pursuant to Article 5 of the *Measures of the Customs of the People's Republic of China on the Control of Processing Trade Goods*. These rules provide either for the non-collection of the import duties on raw materials provided that the final product is subsequently exported ("suspension regime") or the repayment of the import duties actually collected when the final product is exported ("drawback regime"). Thus, export prices do not include the amount of the import duty paid on raw materials.
>
> In contrast, domestic prices in India reflect the very high import duties levied on imported raw materials. Pooja Forge imports a significant proportion of its steel from outside India. Its domestic prices are therefore likely to be higher as a result of the import duties paid.
>
> In consequence, an adjustment to the normal value of the Indian producer reflecting the amount of import duties and indirect taxes included in its domestic prices is necessary to ensure a fair comparison.[293] (italic in original, underlining added)

7.214. The Commission addressed these concerns in its final disclosure as follows:

> [A]ccording to Article 2(10)(b) of the basic anti-dumping regulation, such an adjustment is available if the import charges borne by the like product and by material physically incorporate [*sic*] therein, when intended for consumption on the domestic market would not be collected or would be refunded when the like product is exported to the European Union. In the absence of a claim and evidence that exports from the above-mentioned exporting producers to the EU would benefit from a non—collection or refund of import charges on imports of raw materials (wire rod), the claim must be rejected. Furthermore, it is also noted that, normally, such adjustment is not available when the exporting producer concerned, as is the case in this review, sources all its raw materials from domestic suppliers incurring therefore no import charge.[294] (emphasis added)

7.215. In their comments on the final disclosure, Chinese interested parties wrote to the Commission, arguing that instead of rejecting this request for an adjustment, the Commission should first have explained to the Chinese producers how they should further substantiate their assertion that exports of fasteners from China to the European Union benefited from a non-collection or refund of import charges on imports of raw materials.[295]

7.216. The record shows that Pooja Forge imported most of the raw material (wire rod) it needed in producing fasteners, the product subject to the investigation. It is also uncontested by the parties that, in contrast to Pooja Forge, the Chinese producers bought their wire rod mainly from the Chinese market. The issue is whether or not in such a situation the Commission was under an obligation to make an adjustment for the customs duties and other indirect taxes paid by Pooja Forge on its imports of wire rod.

7.217. The European Union contends that the fact that the Chinese producers bought their raw material domestically, rather than importing it, was one of the reasons why the Commission considered China to be an NME and decided to resort to the analogue country methodology in determining normal values in this investigation.[296] In the EU's view, the reason why the Chinese producers did not import raw materials is because the Chinese market provides them with access

[293] Letter on behalf of Biao Wu and CCCME to the Commission, 19 July 2012 (Biao Wu and CCCME's letter of 19 July 2012), (Exhibit CHN-21), p. 10.

[294] Final disclosure, (Exhibit CHN-22), recital 78. The review regulation contains, almost verbatim, the same explanations about this issue. Review regulation, (Exhibit CHN-3), recital 80.

[295] Comments on behalf of CCCME and Biao Wu, 20 August 2012, (Exhibit CHN-23), p. 12.

[296] European Union's first written submission, para. 169.

to such materials at cheap prices.[297] The European Union asserts that the fact that the Indian producer imports most of its raw materials whereas the Chinese producers do not "is not pertinent to the question of adjustments".[298] It is the consequence of the analogue country methodology used by the Commission, and not a difference that affects price comparability.[299] The European Union therefore concludes that, through this claim, "China is effectively arguing that the European Commission should have taken the distorted raw material situation of the Chinese fasteners producers into account through an adjustment".[300]

7.218. We agree with the EU's argument. China states that "it does not question the use of the analogue country methodology as such but rather the failure of the European Union to make necessary adjustments for differences affecting price comparability existing between the export price and the analogue country's normal value as a result of the inclusion in the normal value of import duties on raw material that are not included in the export price".[301] However, to find for China in this respect would undermine the Commission's right to have recourse to the analogue country methodology, which China does not dispute here. The Commission resorted to the analogue country methodology because it determined that the Chinese producers subject to the investigation did not operate according to the principles of a market economy, including with respect to the price paid for domestic wire rod. As a result of this determination, the Commission decided to base the normal values of Chinese producers on the domestic prices charged by Pooja Forge, a fastener producer from India, which the Commission found to be operating according to market economy principles, including taking into account the price paid for imports of wire rod. We agree with the European Union that the very reason why such an exceptional methodology was used in determining the normal values of Chinese producers was the underlying determination that their costs and prices did not reflect the dynamics of a market economy.

7.219. We also note that the issue of customs duties and other indirect taxes collected on the imports of raw materials has to do with India's internal tax and trade policy. Different WTO Members design such policies in different ways taking into account their economic needs and other relevant factors. Where an IA decides to resort to the analogue country methodology in an investigation involving producers that are not accorded market economy treatment and uses the prices of an analogue producer to determine the normal value, the different kinds of taxes that are imposed on different inputs used in the production of the investigated product in the analogue country may be relevant to the issue of the selection of the analogue country.[302] However, once the analogue country has been selected, the existence of such taxes on inputs will likely become irrelevant as far as the obligation to conduct a fair comparison is concerned. This is because once the IA starts making adjustments for such cost differences, it will effectively be moving towards the costs in the investigated country that, at the outset of the investigation, was not considered to be a market economy.

7.220. Even if the Commission were under an obligation to consider making an adjustment due to alleged differences in the taxation of wire rod in India, despite the fact that the analogue country methodology was used in the investigation, the facts on the record do not show that the Chinese producers showed to the Commission that this difference in taxation affected price comparability as prescribed under Article 2.4 of the Agreement. In response to the Chinese producers' request for an adjustment for the alleged difference in taxation, the Commission stated, during the hearing held on 11 July 2012, that "[t]he starting point would be for parties to claim an adjustment as to the extent to which export prices are not compared on a comparable level".[303] In response, the

[297] European Union's first written submission, para. 172.
[298] Ibid.
[299] Ibid.
[300] Ibid. para. 173.
[301] China's second written submission, para. 202.
[302] In this regard, we note that Article 2(A)7(a) of the EU's Basic AD Regulation stipulates as follows with respect to the selection of an analogue country:

> An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.
> The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.
> G/ADP/N/1/EU/1/Rev.1, p. 10.

[303] Hearing report, (Exhibit CHN-30), p. 9.

Chinese producers indicated, in their letter dated 19 July 2012, that under Chinese law producers of fasteners benefited from an import duty refund for the duties paid on raw materials used in the production of fasteners when such fasteners were subsequently exported from China.[304] We note, however, that this was simply an explanation of what Chinese law said, and not a description of what had actually happened to the Chinese producers subject to the investigation at issue. In other words, the Chinese producers did not argue that they benefited from a refund of import duties paid for raw materials used in the production of the fasteners exported to the European Union and which were the subject of the investigation at issue. In fact, their main argument was that, unlike Pooja Forge, they bought their raw material from their domestic market. The Commission, in its final disclosure, indicated that given that the Chinese producers had not shown that they had benefited from a non-collection or refund of import duties paid on the imports of raw materials, no adjustment could be made to the normal value to remove the effect of the import duties and other charges paid by Pooja Forge on its own imports of raw materials. The Commission also found it normal that the Chinese producers did not come forward with such evidence because they bought their raw materials from the Chinese market and therefore incurred no import duties.[305] These explanations are repeated in the review regulation.[306]

7.221. These facts make it clear that the Chinese producers did not come forward with a substantiated request for an adjustment for the alleged difference in taxation. In our view, therefore, the obligation to make an adjustment, laid down in Article 2.4 of the AD Agreement, was not triggered. We do not consider that the Commission acted inconsistently with this obligation by rejecting an unsubstantiated request for an adjustment. China maintains that this reason is irrelevant where the comparison is made with the prices of an analogue country producer. In China's view:

> The difference in taxation is due to the fact that the analogue producer used imported raw materials subject to high indirect taxes, while the Chinese exporters used locally produced wire rod. As stated above, and undisputed by the Commission, in case the Chinese producers would have used imported raw materials, they would have been able to obtain a duty drawback when exporting pursuant to Article 41 of the Regulations of the People's Republic of China on Import and Export Duties. Likewise, the Indian producer could have claimed a duty drawback under the applicable Indian customs rules when exporting its fasteners. (footnote omitted, emphasis added)

7.222. China's arguments are hypothetical. The AD Agreement does not require that adjustments be made on the basis of such remote possibilities. Article 2.4 only requires that an adjustment be made where there is a substantiated request showing the existence of a difference affecting price comparability. This was not the case in this investigation. We agree with China's argument that the fact that the analogue country methodology was used does not relieve the Commission from the obligation to conduct a fair comparison as required under Article 2.4.[307] Nor, however, does an IA come under an obligation that is not found under Article 2.4 simply because it used the analogue country methodology in its dumping determination. China also contends that by requiring the Chinese producers to show that their exports to the European Union actually benefited from a non-collection or refund of import duties, the Commission imposed an unreasonable burden on them.[308] We disagree. The Commission's request that evidence of the existence of an alleged difference that affects price comparability be shown cannot be said to be unreasonable.

7.223. On this basis, we reject China's argument that the Commission violated Article 2.4 of the AD Agreement by rejecting the Chinese producers' request for an adjustment due to an alleged difference in taxation.

7.7.3.2 Differences in physical characteristics

7.224. China argues that by failing to make adjustments for certain differences in physical characteristics, the Commission failed to conduct a fair comparison as required under Article 2.4 of the Agreement. In terms of the alleged differences in physical characteristics, China refers to two

[304] Biao Wu and CCCME's letter of 19 July 2012, (Exhibit CHN-21), p. 10.
[305] Final disclosure, (Exhibit CHN-22), recital 78.
[306] Review regulation, (Exhibit CHN-3), recital 80.
[307] China's second written submission, para. 217.
[308] Ibid. para. 209.

groups of characteristics, namely the characteristics that were included in the original PCNs, and those that were not included in such PCNs. As far as the first group is concerned, China claims that the Commission failed to conduct a fair comparison with respect to each of the characteristics included in the original PCNs, namely, coating, chrome, diameter and length, and type of fasteners.[309] With respect to the second group, China cites characteristics such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient, which allegedly affected price comparability.[310] China's argument with respect to each of these two groups of characteristics is different. With regard to the first group, China argues that the Commission failed to take the characteristics included in the original PCNs into account and thereby violated Article 2.4. With regard to the second group, China maintains that the Commission acted inconsistently with Article 2.4 by failing to give the Chinese producers further information to allow them to substantiate their initial requests for adjustments. We will evaluate each of these two sets of allegations in turn.

7.7.3.2.1 Differences in physical characteristics that were included in the original PCNs

7.225. With respect to the physical characteristics that were included in the original PCNs, China contends that while the Commission acknowledged that all such characteristics were differences that affected price comparability, it failed to take them into account properly and thereby violated Article 2.4. With regard to coating, China notes the Commission's statement during the review investigation that all fasteners produced by Pooja Forge were electroplated. This determination was based on confidential information on the record and information found on Pooja Forge's website. China also notes that the same website confirms that Pooja Forge also had manufacturing facilities for other types of coating and concludes that it is very unlikely that Pooja Forge manufactured only electroplated fasteners.[311] China argues that the Commission failed to carry out an objective and unbiased determination in making this determination because the latter was based on limited and unverified information.[312] We recall that Article 2.4 requires that an adjustment be made where the requesting interested party shows to the IA that there is a difference between the products being compared which affects price comparability. In our view, with respect to coating, the Chinese producers failed to make such a showing. China's argument is that the Commission's assessment of the information on the record was inadequate, without showing the basis for the alleged inadequacy. As noted above, the AD Agreement does not necessarily require that the IA conduct an on-the-spot verification to examine the accuracy of every piece of information that it uses in its determinations. We also recall that China has not brought a claim under Article 6.6 of the AD Agreement alleging the Commission's failure to satisfy itself about the accuracy of the information on the record on which it based its findings. We therefore reject China's argument with respect to coating.

7.226. With regard to chrome, China claims that the Commission's determination that only chrome Cr3 was used in the fasteners manufactured by Pooja Forge did not represent a proper establishment of facts and an objective and unbiased evaluation thereof. China notes that in coming to this conclusion the Commission relied on information posted on Pooja Forge's website without verifying it. China argues that the Commission should have gathered detailed and precise information regarding the chrome used in Pooja Forge's products.[313] As with China's claim regarding coating, China has not shown to the Panel that the Chinese producers made a substantiated request for an adjustment for chrome which the Commission rejected in violation of Article 2.4. Here too, we recall that China has not brought a claim under Article 6.6 of the AD Agreement alleging the Commission's failure to satisfy itself about the accuracy of the information on the record on which it based its findings. Without a showing that the Chinese producers identified a difference which affected price comparability, which the Commission rejected, we cannot find a violation of the obligation set forth in Article 2.4. We therefore reject China's argument with respect to chrome.

7.227. With regard to diameter and length, China maintains that the Commission took these differences only partially into account because it made its comparisons on the basis of ranges,

[309] China's first written submission, para. 341.
[310] Ibid. para. 356.
[311] Ibid. para. 344; second written submission, para. 227.
[312] China's first written submission, paras. 343-345.
[313] Ibid. para. 346.

rather than per specific diameter and length.[314] China contends that an analysis prepared by two Chinese exporters shows differences in prices within the same range because of differences in diameter and length.[315] We are not convinced that the mere fact that the Commission used ranges, instead of specific figures, in assessing diameter and length necessarily violates the obligation set forth in Article 2.4. China has not shown to the Panel why such an approach rendered the Commission's determination biased or non-objective. Nor did China show that the Chinese producers identified a difference on diameter and length which affected price comparability, which the Commission rejected. We therefore also reject China's argument with respect to diameter and length.

7.228. With regard to types of fasteners (standard vs. special), China challenges the Commission's determination on two grounds. First, it argues that the Commission erred by identifying the types of fasteners with reference to CN codes since each code might have included different types of fasteners. Second, China contends that the Commission made adjustments on the basis of differences that existed between different types of fasteners in the EU market. China takes issue with the EU's methodology in this regard on the grounds that: (i) since Pooja Forge had not made a distinction between types of fasteners in the original investigation the Commission itself could not have known for what exact differences it was making an adjustment to the normal value; (ii) there was no evidence that price differences observed in the EU market with respect to the differences in types of fasteners represented the differences in the Indian market; and (iii) comparing the price averages of each type of fastener to a global average was unreliable.[316] We recall, once again, that in order to show a violation of the fair comparison obligation set forth under Article 2.4 of the Agreement, the complainant has to show that a request for an adjustment linked to a difference that is shown to affect price comparability was rejected by the IA. China has not shown that there was such a showing in the review investigation with respect to types of fasteners. China's arguments purport to show weaknesses in the way the Commission made the distinction between standard and special fasteners, but this does not constitute a difference between Pooja Forge's and Chinese producers' fasteners which affected price comparability. We therefore reject this argument.

7.229. China suggested that the Panel use its fact-seeking power under Article 13 of the DSU to request from the European Union certain documents on the record with respect to coating, chrome, diameter and length.[317] We have not done so because we did not consider it necessary to see documents beyond what has been submitted in exhibits by both parties in resolving China's claim.

7.230. On the basis of the foregoing, we reject China's argument that by failing to take into account the differences in the physical characteristics that were included in the original PCNs the Commission acted inconsistently with the fair comparison obligation laid down in Article 2.4 of the AD Agreement.

7.7.3.2.2 Differences in physical characteristics that were not included in the original PCNs

7.231. The European Union asserts that this aspect of China's claim could have been but was not raised by China in the original proceedings. The European Union does not raise this as a procedural objection but points out that since jurisdiction is a matter that has to be examined on the Panel's own initiative, it would not object if the Panel found this aspect of the claim to be outside its terms of reference.[318] In our assessment of this aspect of the present claim, we will first evaluate the issue alluded to by the European Union and will only proceed with our substantive assessment if we find the claim to be within our terms of reference.

7.7.3.2.2.1 Terms of reference of the Panel

7.232. In response to the EU's argument on terms of reference, China maintains that this aspect of its claim could not have been raised in the original proceedings because, as noted by the

[314] China's first written submission, para. 348.
[315] Ibid. para. 348.
[316] Ibid. paras. 350-355.
[317] China's opening statement, para. 63.
[318] European Union's second written submission, para. 156.

Appellate Body in the original dispute, the Chinese producers were not able to request adjustments in the original investigation due to the Commission's failure, until late in the original investigation, to explain on what basis price comparisons were going to be made.[319]

7.233. As noted in paragraph 7.68 above, in examining whether the present claim could have been brought by China in the original proceedings, we will take into account the factual circumstances, in the review investigation, under which the claim was raised and examine the extent to which such circumstances also existed in the original investigation. We note that in the review investigation, following the Commission's disclosure of 30 May 2012, which conveyed further information regarding the characteristics of Pooja Forge's products, the Chinese company Biao Wu submitted comments in which it argued, among other things, that the characteristics such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient had an impact on price comparability.[320] We have not seen anything on the record of the original investigation, nor does the European Union argue, that these alleged differences were discussed in the original investigation. This shows that this issue was unique to the review investigation and therefore could not have been raised in the original dispute settlement proceedings. On this basis, we conclude that this aspect of China's claim is within our terms of reference and proceed with our assessment of it.

7.7.3.2.2.2 Assessment of the claim on the merits

7.234. As regards the differences in physical characteristics that were not reflected in the original PCNs, China cites characteristics such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness and friction coefficient. China submits that, during the review investigation, the Chinese producers argued before the Commission that these characteristics affected price comparability but they could not further substantiate their requests without information about Pooja Forge's products. The Commission rejected these requests on the grounds that they were not substantiated by evidence. China asserts that such rejection violated Article 2.4 because, by requiring the Chinese producers to substantiate their requests for these adjustments without first giving them sufficient information about the products sold by Pooja Forge, the Commission imposed an undue burden on these producers.[321]

7.235. We recall that in order to make a *prima facie* showing of a violation of the fair comparison obligation under Article 2.4, China has to show that the Chinese producers made a substantiated request for an adjustment which the Commission rejected. China has not done so. China's main argument regarding the alleged differences in physical characteristics that were not included in the original PCNs is the Commission's failure to provide information on the characteristics of Pooja Forge's products. We recall that, above, we have evaluated China's claims challenging specifically the Commission's failure to provide such information and concluded, in paragraph 7.148, that the Commission violated the obligation set forth in the last sentence of Article 2.4 by failing to provide such information. The present claim, however, concerns the substantive aspects of the Commission's determination with respect to the issue of fair comparison. To prevail on such a claim, China has to show that the Commission rejected a substantiated request for an adjustment made by the Chinese producers. This China has not done. Finding a violation of Article 2.4 under the present claim, which concerns the substantive aspects of the Commission's determination, on the basis that the Commission failed to provide information on the characteristics of Pooja Forge's products, would have been speculative since it would have been based on the assumption that had the Commission provided the necessary information the Chinese producers would have made a substantiated request for an adjustment. We cannot make such a finding.

7.236. On this basis, we reject China's allegation that the Commission acted inconsistently with Article 2.4 by failing to make adjustments for alleged differences in physical characteristics that were not included in the original PCNs.

[319] China's second written submission, paras. 242-243; China's comment on the EU's response to Panel question No. 37.b.

[320] Biao Wu's letter, 13 June 2012, (Exhibit CHN-6), pp. 5-6.

[321] China's first written submission, paras. 356-358.

7.7.3.3 Certain other differences

7.237. The European Union asserts that this aspect of China's claim could have been but was not raised by China in the original proceedings.[322] Therefore, we will first evaluate this jurisdictional issue and will only proceed with our substantive assessment of this aspect of China's claim if we find it to be within our terms of reference.

7.7.3.3.1.1 Terms of reference of the Panel

7.238. The European Union contends that this aspect of China's claim could have been raised in the original proceedings. The European Union asserts that given that in the original proceedings China brought claims regarding the use of PCNs and the alleged need to make an adjustment for quality differences, it could also have brought claims regarding any other alleged cost differences between Pooja Forge and the Chinese producers. This, in the EU's view, raises procedural fairness concerns.[323] China maintains that this aspect of its claim could not have been raised in the original proceedings because, as noted by the Appellate Body in the original dispute, the Chinese producers were not able to request adjustments in the original investigation due to the Commission's failure, until late in the original investigation, to explain on what basis price comparisons were going to be made.[324]

7.239. As we note in paragraphs 7.241-7.242 below, in the review investigation, the Chinese producers raised the issue of alleged differences between their and Pooja Forge's costs and requested that adjustments be made to reflect such differences. In this context, the Chinese producers referred specifically to alleged differences in cost factors such as "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity". In this regard, we disagree with the EU's argument that since in the original proceedings China brought a claim regarding alleged differences in the costs of quality control it could also have brought claims regarding other alleged cost differences. The letters sent by the two Chinese producers arguing that adjustments had to be made for certain cost differences state clearly that such arguments were presented in response to "[the Commission's] disclosure dated 30 May 2012".[325] Clearly, therefore, these comments were presented in response to the new information disclosed by the Commission in the review investigation. We have not seen anything on the record of the original investigation, nor does the European Union argue, that these alleged cost differences were discussed in the original investigation. We therefore conclude that this aspect of China's claim is within our terms of reference and proceed with our substantive assessment of it.

7.7.3.3.1.2 Assessment of the claim on the merits

7.240. China contends that the Commission violated the fair comparison obligation set forth in Article 2.4 of the Agreement by rejecting the Chinese producers' requests for adjustments for differences with regard to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity" which affected price comparability. China notes that the Commission declined these requests on two grounds, namely, (i) that the EU's Basic Regulation referred to prices, as opposed to costs, in respect of adjustments, and that the Chinese producers did not present evidence showing that these differences affected price comparability; and (ii) that in investigations against NMEs, the costs and prices of producers in functioning market economies were used in the determination of normal values.[326]

7.241. With respect to these alleged differences, the review regulation states in relevant part:

> Subsequently, these parties repeated their claim that adjustments should be made to take into account the differences in cost of production such as differences in efficiency of consumption of the raw material; differences in wire rod consumption; in electricity consumption, in self-generated electricity, in productivity per employee, in reasonable profit level and in differences related to tooling. As stated above, Article 2(10) of the

[322] European Union's response to Panel question No. 37.b.
[323] Ibid.
[324] China's comment on the EU's response to Panel question No. 37.b.
[325] Ningbo Jinding's letter of 13 June 2012, (Exhibit CHN-33), p. 2; and Changshu's letter of 13 June 2012, (Exhibit CHN-34), p. 2.
[326] China's first written submission, para. 377.

> basic Regulation is referring to price and not cost. There was no evidence adduced by these parties that the alleged differences in cost translated into differences in prices. In investigations concerning economies in transition such as China, an analogue country is used when warranted to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces. Thus, for the purpose of establishing the normal value, a surrogate of the costs and prices of producers in functioning market economies is used. Therefore, these claims for adjustments taking into account the differences in cost of production are rejected.[327] (emphasis added)

7.242. China argues that the Chinese producers did provide evidence showing that the alleged differences in costs translated into differences in prices and therefore justified adjustments. In this regard, China refers to letters sent to the Commission by two Chinese producers, specifically to their Annexes 3.[328] These letters[329] contain the requests for adjustments by the requesting Chinese producers, among others, with respect to "efficiency of consumption of raw material", "difference in wire rod used for production", "consumption of electricity", "self-generated electricity" and "productivity". The Annexes 3 to these letters provide a comparative account of Pooja Forge's and the requesting Chinese producers' costs with respect to each of these five cost factors. In our view, however, while highlighting the differences between Pooja Forge and the Chinese companies in terms of the amounts incurred for each of these cost factors, these letters do not show how such cost differences affected price comparability. For instance, the letter sent on behalf of Ningbo Jinding Fastener Co., Ltd. states, with respect to electricity consumption, that:

> The differences between the fasteners produced by the Indian producer and those produced by our client (for instance, coating, diameter, strength, quality requirements, etc.) result in the fact that the Indian producer's consumption of electricity per unit produced is significantly higher than that of our client.
>
> This is revealed by comparing the data of the Indian producer … with the data of our client … In order to account for this difference in electricity consumption that affects price comparability, the lower value should be adjusted by lowering it by 1.402 Rupee per ton.[330] (emphasis added)

7.243. This letter argues that there is a difference between Pooja Forge and Jinding in terms of electricity costs per unit.[331] It argues that this difference is due to the differences, such as coating, diameter, strength, between the products that these two companies produce. We note that such differences were part of the revised PCNs that the Commission took into account in comparing the normal value with the export price in the review investigation. Therefore, whatever effect such differences had on price comparability would have been taken into account through the use of PCNs. After explaining the difference in electricity costs, Jinding's letter asserts that such difference affects price comparability, but no explanation is provided as to why this would be so. It is clear that, mathematically speaking, differences in cost factors incurred by two companies producing the same product likely will have an impact on their prices because it will affect their overall cost of production. Clearly, this fact, alone, cannot justify any adjustment. The Commission used Pooja Forge as an analogue country producer and used its prices in determining normal values for the Chinese companies. In such a situation, a request for an adjustment because of a difference in costs cannot simply be based on a calculation that shows an actual difference in costs. To succeed in achieving an adjustment, the request has to go beyond that and demonstrate how such difference affects price comparability and therefore requires an adjustment under Article 2.4. The letters before us do not make this demonstration and therefore we agree with the EU's argument that the Chinese producers failed to show that the alleged differences in costs affected price comparability. China also argues that Jinding and Changsu stated, in their comments on the Commission's final disclosure, that Pooja Forge's cost of manufacturing amounted to 80% of the price of its finished product "and that therefore any difference in costs would directly translate into the difference in price".[332] In our view, however, this fact, alone, does not amount to

[327] Review regulation, (Exhibit CHN-3), recital 41.
[328] China's first written submission, para. 378.
[329] Ningbo Jinding's letter of 13 June 2012, (Exhibit CHN-33) and Changshu's letter of 13 June 2012, (Exhibit CHN-34).
[330] Ningbo Jinding's letter of 13 June 2012, (Exhibit CHN-33), p. 6.
[331] Annex 3 to Ningbo Jinding's letter shows the calculation of this difference.
[332] China's second written submission, para. 253.

showing that the alleged difference in costs affected price comparability within the meaning of Article 2.4. That a company's cost of manufacturing represents a certain percentage of the price of its final product does not, in itself, show a difference that affects price comparability.

7.244. China maintains that had the Commission not refused to disclose information regarding the product types and the prices of the fasteners sold by Pooja Forge, the Chinese producers would have been able to provide further evidence regarding the effect of these cost differences on prices.[333] The Commission's failure to provide information was the object of China's other claims, which we have discussed above. The present claim concerns the substantive aspects of the Commission's determination regarding fair comparison, and not whether the Chinese producers had the information that would have allowed them to make a substantiated request for an adjustment. Therefore, we do not take this argument into account in this particular context.

7.245. The EU's other argument in this respect is that China's claim purports "to partly undo the recourse to the analogue country method."[334] We agree. We recall China's statement that it does not question the use of the analogue country methodology *per se*.[335] As noted in paragraph 7.218 above, however, we think the present claim undermines the Commission's use of the analogue country methodology. The Commission resorted to the analogue country methodology because it found that the Chinese fasteners producers did not operate according to the principles of a market economy. As a result of this determination, the Commission took India as the analogue country and calculated the normal values of Chinese producers on the basis of the prices of Pooja Forge, a fastener producer from India. Requiring the European Union to look at the cost factors that China cites in connection with the present claim would indeed have the effect of undoing the Commission's recourse to the analogue country methodology. China argues that easier access to raw materials is unrelated to China's NME status because it is due to the fact that, unlike India, China has domestic production of wire rod. With respect to alleged differences in electricity prices, China contends that the electricity price in China is very similar to that in India and that the self-generation of electricity by Pooja Forge is due to poor infrastructure and lack of electricity supply in India.[336] We are not convinced by these arguments. As mentioned above, in an investigation against an NME where the analogue country methodology is used, claiming adjustments for alleged differences in costs would undermine the IA's recourse to that methodology. In this investigation, the Commission used the prices of Pooja Forge, a market economy producer, as normal value for the Chinese producers because it considered these producers' prices not to reflect the market dynamics. Two companies producing the same product in two different countries will naturally have different costs for a variety of reasons, including the availability of raw materials or the supply of energy in the country of production. In our view, however, the IA is not obligated to make adjustments to reflect such differences in costs in an investigation where the analogue country methodology is used. Therefore, the reasons why there were differences between Pooja Forge and the Chinese producers with respect to access to raw materials or energy costs were immaterial to the Commission's inquiry in the investigation at issue.

