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

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

REPORTS OF THE PANELS

*Addendum*

This *addendum* contains Annexes A to D to the Reports of the Panels to be found in document WT/DS454/R-WT/DS460/R.

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**ANNEX A**

WORKING PROCEDURES OF THE PANELS

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**ANNEX A-1****JOINT WORKING PROCEDURES OF THE PANELS**

1. Pursuant to Article 9.3 of the DSU, the timetables in DS454 and DS460 are harmonized. The Panels shall, to the greatest extent possible, conduct a single panel process, with a single record, resulting in separate reports contained in a single document, taking into account the rights of all Members concerned, and in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired. A complaining party's submissions in one dispute shall be deemed to be an exercise of its third party rights in the other dispute. Third parties may submit single submissions relating to both disputes.

2. In its proceedings, the Panels shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

**General**

3. The deliberations of the Panels and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the disputes (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panels by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panels, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. The Panels shall meet in closed session. The parties, and Members having notified their interest in either dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panels to appear before them.

5. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panels Concerning Business Confidential Information, set out in Annex 1 to these Working Procedures.

6. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panels. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

**Submissions**

7. Before the first substantive meeting of the Panels with the parties, each party shall submit a written submission in which it presents the facts of its case and its arguments, in accordance with the timetable adopted by the Panels. Each party shall also submit to the Panels, prior to the second substantive meeting of the Panels, a written rebuttal, in accordance with the timetable adopted by the Panels.

8. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panels. If the European Union or Japan requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the European Union and Japan shall submit their responses to the request prior to the first substantive meeting of the Panels, at a time to be determined by the Panels in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

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

10. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panels may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation, to the extent that its significance is reasonably apparent, should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

11. To facilitate the maintenance of the record of the disputes and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the disputes. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6. In order to avoid unnecessary duplication of exhibits, parties may file joint exhibits. In particular, the exhibit of any party in DS454 or DS460 may consist of, and be effected by means of a cross-reference to, a document exhibited by any other party in either dispute, including with respect to submissions with the same due date.

#### **Questions**

12. The Panels may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

#### **Substantive meetings**

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

14. The first substantive meeting of the Panels with the parties shall be conducted as follows:

- a. The Panels shall invite the European Union and Japan to make opening statements to present their cases first. Subsequently, the Panels shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panels and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panels' Secretary. Each party shall make available to the Panels and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panels shall give each party the opportunity to ask each other questions or make comments, through the Panels. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panels.
- c. The Panels may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the parties to which they wish to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

- d. Once the questioning has concluded, the Panels shall afford each party an opportunity to present a brief closing statement, with the European Union and Japan presenting their statements first.

15. The second substantive meeting of the Panels with the parties shall be conducted as follows:

- a. The Panels shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panels shall invite China to present its opening statement, followed by the European Union and Japan. If China chooses not to avail itself of that right, the Panels shall invite the European Union and Japan to present their opening statements first. Before each party takes the floor, it shall provide the Panels and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panels' Secretary. Each party shall make available to the Panels and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.
- b. After the conclusion of the statements, the Panels shall give each party the opportunity to ask each other questions or make comments, through the Panels. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to another party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such written questions within a deadline to be determined by the Panels.
- c. The Panels may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the parties to which they wish to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.
- d. Once the questioning has concluded, the Panels shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

### **Third parties**

16