7.246. China argues that in the past the Commission did make adjustments to the normal values obtained from analogue country producers on the basis of differences in costs such as easier access to raw materials, lack of additional production processes and higher efficiency and productivity.[337] The European Union disagrees with China's description of such past practice.[338] In any case, we note that the EU's past practice is not a factor that we can take into account in our assessment of China's claim under Article 2.4 of the AD Agreement, which is based on the particular circumstances of the investigation before us.

7.247. China also refers to the fact that in the original fasteners investigation the Commission made an adjustment to the normal value for differences in quality control and questions why the Commission did not take the same approach with respect to other alleged differences in costs for which the Chinese producers requested adjustments.[339] The European Union acknowledges that it made such adjustment but contends that the adjustment made for quality control was different because applying quality control procedures allows a producer to charge higher prices and

[333] China's first written submission, para. 383.
[334] European Union's second written submission, para. 163.
[335] China's second written submission, para. 202.
[336] Ibid. para. 265.
[337] China's first written submission, para. 380.
[338] European Union's second written submission, paras. 165-166.
[339] China's first written submission, para. 381; second written submission, para. 266.

therefore has a direct impact on prices.[340] According to the European Union, the same does not apply to production factors cited by China because a competitive market price for a standard fastener is determined by supply and demand in the market, not by production costs.[341] In response to a question by the Panel on why an adjustment was made for quality control in the original investigation, the European Union stated that such an adjustment was made because the Commission found that, unlike the Chinese producers, Pooja Forge had quality control as an additional step in its production process. The Commission made this adjustment not because of the differences in costs of quality control between Chinese producers and Pooja Forge, but because Pooja Forge had an additional step in its production process which the Chinese producers did not have.[342] We observe that the definitive regulation refers to this matter and explains why an adjustment was made for differences in quality control.[343]

7.248. We also note that the review regulation also mentions this issue as follows:

> In the original investigation the Commission already made an adjustment to the normal value to take into account quality control steps applied by the Indian producer which were not found for Chinese sampled producers.[344]

7.249. We are persuaded by the EU's explanation regarding the difference between the quality control adjustment made in the original investigation and the cost factors for which the Chinese producers requested adjustments in the review investigation. The record shows that the reason why the Commission made an adjustment for differences regarding quality control was because Pooja Forge and the Chinese producers did not have the same step in their production processes. As the European Union also argues, however, the cost factors for which adjustments were requested in the review investigation did not pertain to such a process. These cost factors were incurred both by Pooja Forge and the Chinese producers. China's argument is that because the amounts incurred were different with respect to each of such factors, adjustments had to be made. As noted above, in our view, this goes to the issue of considering China as an NME and using an analogue country for the determination of normal value. In using this methodology, the Commission did not construct the normal value on the basis of cost factors incurred by Pooja Forge; it took Pooja Forge's prices and used them as normal value.[345] Therefore, making adjustment for differences in cost factors would have defied logic and rendered the use of the analogue country methodology meaningless.

7.250. On this basis, we reject China's argument that the Commission violated the fair comparison obligation set forth in Article 2.4 of the Agreement by rejecting the Chinese producers' requests for adjustments for differences with regard to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity" which affected price comparability.

7.7.3.4 Conclusion

7.251. On the basis of the foregoing, we reject China's claim that the Commission acted inconsistently with Article 2.4 of the AD Agreement by failing to make adjustments for differences that affected price comparability.

7.8 Alleged violation of Articles 2.4 and 2.4.2 of the AD Agreement: failure to take into account all comparable export transactions

7.8.1 Legal provisions at issue

7.252. For Article 2.4 of the Agreement, see paragraph 7.124 above.

7.253. Article 2.4.2 provides:

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[340] European Union's first written submission, para. 200.
[341] European Union's second written submission, para. 167.
[342] European Union's response to Panel question No. 41.
[343] Definitive regulation, (Exhibit CHN-1), recital 103.
[344] Review regulation, (Exhibit CHN-3), recital 50.
[345] See, European Union's second written submission, para. 164.

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

7.8.2 Arguments of parties

7.8.2.1 China

7.254. China argues that, in calculating the dumping margins in the review investigation at issue, the Commission left out the export transactions for which there was no match in Pooja Forge's sales, on the basis of which the normal value was determined. This, in China's view, is inconsistent with Article 2.4.2 of the Agreement. China notes the Commission's finding that all models of fasteners exported from China to the European Union were "like" the fasteners produced and sold by Pooja Forge in India. Therefore, they were "comparable" within the meaning of Article 2.4.2. It follows that the Commission should have included all export transactions of the Chinese producers in the calculation of their dumping margins.[346] In support of this claim, China relies on the WTO jurisprudence finding the so-called practice of "zeroing" to be inconsistent with the AD Agreement chiefly on the grounds that a margin of dumping can only be calculated for the product under investigation as a whole, and not for models thereof. China contends that by failing to take into account "all" comparable export transactions in its dumping margin calculations, the Commission also acted inconsistently with the obligation to conduct a fair comparison between the normal value and the export price, as required under Article 2.4 of the Agreement.[347] In this regard, China submits that the comparison made by the Commission resulted in a presumption of dumping for those export transactions that were not used in the dumping determination and thus, such comparison must be considered as failing to meet the requirement of "fair comparison".[348]

7.8.2.2 European Union

7.255. The European Union maintains that, in the review investigation at issue, the Commission based its dumping determinations on all comparable export transactions, i.e. all export transactions for which a comparable transaction was found in the lists of Pooja Forge's domestic sales. In a few cases where there were no matches on the normal value side for certain export transactions, such transactions were not included in the calculation of dumping margins. The European Union contends that China's reliance on the WTO jurisprudence regarding the zeroing methodology in connection with this claim is inapposite because in the calculation of dumping margins in the review investigation at issue, the Commission took into consideration all comparable export and normal value transactions. In the EU's view, the zeroing jurisprudence was developed to ensure that the results of all model-to-model comparisons were included in dumping calculations made through the weighted average to weighted average (WA-WA) methodology. The Commission did include the results of all such model-specific comparisons in its overall dumping calculations in the review investigation at issue.[349]

7.256. The European Union submits that China's assertion that the Commission's failure to take into account "all" comparable export transactions was inconsistent with Article 2.4.2 disregards the consequences of the methodology used by the Commission in calculating dumping margins in this review investigation. In this regard, the European Union underlines the fact that the Commission prepared the detailed product categories, which it used in its dumping margin determinations, in close communication with the Chinese producers.[350] The European Union underscores the word

[346] China's first written submission, paras. 420-421.
[347] Ibid. para. 424.
[348] China's second written submission, para. 300; and China's opening statement, para. 91.
[349] European Union's first written submission, paras. 205 and 207.
[350] Ibid. paras. 220-221.

"comparable" in Article 2.4.2 of the Agreement and argues that this provision cannot be interpreted as requiring an IA to compare transactions that are not comparable.[351] Further, the European Union argues that, given that Article 6.10 of the Agreement allows the use of certain sampling techniques in dumping determinations as long as all comparable export transactions are taken into consideration, it should not be inconsistent with the obligation set forth in Article 2.4.2 not to include in such determinations export transactions for which no comparable domestic sales exist.[352]

7.257. The European Union submits that there was nothing "inherently unfair" about the Commission's methodology.[353] An alternative to the methodology used by the Commission could have been to construct the normal values for the export transactions for which no matches were found or to compare their prices with those of non-comparable normal value transactions. Such methods, however, would have raised obvious problems of reliability and accuracy.[354] Finally, the European Union maintains that the export transactions that were matched with normal value transactions and used in dumping margin calculations were, both quantitatively and qualitatively, representative of the product as a whole. Specifically, the European Union notes that the percentage of export transactions that were matched and taken into consideration by the Commission ranged between 75%-98% of the exports of all the main models of the fasteners that the Chinese producers had sold to the European Union.[355]

7.8.3 Arguments of third parties

7.258. The **United States** notes that the text of Article 2.4.2 limits the comparison to "comparable" export transactions, which means that this obligation does not extend to "all" export transactions. If the drafters intended to require that all export transactions be compared, they would not have qualified this obligation with the word "comparable". The United States argues that the Appellate Body's jurisprudence also supports this view.[356] This, however, does not mean that an IA has unfettered discretion in limiting the export transactions that it will use in its price comparisons. In this regard, the United States notes that Article 2.2 of the AD Agreement addresses situations where a proper comparison cannot be made between the export price and the normal value. Further, the United States contends that Article 6.10 of the Agreement provides important context by indicating certain factors that may be relevant in deciding when certain export transactions may be excluded from price comparisons, and invites the Panel to take that context into account in assessing the present claim.[357] Though the United States takes no position with regard to the facts underlying this claim, it agrees with the European Union's factual assertion that China is an NME. As a result of this, the Commission had to use the analogue country methodology and faced difficulties in examining all product types in comparing the normal value with the export price.[358]

7.8.4 Evaluation by the Panel

7.259. We note that the factual aspects of this claim are not disputed by the parties. In the review investigation at issue, the Commission followed the WA-WA methodology to compare the normal value with the export price in calculating dumping margins for the Chinese producers. The Commission made these comparisons in two steps. In the first step, it made model-specific comparisons; in the second step, it combined such model-specific results in order to determine the margin of dumping for the investigated product. In the first step, the Commission excluded from the scope of its calculations exports of models which did not match with any of the models sold by Pooja Forge. Therefore, such exports were not taken into consideration in the calculation of the amount of dumping. Nor were they taken into consideration in the second step of the Commission's calculations. When the Commission aggregated the results of model-specific calculations, it divided the total amount of dumping by the total value of exports pertaining to the models for which individual calculations were made in the first step. Exports that were excluded in

[351] European Union's second written submission, paras. 177-179.
[352] European Union's first written submission, para. 216.
[353] European Union's second written submission, para. 180.
[354] Ibid. para. 179.
[355] Ibid. paras. 183 and 188.
[356] United States' statement at the meeting of the Panel, paras. 6-9.
[357] Ibid. paras. 11-18.
[358] Ibid. para. 18.

the first step were also excluded from the denominator of the formula used to calculate the overall dumping margin for the investigated product.

7.260. Chinese producers objected to this calculation method, requesting that the Commission divide the total amount of dumping by the total value of all exports in the second step of its calculation. The Commission rejected this objection, stating that its method provided the most reliable basis to establish the level of dumping. These facts are explained in the review regulation as follows:

> The dumping margins were established on the basis of a comparison of a weighted average normal value with a weighted average export price.
>
> ...
>
> One exporting producer argued that in calculating its dumping margin, the total amount of dumping found should be expressed as a percentage of the total CIF value of all export transactions and not as a percentage of those export transactions used in calculating the amount of dumping. To do otherwise would, in this company's opinion, amount to a presumption of dumping for those export transactions not used in the dumping determination.
>
> A comparison between export price and normal value was made on a weighted average basis only for those types exported by the Chinese exporting producer for which a matching type was produced and sold by the Indian producer. This was considered to be the most reliable basis for establishing the level of dumping, if any, of this exporting producer; to attempt to match all other exported types to closely resembling types of the Indian producer would have resulted in inaccurate findings. On this basis, it is correct to express the amount of dumping found as a percentage of those export transactions used in calculating the amount of dumping − this finding is considered to be representative for all types exported. The same approach was used in calculating the dumping margins of the other exporting producers.[359] (emphasis added)

7.261. The parties disagree on whether or not the Commission's calculation method was consistent with Articles 2.4.2 and 2.4 of the AD Agreement. China maintains that by failing to take into account all export transactions of the Chinese producers in the calculation of dumping margins, the Commission violated the obligations set forth in Articles 2.4.2 and 2.4. The European Union disagrees, arguing that Article 2.4.2 only requires that "comparable" export transactions be taken into consideration in calculating dumping margins. The Commission complied with Article 2.4.2 in this investigation because it took into consideration only exports of models which matched with one of the models sold by Pooja Forge. The European Union also submits that such a methodology is not inconsistent with the fair comparison obligation set forth in Article 2.4.

7.262. In our assessment of the present claim, we will first examine the alleged violation of Article 2.4.2, followed, if necessary, by the alleged violation of Article 2.4.

7.263. We note at the outset that Article 2.1 of the AD Agreement defines "dumping" as follows:

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

7.264. Thus, the Agreement defines dumping with reference to the "product" under investigation, not parts thereof. Therefore, the margin of dumping for a product subject to an anti-dumping investigation has to be calculated with respect to that "product". We also note that in WTO case law Article 2.1 has been consistently interpreted to mean that "dumping is defined in relation to a

[359] Review regulation, (Exhibit CHN-3), recitals 105, 108 and 109.

product as a whole as defined by the investigating authority".[360] The phrase "[f]or purposes of this Agreement" clarifies that the definition of dumping in Article 2.1 applies to the entire AD Agreement, including, naturally, with respect to Article 2.4.2.[361]

7.265. In calculating margins of dumping for the Chinese producers in the review investigation at issue, the Commission did not take into consideration exports of models that did not match with any of the models sold by Pooja Forge. Nor were such exports included in the denominator when the Commission aggregated the results of model-specific calculations in determining the overall margin of dumping for the investigated product. In our view, given the definition of dumping in Article 2.1, a margin of dumping that excludes certain export transactions cannot be said to have been calculated for the investigated product as a whole. Such a calculation would therefore violate Article 2.4.2 of the Agreement which provides that "margins of dumping" have to be established by comparing the weighted average normal value with a weighted average of prices of all comparable export transactions.

7.266. The European Union contends that the Commission's calculation was consistent with Article 2.4.2 because, as stated in that provision, the Commission took into account only export transactions that were "comparable", and did not exclude any comparable export transactions.[362] The alternative to the Commission's methodology, argues the European Union, would have been "to construct matching domestic sales (e.g. by making adjustments as suggested by China)" or "to compare export sales with non-comparable normal value transactions".[363] We disagree. We note that the meaning of "comparable" in the text of Article 2.4.2 of the AD Agreement has been discussed in case law and a consistent line of reasoning has emerged. In *EC – Bed Linen*, the Appellate Body first noted that the use of the word "comparable" did not "diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of 'a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions'".[364] In response to the EU's argument in that dispute that the differences between various models of the product subject to the investigation at issue in that dispute were so substantial that they could not be eliminated by making adjustments, the Appellate Body noted the fact that at the outset of the investigation, the Commission had determined that the different types of the investigated product constituted one single product. The Appellate Body then pointed out that:

> Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable".[365]

7.267. Our understanding of the Appellate Body's finding is that once the IA defines the like product for purposes of an investigation, all export sales of product types that fall within the like product definition have to be taken into consideration in calculating dumping margins. The IA cannot exclude export sales of certain product types from the scope of its dumping determinations on the grounds that such types are not comparable to any of the types in domestic sales that are used to determine the normal value. Obviously, the fact that all sales falling within the IA's like product definition have to be taken into consideration in calculating dumping margins will not necessarily make all product types exported to the investigating country directly comparable to product types that are sold domestically in an exporting company's market. The general obligation under Article 2.4 to make a fair comparison will still apply. To comply with this obligation, the IA will resort either to multiple averaging (explained in paragraph 7.272 below) or to individual adjustments or some combination of these two methods.

7.268. We find the Appellate Body's reasoning persuasive and find it appropriate to apply it to the legal issue before us. The EU's argument before us is very similar to that presented before the Appellate Body in *EC – Bed Linen*. Here, the European Union argues that the Commission was right

[360] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[361] Ibid. para. 93.
[362] European Union's first written submission, para. 227.
[363] European Union's second written submission, para. 179.
[364] Appellate Body Report, *EC – Bed Linen*, para. 56. (emphasis in original)
[365] Ibid. paras. 57-58.

in excluding from the scope of its dumping determinations Chinese producers' exports of models that did not match any of the models sold by Pooja Forge because they were not "comparable" exports within the meaning of Article 2.4.2. We note, however, that, as in the investigation underlying the *EC – Bed Linen* dispute, in the investigation at issue, the Commission defined the like product in a way that covered all different models of fasteners. In response to Chinese producers' comments regarding alleged differences between fasteners sold by Pooja Forge and those sold by the Chinese producers, the Commission states in the definitive regulation that:

> It was also argued by several importers and exporting producers that the fasteners produced in the analogue country, India, are mostly high-value product types destined for the automotive industry and similar applications, and therefore are not alike to the fasteners exported to the Community by the PRC producers. The investigation has shown, however, that both special and standard products are also produced and sold in India. As explained above those fasteners have been found to have the same basic physical and technical characteristics as products exported from the PRC.[366]

7.269. The Commission then concludes that:

> [T]he fasteners produced and sold by the Community industry in the Community, fasteners produced and sold on the domestic market in the PRC and those produced and sold on the domestic market in India, which served as an analogue country, and fasteners produced in the PRC and sold to the Community are alike within the meaning of Article 1(4) of the basic Regulation.[367] (emphasis added)

7.270. As the Appellate Body underlined in the *EC – Bed Linen* dispute, we are of the view that "[a]ll types or models falling within the scope of a 'like' product must necessarily be 'comparable', and export transactions involving those types or models must therefore be considered 'comparable export transactions' within the meaning of Article 2.4.2".[368] It follows that, by ignoring exports of certain models by the Chinese producers on the grounds that they did not match any of the models sold by Pooja Forge, the Commission violated the obligation to calculate margins of dumping on the basis of "all comparable export transactions" as required under Article 2.4.2 of the AD Agreement. In our view, by making its dumping determinations in this particular way, the European Union imposed anti-dumping duties on certain exports from China with respect to which the Commission had not found dumping, without specific authorization to do so under the AD Agreement.

7.271. We also share the Appellate Body's view that Article 2.4 reinforces, as context, such an interpretation of the word "comparable" in Article 2.4.2.[369] Article 2.4.2 starts with the phrase "[s]ubject to the provisions governing fair comparison in paragraph 4". Therefore, the general obligation of fair comparison set forth in Article 2.4 informs the specific obligation set forth in Article 2.4.2.[370] Article 2.4 requires that a fair comparison be made between the normal value and the export price in calculating margins of dumping. To this end, this provision states that the comparison should be made at the same level of trade and in respect of sales made at as nearly as possible the same time. It also stipulates that due allowance shall be made for differences affecting price comparability. Article 2.4 then provides an illustrative list of factors which may require that allowances be made. Importantly, the factors explicitly cited in Article 2.4 include "physical characteristics". This list is not exhaustive; if the circumstances of a given investigation require that adjustments be made for factors other than those listed in Article 2.4, the IA has to make such adjustments in order to comply with the general obligation to conduct a fair comparison.[371]

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[366] Definitive regulation, (Exhibit CHN-1), recital 56.
[367] Ibid. recital 57.
[368] Appellate Body Report, *EC – Bed Linen*, para. 58.
[369] Ibid. para. 59.
[370] In this regard we note the Appellate Body's statement in *EC – Bed Linen* that "[Article 2.4 contains] a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]"."Appellate Body Report, *EC – Bed Linen*, para. 59.
[371] In this regard, we note the Appellate Body's finding, in *US – Hot-Rolled Steel*, that "[t]here are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'". Appellate Body Report, *US – Hot-Rolled Steel,* para. 177.

7.272. Apart from laying down the general obligation to make a fair comparison and listing some of the factors that may necessitate adjustments, Article 2.4 does not prescribe a particular methodology that has to be used in ensuring fair comparison. In practice, typically, an IA makes adjustments to the normal value or the export price in order to comply with this obligation. Sometimes, the IA may group the investigated product into different models, compare the normal value and the export price of each model on a WA-WA basis, and then aggregate the results of model-specific results in order to calculate the overall margin of dumping for the investigated product. This practice, also known as "multiple averaging", has been found to be compatible with the AD Agreement.[372] Using this method minimizes, or even eliminates, the need to make adjustments for individual differences that are shown to affect price comparability. This is what the Commission did in this case. The Commission grouped the investigated product - fasteners - into models by using the simplified PCNs and thereby attempted to minimize or eliminate the need to make adjustments for various factors that were found to affect price comparability. However, the use of such a methodology does not relieve the IA from the general obligation to carry out a fair comparison. If, in an investigation such as the one at issue here, there are certain exported models which do not match any of the models on the normal value side of the comparison, the IA cannot simply exclude exports of such models from its dumping calculations. In our view, in such a situation, Article 2.4 requires that the IA take non-matching models into account by making the necessary adjustments to eliminate the effect of factors that affect price comparability. We therefore disagree with the EU's argument that the matching problem encountered by the Commission in this investigation was one of the "downsides" of the use of PCNs.[373]

7.273. The European Union argues that the WTO jurisprudence that China relies upon in connection with this claim, and which concerns the so-called practice of "zeroing", is inapposite because the issue that China's claim presents is different from the problem addressed in that jurisprudence. Specifically, the European Union contends that the zeroing jurisprudence suggests that the results of all model-specific calculations be taken into consideration in the calculation of the overall dumping margin for the investigated product as a whole, whereas the issue here is the treatment in the context of model-specific calculations of export sales for which there is no comparable normal value.[374] We note that China does not argue that the Commission's calculation method at issue here constituted "zeroing". Nor are we of the view that the Commission used zeroing in calculating dumping margins in this investigation. Nevertheless, we find the Appellate Body's reasoning in *EC – Bed Linen* highly relevant to our analysis even though, technically speaking, the measure before us pertains to a different stage of the calculation of dumping margins through the WA-WA methodology. Thus although the issue before the Appellate Body in *EC – Bed Linen* was the treatment of the results of model-specific calculations in the calculation of the overall dumping margin for the investigated product and the issue before us is the model-specific calculations themselves, the Appellate Body's legal reasoning is instructive for our inquiry because it clarifies that all product types that fall within the scope of a like product are "comparable" within the meaning of Article 2.4.2.

7.274. The European Union maintains that there was no violation of Article 2.4.2 because the export sales that were excluded by the Commission "do not concern the main types of the product and are relatively limited in numbers".[375] Therefore, it argues, "the matched and included export transactions are both qualitatively and quantitatively representative of the product as a whole".[376] We do not consider that the percentage of the exports that are taken into consideration in calculating dumping margins, either quantitatively or qualitatively, is pertinent to the legal obligation under Article 2.4.2. This provision requires that all comparable export transactions be taken into account in calculating dumping margins. Once the IA defines the like product in a particular way, Article 2.4.2 requires that exports of all models that fall within that definition be taken into account in calculating dumping margins. We therefore reject this argument.

7.275. The European Union refers to Article 6.10 of the AD Agreement and argues that this provision shows that the Agreement does not necessarily require that "in any and all circumstances all export transactions must be taken into consideration".[377] We agree with the

[372] Appellate Body Report, *US – Softwood Lumber V*, para. 81.
[373] European Union's first written submission, para. 220.
[374] See, for instance, European Union's first written submission, paras. 205 and 207.
[375] European Union's first written submission, para. 228.
[376] European Union's second written submission, para. 186.
[377] Ibid. para. 181.

European Union. We note, however, that Article 6.10 allows a limited examination of exports in specifically-defined circumstances. This provision lays down the general rule that an IA must make an individual dumping determination for each known exporter or producer concerned of the product under investigation. Exceptionally, "[i]n cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable", it allows the IA to "limit [its] examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated". Thus, Article 6.10 addresses an entirely different situation from that which we are examining here. We observe that the European Union does not argue that Article 2.4.2 or any other provision of the AD Agreement contains a similar exception that would allow an IA to exclude from the scope of its dumping determination exports of models that do not match any of the models sold on the normal value side. The European Union also contends that there was nothing "inherently unfair" about the methodology that the Commission used in calculating the Chinese producers' dumping margins. According to the European Union, an alternative to this methodology could have been to construct normal values for the export transactions for which no matches were found or to compare their prices with those of non-comparable product types on the normal value side. This argument does not find any basis in the AD Agreement and therefore cannot change our assessment based on the text of Article 2.4.2. In our view, a dumping calculation methodology that fails to take into consideration exports of all product types falling within the definition of like product would violate Article 2.4.2 of the Agreement irrespective of whether or not the WTO Member that employs such a methodology considers it not to be inherently unfair. We therefore reject this argument.

7.276. On the basis of the foregoing, we conclude that the Commission violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge. Having found that there is a violation of Article 2.4.2, we need not, and do not, address China's allegation that by doing so, the Commission also violated Article 2.4 of the AD Agreement.

7.9 Alleged violation of Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry

7.9.1 Legal provisions at issue

7.277. Article 4.1 of the AD Agreement reads in pertinent part:

> For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

7.278. Article 3.1 of the AD 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.

7.9.2 Arguments of parties

7.9.2.1 China

7.279. China recalls that, in the original investigation, the Commission excluded from the definition of domestic industry European producers that did not express willingness to be part of the injury sample that the Commission would use. In the original dispute, China challenged this aspect of the original investigation and the Appellate Body found that excluding some domestic producers from the definition of domestic industry on the basis of this self-selection gave rise to a material risk of distortion in defining that industry, and found that the original panel had erred in

finding that the Commission's domestic industry definition was not inconsistent with Article 4.1 of the AD Agreement.

7.280. China notes that in the review investigation, the Commission included in the domestic industry definition all European producers which had come forward within the deadline pursuant to the notice of initiation of the original investigation. The Commission did not condition the inclusion in the domestic industry definition on willingness to be part of the injury sample. However, China maintains that this definition of domestic industry continues to be inconsistent with Article 4.1 of the AD Agreement because the notice of initiation of the original investigation mixed the issue of sampling with the definition of domestic industry and may have discouraged European producers from participating in the investigation by providing that they would be excluded from the domestic industry definition unless they agreed to be part of the sample.[378] China contends that the confusion between the selection of the sample and the definition of domestic industry also appeared in the sampling form.[379]

7.281. China submits that including domestic producers in the definition of domestic industry even if they did not agree to be part of the sample does not remove the inconsistency found by the Appellate Body because it does not eliminate the material risk of distortion.[380] In China's view, in order to implement the DSB recommendations and rulings in the original dispute, the Commission was required to start the process of selecting the producers for the definition of domestic industry from scratch.[381] In this regard, China emphasizes that what the Appellate Body found problematic regarding the domestic industry definition in the original investigation was the "approach" followed by the Commission, not the actual exclusion of some producers from the definition of domestic industry.[382] Finally, China contends that the European Union also acted inconsistently with Article 3.1 of the AD Agreement because the Commission's injury determination in the review investigation at issue was based on a wrongly-defined domestic industry.[383]

7.9.2.2 European Union

7.282. The European Union submits that this claim falls outside the Panel's terms of reference because it could have been but was not raised in the original proceedings. The European Union also argues that the definition of domestic industry was not an integral part of the measure taken to comply because the Commission treated this issue separately in the review investigation.[384]

7.283. The European Union points out that, following the DSB recommendations and rulings in the original dispute, the Commission in the review investigation re-examined the file and included in the domestic industry definition all producers that were excluded from that definition in the original investigation. The Commission then concluded that, given the fragmented nature of the industry, the producers included in this new definition represented a major proportion of the domestic industry and that the sample selected in the original investigation remained representative of the newly-defined domestic industry.[385] In the EU's view, what the Appellate Body found to be a material risk of distortion was the actual exclusion from the domestic industry definition of domestic producers which came forward within the deadline given in the original notice of initiation and provided the required information. Since the Commission did not exclude any such Community producer from its domestic industry definition in the review investigation, there can be no violation of Article 4.1 of the Agreement.[386] The European Union describes as speculative China's contention regarding the effect of the language in the notice of initiation on European producers' willingness to come forward and participate in the investigation.[387] Indeed, according to the European Union, the facts on the record contradict China's argument. In this regard, the European Union maintains that the 25 EU producers that came forward within the deadline but which indicated that they were not willing to be part of the injury sample did have a sufficient incentive to provide information and

[378] China's first written submission, paras. 449-453.
[379] China's second written submission, paras. 312-315.
[380] China's first written submission, para. 458.
[381] China's second written submission, para. 330.
[382] Ibid. paras. 310-311.
[383] China's first written submission, para. 459.
[384] European Union's response to Panel question No. 1.
[385] European Union's first written submission, para. 232.
[386] Ibid. paras. 240 and 251.
[387] Ibid. paras. 235, 248 and 250.

participate in the process.[388] The European Union adds that the new definition of domestic industry represented 36% of total Community production, which is relatively high given the fragmented nature of the industry.[389] The European Union therefore requests the Panel to reject China's claims under Articles 4.1 and 3.1 of the Agreement.

7.9.3 Arguments of third parties

7.284. **Japan** considers that in resolving this claim, the Panel has to take into account three aspects of the Commission's determination, namely (1) whether a domestic industry definition that represents 36% of total production continues to involve a high risk of distortion, (2) the elements that render the process of defining the domestic industry biased or distorted, and (3) whether the IA comes under a greater obligation to avoid bias and to ensure that the domestic producers within the domestic industry definition are as representative as possible, in cases where their percentage share in total production remains low.[390] Regarding the first issue, Japan maintains that 36% continues to have a relatively high risk of distortion and bias. Referring to the Appellate Body's findings in the original dispute, Japan underlines that the starting point in the process of defining the domestic industry should be domestic producers as a whole and the IA has to ensure that those producers that are included in the definition "substantially reflect" the total production so as to avoid any risk of distortion.[391] Japan argues that in the review investigation, the Commission did not do this.[392] Japan sees self-selection as a source of bias and points out that when the request for participation is crafted in a way that favours participation from producers with a particular view, the potential problem arising from self-selection becomes worse.[393]

7.285. As to the second issue, Japan considers it an improvement that the Commission included in the domestic industry definition all producers that provided a questionnaire response, but notes that the process through which such questionnaires were collected did not change. In Japan's view, the nature of the process for soliciting information from the European producers appears not to be neutral and may have given rise to bias. In relation to the third issue, Japan argues that where producers within the domestic industry definition account for a relatively low percentage of total production, the IA comes under a more serious obligation to avoid bias and to ensure that the selected producers are as representative as possible. In Japan's view, an injury determination based on a domestic industry definition that fails to take into consideration one of these three elements cannot be considered as reflecting an "objective examination" within the meaning of Article 3.1 of the AD Agreement, read in conjunction with Article 4.1.[394]

7.9.4 Evaluation by the Panel

7.286. In resolving the present claim, we will first address the EU's jurisdictional objection, followed, if necessary, by an assessment of the merits of the claim.

7.9.4.1 Terms of reference of the Panel

7.287. The European Union contends that this claim falls outside our terms of reference because it could have been but was not raised by China in the original proceedings. The European Union also maintains that the definition of domestic industry was not an integral part of the implementing measure because the Commission treated this issue separately in the review investigation. China disagrees with the European Union. According to China, its claim concerns the EU's failure to implement the DSB recommendations and rulings issued in the original proceedings - a claim that could not have been raised in the original proceedings.[395] China notes the EU's statement in its response to Panel question No. 1 that "in the original panel proceedings China could have but did not make the same arguments …" and contends that the issue is not whether China could have raised the same argument, but rather whether it could have raised the same claim in the original

[388] European Union's second written submission, para. 198.
[389] European Union's first written submission, para. 248.
[390] Japan's written submission, para. 23.
[391] Japan's statement at the meeting of the Panel, para. 4.
[392] Ibid. para. 5.
[393] Ibid. para. 6.
[394] Japan's written submission, paras. 24-27.
[395] China's response to Panel question No. 47.

proceedings.[396] We note that in its response, the European Union clearly argues that "China's claim under Article 4.1, as well as its consequential claim under Article 3.1 of the AD Agreement, equally fall outside the scope of these compliance proceedings". We recall that, in the original proceedings, China raised a claim challenging the Commission's domestic industry definition in the original investigation. Under that claim, China raised five allegations of error.[397] None of the alleged errors challenged the contested language in the notice of initiation of the original investigation conditioning inclusion in the domestic industry definition on willingness to be part of the injury sample. The original panel rejected all of China's allegations. On appeal, the Appellate Body reversed the panel's finding on one aspect of the claim and concluded that "the Commission failed to ensure that the domestic industry definition would not introduce a material risk of distortion to the injury analysis by relying on a minimum benchmark irrelevant to the issue of what constitutes 'a major proportion', and by excluding certain known producers on the basis of a self-selection process among the producers".[398] The present claim is based solely on the argument that the existence of the contested language in the original notice of initiation rendered the Commission's domestic industry definition in the review investigation inconsistent with Article 4.1 of the Agreement. We think that China could have raised the present claim as an additional argument under the domestic industry claim in the original proceedings. However, this is now raised as an independent claim in these compliance proceeding and we have to decide whether this claim is within our terms of reference. We therefore disagree with China's contention that the EU's terms of reference objection takes issue with China's arguments, as opposed to its claim. Further, we recall that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings[]"[399] and that WTO panels "must deal with such [jurisdictional] issues −if necessary, on their own motion- in order to satisfy themselves that they have authority to proceed".[400] We will therefore examine whether the present claim is within our terms of reference.

7.288. In the original dispute settlement proceedings, the Appellate Body found, among other things, that the original panel had erred in finding that the European Union had not acted inconsistently with Article 4.1 of the AD Agreement in defining the domestic industry as comprising domestic producers that accounted for 27% of total production on the basis that such percentage constituted "major proportion".[401] The Appellate Body came to this conclusion on the grounds that "by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion".[402] We note that the Appellate Body made this finding in response to China's argument that "by requiring producers to come forward within 15 days and express a willingness to be included in the sample within that deadline, the European Union adopted an approach that was 'fundamentally non-objective', because producers opposing the investigation were less likely to be willing to be part of the sample".[403] On 28 July 2011, the DSB adopted the Appellate Body report, and the panel report, as modified by the Appellate Body report.[404] Thereafter, the Appellate Body's finding and recommendation regarding the definition of domestic industry became a DSB recommendation. Under article 21.1 of the DSU which provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members", the European Union was required to implement this DSB recommendation. We also recall that pursuant to Article 21.5 of the DSU, the function of a compliance panel is to resolve disagreements between disputing parties as to "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings".

7.289. Under the present claim, China argues that the European Union failed to implement the DSB recommendations and rulings in this dispute because its domestic industry definition in the review investigation was inconsistent with such recommendations and rulings since it did not take into account the legal reasoning provided in the underlying Appellate Body report. This claim requires us to examine whether the Commission implemented the DSB recommendations and rulings consistently with the findings in the Appellate Body report in the original proceedings. In

[396] China's comments on the European Union's response to Panel question No. 1.
[397] Panel Report, *EC – Fasteners (China)*, paras. 7.184-7.189.
[398] Appellate Body Report, *EC – Fasteners (China)*, para. 422.
[399] Appellate Body Report, *US – 1916 Act*, para. 54.
[400] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US),* para. 36.
[401] Appellate Body Report, *EC – Fasteners (China)*, para. 624(b)(i).
[402] Ibid. para. 427.
[403] Ibid. para. 151.
[404] WT/DS397/11.

our view, such a claim goes to the very heart of a compliance panel's task under Article 21.5 of the DSU and falls within our terms of reference.

7.290. Given this, we do not consider relevant for our present inquiry whether or not China could have raised this claim during the original proceedings. However, assuming that China could have raised it in the original proceedings, we would still have found the claim to fall within our terms of reference given the decisive role that the contested statement in the original notice of initiation played in the Commission's definition of domestic industry in the review investigation. In other words, we consider that such statement was an unchanged aspect of the original measure which became an integral part of the measure taken to comply, namely, the review investigation conducted by the Commission. In defining the domestic industry in the review investigation, the Commission bound itself by the limitation that the original notice of initiation imposed on the universe of producers that could have been included in the domestic industry definition. It should also be underlined that the producers included in the definition of domestic industry could also have a bearing on the selection of producers for the injury sample and ultimately on the injury determination itself.

7.291. On this basis, we find this claim to be within our terms of reference and proceed with our assessment of it.

7.9.4.2 Assessment of the claim on the merits

7.292. China maintains that the Commission's domestic industry definition in the review investigation was inconsistent with Article 4.1 of the Agreement because it continued to introduce a material risk of distortion by reason of the statement in the notice of initiation of the original investigation that only producers willing to be included in the injury sample would be part of the domestic industry definition.[405] In China's view, this language shows that the notice "mixed the issues of the domestic industry definition and the sampling determination"[406] and may have discouraged more European producers from coming forward because they knew that they would be excluded from the domestic industry definition unless they agreed to be part of the injury sample. China contends that in the original proceedings the Appellate Body condemned the Commission's approach in defining the domestic industry on the basis of willingness to be included in the injury sample, as opposed to the actual exclusion of such producers from that definition.[407] The European Union asserts that what the Appellate Body found to be inconsistent with Article 4.1 of the AD Agreement was the actual exclusion of European producers that came forward within the relevant deadline and which provided the required information, not the statement in the notice of initiation to the effect that only producers that agreed to be included in the injury sample would be considered as cooperating and included in the domestic industry definition.[408] The European Union claims that it complied with the DSB recommendations and rulings because in the review investigation the Commission defined the domestic industry as including all producers that came forward within the deadline given, regardless of whether they were willing to be part of the injury sample.

7.293. The issue before the Panel is whether or not the European Union complied with the DSB recommendations and rulings with regard to the definition of domestic industry. We start our assessment by recalling the Appellate Body's findings in the original proceedings regarding the definition of domestic industry. In those proceedings, the Appellate Body noted that a 27% share in total production was "at the lower end of the spectrum" but that such a figure could suffice to establish "major proportion" within the meaning of Article 4.1 provided the definition "[did] not introduce material risks of distortion".[409] The Appellate Body then observed that the Commission had defined the domestic industry on the basis of producers that had fully cooperated in the investigation.[410] In the Appellate Body's view:

> [B]y defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the

[405] China's first written submission, para. 457.
[406] Ibid. para. 447.
[407] China's second written submission, para. 310.
[408] European Union's first written submission, para. 240.
[409] Appellate Body Report, *EC – Fasteners (China)*, para. 422.
[410] Ibid. para. 426.

> domestic producers that introduced a material risk of distortion. First, we fail to see the reason why a producer's willingness to be included in the *sample* should affect its eligibility to be included in the *domestic industry*, which is a universe of producers that is by definition wider than the sample. As China argues on appeal, the Commission's approach "confuses two different steps", because the domestic industry should be defined first, before a sample may be selected from the producers included in the domestic industry.[411] (footnote omitted, italic in original, underlining added)

7.294. The Appellate Body noted that more producers had come forward than those that had been included in the Commission's domestic industry definition. Of the 75 producers that had come forward, the Commission had excluded 25 from the domestic industry definition for reasons including unwillingness to be included in the sample.[412] The Appellate Body reiterated that:

> [T]he sample of domestic producers is a smaller universe than the domestic industry, and the unwillingness to be part of the sample should not affect whether a producer should be part of the domestic industry ... Thus, by including only those willing to be part of the *sample* in the domestic industry definition, the Commission's approach shrank the universe of producers whose data could have been used for part of the injury determination.[413] (italic in original)

7.295. We note that the Appellate Body found the Commission's domestic industry definition to be inconsistent with Article 4.1 of the Agreement because of the exclusion of domestic producers that came forward within the deadline but which were not willing to be included in the injury sample. In other words, it was the actual exclusion of such producers that lead the Appellate Body to find a violation of Article 4.1 of the Agreement in the original proceedings. We also note, however, that the legal reasoning on which this finding was based is not necessarily limited to instances where the IA actually excludes from the domestic industry definition producers that come forward within the relevant deadline. The Appellate Body stated that by identifying the domestic industry on the basis of willingness to be included in the injury sample the Commission imposed a self-selection process among the domestic producers that introduced a material risk of distortion. Applying this reasoning to the facts of the original investigation, the Appellate Body found that the Commission had erred by excluding from the definition of domestic industry those producers that had come forward within the deadline but which were not willing to be included in the injury sample.

7.296. We find the Appellate Body's reasoning to be persuasive and will apply it to the facts presented in the review investigation. It is uncontested that in the review investigation the Commission did not issue a new call to domestic producers willing to participate in the investigation. The Commission re-defined the domestic industry on the basis of all European producers that had come forward within the deadline given in the notice of initiation of the original investigation. None of those producers was excluded from the new definition of domestic industry. The fact remained, however, that the boundaries of the Commission's domestic industry definition were set by the notice of initiation of the original investigation. The producers that the Commission included in the new definition of domestic industry were those that had come forward after the issuance of the original notice of initiation, which stated clearly that only those producers that agreed to be part of the injury sample would be considered as cooperating. To us, this shows that the self-selection, or the mixing of the definition of domestic industry and the establishment of an injury sample that the Appellate Body identified in connection with the original investigation, continued to exist in the review investigation. In our view, therefore, the Commission's domestic industry definition in the review investigation also continued to suffer from a self-selection process that introduced a material risk of distortion.

7.297. The fact that, as argued by the European Union, certain EU producers came forward within the relevant deadline and presented information to the Commission although they were unwilling to be part of an injury sample does not eliminate the risk of distortion in the process of defining the domestic industry. The European Union seeks to find support in the panel report in *China – Autos (US),* wherein the panel rejected the argument that the registration requirement imposed by the Chinese IA introduced a material risk of distortion by using a process capable of

[411] Appellate Body Report, *EC – Fasteners (China)*, para. 427.
[412] Ibid. paras. 428-429.
[413] Ibid. para. 429.

leading to self-selection among domestic producers in defining the domestic industry[414], and invites this Panel to reject China's claim on the same basis.[415] China contends that in the investigation at issue in *China – Autos (US)* the IA had not defined the domestic industry on the basis of willingness to be included in the injury sample and that therefore that panel's findings are not relevant to the present claim.[416] We do not find support for the European Union's position in *China — Autos (US)*. We note that the panel in that case examined a registration requirement which "require[d] interested parties to come forward by a deadline and make themselves known to the IA to be considered part of the domestic industry".[417] The panel observed that an IA "must be allowed some flexibility in how it ensures an orderly conduct of its investigations, for instance by establishing deadlines for interested parties to come forward to be considered for inclusion in the domestic industry".[418] It reasoned "merely that domestic producers might choose not to participate does not mean that the registration requirement leads to a definition of domestic industry inconsistent" with the AD Agreement.[419] Importantly, the panel added that "[p]rovided a registration requirement strikes an appropriate balance between the right of interested parties to participate in an investigation, and administrative efficiency, we see nothing in the relevant provisions that would preclude it".[420] We are looking at something different from a registration requirement. In this case, the domestic industry was defined on the basis of producers that came forward and that agreed to be part of an eventual injury sample - clearly a more onerous undertaking than simply registering before a deadline because, in addition to registering, it requires a commitment to provide extensive information that the IA will subsequently request. It seems to us that the facts before us dictate a different conclusion from that in *China — Autos (US)*, for the balance between orderly conduct of investigations and administrative efficiency found to exist in that case is not achieved with the more onerous requirements imposed on domestic producers in this case. Under the circumstances, we are not persuaded by the EU's argument based on the reasoning of the panel in *China – Autos (US)*.

7.298. The European Union also refers to the Appellate Body report in *US – Offset Act (Byrd Amendment),* finding support in the Appellate Body's rejection there of the view that a domestic producer's motivation in deciding to support an application for the initiation of an investigation was relevant to determining whether there was a violation of Article 5.4 of the AD Agreement.[421] We recall that Article 5.4 addresses the degree of support or opposition on the part of domestic producers to an application for the initiation of an anti-dumping investigation, which is commonly referred to as "standing". We do not see a parallel in *US — Offset Act (Byrd Amendment)* to our inquiry in this case. We have found that there was a risk of material distortion in the manner in which the domestic industry was defined because of the requirement to agree to be part of an injury sample. We do not thereby suggest that the domestic producers' motivation *per se* is relevant to finding a violation of Article 4.1 of the AD Agreement. Nor does China make such an argument.[422] Moreover, the definition of domestic industry is made after the initiation of an investigation and is wholly unrelated to the issue of standing. We therefore do not find the Appellate Body's reasoning in *US – Offset Act (Byrd Amendment)* to be relevant to the resolution of the issue before us.

7.299. For these reasons, we find that by defining the domestic industry on the basis of domestic producers that came forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1 of the AD Agreement. Further, we consider that a domestic industry definition based on a self-selection which introduced a material risk of distortion to the IA's injury analysis would necessarily render the resulting injury determination inconsistent with the obligation to make an objective injury analysis based on positive evidence laid down in Article 3.1 of the AD Agreement.[423] We therefore also conclude that the Commission's injury

[414] Panel Report, *China – Autos (US)*, paras. 7.213-7.214.
[415] European Union's first written submission, para. 250.
[416] China's second written submission, paras. 326-327.
[417] Panel Report, *China – Autos (US)*, para. 7.214.
[418] Ibid. para. 7.214.
[419] Ibid. para. 7.214.
[420] Ibid. para. 7.214.
[421] European Union's second written submission, paras. 200-201.
[422] China's opening statement, para. 102.
[423] This view is consistent with the Appellate Body's interpretation of Article 3.1 of the AD Agreement in the original proceedings. Appellate Body Report, *EC – Fasteners (China)*, para. 414.

determination, based on the data obtained from a wrongly-defined domestic industry, was inconsistent with Article 3.1 of the AD Agreement.[424]

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

i. The European Union acted inconsistently with Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products;

ii. The European Union violated Articles 6.4 and 6.2 of the AD Agreement by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products;

iii. The European Union violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values;

iv. The European Union violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge;

v. The European Union's definition of domestic industry was inconsistent with Article 4.1 of the AD Agreement and the resulting injury determination was inconsistent with Article 3.1 of the AD Agreement.

8.2. For the reasons set forth in this Report, the Panel further concludes as follows:

i. China has not established that by failing to ensure that the information provided by Pooja Forge concerning the list and characteristics of its products was made available promptly to the Chinese producers, the European Union acted inconsistently with the obligation set forth in Article 6.1.2 of the AD Agreement;

ii. China has not established that by failing to compare the prices of standard fasteners with the prices of standard fasteners in calculating dumping margins for the Chinese producers in the review investigation at issue, the European Union acted inconsistently with Article 2.4 of the AD Agreement;

iii. China has not established that by failing to make adjustments for differences that affected price comparability, the European Union acted inconsistently with Article 2.4 of the AD Agreement.

8.3. Having found a violation of Article 6.5 with respect to the confidential treatment of information submitted by Pooja Forge regarding the list and characteristics of its products, the Panel refrains from making a finding with respect to China's claim under Article 6.5.1 of the AD Agreement concerning the non-confidential summary of the same information. Similarly, having found that the European Union violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge, the Panel refrains from addressing China's allegation that by doing so, the Commission also violated Article 2.4 of the AD Agreement.

8.4. Our findings of violation of the AD Agreement demonstrate that the measure taken by the European Union to comply with the DSB recommendations and rulings is inconsistent with the AD Agreement. To the extent they have not been implemented, those recommendations and rulings remain operative.

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[424] In this regard, we find support in the panel reports in *EC – Salmon (Norway)* and *China – Autos (US)*. See, Panel Reports, *EC – Salmon (Norway)*, para. 7.124 and *China – Autos (US)*, para. 7.210.

WORLD TRADE ORGANIZATION

WT/DS414/RW/Add.1

31 July 2015

(15-3957)

Original: English

CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS414/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES (WT/DS414)
RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

WORKING PROCEDURES OF THE PANEL

1. In its proceedings, the Panel 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

2. The deliberations of the Panel 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 dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, 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.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the 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 Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have 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

6. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

7. 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 Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

9. 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 Panel 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 should be raised promptly in writing, preferably 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.

10. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel 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 to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, 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 Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, 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 questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes 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 Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

16. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel 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 Panel, 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 Panel, 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 Panel, 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 Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes 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 Panel.

Descriptive part

17. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

18. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary submitted by each party of both opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

19. 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 Panel. 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.

20. The Panel reserves 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 Panel for which a deadline may not be specified in the timetable.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 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 dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, 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, and cc'd to XXXXXX and XXXXXX. 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 Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel 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 Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits 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 dispute.

ANNEX A-2

CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES (WT/DS414) RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. 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 investigations agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute 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 investigations at issue in this dispute.

4. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

5. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

6. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

8. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. On November 16, 2012, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* ("*China – GOES*") (DS414), and found that China imposed antidumping and countervailing duties on U.S. exports of grain oriented flat-rolled electrical steel ("GOES") in a manner that breached China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). As a result, the DSB recommended that China bring its measures into conformity with its obligations under these agreements.

2. Instead of complying with the DSB's recommendations and rulings, China did the opposite: on July 31, 2013, China's Ministry of Commerce ("MOFCOM") issued a *Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States* ("Re-determination") that suffers from many of the same flaws as the original investigation, and as a result, continues to impose antidumping and countervailing duties on imports of GOES in a WTO-inconsistent manner.

3. These breaches include MOFCOM's findings that the imports subject to investigation (the "subject imports") had adverse effects on prices of the domestic like product; that the domestic industry was materially injured in 2008; and that there was a causal relationship between the subject imports and any material injury to the domestic industry in any part of the period of investigation. The breaches also include MOFCOM's failures to disclose certain facts, and to explain its Re-determination.

4. Thus, from a WTO compliance standpoint, the situation is the same as it was in the original proceedings: China still imposes antidumping and countervailing duties on imports of GOES from the United States through measures that are inconsistent with the covered agreements. U.S. companies, therefore, continue to lose sales and market share in China because of these WTO-inconsistent duties.

5. In light of the evidence and arguments presented below, the United States respectfully requests that the Panel find that China's Re-determination fails to comply with the DSB's recommendations and rulings in *China – GOES*, and is inconsistent with China's WTO obligations.

II. REVIEW UNDER ARTICLE 21.5 OF THE DSU

6. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply.

7. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel should reach the same conclusions as the original panel. Moreover, in this dispute, one question is whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence." Accordingly, investigating authorities in antidumping and countervailing duty investigations may have to consider conflicting arguments and evidence and will need to exercise discretion. However, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

III. MOFCOM'S INJURY RE-DETERMINATION FAILS TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS AND IS INCONSISENT WITH CHINA'S WTO OBLIGATIONS

A. MOFCOM's Revised Price Effects Analysis Is Inconsistent with China's Obligations Under Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

8. In its analysis, MOFCOM concluded that the subject imports had adverse effects on the domestic industry's prices in three ways: (i) the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009, as evidenced by a cost-price squeeze experienced by the domestic industry in those periods; (ii) the 5.56 percent increase in subject imports' market share in 2008 drove the domestic industry to cut prices by 30.25 percent in the first quarter of 2009, resulting in price depression; and (iii) the pricing policies of subject foreign producers in the first quarter of 2009, as indicated by certain verification documents, drove domestic producers to cut their prices in the first quarter of 2009, also resulting in price depression.

9. MOFCOM has failed to meaningfully address and remedy the numerous deficiencies that the DSB found in the original determination. Its findings regarding the price effects of subject imports are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, as discussed below.

1. An Investigating Authority's Consideration of Price Effects Must Be Based on "Positive Evidence" and Must "Involve an Objective Examination."

10. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement impose two important requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence." The second requirement is that the injury determination involves an "objective examination" of the volume of the dumped or subsidized imports, their price effects, and their impact on the domestic industry.

2. MOFCOM's Finding That the Volume of Subject Imports Suppressed Domestic Prices in 2008 and the First Quarter of 2009 Does Not Rest on an Objective Examination Based on Positive Evidence

a. MOFCOM's Volume-Based Price Suppression Analysis Is Flawed

11. MOFCOM's analysis is seriously flawed. In its Re-determination, MOFCOM seems to take the position that a price effects analysis can be conducted without taking into account the relationship between the prices of subject imports and the prices of the domestic like product. In considering the effect of the subject imports on prices under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, the investigating authority shall consider evidence as to that effect, such as evidence of the prices of imported products compared to the prices of domestic products. An investigating authority cannot determine that subject imports had a particular price effect while ignoring the evidence as to the actual prices of imports compared to domestic products. Yet MOFCOM ignored the price comparison evidence altogether in its Re-determination.

12. Leaving aside the fundamental problem of MOFCOM's complete failure to conduct an analysis of the relationship between prices of subject imports and the domestic like product, MOFCOM's analysis also suffers from other serious flaws. MOFCOM's attempt to show that the decline in the price-cost differential in 2008 was not attributable to Baosteel's startup costs is unpersuasive. MOFCOM's attempt to show that the domestic industry did not exercise price restraint for its own benefit is also unpersuasive.

b. MOFCOM Fails to Show that Any Price Suppression Was Linked to Subject Imports

13. Moreover, MOFCOM's price suppression analysis suffers from a more fundamental flaw because it fails to show that any price suppression was the effect of subject imports. MOFCOM simply assumed that any price suppression was linked to subject imports. Notably, MOFCOM has now disavowed making any price comparisons between the subject imports and the domestic like product. MOFCOM admits that it "neither conducted a comparison of the price level of the subject

merchandise and the domestic like product nor did it issue any finding on 'low price' or price cutting." In other words, MOFCOM actually has no statistical data or evidence showing that the prices of subject imports were adversely affecting the prices of the domestic like product.

c. MOFCOM's Theory that Subject Imports Caused Price Suppression Has No Basis

14. In the absence of any evidence showing that the prices of subject imports were adversely affecting the prices of the domestic like product, MOFCOM has simply proffered a theory that the increase in the subject imports' volume and market share in 2008 caused the prices of the domestic like product to be suppressed. There are several problems with MOFCOM's analysis.

15. The data for the first quarter of 2009 demonstrates an absence of price competition between subject imports and the domestic like product. Although the domestic industry's prices dropped by 30.25 percent, and the prices of subject imports declined by only 1.25 percent, this sharp divergence in prices did not translate into significant shifts in market share. The domestic industry gained 1.04 percentage points of market share, and subject imports gained 1.17 percentage points – both at the expense of nonsubject imports. If price were an important factor in purchasing decisions, the drastic decline in the domestic industry's prices should have caused a much more significant shift in sales and market share in favor of the domestic industry.

16. The Appellate Body recognized that price movements in the first quarter of 2009 indicated that subject imports and the domestic product were not competing on the basis of price. At no point in its analysis, however, has MOFCOM attempted to address this fundamental flaw. Instead, MOFCOM relies on three arguments in an attempt to show that subject imports were affecting the prices of the domestic like product. First, it contends that there was parallel pricing between subject imports and the domestic product. Second, it argues that certain documents obtained during its verification of domestic producers show that respondents had adopted a pricing strategy to set price lower than those of the domestic product. Finally, it claims that a partial overlap in customers proves that price was important in purchasing decisions. Each of these arguments is unpersuasive, as discussed below.

d. MOFCOM's Reliance on Parallel Pricing is Unsubstantiated

17. With regard to parallel pricing, MOFCOM asserts that the trends in the prices of the subject imports and the domestic product are "consistent" or "fundamentally consistent." MOFCOM elaborates on this by stating: "with regard to the change in the average price trend, from 2006 to 2008, the trend of change between the subject merchandise and the domestic like product was consistent and the rate of change was similar, indicating that competition existed between the subject merchandise and the domestic like product."

18. In its report, however, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis ... there is no basis on which to draw any such conclusion in this case." MOFCOM's reliance on parallel pricing is just as unsupported in the Re-determination as it was in the original determination. In short, MOFCOM's reliance on parallel pricing to show that subject imports affected domestic prices is not supported by positive evidence.

e. Any Evidence of a Supposed Pricing Policy is Not Probative

19. With regard to evidence of a pricing policy by respondents, MOFCOM points to documents that it obtained during verification (a contract between a Russian trading company and a Chinese customer, and three sets of price negotiation documents between a Chinese producer and its customers), and states that these documents show that "prices have significant influence on the purchase decisions of downstream users." An examination of these documents, however, shows that they prove nothing of the sort.

f. A Partial Overlap of Customers Does Not Provide Any Support for MOFCOM's Conclusion that Subject Imports are Competitive with Domestic Like Product

20. MOFCOM also cites to a partial overlap in customers to support its assertion that price was an important factor in purchasing decisions. This partial overlap in customers, however, does not prove what MOFCOM says it does. The fact that some customers – be they distributors of electrical equipment or electrical utilities – buy both from subject sources and from domestic producers does not establish that there is direct competition for sales to these purchasers by domestic and subject suppliers, that the domestic and subject suppliers were selling the same products, or that price is an important factor in purchasing decisions.

21. MOFCOM should have conducted a thorough inquiry into the relative importance of price and non-price factors in purchasing decisions, rather than simply attributing the price suppression to the subject imports. But the Re-determination demonstrates that MOFCOM failed to do this, thereby underscoring the lack of objectivity of its examination. Because MOFCOM failed to show that subject imports "have explanatory force" for the suppression of domestic prices, MOFCOM's analysis is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

3. MOFCOM's Finding that Price Depression in the First Quarter of 2009 Was an Effect of Subject Imports Does Not Rest on an Objective Examination Based on Positive Evidence

22. Instead of pointing to any evidence or providing a substantive analysis of the purported link between the loss of market share in 2008 and the domestic price drop in interim 2009, MOFCOM merely asserted that "[t]he evidence that the Investigation Authority obtained fully support this determination," and that its finding was based on a "comprehensive rather than isolated analysis of the situation in 2008 and the first quarter in 2009." MOFCOM never explains what this "evidence" is, or the nature of the "comprehensive analysis" that it supposedly conducted.

23. As the original panel and the Appellate Body explained, merely showing the existence of a significant depression in prices does not satisfy the requirements of the covered agreements. An authority must also show that such price depression is an effect of the subject imports. MOFCOM has not done so here. MOFCOM's finding that the depression of domestic prices in the first quarter of 2009 was attributable to the domestic industry's loss of market share to subject imports in 2008 is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

4. MOFCOM's Finding That the Pricing Policies of Subject Foreign Producers Caused Price Depression in Interim 2009 Does Not Rest on an Objective Examination Based on Positive Evidence

24. MOFCOM's reliance on an alleged policy of price undercutting by subject imports to explain its finding of price depression in the first quarter of 2009 is as misplaced as it was in MOFCOM's original determination. As the Appellate Body noted in its analysis of this issue, in light of the pricing dynamic in that period – where the price of subject imports declined by 1.25 percent, while the price of domestic products plunged by 30.25 percent, and subject imports oversold the domestic product – there was no basis to conclude that a policy of price undercutting could explain depressive or suppressive effects on domestic prices.

25. In addition to the fundamental implausibility of MOFCOM's reasoning, there are also other defects in its analysis, which cast further doubt on whether MOFCOM conducted an objective examination based on positive evidence. The price negotiation documents also fail to support MOFCOM's claims.

5. Conclusion

26. In sum, MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence. Furthermore, MOFCOM's theories that a 5.56 percent increase in subject imports' market share in 2008 drove the domestic industry to cut prices

by 30.25 percent in the first quarter of 2009, or that the domestic industry was driven to do so by "pricing policies" of subject foreign producers, lack any foundation in the record. As a result, MOFCOM has not shown, through these findings, that "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." Accordingly, MOFCOM's analysis is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

B. MOFCOM's Analysis of the Impact of Subject Imports on the Domestic Industry is Inconsistent with China's Obligations Under Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement

27. MOFCOM's finding that the subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in breach of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

28. The "examination" contemplated by Articles 3.4 and 15.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury." MOFCOM failed to conduct such an examination with respect to its finding that the domestic industry was materially injured in 2008.

29. Additionally, an authority's factual findings under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement must comply with the "objective examination" and "positive evidence" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, respectively. MOFCOM's findings are not based on an objective examination and are not supported by positive evidence. MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective. It is distorted because factors that are identified as being indicative of material injury are not viewed in their proper context. It is selective because it ignores the fact that many of these factors showed that the domestic industry was performing well in 2008.

30. In sum, MOFCOM's "examination of the impact of the dumped imports on the domestic industry concerned" and "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" was not based on an "objective examination" of "positive evidence." MOFCOM's findings, therefore, are inconsistent with Articles 3.1 and 3.4 of the AD Agreement and 15.1 and 15.4 of the SCM Agreement.

C. MOFCOM's Revised Causation Analysis Is Inconsistent with China's Obligations Under Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement

31. For the reasons highlighted below, MOFCOM's causation analysis was not based on an objective examination of positive evidence, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or an examination of all relevant evidence, as required by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

1. An Investigating Authority's Causation Analysis Must Be Based on "Positive Evidence" and Must "Involve an Objective Examination."

32. An authority's factual findings under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement must comply with the "positive evidence" and "objective examination" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement respectively. As we demonstrate below, five aspects of MOFCOM's causation analysis fail to conform to these requirements.

2. MOFCOM's Causation Analysis Fails Because of its Reliance on its Defective Price Effects Findings

33. Because MOFCOM has not established that the imports under investigation had any significant price effects on the domestically produced product, a necessary element of its causal

link analysis fails. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

3. MOFCOM's Assertion That the Domestic Industry Was Prevented by Subject Imports from Realizing the Benefits of Economies of Scale Does Not Rest on an Objective Examination Based on Positive Evidence

34. At several points in the Re-determination, MOFCOM states that China's domestic GOES industry increased its production capacity, but that it was injured by subject imports because they prevented it from realizing attendant economies of scale. These are nothing more than conclusory assertions, unsupported by any factual analysis. Among the questions that MOFCOM leaves unaddressed are: which of the two domestic producers was prevented from realizing economies of scale? Why should the producer have reasonably expected to realize economies of scale? What should these economies of scale have been, and when should they have been realized?

35. In sum, MOFCOM's findings that the domestic industry was injured because it was prevented by subject imports from realizing the benefits of economies of scale does not rest on an objective examination based on positive evidence, and MOFCOM fails to demonstrate a causal relationship between subject imports and any such injury to the domestic industry. MOFCOM's findings are inconsistent with Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement.

4. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by the Domestic Industry's Overexpansion and Overproduction Continues to be Seriously Flawed

36. The original panel found that MOFCOM breached Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement by failing to conduct a non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's overexpansion and overproduction. China did not appeal the original panel's findings with regard to causation to the Appellate Body, nor has it fixed the deficiencies that the original panel found. MOFCOM's analysis of this factor in the Re-determination is marred by numerous errors and unsupported, conclusory statements, and continues to fall short of what is required by Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

5. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by Nonsubject Imports Is Inadequate

37. MOFCOM's Re-determination Disclosure make new disclosures concerning the volumes of nonsubject imports and the Re-determination relies on these data in finding that nonsubject imports did not affect the causal link between subject imports and material injury to the domestic industry. As before, MOFCOM's non-attribution analysis with respect to nonsubject imports is unpersuasive and is not based on an objective examination of the newly-disclosed evidence.

38. There are two significant problems with MOFCOM's analysis. First, MOFCOM's statement about the relative importance of subject and nonsubject imports since 2008 is demonstrably incorrect. Second, and more fundamentally, MOFCOM's analysis fails to address the inquiry that MOFCOM should have conducted, which is to ask how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry while the increasing and much greater quantity of nonsubject imports sold in 2008 at lower AUVs could have had no injurious effects.

39. Because MOFCOM's Re-determination is devoid of any such analysis of the effect of nonsubject imports, China failed to comply with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

D. MOFCOM's Failure to Disclose Essential Facts Violates Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement

40. China breached Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's injury Re-determination.

41. These facts are "absolutely indispensable" to MOFCOM's determination of material injury. Without such information, no affirmative determination could be made and no definitive duties could be imposed. The covered agreements require that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination. The aim of the requirement is "to permit parties to defend their interests."

42. The facts are "essential facts" in that they are "facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures." They formed part of the basis for MOFCOM's determination of material injury and decision to apply the definitive measures at issue in this dispute. MOFCOM was required to disclose the essential facts that supported its price effects examination and causation analysis, so that interested parties could defend their interests.

E. MOFCOM's Findings are Inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement

43. The original panel found that China breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because MOFCOM did not adequately explain the basis for its "low price" findings for its decision that nonsubject imports were not a cause of injury. The Appellate Body agreed with the panel, finding that MOFCOM had failed to disclose all relevant information on the matters of fact relating to its conclusion that there had been price undercutting.

44. MOFCOM's Re-determination suffers from the same flaws. It does not explain the matters of fact and law and reasons which led to the imposition of antidumping and countervailing duties. These issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. This information was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and material injury. As such, MOFCOM's failure to disclose the information in its final determinations therefore breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

IV. CONCLUSION

45. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures fail to comply with the recommendations and rulings of the DSB; and are inconsistent with China's obligations under the SCM Agreement and Antidumping Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In its first written submission, the United States demonstrated that a number of aspects of the Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States ("Re-determination") that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States are inconsistent with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Accordingly, China has failed to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") to bring its measures into conformity with China's obligations under the AD and SCM Agreements.

2. China's responses are characterized by unsubstantiated assertions, and a failure to address the substance of the U.S. arguments. Contrary to China's assertions, the issues in this dispute do not involve questions of how to interpret conflicting evidence, and the United States is not asking the Panel to second-guess China's Ministry of Commerce ("MOFCOM"). Instead, on issue after issue, the United States has proven that MOFCOM's analysis does not rest on an objective examination based on positive evidence. MOFCOM's analysis is not based on data that provide an accurate and unbiased picture, and has not been conducted without favoring the interests of any party.

3. China's responses suffer from a fundamental weakness. Despite the findings of the DSB that MOFCOM had not provided positive evidence to support the findings and conclusions contained in its original determination, MOFCOM chose to base its revised findings on essentially the same faulty record. MOFCOM continued to rely on evidence that the DSB specifically identified as having dubious probative value, without attempting to rectify the obvious flaws. Instead of rectifying its evidentiary shortcomings, in its Re-determination, MOFCOM simply deleted references to "low prices," and switched its rationale to rely solely on the volume of subject imports. The little new information contained in the revised materials only serves to underscore the fact that the deficiencies of the original determination have not been remedied in MOFCOM's Re-determination.

4. When the Panel scrutinizes MOFCOM's Re-determination and China's arguments, the United States is confident that the Panel will agree that China failed to comply with the DSB's recommendations and rulings as well as China's obligations under the AD and SCM Agreements. In this submission, the United States focuses on some of the key issues in this dispute, including those that have arisen as a result of China's first written submission.

II. CHINA CANNOT DEFEND MOFCOM'S REVISED PRICE EFFECTS ANALYSIS

5. As demonstrated in the U.S. first written submission, China breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's price effects analysis was fundamentally flawed in a number of respects. In response, China offers arguments that are unconvincing and do not serve to rebut the U.S. showing that China's price effects analysis in the Re-determination fell far short of meeting China's WTO obligations.

A. China's Disregard of Price Comparisons is Based on a Flawed Interpretation of the Covered Agreements and Does Not Reflect an Objective Examination Based on Positive Evidence

6. According to China, an authority may choose to conduct a price effects analysis that does not even consider the record evidence concerning the relative prices of imports and domestic products. The text of the covered agreements is the starting point for showing that China's legal position is incorrect. First, under Article 3.2, the question to be examined is the "effect of the

dumped imports on prices in the domestic market for like products." Second, Article 3.1 states that an injury determination must be based on "positive evidence" and must involve an "objective examination" of this question of price effects. Third, Article 3.2 contains some details on what factors are relevant to determining what, if any, effects imports may have had on domestic prices. Fourth, Article 3.2 closes with the statement that "No one or several of these factors can necessarily give decisive guidance." The common sense reading of these provisions is that an objective assessment of all of the relevant factors would require an evaluation of evidence on relative prices.

7. The United States also notes that China provides no support for its position in any prior panel or Appellate Body reports. The United States further notes that the fact that MOFCOM neglected to undertake price comparisons suggests that available evidence of prices would have weakened the "explanatory force" of subject imports for any adverse price effects. Finally, China misrepresents the U.S. position in this dispute.

B. China Fails to Show that Subject Imports Had "Explanatory Force" for Any Price Suppression

8. In its first written submission, the United States showed that MOFCOM's price effects analysis in its Re-determination contains a crucial gap because it fails to show that subject imports had any "explanatory force" for the asserted price effects. In essence, MOFCOM's analysis consisted of little more than its observations that: (i) the volume and market share of subject imports increased in 2008; (ii) the domestic industry experienced price suppression and depression; and (iii) consequently subject imports must have caused these price effects. MOFCOM ignored compelling evidence in the record of an absence of price competition between subject imports and the domestic like product. Instead of addressing the evidence, China attempts to explain away this fundamental gap in MOFCOM's analysis.

1. Market Share Shifts in 2008 Do Not Demonstrate a Linkage Between Subject Imports and Prices of the Domestic Like Product

9. China contends that by merely noting the domestic industry's loss of market share to subject imports in 2008 "MOFCOM more than met its burden of showing that subject imports had some explanatory force." MOFCOM's analysis contains a crucial flaw. MOFCOM simply *assumed* that the increasing volume and market share of subject imports in 2008 had explanatory force for the alleged price suppression experienced by the domestic industry in 2008 and the first quarter of 2009. The problem with MOFCOM's so-called analysis is that coincidence is not tantamount to evidence of price effects, nor does it automatically amount to explanatory force. The sharply divergent price trends, along with the muted market share response, in the first quarter of 2009 demonstrated the absence of price competition between subject imports and the domestic like product.

10. Moreover, China's efforts to discount the relevance of the Appellate Body's discussion of the price movements in the first quarter of 2009 are unavailing. The Appellate Body specifically addressed China's argument regarding "the importance of the increase in subject import volume to MOFCOM's finding of significant price depression and suppression," and did not find it persuasive.

11. Additionally, China makes much of its characterization that the subject imports' gain in market share and the domestic industry's loss of market share in 2008 were of similar magnitude. But China's characterization is misleading because it ignores a key fact. China has failed to acknowledge that the overall market was experiencing substantial growth, and that sales of both imported products and domestic products were increasing. In short, MOFCOM can point to no evidence linking the increase in the subject imports' market share in 2008 to any price suppression in 2008 or the first quarter of 2009.

2. MOFCOM's Findings in Connection With its Like Product and Cumulation Determinations Do Not Support MOFCOM's Assumption that Competition Was Based on Price

12. China maintains that MOFCOM's findings in two different contexts – its determination of the domestic like product, and its determination to cumulate imports from the United States and

Russia – support a conclusion that subject imports and the domestic like product were competitive for purposes of MOFCOM's price effects analysis. China's contention is unfounded. MOFCOM's like product and cumulation analyses do not go beyond very general similarities between subject imports and the domestic like product, and do not include any meaningful consideration of the nature of price competition – or lack thereof – between these products. China's assertion that these analyses were sufficient to show that there was direct competition between subject imports and the domestic like product – such that subject imports could be found to have "explanatory force" for price effects – is without any merit.

3. Any Findings of "Parallel Pricing" Do Not Show a Competitive Relationship Based on Price

13. As noted in the U.S. first written submission, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis … there is no basis on which to draw any such conclusion in this case." China claims that its findings on parallel pricing have "expanded significantly." This "expanded analysis," however, is merely rhetoric regarding the same conclusory statements made in the original determination. MOFCOM's reliance on parallel pricing, thus, is just as unsupported in the Re-determination as it was in the original determination.

14. Moreover, MOFCOM's theory of parallel pricing has two problems. First, the price trends that it identifies are at such a level of generality as to have no probative value. The second flaw in MOFCOM's theory is that it simply mischaracterized the data, or characterized it in such a broad-brush fashion as to be of little value. MOFCOM stated that "[i]n 2007 and 2008, the rate change in the price of the subject merchandise was close to that of domestic like products;" and that "from 2006 to 2008, the trend of change between the subject merchandise and the domestic like product was consistent and the rate of change was similar." This is clearly a mischaracterization of the data.

15. In addition, China urges the Panel not to "second-guess" MOFCOM. But, contrary to the way in which China seeks to portray this issue, this is not an instance where there are divergent but reasonable ways to evaluate the evidence. In concluding that the data discussed above showed that there was parallel pricing sufficient to establish the existence of a competitive relationship between subject imports and the domestic like product, MOFCOM failed to engage in an objective examination.

4. China's Reliance on Alleged Pricing Policies is Misplaced

16. The United States showed in its first submission that the four verification documents relied upon by MOFCOM were not probative of price competition between the subject imports and the domestic like product. China fails to rebut the U.S. argument. The United States noted at the outset that these verification documents pertain only to the first quarter of 2009, and thus shed little, if any, light on competitive conditions in 2008, the part of the period of investigation that MOFCOM now deems to have "more evidentiary value for determining injury and causal link." China fails to address this point. Further, China's assertion that the United States "concedes … that purchasers were using *offers for subject merchandise* to negotiate for lower domestic prices" is incorrect. Moreover, the original panel and the Appellate Body both recognized that the probative value of the "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the price of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.

5. Evidence of a Partial Customer Overlap Does Not Support a Finding of a Competitive Relationship Based on Price

17. The United States showed in its first submission that a partial overlap of customers does not provide any support for MOFCOM's conclusion that subject imports compete with the domestically produced product on the basis of price. China's response to this is first to accuse the United States of engaging in "speculation." This is nothing more than a disingenuous attempt to divert attention from the gap in MOFCOM's reasoning. China then conflates the customer overlap issue with MOFCOM's consideration of a different issue – namely the question of whether there were certain specialty products that the Chinese industry did not produce. Neither the partial overlap of

customers nor MOFCOM's findings that the Chinese GOES industry produces certain specialty products supports MOFCOM's conclusion that subject imports are competitive with the domestic like product.

6. Conclusion

18. MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence. MOFCOM has not shown that "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." When confronted with the flaws and insufficiencies in each component of MOFCOM's analysis discussed above, China often resorts to arguing that the aspect of the analysis in question is only part of a multi-faceted discussion of the record as a whole, or that MOFCOM "holistically" reviewed all of the evidence. If the constituent parts of MOFCOM's analysis are unsupported by positive evidence, not based on an objective examination, or otherwise inconsistent with the WTO agreements, these appeals to the "big picture" cannot save MOFCOM's analysis. Accordingly, China has acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

C. MOFCOM's Finding that Price Depression in the First Quarter of 2009 Was an Effect of Subject Imports Is Inconsistent with the Obligation to Base Findings on Positive Evidence and an Objective Examination

1. China's Effort to Link Price Depression in the First Quarter of 2009 to Market Share Shifts in 2008 Falls Short

19. Although China contends that MOFCOM has "significantly expanded and clarified its reasoning" of price depression in the Re-determination, this is not so. According to China, the increasing volume and market share of subject imports in 2008 constitute "evidence," and MOFCOM's conclusion that the domestic industry slashed its prices by 30.25 percent in response constitutes the requisite "analysis." However, the fact that there is no evidence that the 30.25 percent drop in the domestic industry's prices in the first quarter of 2009 was in any way related to the gain in the subject imports' market share in 2008 undermines MOFCOM's theory. MOFCOM has essentially concocted a reason to link two events with no apparent cause-effect relationship. This does not constitute "analysis." The United States explained in its first submission that MOFCOM's price depression analysis was further marred by its claim that price depression was caused by efforts of subject imports to undercut the price of the domestic product in the first quarter of 2009. China has failed to address this issue.

20. Moreover, the Appellate Body made clear that "Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices" and that "an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices." Notwithstanding MOFCOM's claim that it engaged in a "comprehensive" analysis, MOFCOM's consideration of the price depression issue is as unsupported as it was in the original injury determination.

2. MOFCOM's Finding That Alleged Pricing Policies Caused Price Depression in Interim 2009 Has No Foundation

21. China's assertion that "the pricing policy documents show the ways in which purchasers were using *subject import prices* to drive down domestic prices" is incorrect. The Appellate Body was clear that, in light of the pricing dynamic in the first quarter of 2009 – where the price of subject imports declined by 1.25 percent, while the price of domestic products plunged by 30.25 percent, and subject imports oversold the domestic product – there was no basis to conclude that a policy of price undercutting could explain depressive or suppressive effects on domestic prices.

22. China's contends that Panel and Appellate Body criticism of MOFCOM's reliance on pricing policy documents no longer apply because these criticisms allegedly focused on MOFCOM's old explanation involving "low price." China misreads the Appellate Body report. The Appellate Body's

analysis was not based on MOFCOM's "low price" findings in the original determination. In short, the Appellate Body's analysis is as relevant to the Re-determination as it was to MOFCOM's original injury determination.

III. CHINA CANNOT DEFEND MOFCOM'S REVISED IMPACT ANALYSIS

A. The United States Properly Challenges Revised Aspects of MOFCOM's Impact Analysis

23. China asserts that the United States improperly brings a new claim before this Panel. Specifically, China attempts to challenge on procedural grounds the U.S. demonstration that MOFCOM's Re-determination breaches Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement. China, for instance, asserts that "the introduction of a new claim at this stage of proceedings is contrary to basic principles of fairness and due process." China is incorrect. This claim, like other U.S. claims, is appropriate because the claim challenges aspects of China's compliance measures that are inconsistent with the covered agreements. Thus, China's arguments relating to claims that may be alleged under Article 21.5 of the DSU are misguided.

24. The United States raises a claim to address an aspect of China's compliance measure that is inconsistent with the covered agreements. MOFCOM's revised injury determination contains several changes. In light of these changes, the utility of the compliance proceedings would be "seriously undermined" if the Panel were unable to evaluate whether China's Re-determination on this aspect is consistent with the covered agreements.

B. China's Arguments Regarding the Impact of the Subject Imports on the Domestic Industry Fail

25. The United States showed in its first written submission that MOFCOM's examination of the factors enumerated in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement for 2008 is highly distorted and selective.

26. Contrary to China's argument, the United States is not arguing that it is not reasonable, or that it is distortive, for an authority to focus on the latter portion of its period of investigation when assessing injury. The United States *is* arguing that – when focusing on a recent period, or any period, for that matter – data must be viewed in their proper context. MOFCOM "focused on the trends in growth rates," or on the velocity of growth, without considering the trends in their proper context.

27. The "examination" contemplated by Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury." Additionally, an authority's factual findings under Articles 3.4 and 15.4 must comply with the "objective examination" and "positive evidence" requirements set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. MOFCOM's conclusion that the domestic industry experienced material injury in 2008 is not based on a thorough evaluation of the state of the industry in that year, is not based on a persuasive explanation, and is neither objective nor based on positive evidence.

IV. CHINA CANNOT DEFEND MOFCOM'S REVISED CAUSATION ANALYSIS

A. MOFCOM's Causation Analysis Fails Because of its Reliance on its Defective Price Effects Findings

28. MOFCOM's price effects analysis represented an important element of its overall injury determination, notwithstanding China's suggestion that it was merely "collateral." Because MOFCOM failed to establish that subject imports had any significant price effects on the domestically produced product, a necessary element of MOFCOM's causal link analysis is compromised. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by the covered agreements.

B. MOFCOM's Assertion That the Domestic Industry Was Prevented by Subject Imports from Realizing the Benefits of Economies of Scale Does Not Rest on an Objective Examination Based on Positive Evidence

29. In the Re-determination, MOFCOM made a number of conclusory assertions to the effect that the increased output and capacity of the domestic industry did not produce the corresponding economies of scale. MOFCOM's assertions were not supported by any factual analysis. MOFCOM's findings about economies of scale are nothing more than conclusory assertions, unsupported by any factual analysis. MOFCOM's findings that the domestic industry was injured because it was prevented by subject imports from realizing the benefits of economies of scale does not rest on an objective examination based on positive evidence.

C. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by the Domestic Industry's Overexpansion and Overproduction Continues to be Seriously Flawed

30. The United States showed in its first written submission that MOFCOM's non-attribution analysis with respect to the injury caused by the domestic industry's overexpansion and overproduction was marred by errors and unsupported, conclusory statements. Rather than addressing the flaws in MOFCOM's analysis, China, for the most part, asserts that, because the covered agreements do not specify any particular methodology, MOFCOM was free to address this issue in any manner. China's argument misses the point. The covered agreements provide that an authority's analysis must be based on positive evidence and an objective analysis. MOFCOM's analysis did not meet these fundamental standards. Thus, MOFCOM's redetermination is inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement by having failed to conduct an objective non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's over-expansion and over-production.

D. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by Nonsubject Imports Is Inadequate

31. MOFCOM's non-attribution analysis makes no commercial sense. MOFCOM failed to address the question of how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry while the increasing and much greater quantity of nonsubject imports in 2008, sold at lower AUVs than subject imports, could have had no injurious effects. MOFCOM also failed to explain how the smaller quantity of subject imports in the first quarter of 2009 could have had injurious effects on the domestic industry, while the much greater quantity of nonsubject imports in that period allegedly had no injurious effects. Additionally, China's argument for using market share data conflates shifts in market share with absolute market share data. Had MOFCOM examined the relative market shares of subject and nonsubject imports, it would have been apparent that nonsubject imports were a much more significant factor in the market than subject imports in 2008 and the first quarter of 2009. Because of these flaws in MOFCOM's non-attribution analysis with respect to nonsubject imports, MOFCOM failed to comply with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

V. CHINA BREACHED ARTICLE 6.9 OF THE AD AGREEMENT AND ARTICLE 12.8 OF THE SCM AGREEMENT THROUGH MOFCOM'S FAILURE TO DISCLOSE THE ESSENTIAL FACTS

32. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by failing to disclose the "essential facts" forming the basis of MOFCOM's decision to apply definitive measures. The provisions dictate the timing of the disclosure, as such disclosure must take place "before a final determination is made." In addition, what constitutes "essential facts" are those facts that relate to the elements an authority is required to examine in the context of an injury analysis, which are set out in Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

A. China Cannot Defend MOFCOM's Failure to Disclose the Essential Facts Underlying its Injury Re-determination

33. The United States identified categories of essential facts that must have been taken into account by MOFCOM in its price effects and causation determinations. As the United States has explained, for each category of essential facts, China's disclosure was non-existent. As a result, China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same.

34. In its response, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the price trends of the subject imports and the domestic like product were the same. In short, though there may be some complications presented where essential facts are based in part on confidential information, the authority is not excused from its obligation to disclose to interested parties the essential facts which formed the basis of the decision to apply definitive measures.

MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale.

35. Again, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale.

"Sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009.

36. China cites a series of general statements in the preliminary disclosure that do nothing to reveal the essential facts supporting the existence of these alleged sales obstacles.

MOFCOM's conclusion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009.

37. MOFCOM fails to support its assertion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009.

MOFCOM's assertion that the price-cost differential for Wuhan decreased in 2008.

38. China points to a decline in gross profit, but it does not cite any essential facts to support its conclusion that Wuhan's price-cost differential decreased in 2008.

MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand.

39. Unsupported with a citation to the record, China asserts that "it was clear that the growth in domestic capacity in 2008 was actually less than the growth in overall in overall demand." It is unclear as to what data China is referring, particularly since the available data actually show capacity and output outstripping demand.

MOFCOM's division of responsibility for the inventory overhang.

40. China claims that "MOFCOM's preliminary disclosure document included extensive discussion on the cause of the domestic industry's inventory overhand." China, however, omits the fact that nowhere in the preliminary disclosure document does MOFCOM provide the data supporting its division of responsibility for the inventory overhang.

VI. CHINA BREACHED ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT AND ARTICLES 22.3 AND 22.5 OF THE SCM AGREEMENT

41. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement by failing to explain in sufficient detail the matters of fact that MOFCOM took into consideration in its injury Re-determination. These issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury Re-determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. In its response, China makes a series of statements that are unsupported by the record. The Re-determination does not support China's explanations. MOFCOM did not explain its findings in sufficient detail and, consequently, China has not satisfied the requirements of the covered agreements.

VII. CONCLUSION

42. For the reasons set forth in this submission and its first written submission, the United States respectfully requests the Panel to find that China's measures fail to comply with the recommendations and rulings of the DSB; and are inconsistent with China's obligations under the AD Agreement and SCM Agreement.

ANNEX B-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES AT THE SUBSTANTIVE MEETING

1. The United States begins by noting that we have seen this scenario before. The United States has commenced three dispute settlement proceedings against China concerning antidumping and countervailing duty measures on U.S. exports. Each of the disputes we have brought addresses similar problems under the same procedural and substantive provisions of the covered agreements.

2. In this dispute, the DSB found that China imposed antidumping and countervailing duties on U.S. exports of grain oriented flat-rolled electrical steel ("GOES") in a manner that breached China's obligations under the AD Agreement and the SCM Agreement. As a result, the DSB recommended that China bring its measures into conformity with its obligations under these agreements. However, instead of complying with the DSB's recommendations and rulings, China took a different track. China issued a re-determination of duties that suffers from the same basic flaws as the original investigation, and as a result, China continues to impose antidumping and countervailing duties on imports of GOES in a WTO-inconsistent manner.

3. As the Appellate Body has indicated, "[a] panel can assess whether an authority's explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation in the light of the facts and the alternative explanations that were before that authority." Here, a critical examination reveals that China's continued reliance on evidence that the DSB specifically identified as having dubious probative value, without attempting to rectify the obvious flaws, falls far short of compliance.

I. CHINA MISINTERPRETS ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT, AND 15.1 AND 15.5 OF THE SCM AGREEMENT

4. The United States has established that when examining the "positive evidence" relating to the effect of subject imports on prices in the market, an objective authority would compare the pricing levels of imports and domestically produced products. When properly interpreted, Articles 3.1 and 3.2 of the AD Agreement, and 15.1 and 15.2 of the SCM Agreement, require an authority to consider evidence of relative prices of subject imports and the domestic products as part of an objective examination of "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."

5. China, by contrast, is promoting an untenable interpretation of the covered agreements when it argues that an authority may choose to conduct a price effects analysis that ignores the question of the relative prices of imports and domestic products. Articles 3.2 and 15.2 do not provide that an authority may limit its analysis merely to a finding that price depression or price suppression is occurring. The text states that "no one or several of these factors can necessarily give decisive guidance." Accordingly, regardless of the final basis for a finding of adverse price effects, an authority needs to look at all relevant factors.

6. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement further reinforce that an analysis of price effects requires an analysis of relative prices. From any perspective, an obligation to conduct an "objective examination" based on "positive evidence" – when reviewing the price effects of one group of products on a second group of products – would include an examination of the relative prices of the two groups. Failing to do so would miss an important aspect of determining whether the two groups are price competitive, and whether subject imports have "explanatory force" for the occurrence of adverse price effects. This is especially true when, as in this dispute, the petitioner specifically alleged adverse price effects due to the low price of subject imports.

7. China misconstrues the Appellate Body's findings. China notes that the Appellate Body observed that one could find significant price effects either from a pricing element, a volume element, or a combination of the two. However, it does not follow from this observation that an authority is free to disregard all information regarding relative prices, even if it bases its price effects analysis on volume. If subject imports and the domestic products do not compete on price, as the evidence indicates in this dispute, then an unbiased authority would call into question the "explanatory force" of subject imports for any adverse price effects.

II. CHINA FAILS TO SHOW THAT SUBJECT IMPORTS HAD "EXPLANATORY FORCE" FOR ANY PRICE SUPPRESSION

8. Compelling evidence in the record of MOFCOM's investigation indicates an *absence* of price competition between subject imports and the domestic like product. The domestic industry's prices dropped by a staggering 30.25 percent, while the prices of subject imports declined by only 1.25 percent. Yet, this sharp divergence in prices did not translate into significant shifts in market share. If price were an important factor in purchasing decisions, the drastic decline in the domestic industry's prices should have caused a much more significant shift in sales and market share in favor of the domestic industry.

9. China's efforts to downplay the significance of what happened in the first quarter of 2009 – and to distance itself from the Appellate Body's observations – are unconvincing. China accuses the United States of "mechanically" applying the Appellate Body's findings, and argues that "the context is different" because MOFCOM's analysis of price effects in the redetermination "has been substantially revised and clarified." This is inaccurate. The only significant change in MOFCOM's price effects analysis is that MOFCOM has changed its *rationale* from the original determination by cutting out nearly all references to relative prices, and to rely now solely on the volume of subject imports.

10. Whatever changes there have been in MOFCOM's price effects analysis since the original injury determination, the fundamental facts are unchanged. MOFCOM made its re-determination on the same record as the original injury determination. The pricing and market share data in the first quarter of 2009 continue to point to an absence of price competition between subject imports and the domestic product.

A. Market Share Shifts Do Not Show Price Competition Between Subject Imports and Domestic Like Product

11. China seeks to avoid the obvious implications of the pricing and market share data for the first quarter of 2009 by suggesting the domestic industry's gain in market share in that quarter was in fact more substantial than 1.04 percent if one compares the first quarter of 2009 to full year 2008 instead of to the first quarter of 2008. China, however, provides no evidentiary basis for this assertion. Again, the record evidence strongly suggests an *absence* of price competition between subject imports and the domestic like product.

B. MOFCOM's Findings in Connection With its Like Product and Cumulation Determinations Prove Nothing

12. The comparisons that MOFCOM made for purposes of the domestic like product and cumulation analyses were at a level of extreme generality. For most of the comparisons between the subject imports and the domestic like product, MOFCOM found merely that the products were "fundamentally the same." These are nothing more than broad-brush generalizations. They are not enough to show that subject imports are sufficiently competitive with the domestic like product to be causing adverse price effects. MOFCOM's approach is not consistent with the obligation to conduct an "objective examination" based on "positive evidence."

C. The DSB Has Already Found That Any Parallel Pricing Does Not Show a Competitive Relationship Based on Price

13. China's assertion that MOFCOM's findings of "parallel pricing" were sufficient to show a competitive relationship between subject imports and the domestic like product is just as unpersuasive. MOFCOM's parallel pricing findings are essentially the same as they were in the

original injury determination, and suffer from the same defects identified by the original panel and the Appellate Body.

D. The DSB Has Already Found That Pricing Policy Documents Have No Probative Value

14. Nor are the so-called pricing policy documents relied on by MOFCOM probative of price competition between the subject imports and the domestic like product. These four documents pertain only to the first quarter of 2009. Both the original panel and the Appellate Body recognized that the probative value of these "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the prices of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.

E. A Partial Customer Overlap Does Not Support a Finding of a Competitive Relationship Based on Price

15. Finally, evidence of a partial overlap in customers does not support a finding of a competitive relationship based on price.

F. Conclusion

16. In sum, none of the additional factors that China claims support MOFCOM's price effects analysis stands up to scrutiny. When confronted with specific flaws and insufficiencies in MOFCOM's analysis, China repeatedly resorts to arguing that the aspect of the analysis in question is only part of a multi-faceted discussion of the record as a whole, and that the United States somehow fails to see the big picture. If the constituent parts of MOFCOM's analysis do not hold up, these vague appeals to the big picture, or, as China puts it, to a "holistic" analysis, cannot save MOFCOM's analysis.

III. CHINA FAILS TO SHOW THAT SUBJECT IMPORTS HAD "EXPLANATORY FORCE" FOR PRICE DEPRESSION IN THE FIRST QUARTER OF 2009

17. Turning now to alleged price depression in the first quarter of 2009, there is no evidence that the sharp drop in the domestic industry's prices in that quarter was in any way related to the gain in the subject imports' market share in 2008. As with its analysis of price suppression, MOFCOM has essentially concocted a reason to link two events with no causal relationship.

IV. CHINA'S IMPACT ANALYSIS IS INCONSISTENT WITH ARTICLES 3.4 OF THE AD AGREEMENT AND 15.4 OF THE SCM AGREEMENT

18. MOFCOM's impact causation analysis is inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. As explained in the U.S. submissions, MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective. The United States has shown that in 2008 the positive trends vastly outnumbered and outweighed the negative ones. As a result, the investigating authority was obligated to provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry {is}, or remain{s}, injured." China failed to do so in this dispute.

V. CHINA'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.5 OF THE AD AGEREMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

19. MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement. The domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins. Numerous errors and unsupported, conclusory statements tarnish MOFCOM's analysis of injury caused by the domestic industry's overexpansion and overproduction.

20. In addition, MOFCOM's new disclosures show that nonsubject imports were a much more significant factor in the Chinese market than subject imports, in all parts of the period of investigation. They entered China in significantly greater quantities than cumulated subject

imports throughout the period; they continued to grow by significant amounts; and they had lower average unit values than subject imports in 2008.

21. Instead of conducting an objective non-attribution analysis, MOFCOM summarily dismissed the role of nonsubject imports. In doing so, it mischaracterized the relative importance of nonsubject imports. MOFCOM failed to ask how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry, while the increasing and much greater quantity of nonsubject imports sold in 2008 at lower AUVs could have had no injurious effects.

VI. CHINA'S DISCLOSURES ARE INADEQUATE

A. China Failed to Disclose the Essential Facts, Contrary to Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement

22. The United States will now turn to MOFCOM's failure to disclose the essential facts that formed the basis of its re-determination. In previous submissions, the United States showed that China failed to meet the requirements of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement. Accordingly, the compliance panel in this dispute should find that China acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its re-determination.

B. China Failed To Explain its Re-determination, Contrary to Articles 12.2 and 12.2.2 of the AD Agreement, and 22.3 and 22.5 of the SCM Agreement

23. China also has failed to rebut the U.S. demonstration that China breached its WTO obligations by failing to explain its re-determination of material injury. The re-determination simply does not support China's explanations. Therefore, MOFCOM did not explain its findings in sufficient detail. Consequently, China has not satisfied the requirements of the covered agreements.

VII. CONCLUSION

24. For the reasons set forth above and in our submissions, the United States respectfully requests the compliance panel to find that China has failed to implement the recommendations and rulings of the DSB and its measures taken to comply are inconsistent with China's obligations under the AD Agreement and SCM Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE INTERIM REVIEW MEETING

1. The United States recognizes that China has the right pursuant to Article 15.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to request a meeting to discuss the requests for review of precise aspects of the interim report. Nonetheless, such meetings have become very rare in WTO dispute settlement, and the United States considers that it would have been more efficient to submit comments on each other's requests in writing.

2. As an initial matter, it may be useful to recall that the purpose of an interim review meeting under DSU Article 15.2 is to allow parties an opportunity to comment on issues identified in the requests for review of precise aspects of the interim report. This is the only appropriate topic of discussion for the interim review meeting. A party that goes beyond the issues raised in the written comments would be going beyond the review envisioned in Article 15.2. Regrettably, as we will explain, China's recent effort to introduce new evidence in this proceeding goes beyond the scope of interim review under DSU Article 15.

3. In this statement, we proceed as follows. First, the United States explains why China's attempt to submit new evidence to the Panel is incompatible with the DSU and the Panel's Working Procedures. We note that China's requests should also be rejected because they were not based on evidence before the Panel when made. We also explain why China's new evidence is in any event irrelevant under the Panel's terms of reference for purposes of the Panel's examination of China's compliance measures. Second, we note that we agree with one request by China, to delete the additional recommendation in relation to China's measure taken to comply, but for the different reason that no recommendation under DSU Article 19.1 is necessary or appropriate in a compliance proceeding. Third, we will comment on China's other requests for review of aspects of the Panel's interim report. In brief, the United States considers that the Panel report is strong and its conclusions are well-founded, and China has provided no reasons for the Panel to amend any of its findings.

I. PARAGRAPH 8 OF CHINA'S COMMENTS: CHINA'S NEW EVIDENCE IS UNTIMELY, CONTRARY TO THE DSU, AND, IN ANY EVENT, IRRELEVANT FOR PURPOSES OF THIS PROCEEDING

4. In paragraph 8 of its comments, China asserts that "China expects the expiration of these measures on April 10, 2015." China further asserted that "MOFCOM will publish a public notice of termination regarding the measures at issue on April 10, 2015, and China will submit the public notice to the Panel immediately." In light of this, China suggests that "China would like to respectfully request the Panel to take into consideration the fact of termination of the disputed measures" and requests that the Panel "issue no recommendations in its final report." On April 21, China submitted a notice to the Panel allegedly relating to the termination of the antidumping and countervailing duties on GOES from the United States. China's assertions and attempt to submit new evidence are flawed in multiple respects.

A. China's Submission of New Evidence Is Untimely and Must Be Rejected as Inconsistent with Article 15 of the DSU and with the Panel's Working Procedures

5. First, China's attempt to introduce new evidence during the interim review stage of a panel proceeding is contrary to the DSU and should be rejected. On that basis alone, as China's request is premised on the Panel's acceptance of China's exhibit as new evidence, the Panel should reject China's request to make any finding on the alleged "fact of termination".

6. The interim review stage is not the time for a panel to examine new evidence. Article 15.1 of the DSU allows parties to submit comments on the descriptive part of the panel's draft report. Following expiry of "the set time period" for receipt of comments on the draft descriptive part, "the

panel shall issue an interim report" with its findings and conclusions. Article 15.2 of the DSU permits parties to submit a written request for "the panel to review precise aspects of the interim report prior to circulation" of the report. The panel process is almost completed when the interim review stage has commenced. The parties have already provided their facts and arguments, and the panel issues the draft descriptive part under Article 15.1 "*[f]ollowing the consideration* [by the panel] of [the parties'] rebuttal submissions and oral arguments." The panel issues an interim report containing "the panel's findings and conclusions," and at this point the parties make requests to "the panel to review precise aspects of the interim report." That is, the interim report contains the panel's findings and conclusions "following the consideration" of the parties' evidence and arguments, and Article 15.2 nowhere contemplates that the parties' can submit *additional* facts for the panel to consider.

7. China's attempt to introduce new evidence thus falls outside the scope of the review contemplated by Article 15.2 of the DSU, and the panel should reject this attempt to introduce new evidence during the interim review stage. We note that this is not a new issue. We are aware of six reports in which previous panels or the Appellate Body have considered an effort by a party to introduce new evidence at the interim review stage. In every such report, the panel or the Appellate Body rejected the effort to introduce new evidence.[1] The United States respectfully requests that this panel reject China's attempt for the same reasons as previous panels and the Appellate Body. As the Appellate Body stated in *EC – Sardines*, and again in *EC – Selected Customs Matters*, "the interim review stage is not the appropriate time to introduce new evidence."[2] As explained by the Appellate Body, at the time of the interim review, "the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review . . . this, in our view, cannot properly include an assessment of new and unanswered evidence."[3] The same situation applies here.

8. China's untimely submission of new evidence is also inconsistent with paragraph 8 of the Working Procedures of the Panel. The Panel in its procedures set out that the parties should submit all factual evidence to the Panel "no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party." China's evidence fits none of these categories.

9. The United States further notes that, were the submission of evidence permitted at this stage, it would need to be examined and responded to by the other party, and then evaluated by the panel. Any findings by the panel would then need to be issued to the parties for review under DSU Article 15. This would lead to a reopening of the panel process, perhaps multiple times, and delay in the issuance of the panel's report, contrary to the goals of "prompt settlement" and efficient procedures reflected in DSU Articles 3.3, 12.8, and 20.1.

10. Under DSU Article 15, and as reflected in the Panel's Working Procedures, interim review is not the time for submission of new evidence by a party. For these reasons, the United States respectfully requests that the Panel reject China's attempt to introduce new evidence at this stage of the proceeding and therefore reject the request for review contingent on this untimely evidence.

B. China's Request May Also Be Rejected Because It Was not Substantiated When Made

11. The preceding basis is sufficient reason to reject China's request to consider the factual assertion made by China. The United States also notes that China's request for review may be rejected on the additional basis that it was not based on the evidence before the Panel in this proceeding. China requested "the Panel to take into consideration *the fact of termination* of the disputed measures". However, China had provided no such "fact" in this proceeding to justify its request for review. To the contrary, China's request for review was *explicit* in noting China's speculation about future events. China stated that "China *expects* the expiration of these measures on April 10, 2015." China further asserted that "MOFCOM *will publish* a public notice of

[1] *See e.g., EC – IT Products*, para. 6.48 and 7.167; *EC – Sardines (Panel),* para. 6.16; *EC – Sardines (AB)*, para. 301; *EC – Selected Customs Matters (Panel)*, paras. 6.3-6.6; *EC – Selected Customs Matters (AB)*, para. 259; *EC – Bananas III (Article 21.5 – US) (Panel)*, para. 6.18.

[2] *See EC – Sardines (AB)*, para. 301; *EC – Selected Customs Matters (AB)*, para. 259. *See also EC – IT Products*, para. 6.48 and 7.167.

[3] *EC – Sardines (AB)*, para. 301.

termination regarding the measures at issue on April 10, 2015." But possible future events do not form an adequate basis for the Panel to review and modify aspects of its interim report. Because China's request was made not based on any evidence that had been developed by the parties and considered by the Panel prior to issuance of the report, there was no need or basis for the Panel to review its findings further. China's request may be rejected for this reason as well.

C. In Addition to Being Untimely, China's New Evidence Is Irrelevant for the Panel's Legal Assessment

12. China's new evidence, in addition to being untimely, is also not relevant to the matter being examined by the Panel. In several reports, the Appellate Body has stated that, as a general rule, the measures subject to a panel's review "must be measures that are in existence at the time of the establishment of a panel,"[4] and therefore the task of the panel is to determine whether the measures at issue are consistent with the obligations at issue "*at the time the Panel was established.*"[5] The Appellate Body has also stated that a panel's review of the matter should focus on the measures identified in a panel request "as they existed and were administered at the time of establishment of the Panel."[6] This ensures that a complaining party need not "adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'."[7]

13. Here, China's new exhibit alleges the termination of the antidumping and countervailing duties on GOES from the United States as occurring on April 10, 2015, long after the panel was established. Previous panels and the Appellate Body have noted that evidence "that predate[s] or post-date[s] the establishment of a panel may be relevant to determining whether or not a violation of [an obligation] exists at the time of [panel] establishment."[8] However, China's exhibit has no relevancy to the legal situation that existed on the date of the Panel's establishment when the DSB referred the matter to the Panel. Thus, the new evidence, even on the terms China alleges, is not relevant to the Panel's legal assessment and its findings and conclusions in this proceeding.

II. PARAGRAPH 8 OF CHINA'S COMMENTS: THE UNITED STATES AGREES, BUT FOR A DIFFERENT REASON, THAT THE PANEL'S RECOMMENDATION IN PARAGRAPH 8.6 SHOULD BE DELETED

14. The United States and China have both requested the deletion of the recommendation contained in the Panel's interim report. Therefore, as a practical matter, we may have simplified the Panel's task with respect to this recommendation. Nonetheless, the parties have requested deletion for different reasons. As explained above, the basis China puts forward is flawed and must be rejected. Nonetheless, the recommendation may be deleted for the reason explained by the United States.

15. If this were not a compliance proceeding, the Panel would have been required under DSU Article 19.1 to make recommendations on the measure examined. However, because we are in a compliance proceeding, there is no need for the Panel to make an additional recommendation on China's measure taken to comply. As noted previously by the United States, a panel in a compliance proceeding is tasked under DSU Article 21.5 with determining whether a measure taken to comply that is within the panel's terms of reference exists, or is inconsistent with a covered agreement.

16. As noted by the second compliance panel in *US – Foreign Sales Corporations*, "an Article 21.5 compliance procedure occurs *after* the DSB has already made recommendations and rulings based on Article 19.1 of the DSU."[9] The compliance panel is examining whether the Member has brought its measure into full compliance with WTO rules through the specific inquiry

[4] *EC – Chicken Cuts (AB)*, para. 156.

[5] *EC – Selected Customs Matters (AB)*, para. 259. *See also China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.456.

[6] *EC – Selected Customs Matters (AB)*, para. 187.

[7] *Chile – Price Band System (AB)*, para. 144.

[8] *EC – Selected Customs Matters (AB)*, para. 186, 188-89 (agreeing with and quoting *EC – Customs (Panel)*, para. 7.37).

[9] *US – FSC (Article 21.5 – EC II) (Panel),* para. 7.43.

set out in Article 21.5.[10] Until a Member has brought its measures found to be inconsistent by the DSB into compliance with its WTO obligations, the DSB's original recommendation will remain operative.[11]

17. The Panel has found that China's measures taken to comply are inconsistent with the covered agreements. The United States has requested that the Panel make clear that China has failed to bring its measures found by the DSB to be inconsistent with the covered agreements into compliance with the recommendations and rulings of the DSB. That is all the Panel needs to do in this proceeding. Therefore, the United States agrees that the Panel may delete the additional recommendation on China's measure taken to comply, for the reasons set out previously.

III. U.S. COMMENTS ON OTHER REQUESTS BY CHINA

18. **China's Comments on Paragraphs 7.21:** China has provided no basis for the Panel to alter its language regarding China's use of the term "unfair imports".

19. **China's Comments on Paragraphs 7.55 to 7.57, and Paragraph 7.66:** China asserts the Panel should delete any discussion of facts that could not be used to justify China's measure under the applicable standard of review. The United States disagrees with China's assertion and recalls that the standard of review stated by the Appellate Body is whether the authority's determinations are "reasoned and adequate" in "light of the evidence." The Appellate Body has explained that in order to make such a finding "a panel's examination of those conclusions 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." Thus, an authority's determination is to be reviewed on the basis of information and reasoning set out in the determination.

20. The Panel found that MOFCOM's re-determination did not to set out the market share data referenced in Paragraph 7.55. The Panel properly found that MOFCOM's re-determination failed to satisfy the requirements of the covered agreements, in light of the standard of review. At the same time, the facts at issue were evidence that China submitted to the Panel and therefore it was appropriate for the Panel to examine and discuss the evidence, including its role in light of the standard of review and in light of the fact that it provided further support for the Panel's findings. Accordingly, no changes are necessary in response to China's comments.

21. **China's Comments on Paragraphs 7.58, and 7.63 to 7.65:** China offers no basis for the Panel to modify the reasoning or findings in these paragraphs.

22. **China's Comments on Paragraphs 7.72 to 7.81:** China appears to simply present its dissatisfaction with the Panel's findings. The United States has responded thoroughly to China's arguments on this issue, and the Panel has explained its findings and disagreement with China's position. Accordingly, no changes are necessary in response to China's comments.

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[10] *EC – Bananas III (Article 21.5 – US) (AB)*, para. 322.

[11] *See e.g. US – FSC (Article 21.5 – EC II) (Panel),* paras. 7.35-7.36; *US – FSC (Article 21.5 – EC II) (AB),* paras. 85-96; *EC – Bananas III (Article 21.5 – US) (Panel)*, para. 8.13.

ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. When China's Ministry of Commerce ("MOFCOM") issued its redetermination in this dispute, that redetermination addressed and fully complied with all of the concerns raised by the original Panel and the Appellate Body in their reports. MOFCOM's redetermination addressed all of the findings in those reports – those on the antidumping duty margins, those on the countervailing duty margins, the procedural issues, and the injury findings. The United States has not raised any claims concerning the redetermination findings about the antidumping duty or countervailing duty margins. The United States has challenged only the injury findings, and certain disclosure issues relating to those injury findings. Most of these issues were raised in the original proceeding: (1) that the adverse price effects were not the result of subject imports; (2) that the finding of causation was flawed; (3) that certain essential facts were not disclosed; and (4) that certain findings were not sufficiently explained. The United States also raises a completely new claim under Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement, which is an improper expansion of this dispute to include a wholly new claim.

2. On each of these issues, MOFCOM's redetermination fully addresses the concerns raised about MOFCOM's original determination. With the benefit of the clarification of certain legal standards by the Appellate Body, the MOFCOM redetermination addresses all the issues, provides an expanded and clarified rationale for all of the findings previously questioned, and thus has demonstrated the redetermination fully complies with the relevant WTO obligations. That the United States is not satisfied, and has brought this dispute back to the WTO, reflects two fundamental errors in the U.S. approach.

3. The first error is that the United States appears to believe MOFCOM had to change its mind, and find no material injury in this particular case. But this belief reflects a fundamental misreading of the Panel and Appellate Body decisions in this dispute. The Panel and Appellate Body identified gaps and shortcomings in the analysis and explanation provided in the original determination. MOFCOM was then asked to reconsider in light of these issues, and either to change its analysis on an issue or better explain and justify the conclusion previously reached. That is precisely what MOFCOM did.

4. The second fundamental error in the U.S. approach is that the United States appears to believe that this Panel should substitute its judgment for that of the administering authority. That the United States can think of other possible interpretations does not make the MOFCOM interpretation unreasonable or WTO inconsistent. As long as MOFCOM considered the other possibilities and explained its reasoning, the MOFCOM findings are WTO consistent. MOFCOM did so in its redetermination in this case.

II. MOFCOM'S PRICE EFFECTS FINDINGS WERE CONSISTENT WITH ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.2 OF THE SCM AGREEMENT

5. The U.S. claims that MOFCOM's findings with respect to the price effects of subject imports were not based on positive evidence and an objective examination of the facts within the meaning of Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. According to the Appellate Body, the standard for price effects is whether subject imports have "explanatory force" for price suppression or depression, and this may be achieved by identifying "the relevant aspects of such imports, including the price and/or the volume of such imports." Nowhere does the text of Article 3.2 or Article 15.2, or the Appellate Body's clarification of those provisions, mandate a price comparison. The texts require only an examination of the relationship between subject imports and domestic prices and discussion of why the subject imports have "explanatory force." MOFCOM's redetermination more than meets this standard.

A. MOFCOM's Focus On The Volume And Other Aspects Of Subject Imports Does Not Reflect A "Flawed Analysis" Of Price Suppression

(1) The U.S. insistence on price comparisons reflects a misunderstanding of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement

6. MOFCOM properly concluded that the volume of subject imports in the context of this case contributed significantly to the price suppression experienced by the domestic industry in 2008 and early 2009. In response, the United States contends that MOFCOM must perform a price comparison. Contrary to the U.S. argument, there is no requirement to undertake price comparisons. The text of Articles 3.2 and 15.2 imposes no requirement to conduct price comparisons. The Appellate Body has confirmed that such examination of domestic prices in conjunction with any aspect of subject imports may reflect the price *and/or the volume of such imports*, confirming that price comparisons themselves are not required to establish price effects. The U.S. interpretation to the contrary is simply inconsistent with both a plain reading of Articles 3.2 and 15.2, as well as the Appellate Body's further clarification of that legal standard.

(2) MOFCOM reasonably identified subject imports as a source of significant price effects

7. MOFCOM's redetermination correctly reflects that as a matter of law and as a matter of fact, the subject imports in this case had a significant effect on domestic prices. Whether the subject imports are higher priced or lower priced, if they are increasing in the market and particularly if they are increasing so much as to be gaining market share, that expansion in subject imports can affect domestic prices. In such a situation, the domestic firms need to decide whether and how to respond. A logical response is to restrain price increases that might otherwise be needed, or to lower prices. As MOFCOM found in its redetermination, that is precisely what happened in this case.

8. Contrary to the U.S. arguments, MOFCOM did not "simply assume" a linkage between subject import volumes and price effects. Rather, MOFCOM showed not only that the volume and market share of subject imports increased, but that this gain came directly at the expense of the domestic industry. As MOFCOM noted, the subject imports gained 5.56 percentage points of market share and the domestic industry lost 5.65 percentage points of market share. In other words, subject imports explained 98 percent of the loss of domestic market share in 2008. MOFCOM stressed this key point several times in its discussion, noting both that the lost domestic market share was "taken by the subject merchandise," that the amounts of the subject import gain and domestic loss were almost identical, and that the surging subject imports were "overtaking the market share of the domestic industry."

9. MOFCOM also made specific findings that subject imports and domestic products were directly competitive with each other. MOFCOM made this finding in the context of determining the like product, and the context of deciding to cumulatively assess subject imports. The United States challenged neither of these key factual findings. It is the United States that makes the unrealistic and unsupported assumption that a domestic industry can watch increasing volumes of competitive subject imports gain significant market share and do nothing in response.

B. Alternative explanations offered by the United States to suggest a different rationale for the price suppression occurring in 2008 are not persuasive

10. The United States offers a handful of alternative explanations for the price suppression seen in 2008, citing in particular the effects of Baosteel's startup costs and purported self restraint in domestic pricing. Even if there were some other price effects from other factors as the United States speculates, that does not eliminate or in any way disprove the significant contribution of subject imports to the price suppression. MOFCOM had no obligation to disprove any possible role by other factors, as the United States implies with its arguments. To the contrary, MOFCOM only needed to establish the "explanatory force" of the subject imports themselves as a significant contribution to adverse price effects. MOFCOM did so in its redetermination.

C. Attempts by the United States to discredit MOFCOM's examination of volume and market share all fail to confront the core of MOFCOM's analysis of price effects and the relevant standard

11. After its initial argument about MOFCOM's finding of adverse price effects, the United States then presents a series of arguments claiming that MOFCOM's finding that subject imports caused price suppression has no basis. But each of these U.S. arguments fails to address the core of MOFCOM's analysis that increasing subject imports took significant market share, had a restraining effect on domestic prices, and thus suppressed the domestic prices.

12. First, the United States claims a temporal error in MOFCOM's analysis, arguing that the loss of 5.65 percentage points of market share by the domestic industry in 2008 "did not fully occur until the end of 2008." The U.S. logic implies that no company reacts to market changes during the course of the year, only when those changes are quantified and totaled at the end of the year. There is simply no factual foundation for this logic, which defies even common sense. Second, the United States contends that because the domestic industry gained more market share in 2007 than it lost in 2008, this fact establishes that the increase in subject imports in 2008 would not have had the effect on prices claimed by MOFCOM. This claim is also advanced without any evidentiary foundation. Any past gain in market share is logically irrelevant to the effect of the subject imports in 2008 and how the domestic industry would react to those subject import gains in 2008. Third, the United States speculates about the impact of various non-price factors in an attempt to discredit MOFCOM's analysis. This speculation is at odds with MOFCOM's specific factual findings – unchallenged by the United States – that the subject imports and domestic products were "directly competitive" in this case, being sold in the same sales channels to the same customers.

D. Diverging price trends in the first quarter of 2009 do not disprove any connection between subject imports and price suppression in 2008 and the first quarter of 2009

13. The United States also contends that data for the first quarter of 2009 demonstrates an absence of price competition between subject imports and the domestic like product. According to the United States, if price were an important factor, the sharp decline in domestic industry prices witnessed in the first quarter of 2009 should have produced a larger shift in domestic sales and market share. We note that the U.S. argument rests on a single fact disconnected from the overall evidence before MOFCOM in this case and the various findings that MOFCOM made. Before turning to the details of the U.S. arguments about this single fact, we note a few more general points.

14. The United States cites the Appellate Body discussion of this fact, but ignores two key points about that discussion. The Appellate Body comment addressed the reasoning in the original MOFCOM determination about the effects of the "the prices of subject imports," and not about the effects of subject imports more generally. In other words, the criticism reflected an aspect of the original determination that has been significantly changed in the redetermination. The redetermination has substantially clarified the focus on how the subject imports was having adverse price effects, clarifications that were not before the Appellate Body.

15. Moreover, the Appellate Body questioned whether the prices of subject imports "adequately explained" the price suppression and depression. The criticism thus focused on the adequacy of the explanation. The Appellate Body was not agreeing that this single fact meant that there were no price competition. It would not have been the Appellate Body's function to make such a factual finding, which is why the focus was on the adequacy of the specific determination before the Appellate Body and the explanation provided in that determination.

16. That old determination is not the subject of this proceeding. There is a new redetermination that specifically addresses these points. The U.S. criticism that MOFCOM did not provide any explanation or reasoning is largely a repeat of the U.S. arguments from the prior Appellate Body proceedings. But MOFCOM has fully considered the issues raised by the Panel and Appellate Body, and has now fully explained its reasoning with two full pages addressing this specific point. The United States attacks this reasoning, but these attacks also have no merit.

(1) Parallel Pricing

17. The United States contends that MOFCOM's findings on parallel pricing between the domestic like product and subject merchandise from 2006 to 2008 to establish a competitive relationship remain unsupported. But MOFCOM's explanation has been expanded significantly from the more limited findings at issue before the Panel and the Appellate Body previously. MOFCOM has now more fully explained its reasoning, addressing trends both over the 2006 to 2008 period, as well as the divergence in the first quarter of 2009. Consistent trends over the 2006 to 2008 period combined with the growth in market share confirm the competitive overlap.

18. Furthermore, MOFCOM explained in much more detail how the break in parallel pricing in the first quarter of 2009 was in fact very much part of the injurious competitive dynamic: the domestic industry lowered its prices in the first quarter of 2009 precisely in reaction to the adverse effects in 2008, to which the domestic industry was reacting. The United States may have a different interpretation of the evidence, but this is not a reason to second-guess how the authority considered this evidence and explained its reasoning.

(2) Pricing Policy

19. The United States is also dismissive of evidence of pricing competition in the form of pricing policy documents obtained during verification. Yet, the United States ultimately concedes, as it must, that purchasers were using offers for subject merchandise to negotiate for lower domestic prices. Combined with the Russian offer to match whatever price changes the Chinese industry might offer, these pricing policy documents are evidence consistent with price competition. It was reasonable for MOFCOM to find that the reviewed contract meant the trading company would offer a lower price, but this finding is not necessary to show the competitive relationship with respect to price. Furthermore, MOFCOM directly addressed issues of substitutability and quality in its redetermination, finding subject imports and domestic products to be directly competitive.

(3) Overlap of Customers

20. The United States ignores MOFCOM's more comprehensive discussion not the customer overlap and its significance for this case. MOFCOM's findings on the overlap in competition and the inferences drawn from these findings were not made in isolation, but were part of overall findings on the existence of the directly competitive relationship between subject imports and domestic products. Thus, while the United States speculates that customers could have been buying different products from domestic and subject suppliers, MOFCOM in fact discussed at some length its analysis of questionnaire responses, its specific verification of the domestic industry capabilities to produce those products the exporters had alleged could not be produced by the Chinese companies, its review of evaluation reports of downstream users, *and* the overlap of customers. It was the evidence about customer overlap in conjunction with all the other evidence that together led MOFCOM to find competitive overlap.

E. MOFCOM properly concluded that the subject imports contributed significantly to sharp price depression in early 2009

21. Beyond price suppression in 2008 and first quarter of 2009, MOFCOM also found price depression in the first quarter of 2009 as domestic prices fell sharply. To this end, the United States does not dispute the existence of price depression in the first quarter of 2009. It fully acknowledges that domestic prices declined by 30.25 percent. Instead, the United States challenges only that subject imports had anything to do with that price depression.

22. In its redetermination MOFCOM explained in more detail and more completely the dynamics of the domestic industry reacting to the subject import volume and market share gains throughout 2008 by cutting prices in the first quarter of 2009. The U.S. argument largely ignores this expanded discussion, and makes translation mistakes to downplay the extent to which subject imports captured virtually all of the lost domestic market share.

23. The United States argues there is "no evidence" or "substantive analysis" that the price decline was related to the surge in market share in 2008, but then largely ignores the MOFCOM repeated discussion of this very point. MOFCOM noted this domestic industry reaction to the loss of

market share in 2008 by cutting prices in Q1 2009 to fight for the lost market share in its initial discussion of the impact of subject imports on domestic prices. MOFCOM then also explained in direct response to arguments raised by the U.S. Government and AK Steel concerning price trends in the first quarter of 2009 that the evidence reflected that the domestic industry was specifically responding to the surge in subject imports in 2008 through a reduction in prices in Q1 2009.

24. Simply stated, the United States is just wrong to argue that there was no analysis establishing a link between subject imports and price depression. The data on the increasing volume and market share of subject imports are evidence. The MOFCOM discussion of that data is analysis. More importantly, MOFCOM has explained fully its reasoning in this regard. MOFCOM has fully explained a completely reasonable interpretation of the available evidence. MOFCOM did not ignore and in fact fully discussed the issue of expanding domestic capacity and the price trends in Q1 2009, and how those facts would have affected the domestic price effects MOFCOM analyzed. That the MOFCOM interpretation is not the only possible interpretation does not make it any less reasonable.

F. MOFCOM properly concluded that the pricing policy of subject imports further contributed significantly to the sharp price depression in early 2009

25. The United States challenges MOFCOM's reliance on the pricing policy documents, again relying on the Panel and Appellate Body criticism, not the substance of the redetermination. But as the Appellate Body noted, "{e}ven in the absence of price undercutting, however, a policy that aims to undercut a competitor's prices may still be relevant to an examination of its price depressive or suppressive effects." MOFCOM's redetermination explains more fully why these pricing policy documents were relevant. The MOFCOM redetermination explained that the volume and market share of subject imports had the effect of suppressing and depressing domestic prices.

26. The pricing policy documents show the ways in which purchasers were using subject import prices to drive down domestic prices, consistent with the Appellate Body's observation that such a situation could be relevant. MOFCOM properly considered the evidence of the pricing policy in Q1 2009 along with all of the other evidence to draw its conclusion about price depression.

III. MOFCOM PROPERLY ANALYZED THE IMPACT OF SUBJECT IMPORTS CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.4 OF THE SCM AGREEMENT

27. For the first time in this dispute, the United States is now raising a claim under Articles 3.4 and 15.4 that MOFCOM improperly found the Chinese industry to be materially injured. This new claim fails for both procedural and substantive reasons. Procedurally, the United States cannot expand the scope of the dispute in an Article 21.5 compliance proceeding to include wholly new claims not previously addressed by the Panel. The Panel made no prior rulings on Articles 3.4 or 15.4 and MOFCOM has had no opportunity to consider any such rulings and bring any problems into compliance. It would be extremely unfair – and contrary to WTO precedents – to allow such a claim.

28. But even if the Panel were to consider this claim, it would fail on the merits. The United States has not raised any points that MOFCOM did not consider in its determination. The basic outline of MOFCOM's finding of material injury is clear. The domestic industry was materially injured in 2008 and early 2009 when the large volume of subject imports captured significant market share for the first time, suppressed and depressed prices for the domestic industry, and thus led to adverse trends in financial performance. MOFCOM considered the full period of investigation, and used the domestic industry's performance early in the period as the basis for evaluating its much weaker and materially injured performance later in the period. The U.S. arguments about specific factors all ignore the downturn – either relative or absolute – at the end of the period that demonstrates material injury.

29. MOFCOM properly focused on key negative trends at the end of the period to find the domestic industry materially injured. That the industry was doing better earlier in the period, and that some trends were less adverse than others, does not mean the domestic industry was not materially injured. The U.S. claim would have this Panel reweigh the evidence and substitute its judgment for that of the administering authority – neither of which falls within the Panel's scope of

review. MOFCOM addressed all of the key factors set forth in Articles 3.4 and 15.4, weighed the conflicting evidence, and made a reasonable judgment that was fully explained. MOFCOM's findings should be affirmed.

IV. MOFCOM PROPERLY ANALYZED CAUSATION CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

30. MOFCOM's redetermination sets forth a straightforward and reasonable analysis of causation that fully respects its WTO requirements. Early in the period, the overall market was growing and the domestic industry was doing well. But then directly competitive subject imports surged in 2008, increasing significantly both their absolute volume and more importantly their market share, capturing 5.56 percentage points of market share in 2008. As a result of this gain in volume and market share, subject imports suppressed and depressed domestic price levels. The subject imports thus took away market share, prevented price increases needed to cover rising costs, and forced the domestic industry to lower prices to prevent further losses of market share and to win back a portion of the market share already lost.

31. China notes that the United States does not challenge the heart of this analysis - that the increasing volume and market share of the directly competitive subject imports caused material injury. Rather, the United States challenges only the linkage between those adverse volume effects and the collateral adverse price effects found by MOFCOM, price suppression in 2008 and Q1 2009 and price depression in Q1 2009, and the denial of any economies of scale. And the United States makes two non-attribution arguments. None of these U.S. arguments undermine the basic causation – the link between the subject imports and the adverse effects on the domestic industry – that MOFCOM found in this case.

32. MOFCOM properly analyzed the adverse price effects, fully addressing any concerns raised by the Panel and Appellate Body in the earlier proceedings. In particular, MOFCOM specifically linked the increasing volume and market share of subject imports to the price suppression and price depression that affected the domestic industry, relying on both those volume effects as well as the other evidence of the competition between subject imports and the domestic products.

33. MOFCOM also properly relied on the denial of economies of scale as part of its analysis. In a growing market, a domestic industry can reasonably invest in new capacity in anticipation of economies of scale from larger production that necessarily lowers per unit costs, as the preexisting fixed costs are now allocated over larger production volume. When unfairly traded imports capture a significant part of that volume through increased market share, that adverse effect reasonably supports a finding of causation.

34. MOFCOM properly separated and distinguished the effect of increased domestic capacity and production. The United States makes this argument the centerpiece of its attack, but incorrectly assumes that if domestic capacity and production were having some effect then subject imports themselves could not be having any adverse effects. Articles 3.5 and 15.5 do not require disproving any role of any other factor – only that these other facts be taken into account and separated and distinguished from the role of subject imports. In fact, MOFCOM's redetermination shows that even after controlling for the effects of domestic capacity and production, subject imports themselves were still making a significant contribution to the material injury suffered by the domestic industry over the 2008 and early 2009 period. The U.S. arguments are little more than comments about alternative approaches that in no way undermine the reasonableness of the approaches used by MOFCOM.

35. MOFCOM also properly separated and distinguished the effect of non-subject imports. Unlike subject imports, which gained significant market share, non-subject imports did not. Unlike the dumped and subsidizes subject imports, non-subject imports were fairly traded and thus did not impermissibly expand their market share. The U.S. argument that the absolute volume of non-subject imports was higher ignores the more probative evidence about market shares. And the U.S. argument about the prices of non-subject imports relies entirely on average unit value data that the United States itself strenuously argued was not reliable.

36. The Panel should therefore affirm MOFCOM's expanded and more complete redetermination as consistent with the obligations under Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

V. MOFCOM PROPERLY DISCLOSED ALL ESSENTIAL FACTS PRIOR TO THE DETERMINATION CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 6.9 OF THE AD AGREEMENT AND 12.8 OF THE SCM AGREEMENT

37. The United States asserts that MOFCOM's injury redetermination was inconsistent with Articles 6.9 of the AD Agreement and 12.8 of SCM Agreement for its failure to disclose all "essential" facts forming the basis of the redetermination before issuance of the final redetermination. The United States identifies seven facts that it claims MOFCOM failed to disclose in such a manner that interested parties would have an opportunity to defend their interests. The U.S. argument is procedurally and substantively defective: procedurally because the United States has not established a *prima facie* case that the listed facts are "essential;" and substantively because MOFCOM's injury redetermination discloses all of the listed facts in accordance with a proper balance of the necessary disclosure while still protecting the confidential information.

A. The United States Has Not Established a *Prima Facie* Case that MOFCOM Failed to Disclose All Essential Facts That Form the Basis of the Redetermination

38. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency."[1] The United States thus has the burden of establishing a *prima facie* case that MOFCOM failed to disclose all essential facts. The United States has failed to establish a *prima facie* case. Leaving aside the legal definition of what constitutes an "essential" fact, the United States has not satisfied the evidentiary burden of proving that each of the seven facts listed are "essential" to the redetermination. Rather than relating each of the alleged facts to the legal standard, the United States uses general language and broad assertions that the facts are "absolutely indispensable" without any explanation. The United States has "simply allege[d] facts without relating them to its legal arguments,"[2] and has therefore failed to establish a *prima facie* case. As such, the Panel has no basis to rule on these claims.

B. Evaluated on the Merits, the U.S. Claims Must Fail Because MOFCOM's Preliminary Disclosure Document Disclosed the Facts in Dispute

39. Because the United States has not satisfied the evidentiary burden of establishing that the listed facts meet the definition of "essential" under the covered agreements, China does not address that issue in this submission. Rather, China focuses here on the fundamental factual error in the United States' argument: contrary to the U.S. claims, MOFCOM *did* sufficiently disclose each of the listed facts in the preliminary disclosure document. The U.S. argument is premised on an assumption – that MOFCOM did not previously disclose these facts – which is not true. Remarkably, this U.S. error is confirmed in some instances by the fact that the United States actually made arguments based on these facts for purposes of the final redetermination. Such arguments would be impossible to make if MOFCOM had not already disclosed these facts. MOFCOM properly disclosed each of the facts identified by the United States in MOFCOM's preliminary disclosure document. MOFCOM did so in a manner that provided the United States and other interested parties with the ability to defend their interests and make arguments about those facts. That the United States has concerns with the actual conclusions reached, as made clear by the United States' decision to comment on many of these facts following the preliminary disclosure, is irrelevant for these claims.

VI. MOFCOM PROPERLY PROVIDED THE MATTERS OF FACT AND LAW THAT LED TO THE IMPOSITION OF THE ANTIDUMPING AND COUNTERVAILING DUTIES CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT AND 22.3 AND 22.5 OF THE SCM AGREEMENT

40. The United States claims that MOFCOM's redetermination failed to explain the matters of fact and law that led to the ultimate imposition of the antidumping and countervailing duties. The United States identifies five issues that it claims MOFCOM did not explain in the Redetermination.

[1] *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 9.
[2] Appellate Body Report, *US – Gambling*, para. 140.

As with the U.S. claims concerning "essential facts," the claims under Articles 12.2 and 12.2.2 of the AD Agreement and 22.3 and 22.5 of the SCM Agreement fail for several reasons.

41. Here again, the United States has not established a *prima facie* case for its claim. This failure is determinative, as the Panel cannot rule on a claim for which the *prima facie* case has not been established.

42. Furthermore, as a factual matter, the United States errs in its allegation that MOFCOM did not explain the facts listed in the U.S. first written submission. The United States may disagree with the substance of MOFCOM's findings, but such a disagreement is not relevant to these claims. The United States might have preferred even more discussion or preferred that MOFCOM disclosed business confidential information, but those U.S. preferences are not WTO obligations. The question is whether or not the facts and reasoning that led to a given conclusion are sufficiently clear from the determination. MOFCOM fully complied with this obligation.

VII. CONCLUSION

43. For all of these reasons, China respectfully requests the Panel to find that: (1) the U.S. claims concerning material injury under Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement should be dismissed as outside the proper scope of this Article 21.5 proceeding, (2) the U.S. claims about disclosure of essential facts under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement should be dismissed for failing to state a *prima facie* case; (3) the U.S. claims about adequacy of explanation under Articles 12.2 and 12.2.2 of the AD Agreement and Article 22.3 and 22.5 of the SCM Agreement should be dismissed for failing to state a *prima facie* case; and (4) regardless of the rulings on the three foregoing arguments, the MOFCOM redetermination is otherwise fully consistent with China's obligations under the AD Agreement and SCM Agreement.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

I. MOFCOM PROPERLY ANALYZED PRICE EFFECTS

1. MOFCOM properly analyzed the price effects of subject imports, focusing on volume-related price suppression and depression over the period concerned, but in the context of other key evidence about the competitive relationship between subject imports and domestic shipments. MOFCOM did not merely rely on volume alone to establish price effects. The volume evidence in combination with the established competitive relationship served to demonstrate the "explanatory force" of subject imports and the significant price effects MOFCOM found in the case.

2. Nothing in the WTO texts support the U.S. position that MOFCOM needed to perform a comparison of relative prices as a necessary part of its price effects analysis. First, the U.S. reading is not derived from the plain meaning of the text, but its own "common sense" presumptions. Second, nothing in the text indicates that an authority must *a priori* include such price comparisons. Third, the Appellate Body focused upon this interpretive point in *China – GOES* and has already rejected the U.S. position, finding that: (1) there are two distinct types of inquiries, including price undercutting and price depression/suppression; (2) that they each may depend on different factual elements; and (3) that they are not mutually inclusive exercises. The only U.S. response to this clear Appellate Body finding is a qualification of this language in a footnote found in the Appellate Body's report, but the U.S. selectively quotes from and ultimately misreads that footnote.

3. MOFCOM's redetermination demonstrated that subject imports had "explanatory force" for significant price suppression. In particular, MOFCOM demonstrated a linkage between subject imports and prices of the domestic like product in 2008. MOFCOM's treatment of subject import volume and market share was made in conjunction with numerous other factual findings all supporting a finding of a positive competitive relationship between subject imports and the domestic like product, as discussed below.

4. MOFCOM's like product and cumulation findings show that the subject import and domestic products were competing on price. In particular, the specific findings of substitutability strongly supports the notion of price competition. The United States has not contested these findings, which are more than just "general similarities" between subject imports and the domestic like product. Indeed, the United States now concedes "some degree of competitive overlap." So the U.S. argument is that even through products are "competitive" and "substitutable," they are not highly substitutable enough to be competing on price. Yet the United States has provided absolutely no factual, logical, or legal basis for such an assertion, and this assertion is completely at odds with the ability of subject imports to increase enough in 2008 to gain 5.56 percentage points of market share. It is hard to imagine that products that are competitive, substitutable, and gaining market share are not competing based on price. Moreover, even if the standard were in fact "highly substitutable," the U.S. argument still fails because it ignores the specific facts of this case. As MOFCOM specifically noted in its redetermination, Allegheny Ludlum in its questionnaire response stated "that the subject merchandise it produces or exports are highly substitutable and competitive with the Chinese domestic like product and the like product from other countries." MOFCOM was well within its discretion to accept as credible the Allegheny Ludlum statement that its products were "highly substitutable."

5. MOFCOM's analysis of parallel price trends noted that such trends were "fundamentally consistent" and therefore also indicated a competitive relationship. The limited number of data points does not invalidate the trends, since these data points based on annual AUVs provided a broad assessment that smoothed out potentially anomalous data. These data points over the 2006 to 2008 period constitute more probative evidence than the more limited evidence on which the United States relies. If this data over a three year period has – in the U.S. words -- "no probative value," then what is the Panel to make of the U.S. argument that relies so heavily and so repeatedly on a single data point for a single quarter? Is there something less than "no probative value?" These trends were in the same direction, and within a handful of percentage points of each

other. Given the nature of AUVs, which only broadly reflect the underlying pricing data, such small differences in the percentage point changes are not material. Finally, even assuming the U.S. argument is correct and the AUV data showing broad pricing trends is of "no probative value," there are still numerous other factual bases supporting the MOFCOM finding of adverse price effects. Yet if one subtracts the AUV data for Q1 2009 from the U.S. argument, there really is nothing else left to the U.S. argument. In sum, when looking at the record as a whole, the trends identified by MOFCOM were probative and offered reasonable support for MOFCOM's findings.

6. MOFCOM also analyzed the pricing policy documents found at verification as providing further evidence of price competition between the subject imports and the domestic like product. That these documents relate to Q1 2009 does not mean these documents have no relevance at all for other time periods, regardless of all the other facts on the record. The United States admits that these documents in fact show purchaser behavior, and that is precisely why these documents are probative for understanding how purchasers viewed the relationship between subject imports and domestic products.

7. MOFCOM's discussion of customer overlap further confirms the explanatory force of subject imports with respect to price effects. MOFCOM's notes the simple but important fact that there were common customers specifically for GOES, not just any product, and so the same customers were buying from both import and domestic sources. Allegheny Ludlum reinforced this point, when it explained in its questionnaire response "that the subject merchandise it produces or exports are highly substitutable and competitive with the Chinese domestic like product and the like product from other countries." MOFCOM went on to analyze whether there were any specialty products being supplied by subject producers that could not be supplied by the domestic industry, finding that this was not the case. Thus, MOFCOM reasonably established: (1) common customers; (2) same products sold; and (3) no attenuated competition due to specialty products. These findings are not speculation.

8. The United States attacks each of these multiple MOFCOM factual finding in isolation against its lone argument that the market share response to diverging prices in the first quarter of 2009 does not support a finding that subject imports and the domestic like product had a competitive relationship. This single (but often repeated) U.S. argument ultimately fails on two fundamental grounds.

9. First, the United States misrepresents the market share response by comparing end points – first quarter 2008 to first quarter 2009 – rather than looking, as MOFCOM did, to the full loss in market share over the entirety of 2008. This U.S. argument ignores the decline in domestic industry market share that occurred *over the course of* 2008 – the totality of which is what the industry responded to, not trends in market share between isolated periods, the first quarter of 2008 and the first quarter of 2009. MOFCOM never indicated that this recapture of market share was only 1.04 percentage points, only that the increase in first quarter 2009 was 1.04 percentage points when compared to first quarter 2008. The increase compared to 2008 as a whole was necessarily more substantial. Only a significant decline in domestic pricing could lead to this swing in market share in just one quarter, consistent with MOFCOM's conclusion that the domestic like product and subject imports competed on price. MOFCOM's analysis was "based on a *comprehensive* rather than isolated analysis of the situation in 2008 and the first quarter in 2009." Stripped to its core, the U.S. argument rests entirely on trends in a single quarter at the end of MOFCOM's period of investigation to rebut all of MOFCOM's findings over the entire period of investigation. In contrast MOFCOM considered all the evidence in reaching its determination.

10. Second, the United States fails to acknowledge the reasonable inferences to be drawn from MOFCOM's findings as a whole. The United States continues to isolate MOFCOM's volume and market share findings and never considers MOFCOM's price effects findings as a whole. The Appellate Body has recognized the importance of considering evidence as a whole: "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference . . . ." The United ignores this key principle when repeatedly considering each point in isolation. But each MOFCOM finding reinforces the other and contributes to the overall demonstration of the explanatory force of subject imports. The United States cannot rebut the probative value of volume and market share trends by mechanistically considering those trends alone, ignoring the other evidence and findings.

11. The U.S. arguments concerning MOFCOM's treatment of price depression in the first quarter of 2009 mirror its arguments concerning MOFCOM's findings on price effects in general. First, the United States mischaracterizes MOFCOM's analysis as focusing solely on the increasing volume and market share of subject imports. Although those particular facts did constitute probative evidence of price effects, they were part of a broader analysis of subject imports that showed their competitive relationship with the domestic like product.

12. Second, the single piece of evidence about divergent trends in Q1 2009 sheds very little light on the true effect of the domestic industry reducing prices. The end point to end point analysis presented by the United States does not account for the market share lost by the domestic industry over the entirety of the 2008, and consequently the level of market share regained by the domestic industry from its low point to the end of the first quarter of 2009. Far from being "irrational," the price decline did allow the domestic industry to recover a substantial portion of market share loss in very short order – circumstances that might only occur in the presence of a significant drop in price. The price drop in the first quarter of 2009 was thus far from "irrational." Rather, the price drop was a rationale response by the domestic industry and it succeeded in recovering much of the lost market share.

13. Whether or not MOFCOM had written evidence of actual offers for imported merchandise or actual sales transactions does not detract from the probative value of the policies themselves. These documents are further evidence of the competitive relationship between subject imports and the domestic like product on terms directly bearing on price. Again, regardless of whether there was actual underselling or not, the pricing policy documents show the ways in which purchasers were using the growing presence of subject import prices to drive down domestic prices, consistent with the Appellate Body's specific observation that such a situation could be relevant.

II. MOFCOM PROPERLY ANALYZED ADVERSE IMPACT

14. The United States has not successfully rebutted China's argument that this claim is not properly before this Article 21.5 panel. Prior WTO precedent and fundamental fairness prevent a complaining country from not raising a claim initially, luring the defending country into reasonably believing there was nothing that needed to be changed, and only then raising that new claim in an Article 21.5 proceeding when the defending country no longer has any chance to bring that aspect of its measure into compliance. Yet that is precisely what the United States is trying to do in this case.

15. The U.S. efforts to show the MOFCOM finding on adverse impact was somehow new all fail. A comparison of the injury discussion in the original MOFCOM determination and the revised redetermination now before this Article 21.5 panel shows no additional discussion of the market conditions in 2008. Contrary to the U.S. allegation, there is no new focus on 2008 in the MOFCOM discussion of injury; the injury discussion is essentially unchanged, reciting the key facts that highlight the declines at the end of the period.

16. Thus the U.S. argument that the redetermination somehow changed reduces to a single point: that because MOFCOM deleted a few references to "low price," these minor changes somehow created a "new" determination on this issue so different that it is now properly subject to a challenge in this Article 21.5 proceeding. This U.S. argument, however, fails for three key reasons. (1) The references to "low price" in the original determination of injury were simply references to unfairly traded imports. (2) Even if one were to assume that "low price" were not just a reference to unfairly traded imports more generally, the references to "low price" refer to *the price of subject imports,* an issue that has no particular relevance when analyzing the injury suffered by a domestic industry. (3) This different focus of injury determinations under Article 3.4 and 15.4 largely explains why the U.S. argument on injury in fact says nothing at all about "low priced" subject imports.

17. This situation is essentially the same as that before the panel in *US – Countervailing Measures Concerning Certain Products from the EC*, which correctly stressed that "the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to the dispute." Nor are these conclusions in any way at odds with the Appellate Body jurisprudence. In discussing its prior jurisprudence in *Canada – Aircraft (Article 21.5 – Brazil)* and *US – FSC (Article 21.5 – EC)*, the Appellate Body in the more recent decision in *EC – Bed Linen (Article 21.5*

– *India)* stressed the requirement to raise a new claim challenging a new component of the measure taken to comply which was not part of the original measure. That is why the Appellate Body repeatedly stressed that the scope of Article 21.5 proceedings covered "a new claim challenging a new component of the measure taken to comply which was not part of the original measure," and "a new claim challenging a changed component of the measure taken to comply."

18. The U.S. claim on adverse impact also fails on its merits. MOFCOM reviewed the evidence objectively, and reached reasonable conclusions that the domestic industry that had done well early in the period suffered a number of declining indicators at the end of the period when subject imports surged. The United States now concedes there is nothing inherently unreasonable or distortive in focusing on the end of the period, as MOFCOM did in this case. Moreover, MOFCOM did not ignore the earlier part of the period. MOFCOM properly used the trends over the 2006 to 2007 period as reasonable context for evaluating the trends over the 2007 to 2008 period. There is nothing WTO inconsistent about finding injury at the end of the period, and positive trends earlier in the period do not somehow immunize the domestic industry from suffering material injury later in the period. MOFCOM reasonably considered all of the evidence, put the end of the period in proper context, and made a reasoned and objective judgment based on all the evidence.

19. The United States alleges without any support that the earlier trend may have been unsustainable, but this possibility was (1) inconsistent with the evidence of strong rates of growth in total consumption in China, increasing 22.8 percent in 2007 and another 18.1 percent in 2008, and (2) no party during the original proceedings before MOFCOM submitted any evidence contradicting this basic point. Based on the evidence before MOFCOM, the growth rates over the 2006 to 2007 were consistent with the rapidly growing Chinese market and thus provided a reasonable benchmark. The United States attempts to downplay this relatively high growth rate in overall consumption, but in doing so makes illogical comparisons of percentage changes, and does not demonstrate that MOFCOM's approach was in any way not reasonable or objective.

20. The United States also points to large increases in 2007, but in doing ignores the basic context of a growing market. Given the generally comparable rates of growth in the overall market over the 2006 to 2007 period and 2007 to 2008 period, it was reasonable for MOFCOM to compare the trends over these two periods and find that the negative trends over the 2007 to 2008 period were indicative of injury. Rather than cancelling out the injury in 2008, the more positive trends in 2007 just underscore and provide reasonable context for finding the negative trends in 2008 to be injurious. Thus, although the United States accuses MOFCOM of not putting trends into context, in fact it is the U.S. argument that seeks repeatedly to misunderstand or ignore the context.

21. Beyond this context of evaluating trends in light of the growing market, MOFCOM also properly evaluated the trends for the injury as a whole. This focus on the industry as a whole does not represent side stepping the issue. MOFCOM fully considered the relevance of Baosteel's entry into the domestic industry in its redetermination when appropriate. But for purposes of Articles 3.4 and 15.4, the focus must be on the industry as a whole. Subject imports can be injurious in all markets, whether there is a new entrant or not.

22. The United States continues to say nothing about Q1 2009 in its argument about adverse impact. Even after China pointed out this serious failing in the U.S. FWS, noting the MOFCOM focus on "trends that turned adverse in 2008 and then became worse in Q1 2009," the U.S. SWS says not one word about the negative trends in Q1 2009. The U.S. failure to say anything about Q1 2009 is far more "selective" than anything in MOFCOM's analysis.

23. Moreover, any positive trends did not "outweigh" the negative trends. MOFCOM reasonably and persuasively explained why, after considering all the factors as a whole, it found the domestic industry to be injured. That is why MOFCOM repeatedly stressed what would be reasonably expected in a growing market, and then noted the injurious trend. Thus, MOFCOM acknowledged that capacity and production were up, but then noted that these increases "did not produce the corresponding economies of scale and profits" the domestic industry expected from its investments. MOFCOM noted that "the increase in sales did not bring about the corresponding increase in profit." MOFCOM also noted for several factors the increase early in the period followed by the decrease later in the period – a decrease in the growth in 2008 and often a decrease in the actual amount in Q1 2009.

III. MOFCOM PROPERLY ANALYZED CAUSATION

24. The United States makes only two arguments about the basic causal link and they both fail. The U.S. argument about defective price effects addresses individual pieces of evidence in isolation rather than look at the totality of the record and all of MOFCOM's findings as they relate to price effects. MOFCOM did not make conclusory statements about the effects of rising subject import volumes and market share in isolation. Rather, MOFCOM made a series of well reasoned findings establishing the general competitive relationship of subject imports and the domestic like product in conjunction with rising imports volumes and market share. These findings as a whole demonstrated the "explanatory force" of subject imports and their significant effect on price. The U.S. position really reduces to making a single argument across all MOFCOM's findings, contending that the price divergence between subject imports and the domestic like product in the first quarter of 2009, relative to shifts in market share, somehow trumps all other evidence and repudiates any finding of adverse price effects. But as discussed in detail in Section II, this U.S. analysis is flawed.

25. The U.S. argument about MOFCOM's analysis of economies of scale also fails to address what MOFCOM actually found – how subject imports affected the domestic industry as a whole, and deprived the domestic industry of its ability to fully realize the potential on its investments in new capacity. The United States now acknowledges that MOFCOM's basic point is true, but dismissed the more basic point MOFCOM was making in its redetermination. China finds the U.S. criticism of an "abstract truism" rather strange, given that the U.S. initial argument on this point was itself just a list of abstract questions. Nor does this basic point change by considering each firm individually, rather than considering the industry as a whole as required by Articles 3 and 15. It was in no way a "failure" for MOFCOM not to quantify these effects, and the United States has not cited to any WTO obligation to quantify such effects. MOFCOM thus reasonably and objectively noted this qualitative connection between the growing volume of subject imports, the lack of economies of scale from new investments, and the adverse effects suffered by the domestic industry.

26. On both of these issues, the United States essentially argues that simply by articulating another way to view the evidence, it has somehow shown that MOFCOM's analysis is necessarily and unavoidably flawed. But this approach is just wrong. MOFCOM reasonably addressed all the evidence, considered these other perspectives, and reasonably concluded that subject imports were contributing to adverse effects being suffered by the domestic industry.

27. Similarly, the United States makes only two arguments about non-attribution, but these two arguments also both fail. MOFCOM properly considered and distinguished the effects of subject imports from the effect of domestic industry expansion of capacity. The entire U.S. argument on this point is really little more than a dispute over the MOFCOM methodology for showing that subject imports contributed significantly to the inventory overhang, even after taking into account the expansion of domestic capacity.

28. China had made the point in its FWS that its discussion of non-attribution regarding the expansion in the domestic industry had considered inventory expansion as only one of many factors. The United States never responds at all to any of the other points that MOFCOM had noted about this issue. In particular, the United States never responds to MOFCOM's discussion that: (1) one cannot reasonably compare percentages that are calculated by base amount of very different magnitudes, as does the U.S. argument on this point; (2) the clear link between subject import market share gains in 2008 and lost market share by the domestic industry; and (3) the fact that the domestic firms had to cut their prices in early 2009 specifically in an attempt to regain the market share that had been lost in 2008. China is not attempting to "draw attention away" from MOFCOM's analysis of inventory. China is putting the inventory discussion into context, *as part of* the overall analysis.

29. The U.S. argument thus reduces to disagreements with MOFCOM's methodology – the use of the 2007 as the base year; and the combined consideration of 2008 and Q1 2009. Since the United States did not even attempt to address China's other arguments, the U.S. claim comes down to these technical disputes about a particular methodology.

30. MOFCOM's choice of 2007 as the baseline rests on positive evidence and reflects objective examination of that evidence. MOFCOM fully explained its choice. First, MOFCOM noted that in a normal growing market "a reasonable basis for the market competitor's forecast" for its market share in the next year would be to start with its market share in the current year, absent some other factors. Second, when seeking to analyze the situation in 2008, the year 2007 would be "the most comparable and representative." Third, and more specific to this particular case, the year 2007 was a year in which subject imports had been stable (not surging like 2008), and the domestic industry "did not show any signs of an adverse situation yet" (not weakening indicators like 2008).

31. Although using 2006 would also have been reasonable, that base-line would have had the following problems. First, any market competitor at the end of 2007, trying to forecast its 2008 market share, would not normally go back to 2006. Doing so would have ignored the more recent changes in the business during 2007. Second, 2006 would also have been before the subject import surge, but it would have been more remote in time and thus more subject to other intervening factors. MOFCOM sought to understand what changed in 2008 – why the positive trends in 2007 reversed in 2008. Thus, MOFCOM chose 2007 because going back to 2006 would have introduced more uncertainty in this analysis, since the further back in time the authority goes, the greater the risk of "some other factors" playing a role.

32. The United States also makes much of MOFCOM's choice to consider 2008 and Q1 2009 as a whole, arguing that the contribution of subject imports to the inventory overhang in Q1 2009 alone would have been smaller. As with the choice of 2007 as a base year, MOFCOM fully explained its choice to consider inventory build-up over a 15 month period, and that explanation is reasonable and objective. In particular, MOFCOM address this choice of methodology at some length in its redetermination.

33. Thus, MOFCOM's choices rested on completely reasonable principles: (1) that different economic factors have different characteristics and thus may need to be treated differently in trying to understand the causal relationships; and (2) that inventory in particular has a distinctive feature in that it accumulates over time, and thus requires a different approach to understating the relative contribution of different factors to inventory build-up.

34. Instead of addressing these arguments, the United States points to a isolated comment by MOFCOM, and then twists that comment out of context. Even if the contribution of subject imports may have been less in Q1 2009, the focus on that narrow period was not the most appropriate way to consider inventory with its unique characteristic of being accumulated over time, not sold over a discrete period. Given that 2008 accounted for the vast majority of the overall 2008 and early 2009 period being considered, MOFCOM reasonably explained why it put particular weight on the contribution of subject imports to the inventory build up in 2008.

35. MOFCOM thus met its obligations under Articles 3.5 and 15.5. As China has noted, MOFCOM had no obligation to show that subject imports were the only factor. The United States does not dispute this point. MOFCOM showed – using a reasonable methodology – that subject imports accounted for about half of the inventory build up, and thus were making a significant contribution to the adverse effects being experienced by the domestic industry, even when distinguished from the effects attributable to the expansion in domestic capacity.

36. MOFCOM also properly considered and distinguished the effects of subject imports from the effects of non-subject imports. MOFCOM reasonably found that if large volumes of non-subject imports were having no effects in 2006 and 2007, and did not gain any market share in 2008, then non-subject imports were not the problem. The United States relies entirely on the argument that since non-subject imports had large volume, and allegedly had lower prices, then non-subject imports must have mattered more. This argument fails for many reasons. First, the U.S. argument still does not address and cannot explain how the larger volume and allegedly lower priced non-subject imports did not have any adverse effect in 2006 and 2007. Second, the United States incorrectly asserts that "MOFCOM did not examine market share data." MOFCOM could not have noted the shifts in the market share without examining the market share data. Third, MOFCOM focused its analysis on shifts in market share because those changes over time were more probative on understanding why the performance of the Chinese industry changed over time. The shifts in market share both took into account the growing market and allowed MOFCOM to see what supply sources were gaining and losing market share over time. Fourth, MOFCOM correctly

noted that the shift in market shares in 2008 was the key fact to consider. The year 2008 was when the domestic industry lost 5.65 percentage point of market share – this is the adverse effect to be explained. And in 2008, subject imports gained 5.56 percentage points of market share, while non-subject imports gained only 0.09 percentage point of market share.

IV. MOFCOM PROPERLY DISCLOSED ALL ESSENTAL FACTS

37. In its SWS the United States still has not set forth a *prima facie* claim. Even this expanded discussion continues to make an overarching fundamental error -- there is not a single sentence in the U.S. SWS explaining why each of the seven facts at issue should be considered "essential." Many of the U.S. arguments are basically that public summaries of facts are somehow not sufficient, and that the underlying data needed to be disclosed. When arguing for disclosure of facts that the authority has deemed (without any challenge) to be confidential, the complaining party has a particular burden to articulate clearly and explicitly why that particular fact – as opposed to its public summary – is in fact essential. Yet the United States has made no effort to do so. For these reasons, China continues to believe the Panel should reject the U.S. claim as failing to state a *prima facie* case.

38. Even if the United States has finally established a *prima facie* case, the United States still has not sufficiently demonstrated that the facts at issue were "essential" or that the facts were not sufficiently disclosed. The consistent theme in the U.S. argument is to dismiss without serious discussion what MOFCOM actually disclosed and just insist that the undisclosed confidential underlying data was somehow "essential."

39. Trends in Import Prices. The disclosure clearly describes the different sources of data for the price trends. The U.S. argument ignores the clear use of percentage changes to provide a sufficient public summary of the underlying confidential data. Nor does the United States anywhere demonstrate how the "data underlying" these percentage changes were somehow "essential," or why the percentage changes themselves were not sufficient disclosure of these facts.

40. Economies of Scale. The disclosure found that the "rise of demand gives an impetus" to capacity in China, a statement fully supported by the facts disclosed showing the percentage changes in demand and domestic industry capacity. The United States has not presented any argument why the confidential underlying data are "essential facts."

41. Sales Obstacles. The disclosure makes this reference to "sales obstacles" clear in context, and that is why this particular paragraph ends with the concluding statement that "[h]ence, the domestic industry has been seriously impacted in both production and sales due to a great deal of imports." Nowhere does the United States explain what additional facts about subject imports in this context were undisclosed "essential facts."

42. Price Reduction in Q1 2009. MOFCOM's disclosure cited to the loss of domestic industry market share in 2008 and the regaining of that share in Q1 2009, essential facts that were fully disclosed, and then drew the reasonable conclusion about the business motivation for the Chinese industry to lower its prices.

43. Price-cost differential for Wuhan. The disclosure clearly documents the decline in gross profit rate, which is the difference between average prices earned and average costs incurred -- the "price-cost differential." The U.S. argument ignores the clear use of percentage changes to provide a sufficient public summary of the underlying confidential data. The underlying data are not "essential facts," and were confidential data that did not need to be disclosed beyond these percentage changes.

44. Capacity Did Not Exceed Market Demand. The disclosure describes the trends in both capacity and consumption, using percentage changes to protect the confidentiality of the underlying data. MOFCOM disclosed sufficient facts to show that even after its growth over the 2006 to 2008 period, domestic capacity was still below the total market in China.

45. Allocation of Inventory Overhang. The disclosure clearly explains the data sources and methodology used to confirm that subject imports made a significant contribution. The U.S.

argument ignores the use of percentage changes to provide a sufficient public summary of the underlying confidential data used in the calculations.

V. MOFCOM PROPERLY DISCLOSED THE FACTUAL AND LEGAL BASIS OF ITS DETERMINATION

46. The U.S. FWS made no effort to state a *prima facie* case for this claim, offering only brief and insufficient one sentence statements that certain points were important to the final decision by MOFCOM, without any discussion of why. The United States has not responded to this argument, and instead uses its SWS in an unsuccessful attempt to state its claim for the first time. But the U.S. SWS only attempts to rehabilitate three of the five claims made initially, indicating that it has abandoned the two other sub-claims.

47. The U.S. efforts to rehabilitate the first three of these sub-claims still fail to state a *prima facie* case. The U.S. SWS does not cure this fundamental defect, and instead repeats the defect of assertion without explanation or argument. Even if the Panel itself believes these points are material, it is not the job of this Panel to make the U.S. arguments for the United States, and certainly not at this late stage of the proceeding. If the Panel cannot find any explanation of why the United States believes certain points to be material in the FWS or SWS, it is not too late for the United States to attempt to make such a showing now. But if the Panel decides to consider the merits, these claims still fail.

48. Trends in Import Prices. The entire U.S. argument is to disagree with the MOFCOM characterization of the trend in overall prices as measured by average unit values. But this U.S. argument makes too much out of too little. The U.S. argument ignores the paragraph-long explanation of why the domestic average prices fell by a larger amount in early 2009. Thus, MOFCOM disclosed and discussed the key facts. The United States might disagree with MOFCOM's assessment, but there is no basis to say this point was not discussed.

49. Economies of Scale. The entire U.S. argument is that China made a statement without citation of the redetermination, but takes this statement out of context. This statement from China's FWS was made after three preceding sentences that did cite the redetermination. The fourth sentence was simply expanding on the implications of the prior three sentences.

50. Sales Obstacles. The entire U.S. argument on this point is a one sentence disagreement with China's argument, but this one sentence largely ignores the redetermination itself. MOFCOM's redetermination drew permissible inferences based on the loss and then partial regaining of market share, MOFCOM was also aware of the explicit statement by the Chinese producers in their petition that during Q1 2009, "the petitioners had to reduce product price to maintain their market share under the impact of the unfair trade practice of the two subject countries." The United States never discusses any of these facts, and only asserts that there must have been something else that was not disclosed and something else that needed to be discussed. But an assertion is not an argument, and so this U.S. claim must fail.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA AT THE SUBSTANTIVE MEETING

I. MOFCOM PROPERLY ANALYZED PRICE EFFECTS

1. Nothing in the relevant WTO texts supports the U.S. position that MOFCOM must compare relative prices as a necessary part of price effects analysis. The U.S. reading has no basis in the plain meaning of the text, which gives administering authorities discretion to choose the analytic approach. Moreover, the Appellate Body addressed precisely this interpretive point in *China – GOES*, and has already rejected the U.S. position. The United States also complains about what the absence of findings about price undercutting implies for MOFCOM's conclusions. But this argument fails. First, it incorrectly assumes there was some detailed pricing information that MOFCOM ignored. Second, this argument also incorrectly assumes more detailed information would have somehow been adverse. The U.S. argument is thus really about requiring authorities to engage in a certain type of analysis and requiring authorities to gather data to conduct that analysis. Particularly in the context of a redetermination looking back at a period of time several years old, it is completely reasonable for an authority to make a new determination based on information already on the record before the authority.

2. Turning to the factual issues, MOFCOM's redetermination properly demonstrated that subject imports had "explanatory force" for the adverse price effects found, including the findings of price suppression. Contrary to the repeated U.S. arguments, MOFCOM did not rely on volume alone to establish price effects. The volume evidence in combination with the established competitive relationship explained the nearly one-to-one relationship between subject import gains and domestic industry losses. The United States tries to dismiss the evidence of the strongly competitive relationship, but these arguments cannot be reconciled with the undisputed findings by MOFCOM.

3. Collectively, the evidence of (1) a single like product that rested on the factual finding of substitutability among different supply sources; (2) cumulation that rested on the factual findings of substitutability and a competitive relationship among subject imports sources and with the domestic products; (3) U.S. producer testimony of a "highly competitive" relationship among supply sources; (4) parallel pricing trends over the 2006 to 2008 period; (5) documents revealing how purchasers leveraged subject import prices to affect domestic prices; (6) overlapping customers that bought from both domestic and subject imports, highly their substitutability; and (7) nearly one-to-one market replacement, supports the explanatory force of subject imports. MOFCOM's demonstration of "explanatory force" thus rested on multiple, consistent, and mutually reinforcing factual findings. The U.S. argues unsuccessfully that the difference between percentage changes in AUVs over one comparison period in Q1 2009 somehow trumps the seven other factual findings made by MOFCOM. But this one fact in isolation does not undermine the collective weight of the other evidence that strongly support the existence of the competitive relationship.

4. The United States attacks each of these multiple MOFCOM factual findings in isolation with its argument that the market share responses to diverging prices in the first quarter of 2009 does not support a finding that subject imports and the domestic like product had a competitive relationship. But this repeated U.S. argument ultimately fails for several reasons. First, the United States misapplies certain comments by the Appellate Body that addressed the reasoning in the original MOFCOM determination about the effects of "the prices of subject imports," and not about the effects of subject imports more generally. The redetermination has substantially changed and clarified the focus on how the subject imports were having adverse price effects -- clarifications that were not before the Appellate Body. In particular, the redetermination both explained in more detail the evidence supporting the finding of competitive relationship, and addressed specifically and at some length the reasons for giving less weight to the divergent AUV trends in the first quarter of 2009. Moreover, the Appellate Body questioned whether the prices of subject imports "adequately explained" the price suppression and depression, and thus focused on the adequacy of the available data and explanation. The Appellate Body could not have evaluated a different set of findings from a different determination, which is why the focus was on the adequacy of the specific determination before the Appellate Body.

5. Second, the U.S. argument misrepresents the domestic industry market share response by comparing end points – first quarter 2008 to first quarter 2009 – rather than looking, as MOFCOM did, to the full loss in market share over the entirety of 2008. Third, MOFCOM never indicated that this recapture of market share was only 1.04 percentage points; the increase compared to 2008 as a whole was necessarily a more substantial 5.15 out 5.65 percentage points regained from subject imports.

6. The United States simply fails to acknowledge the reasonable inferences to be drawn from MOFCOM's findings as a whole. The Appellate Body has recognized the importance of considering the evidence as a whole, explaining that "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference . . . ." The United States ignores this key principle when repeatedly considering each point in isolation, but never stepping back to consider them as a whole. But each MOFCOM finding reinforces the other and contributes to the overall demonstration of the "explanatory force" of subject imports. The United States cannot rebut the probative value of volume and market share trends by mechanically considering those trends alone, ignoring the extensive other evidence and findings that supported MOFCOM's overall determination about adverse price effects.

7. Thus, the MOFCOM findings of price suppression in 2008 and early 2009 and price depression in early 2009 both rest on a proper foundation of evidence that establishes the "explanatory force" of the subject imports. MOFCOM discussed the evidence supporting its findings and reasonably addressed the potentially contrary evidence, in the end making a reasonable and balanced judgment about all of the evidence.

II. MOFCOM PROPERLY ANALYZED ADVERSE IMPACT

8. The United States has not successfully rebutted China's argument that this new claim is not properly before this Article 21.5 panel. Prior WTO precedent and fundamental fairness do not allow a complaining country to avoid a claim initially, luring the defending country into reasonably believing there was nothing that needed to be changed regarding that aspect of a measure, and only then raising that new claim in an Article 21.5 proceeding when the defending country no longer has any chance to bring that aspect of its measure into compliance. Yet that is precisely what the United States is trying to do in this dispute with its new claim on adverse impact.

9. The U.S. efforts to show the MOFCOM finding on adverse impact was somehow "new" and thus permissible all fail. Contrary to the U.S. allegation, there is no new focus on 2008 in the MOFCOM discussion of injury; the injury discussion is essentially unchanged, reciting the same key facts that highlight the declines at the end of the period. Thus the U.S. argument that the redetermination somehow changed reduces to a single point: that because MOFCOM deleted a few references to "low priced imports," these minor changes somehow created a "new" determination on this issue. This U.S. argument, however, is wrong. First, the MOFCOM discussion of material injury was always focused on the subject imports, not on the prices of the subject imports. Second, even if one were to assume that "low priced imports" were not just a reference to unfairly traded imports more generally, which it was, the references to "low price" refer to *the price of subject imports,* an issue that has no particular relevance when analyzing the injury suffered by a domestic industry under Article 3.4 and 15.4.

10. But regardless of the Panel ruling on this important procedural issue, the U.S. claim on adverse impact also fails on its merits. First, the United States alleges without any support that the earlier trend may have been unsustainable, but this theory several problems. First, this theory is inconsistent with the evidence of strong rates of growth in total consumption in China, increasing 22.8 percent in 2007 and another 18.1 percent in 2008. Moreover, no party during the original proceedings before MOFCOM submitted any evidence contradicting this basic point about the growing market or in anyway suggesting the growth would not continue. Second, the United States also points to large increases in 2007, but in doing ignores the basic context of a growing market. Third, beyond this context of evaluating trends in light of the growing market, MOFCOM also properly evaluated the trends for the injury as a whole. Contrary to the U.S. argument, this focus on the industry as a whole does not represent side stepping the issue. Finally, any positive trends did not "outweigh" the negative trends. MOFCOM reasonably and persuasively explained why, after considering all the factors as a whole, it found the domestic industry to be injured.

III. MOFCOM PROPERLY ANALYZED CAUSATION

11. The United States makes only two arguments about the basic causal link and they both fail. As we have just discussed in some detail, the flawed U.S. argument about MOFCOM's price effects findings addresses individual pieces of evidence in isolation rather than look at the totality of the record and all of MOFCOM's findings as they relate to price effects.

12. So in fact, other than repeating its price effects arguments, the U.S. argument about causal link actually reduces to a single argument. The United States challenges MOFCOM's analysis of economies of scale, but this argument also fails to address what MOFCOM actually found. In particular, this U.S. argument does not address MOFCOM's finding that subject imports captured tonnage and market share that affected the domestic industry as a whole, and deprived the domestic industry of its ability to fully realize the potential on its investments in new capacity. MOFCOM reasonably and objectively noted this qualitative connection between the growing volume and market share of subject imports, the corresponding lack of economies of scale from new investments, and the adverse effects suffered by the domestic industry. On both of these issues, the United States essentially argues that simply by articulating another way to view the evidence, it has somehow shown that MOFCOM's analysis is necessarily and unavoidably flawed. But this approach is wrong. MOFCOM reasonably addressed all the evidence, considered these other perspectives, and reasonably concluded that subject imports were significantly contributing to adverse effects being suffered by the domestic industry.

13. MOFCOM properly considered and distinguished the effects of subject imports from the effect of domestic industry expansion of capacity. The entire U.S. argument on this point is really little more than a technical dispute over the MOFCOM methodology for showing that subject imports contributed significantly to the inventory overhang, even after taking into account the expansion of domestic capacity.

14. Before moving to the specifics of the U.S. arguments about MOFCOM's methodology and why these arguments are wrong, it is helpful to step back and put this argument into an overall context. The dispute is not about whether MOFCOM "separated and distinguished;" the United States admits as much, acknowledging that MOFCOM addressed this issue with its "non-attribution analysis" about alleged overexpansion and overproduction. Rather the dispute is entirely over how MOFCOM did so. But in doing so, the United States has made this issue entirely about the methodology chosen, and ignores the repeated guidance from the Appellate Body that the AD Agreement does not specify the methodology, and will not second guess any reasonable and objective method. Thus, China need not show that its method was the only way, or even the best way. China need only show that MOFCOM properly established the facts in question, and then evaluated them in an unbiased and objective manner. As we will now demonstrate, MOFCOM more than met this standard.

15. This U.S. non-attribution argument reduces to disagreements about two specific aspects of the MOFCOM methodology: first, the use of 2007 as the base year; and second, the combined consideration of 2008 and Q1 2009. Since the United States did not even attempt to address China's other arguments, the U.S. claim comes down to these technical disputes about a particular methodology. But MOFCOM's choice of 2007 as the baseline rests on positive evidence and reflects objective examination of that evidence. MOFCOM fully explained its choice. Although using 2006 would also have been reasonable, that base-line would have had several serious problems. Thus, MOFCOM chose 2007 because going back to 2006 would have introduced more uncertainty in this analysis, since the further back in time the authority goes, the greater the risk of "some other factors" playing a role. The United States also makes much of MOFCOM's choice to consider 2008 and Q1 2009 as a whole, arguing that the contribution of subject imports to the inventory overhang in Q1 2009 alone would have been smaller. As with the choice of 2007 as a base year, MOFCOM fully explained its choice to consider inventory build-up over a 15-month period, and that explanation is reasonable and objective.

16. MOFCOM also properly considered and distinguished the effects of subject imports from the effects of non-subject imports. MOFCOM reasonably found that if large volumes of non-subject imports were having no effects in 2006 and 2007, and did not gain any market share in 2008, then non-subject imports were not the problem. The United States relies entirely on the argument that since non-subject imports had large volume, and allegedly had lower prices, then non-subject imports must have mattered more. This argument fails for many reasons. First, the U.S. argument

still does not address and cannot explain how the larger volume and allegedly lower priced non-subject imports did not have any adverse effect in 2006 and 2007. Second, the United States incorrectly asserts that "MOFCOM did not examine market share data." MOFCOM could not have noted the shifts in the market share without examining the market share data. Third, MOFCOM focused its analysis on shifts in market share because those changes over time were more probative on understanding why the performance of the Chinese industry changed over time. The shifts in market share both took into account the growing market and allowed MOFCOM to see what supply sources were gaining and losing market share over time. Fourth, MOFCOM correctly noted that the shift in market shares in 2008 was the key fact to consider. The year 2008 was when the domestic industry lost 5.65 percentage point of market share – this is the adverse effect to be explained. And in 2008, subject imports gained 5.56 percentage points of market share, while non-subject imports gained only 0.09 percentage point of market share.

IV. MOFCOM PROPERLY DISCLOSED ALL ESSENTAL FACTS

17. Even after two submissions, the United States still has not set forth a *prima facie* claim about the failure to disclose "essential facts." Even the expanded discussion in the U.S. Second Written Submission continues to make an overarching fundamental error -- there is not a single sentence explaining why each of the seven facts at issue should be considered "essential." Many of the U.S. arguments are basically that public summaries of facts are somehow not sufficient, and that the underlying data needed to be disclosed. When arguing for disclosure of facts that the authority has deemed -- without any challenge -- to be confidential, the complaining party has a particular burden to articulate clearly and explicitly why that particular fact – as opposed to its public summary – is in fact essential. Yet the United States has made no effort to do so. For these reasons, China continues to believe the Panel should reject the U.S. claim as failing to state a *prima facie* case. But even if the Panel believes the United States has finally established a *prima facie* case, the United States still has not sufficiently demonstrated that the facts at issue were actually "essential" or that the facts were not sufficiently disclosed. We discussed each of the seven specific facts at issue in our written submissions. We will not repeat that level of detail now. The consistent theme in the U.S. argument is to dismiss without serious discussion what MOFCOM actually disclosed and just insist that the undisclosed confidential underlying data was somehow "essential." Our written submission documents fact by fact what MOFCOM said and why it was sufficient.

V. MOFCOM PROPERLY DISCLOSED THE FACTUAL AND LEGAL BASIS OF ITS DETERMINATION

18. The United States has also still not stated a *prima facie* case for its claim about the disclosure of the basis for the determination, offering only brief and insufficient one sentence statements that certain points were important to the final decision by MOFCOM, without any discussion of why. The United States has not actually responded to this argument, and instead uses its Second Written Submission in a still unsuccessful attempt to state its claim for the first time. But the U.S. effort fails. At the outset, we note that the United States only attempts to rehabilitate three of the five specific claims made initially, indicating that it has now abandoned the two other specific claims. The U.S. efforts to rehabilitate the first three of these specific claims still fail to state a *prima facie* case. The U.S. Second Written Submission does not cure this fundamental defect of not explaining why certain points were material, and instead repeats the defect of assertion without explanation or argument. Even if the Panel itself believes these points are material, it is not this Panel's job to make the U.S. arguments for the United States, and certainly not at this late stage of the proceeding. If the Panel cannot find any explanation of why the United States believes certain points to be material in the written submissions already made, it is now too late for the United States to attempt to make such a showing now. But if the Panel decides to consider the merits, these claims still fail. We discussed each of the three remaining claims at issue in some detail in our written submissions. We will not repeat that discussion here. We urge the Panel to consider that explanation of why MOFCOM's discussion was sufficient.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE INTERIM REVIEW MEETING

1. China would like to thank the Panel for arranging this meeting on the interim report. We realize such meetings are not common. But given the circumstances of this dispute, with the termination of the challenged measures occurring during the pendency of this Article 21.5 proceeding, China believes it is useful and appropriate for the parties and the Panel to meet one more time to discuss how most appropriately to take into account this important recent development.

2. As we all know, the interim report was released on 17 March 2015. It concerns measures first taken by China on 10 April 2010, specifically anti-dumping measures on imports of grain oriented flat-rolled electrical steel originating in both Russia and the United States, as well as an anti-subsidy measure on the same product originating in the United States. This Article 21.5 proceeding has concerned China's actions in seeking to bring those measures into conformity as first recommended by the Panel and Appellate Body back in 2012.

3. We now have the interim report concerning China's implementation efforts. Although China is disappointed in the Panel's findings, China nevertheless appreciates the role of WTO dispute settlement – and the efforts by Panels – in providing an orderly way to address and resolve disputes between Members. We have made some specific comments on precise aspects of the interim report that we hope the Panel will consider.

4. Beyond these specific comments, however, there is a separate issue concerning the Panel's recommendation in its interim report. We believe important events have occurred and require the Panel to reconsider of this issue. In the last paragraph of the interim report, paragraph 8.6, the Panel recommends that China "bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements." China suggests that this paragraph be struck from the report, a change that is necessary in light of recent events and consistent with past practice.

5. As noted, the anti-dumping and anti-subsidy measures at issue are now more than five-years old. Consistent with the obligations under Article 11.3 of the Anti-Dumping Agreement and Article 21.3 of the SCM Agreement, China terminates anti-dumping and anti-subsidy measures after five years unless it is demonstrated that they remain necessary to address dumping, subsidization, and injury. China takes these obligations seriously and has implemented them into its national law as Article 48 of its AD Regulation and Article 47 of its CVD Regulation.

6. The process for determining whether an expiry review was necessary to consider the matter was initiated on 10 October 2014, as announced in Public Notice No. 67 issued by MOFCOM. Under that process, parties had 60 days prior to the five-year expiration date of the measures at issue to file a written application for an expiry review to MOFCOM. No such application was submitted by any party. As a consequence, on 10 April 2015, MOFCOM issued Public Notice No. 11 of 2015 informing the public that no application had been filed for expiry review by the domestic industry or by any natural person, legal person or organization on behalf of the domestic industry within the time limit as specified. Under these circumstances, MOFCOM decided not to launch an expiry review, but instead terminated the measures at issue effective as of 11 April 2015. China submitted this termination notice and an English translation to the Panel and the United States on 21 April 2015.

7. There are several reasons for the Panel to consider this important piece of evidence. First, the evidence simply did not exist until several days ago, and could not have been submitted, but is nevertheless highly relevant. Second, this evidence goes to the essence of this Article 21.5 proceeding – the ongoing imposition of the challenged anti-dumping and anti-subsidy measures. Those measures are no longer being imposed. Third, this Article 21.5 proceeding is still ongoing and therefore all parties have a chance to be heard and there is no unfairness to anyone.

8. The specific measures that led to this dispute have thus been terminated. Such measures once terminated cannot simply be revived. Rather new anti-dumping and anti-subsidy measures can only be imposed upon completion of a new investigation, and new affirmative findings of dumping/subsidy, injury, and causality are made. MOFCOM has never imposed anti-dumping and anti-subsidy measures absent such complete procedures.

9. Given the termination of the measures, China therefore requests that the Panel take steps to modify its interim report to reflect this reality, and that the Panel remove any recommendation that China bring its measures into conformity. China has already done so. There are no longer any "measures" in effect to which such a recommendation would apply.

10. Such action would be consistent with the limits of the Panel's mandate and past practice. China notes that panels have repeatedly found it appropriate to abstain from issuing any recommendations regarding terminated measures. And the Appellate Body has in fact distinguished the question of whether a panel can make a finding concerning an expired measure from the question of whether a panel can make a recommendation relating to an expired measure. For example, in *US – Certain EC Products*, the Appellate Body reversed the panel's decision to make a recommendation pursuant to Article 19.1 of the DSU on the grounds that the panel had already found that the measure at issue in that dispute had expired. The same principle has extended to Article 21.5 proceedings under the Dispute Settlement Understanding.

11. China believes the same facts exist here, and that the Panel should revise the interim report to reflect the recent developments. In China's view, the final report should reflect the current reality. First, the specific measures the United States challenged have been terminated. Second, given the termination of the measures, the Panel has no need to make any recommendations regarding China bringing its measures into compliance with its obligations under the WTO agreements. Third, given the termination of the measures. China in fact is now already in compliance with its obligations. Any prior recommendations relate to measures that no longer exist and therefore cease to be operative.

12. China would also like to respond to some of the U.S. comments on the interim report concerning recommendations. At paragraphs 8-12 of its comments, the United States agrees with China that there is no need for this Panel to make any recommendation and that paragraph 8.6 of the interim report should be deleted. These comments by the United States, however, imply that the original recommendations should remain operative. That is not correct.

13. China would like to make clear there is no longer any disputed measure in effect to which the original recommendations could still apply. In accordance with the normal operation of Chinese law, these measures were in effect for the five years permitted by Chinese law. No party submitted an application to renew these measures and so they have been terminated.

14. Given these facts, the measures that were the subject of this proceeding no longer exist, and will not exist upon release of the Panel's final report. That is why China requests that the Panel take steps to modify its interim report to reflect this reality, and namely that it remove any recommendation that China bring its measures into conformity. There are no longer any "measures" in effect to which such a recommendation would apply. The United States argues in paragraph 12 of its comments that the original recommendations remain in effect, but acknowledges that is true only until "a Member has brought its measures found to be inconsistent by the DSB into full compliance with its WTO obligations." Termination of the measures at issue in this dispute brings China into full compliance.

15. For the same reasons, there is no need for the new language that the United States has suggested. In paragraph 10 of its comments the United States has proposed new language that is not appropriate. Given that the measures no longer exist, there is no factual or legal basis for a statement that "China has failed to bring its measure" into compliance, as the United States has suggested.

16. We appreciate the Panel's time in considering these new facts and in reconsidering the language currently found in paragraph 8.6 of the Panel's interim report.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. AN INVESTIGATING AUTHORITY'S PRICE EFFECTS ANALYSIS MUST MEET SUBSTANTIVE AND PROCEDURAL REQUIREMENTS LAID DOWN IN THE ADA AND SCM AGREEMENTS

1. Articles 3.2 ADA and 15.2 SCM require the investigating authority to undertake a price effects analysis as part of an injury determination. A price effects analysis under Article 3.2 ADA and Article 15.2 SCM must meet several substantive and procedural requirements: (i) the investigating authority must assess whether domestic prices are depressed or suppressed by subject imports; (ii) this assessment must be "rigorous" and entail an objective examination based on positive evidence; and (iii) the investigating authority's consideration must be disclosed to the parties so that they can know whether the authority has met these substantive, procedural and evidentiary requirements.

2. The Appellate Body explained in *China – GOES* that the analytical and evidentiary obligations under the ADA and SCM Agreements discipline an investigating authority's requirement to "consider" (i.e. to "*take something into account* in reaching its decision")[1] price effects under Articles 3.2 and 15.2. Articles 3.1 and 15.1 ensure that, although investigating authorities need not make a definitive determination in respect of price effects, this "does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2",[2] and it "does not diminish the scope of *what* the investigating authority is required to consider".[3]

3. The text and context of Article 3.2 and Article 15.2, as clarified through jurisprudence, require an authority to examine whether any observed price depression or price suppression is attributable to subject imports. In *China – GOES*, the Appellate Body explained that "consideration of significant price depression or suppression under Articles 3.2 and 15.2 encompasses by definition an analysis of whether the domestic prices are depressed or suppressed by subject imports".[4] The Appellate Body clarified that "it is *not* sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression".[5]

2. IS THE INVESTIGATING AUTHORITY REQUIRED TO CONDUCT A PRICE COMPARISON IN ORDER TO DETERMINE WHETHER PRICE DEPRESSION OR PRICE SUPPRESSION IS THE EFFECT OF THE SUBJECT IMPORTS?

4. In the view of the European Union, an objective authority cannot conclude that price suppression or price depression is "the effect" of the subject imports without making a proper comparison of the prices of subject imports with the prices of the domestic like product.

5. In the original dispute the Appellate Body noted that panels must allow for the possibility that either the price or the volume of subject imports is sufficient by itself to sustain a finding that price suppression or depression is "the effect" of subject imports.[6] The Appellate Body also clarified that a finding that price suppression or price depression is the effect of the subject imports does not require a finding of actual price undercutting.[7] In the EU's view, however, neither of these findings has the implication that an objective investigating authority can dispense with comparing the prices of the subject imports and the domestic like products.

[1] Appellate Body Report, *China – GOES*, para. 130 (emphasis original).
[2] Ibid. para. 130.
[3] Ibid. paras 131-132 (emphasis original).
[4] Ibid. para. 142.
[5] Ibid. para. 138 (emphasis original).
[6] Ibid. para. 216.
[7] Ibid. para. 206.

6. While the Appellate Body referred to the possibility that a finding that price depression or price suppression was the effect of subject imports could be sustained by evidence relating to the volume of those imports, it recognised that

> […] Given the inter-relationship of product volumes and prices, it is not clear that an investigating authority may in practice easily separate and assess the relative contribution of the volumes versus the prices of subject imports on domestic practices.[8]

7. Because of the inter-relationship of product volumes and prices observed by the Appellate Body, the effects of the volume of subject imports cannot be properly assessed without talking into account also the effects of the prices of such imports. In turn, the effects of the subject imports' prices on the prices of the domestic like product cannot be properly assessed in the absence of any price comparison.

8. In particular, subject imports cannot have the effect of supressing or depressing the prices of the domestic like products unless they compete on price with them. Yet, unless the investigating authority has conducted a proper price comparison, it will not be possible to ascertain the nature and the extent of competition between subject imports and the domestic like products. The original dispute illustrates this. The Appellate Body observed that:

> […] The fact that there was a substantial divergence in pricing levels over the period could suggest that the two products were not in competition with each other, or that there were other factors work. […][9]

9. The Appellate Body went on to quote with approval the observation made by Japan to the effect that:

> […] the fact that the price of subject imports was higher than the price of domestic like products in the first quarter of 2009 "may rather indicate that both products are not in competition with each other, and therefore, price depression or price suppression of the domestic products could not be the effect of the imports."[10]

10. MOFCOM's Re-determination does not appear to address the issues that were raised by the Appellate Body in view of the substantial price differentials shown by the evidence relied upon by MOFCOM in its original determination. Instead, MOFCOM appears to have disregarded such evidence in its Re-determination.

11. While the European Union does not put into question that an investigating authority has a certain margin of discretion in choosing a methodology for analysing the effects of subject imports on domestic industry prices;[11] the ADA and SCM do not prescribe any precise methodology for establishing the existence of price depression and suppression. This does not mean, contrary to what appears to be China's position, that a comparison of the prices of domestic and imported products is **never required**, so that the investigative authorities enjoy complete discretion to decide whether or not to make such a comparison.

12. Second, contrary to China's position in this case, the European Union does not understand the Appellate Body in *China – GOES,* to have stated or even implied that an investigating authority has in all cases a full discretion under Article 3.2 ADA and 15.2 SCM to dispense with comparing the prices of the subject imports and the domestic like products. In the view of the European Union, rather the contrary would be true in most cases, based on the guidance provided by the Appellate Body.

[8] Appellate Body Report, *China – GOES*, footnote 346.
[9] Ibid. para. 226.
[10] Ibid. footnote 375.
[11] Panel report, *China – Autos (US)*, para. 7.255.

13. The Appellate Body noted that it "[could] conceive of ways in which an observation of parallel price trends might support a price depression or price suppression analysis"[12], despite the absence of price undercutting. For example, according to the Appellate Body,

> The fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices.[13]

14. MOFCOM's redetermination purports to rely in part on a finding of parallel pricing. A proper finding of parallel pricing, however, would have to be based on a price comparison at different time points during the investigation period. Yet MOFCOM did not conduct any such comparison. Merely comparing the increase or decrease rates expressed in percentage terms, without disclosing the initial price levels to which those rates refer, which is what MOFCOM appears to have done in this case, is of limited value in order to assess the nature and the extent of competition between the subject imports and the domestic like products. Where, as it appears to be the case in this dispute, there is a substantial price differential between subject imports and the domestic like product, the mere fact that prices move in the same direction at similar rates could be due to other factors and does not provide conclusive evidence of price competition. In other words, it does not have, of itself, sufficient "explanatory force".

15. Similarly, the relevance of anecdotal evidence on a supposed policy of price undercutting, such as that relied upon by MOFCOM in this case, cannot be properly assessed without taking into account also the actual differences in prices between the subject imports and the domestic like products. Again, this is confirmed by the findings of the Appellate Body in the original dispute, where the Appellate Body noted that:

> […] Even though we consider that a policy of price undercutting can explain depressive or suppressive effects on domestic prices even in the absence of actual price undercutting, we do not see that, in the light of the price dynamic in the first quarter of 2009, there was a basis to conclude so in this case […][14].

16. The analysis of the "price dynamic" mentioned by the Appellate Body involves a price comparison, which MOFCOM, however, refused to do in its Re-determination.

17. In *U.S. – GOES* the Appellate Body noted that, for the purpose of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement, "the investigating authority is not required to conduct a fully fledged and exhaustive analysis of all known factors that may cause injury to the domestic industry"[15]. Nonetheless, the Appellate Body went on to stress that the Appellate Body "may not disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices".[16]

18. *A fortiori* the investigating authority should not be allowed to disregard evidence relating to the prices of subject imports that may call into question the "explanatory force" of the volume of subject imports. For the reasons explained above, a comparison of the prices of subject imports with the prices of the domestic like product is manifestly relevant, and indeed indispensable, in order to assess the effects of subject imports on the prices of domestic like products. Where an investigating authority deliberately omits to include in its determination any such price comparison, despite the fact that the necessary evidence is, or should have been, available in the record, it can be surmised that such price comparison would have called into question the authority's findings based on the volume of subject imports.

[12] Appellate Body Report, *China – GOES*, para. 210.
[13] Ibid. para. 210.
[14] Appellate Body Report, *China – GOES*, para. 226.
[15] Ibid. para. 151.
[16] Ibid. para. 152.

19. Selective use of data raises questions of bias and accuracy, and thus inconsistency with the requirement to conduct an "objective examination" based on "positive evidence".[17] As such, an investigating authority is obliged to consider arguments made by interested parties regarding the accuracy and relevancy of data, and the determination "must be based on an examination of *all* relevant evidence before the investigating authority".[18] An investigating authority must also adequately explain its conclusions on the issues raised.[19] A panel is therefore tasked with "examin[ing] whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence".[20]

[17] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.

[18] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.397. (emphasis added) See also Appellate Body Report, *Thailand – H-Beams*, para. 107.

[19] Panel Report, *EC – Salmon (Norway)*, paras 7.644-7.645.

[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Due to its systemic interest, as well as its direct interest stemming from the DS454 dispute, Japan addresses the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"),[1] and respectfully requests that the Panel take Japan's views into consideration.

II. ARGUMENTS

A. The Consistency of MOFCOM's Price Effects Analysis with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

2. On the topic of the price effects analysis conducted by the Ministry of Commerce of the People's Republic of China ("MOFCOM"), the requirement under Article 3.1 of the Anti-Dumping Agreement is for an investigating authority to determine "the effect of the dumped imports on prices in the domestic market for like products", and do so "based on positive evidence and … an objective examination". Article 3.1 serves as "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".[2]

3. As an initial matter, "positive evidence" must be both pertinent and of reliable quality;[3] and an "objective examination" requires that an investigating authority's analysis "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[4] MOFCOM's apparent lack of evidence and disregard for contrary evidence in its price suppression and price depression determinations appear to violate the "overarching" and "fundamental" principles of Article 3.1 to base determinations on "positive evidence" and an "objective examination".

4. Turning to the substantive inquiry regarding "the effect of the dumped imports on prices in the domestic market for like products", Article 3.2 sets forth three price effect factors that the investigating authority must consider to determine whether such an "effect" exists: price undercutting, price depression, and price suppression. Article 3.2 also makes clear that "[n]o one or several of these factors can necessarily give decisive guidance". In the current case, MOFCOM claims to have reached its price effects determination on the basis of finding price suppression and price depression, so Japan focuses on those two factors.

5. The Appellate Body has made clear that, in order to find price suppression or price depression, "an investigating authority *is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices*",[5] and "*is required to consider the relationship between subject imports and prices of like domestic products, so as to*

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[1] Japan notes that while it presents its arguments in terms of the applicable provisions of the Anti-Dumping Agreement, the same arguments should apply to the corresponding provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

[2] Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

[3] *See* Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165; Panel Report, *China – X-Ray Equipment*, para. 7.32; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.213; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.55.

[4] Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193). *See also* Appellate Body Report, *EC – Fasteners (China)*, para. 414.

[5] Appellate Body Report, *China – GOES*, para. 138 (emphasis added).

understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices".[6]

6. Further, Japan submits that under Article 3.2, an investigating authority must find the *actual* depression or suppression of domestic prices by dumped imports, as opposed to merely the *potential* for such depression or suppression. In this regard, the text of Article 3.2 reads: "… the investigating authorities shall consider … whether the effect of such imports *is … to depress* prices to a significant degree or *prevent* price increases, which *otherwise would have occurred*, to a significant degree".[7] Use of the present tense phrases "is … to depress" and "is … to … prevent" indicates that price depression and suppression must be *actually* occurring. Moreover, the phrase "which otherwise would have occurred" relating to price suppression makes it clear that the prices of domestic like products must *actually* be lower than the prices that would have existed had there been no imports at dumped prices.

7. The Appellate Body has also explained that "an 'effect' is 'a result' of something else",[8] and that the provisions of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[9] In the context of Article 3, Japan emphasizes that the actual depression or suppression of domestic prices found to exist by an investigating authority must be attributable to *dumping*. Article 3.2 provides that "[w]ith regard to the effect of the *dumped imports* on prices, the investigating authorities shall consider … whether the effect of *such imports* is otherwise to" depress or suppress domestic prices.[10] The reference to "such imports" is plainly a reference to "dumped imports". Article 3.1 also provides that the overall inquiry is with respect to "the effect of the *dumped imports* on prices in the domestic market for like products".[11] Thus, the required effects on domestic prices must be attributed to *dumping*; otherwise, a large volume of imports at *non-dumped* prices could justify the imposition of anti-dumping measures. As such, it should be evident that investigating authorities must consider the degree of dumping, and accordingly the prices of dumped imports, in order to conclude that dumped imports have "explanatory force" for the suppression or depression of domestic prices.

8. Japan is also of the view that, to properly find price suppression or depression by subject imports, an investigating authority must examine the *competitive relationship between the subject imports and the domestic like products*. It must find that subject imports actually compete with the domestic like products, and have evidence that subject imports actually substitute for the domestic like products. In this regard, an investigating authority must consider the degree and nature of competition along with the price differential between the subject imports and the domestic like products. It must also assess evidence that is indicative of a lack of competition, such as opposing price trends or parallel price trends of vastly different magnitudes between subject imports and domestic like products.

9. As is evident from the above explanation, to establish the required competitive relationship and price suppression or depression, an investigating authority cannot just rely on facts such as an increase in subject import volume, parallel pricing between subject imports and domestic like products, consumer overlap, or domestic pricing policies that take into account import prices.

10. To begin, with regard to China's assertion that a consideration of import volume alone may be a sufficient basis for finding price suppression or depression, China erroneously conflates the volume and price effects inquiries under Articles 3.1 and 3.2. If the volume of subject imports were a sufficient basis to find price effects, the price effects inquiry would become redundant and the second sentence of Article 3.2 would be rendered inutile. This is clearly an untenable result. Also, logically, an increase in volume or market share of subject imports does not necessarily suggest that there is price suppression or depression, because the volume and market share of subject imports may increase where the domestic industry *fails* to lower prices or restrain price increases in response to imports.

[6] Appellate Body Report, *China – GOES*, para. 154 (emphasis added).
[7] Emphases added.
[8] Appellate Body Report, *China – GOES*, para. 135. *See also The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 18 June 2014, http://www.oed.com/view/Entry/59664 (defining "effect" as "[t]hat which results from the action or properties of something or someone").
[9] Appellate Body Report, *China – GOES*, para. 128.
[10] Emphases added.
[11] Emphasis added.

11. Next, on parallel pricing, prices moving in a "parallel" manner are merely evidence of a correlation between the prices of subject imports and the domestic like product, not that prices of the former are having effects on prices of the latter. The panel in *China – Autos (US)* concurred.[12] Similarly, as the same consumer may purchase different kinds of "like" products, consumer overlap does not mean that price competition exists. Nor are pricing policies alone a sufficient basis for finding price competition, because a domestic industry may naturally consider a variety of other prices – including import prices, prices of related but non-like products, and the overall price index in general – in setting its own prices.

12. Japan also disagrees with China's contention that the competitive relationship required for ascertaining price effects under Article 3.2 can simply be presumed from like product or cumulation findings. As several panels have agreed, a like product finding does not mean that the prices of subject imports and domestic like products may be appropriately compared for ascertaining price effects.[13] For example, in *China – X-Ray Equipment*, the panel explained that x-ray equipment used for scanning hand baggage at airports may be "like" x-ray equipment used for scanning rail carriages, trucks, or marine cargo containers, but the former is not in competition with or substitutable for the latter, such that prices of the latter may be considered to have effects on prices of the former. As such, a "likeness" finding or an investigating authority's consideration of competition and/or substitutability for purposes of a "likeness" finding does not automatically ensure that price competition exists.

13. In sum, only upon conducting a complete examination as outlined above can an investigating authority properly determine whether price suppression or price depression, and consequently price effects, by subject imports exists within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Here, Japan agrees with the United States that MOFCOM appears to have failed to satisfy its obligations in this regard.

B. The Consistency of MOFCOM's Impact Analysis with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

1. Whether the United States' Claim Is Properly Before the Panel

14. With regard to China's argument that this Panel may not consider the United States' Articles 3.1 and 3.4 claims concerning MOFCOM's impact analysis, Japan disagrees because MOFCOM's redetermination is a "new and different"[14] measure, as it was issued in response to the recommendations by the dispute settlement body ("DSB") and plainly separate from MOFCOM's original determination. Moreover, MOFCOM made several changes to the impact analysis in its redetermination, including elimination of references to the "low price" of subject imports. Further, MOFCOM's impact analysis in its redetermination may also be considered "new and different" in the sense that it is affected by MOFCOM's revised dumping margins[15] and MOFCOM's revised price effects analysis.

2. The Merits of the United States' Claim

15. Turning to the merits of the United States' claim, an objective examination of impact must "include[] and weigh[] *each* of the 16 injury indicia [listed in Article 3.4]",[16] and 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".[17] Thus, here, the Panel should examine whether MOFCOM adequately considered and weighed each of the 16 injury indicia, including the positive trends

[12] *See* Panel Report, *China – Autos (US)*, para. 7.265.

[13] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.67; Panel Report, *China – Autos (US)*, para. 7.278 and note 441.

[14] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 41-42.

[15] *See* the first sentence of Article 3.4 of the Anti-Dumping Agreement.

[16] Panel Report, *China – X-Ray Equipment*, para. 7.216 (emphasis added). *See also* Appellate Body Report, *US – Hot-Rolled Steel*, para. 197.

[17] Panel Report, *China – X-Ray Equipment*, para. 7.195 (quoting Panel Report, *Thailand – H-Beams*, para. 7.249) (emphasis added). *See also id.*, para. 7.180; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

alleged by the United States,[18] and whether MOFCOM provided the required "*compelling explanation*".

C. The Consistency of MOFCOM's Causation Analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

1. Causal Link

16. With respect to the causal link between subject imports and material injury suffered by the domestic industry, first, Japan concurs with the United States that a price effects determination inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement necessarily results in a causation determination inconsistent with Articles 3.1 and 3.5.[19]

17. Second, with respect to the United States' argument that MOFCOM improperly relied on a conclusory assertion that subject imports prevented the domestic industry from realizing the benefits of economies of scale, even if this finding had evidentiary support, it is not sufficient to establish a causal link under Articles 3.1 and 3.5 because 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"[20] to the domestic industry. That is, an investigating authority must base its causation determination on its examination of the volume of dumped imports and their price effects, including their dumping margins. Otherwise, even a large volume of imports at non-dumped prices could justify the imposition of anti-dumping duties, which is clearly an untenable result.

18. Also, China's view that "whenever subject imports gain market share, the domestic industry necessarily suffers from … economies of scale effects" due to the "inherent" effect of the domestic industry's "total fixed costs of production … being allocated over smaller output"[21] conflates the volume analysis with the causation analysis. Under China's view, an increase in market share by subject imports would always result in lack of economies of scale for the domestic industry, and consequently always result in an affirmative causation finding, making the causation inquiry redundant. Moreover, under China's theory, an investigating authority could affirmatively find causation and impose anti-dumping duties any time import volumes increased because of the "inherent" economies of scale effects, even if such imports took place at non-dumped prices. Again, these are not tenable results.

19. Here, the Panel must consider whether MOFCOM properly found that *dumped imports*, by virtue of their volume or price effects, caused material injury to the domestic industry. MOFCOM seems to have failed to do so.

2. Non-Attribution

20. On non-attribution, an investigating authority must "separate and distinguish" the injurious effects of subject imports from those of other known factors. This entails identifying the "nature and extent" of the injurious effects of the non-attribution factor at issue and the "nature and extent" of the injurious effects of the subject imports, and distinguishing the two.[22] Accordingly, the Panel here should carefully examine whether MOFCOM assessed the precise degree of the injurious effects that may have been caused by the domestic industry's overexpansion/overproduction and non-subject imports, and separated and distinguished those injurious effects from the injurious effects of the subject imports. MOFCOM appears not to have done so.

[18] *See* United States' first written submission, paras. 91-105.

[19] *See* Panel Report, *China – GOES*, para. 7.620; Panel Report, *China – X-Ray Equipment*, paras. 7.239-7.240; Panel Report, *China – Autos (US)*, paras. 7.327-7.328.

[20] Emphasis added.

[21] China's first written submission, para. 101.

[22] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226, 228. *See also* Panel Report, *China – Autos (US)*, para. 7.323 (citing Appellate Body Report, *US – Hot-Rolled Steel*, paras. 233-236).

D. The Consistency of MOFCOM's Disclosure of Essential Facts and Notice of Final Determination with Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement

21. With respect to the United States' argument that MOFCOM violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose a number of essential facts under consideration that formed the basis for its redetermination, what is required under Article 6.9 is the disclosure of "essential facts", meaning "those *facts on the record that may be taken into account* by an authority in reaching a decision as to whether or not to apply definitive … duties", or "those *facts that are significant in the process of reaching a decision* as to whether or not to apply definitive measures".[23] Moreover, "[a]n authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures", and "disclosing the essential facts under consideration pursuant to Article[] 6.9 … is paramount for ensuring the ability of the parties concerned to defend their interests".[24] Further, "[w]hat constitutes an 'essential fact' must … be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures …, as well as the factual circumstances of each case".[25]

22. As for the United States' argument that MOFCOM violated Articles 12.2 and 12.2.2 by failing to explain the matters of fact and law and reasons that led to the imposition of duties in several respects, with respect to a final determination, Article 12.2 states that an investigating authority must provide a notice or 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",[26] and Article 12.2.2 further specifies that the 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".[27] With regard to "matters of fact", Article 12.2.2 requires disclosure of "those facts that allow an understanding of the factual basis that led to the imposition of final measures",[28] and "[w]hat constitutes 'relevant information on the matters of fact' is … to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures …, as well as the factual circumstances of each case".[29] Moreover, with regard to the obligation to disclose reasoning in Article 12.2.2, "it is particularly important that the 'reasons' for rejecting or accepting … arguments should be set forth in sufficient detail to allow … exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement".[30]

23. In Japan's view, the facts identified by the United States were facts taken into consideration by MOFCOM in its injury and causation determination and therefore should have been disclosed, and the reasoning behind the assertions and findings identified by the United States should have been explained in sufficient detail.[31] The Panel should carefully examine whether MOFCOM satisfied its obligations in this regard.

III. CONCLUSION

24. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

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[23] Appellate Body Report, *China – GOES*, para. 240 (emphases added).
[24] Appellate Body Report, *China – GOES*, para. 240.
[25] Appellate Body Report, *China – GOES*, para. 241.
[26] Emphasis added.
[27] Emphasis added.
[28] Appellate Body Report, *China – GOES*, para. 256.
[29] Appellate Body Report, *China – GOES*, para. 257.
[30] Panel Report, *China – X-Ray Equipment*, para. 7.472. *See also* Panel Report, *China – Broiler Products*, para. 7.528.
[31] *See* United States' first written submission, paras. 146 and 153.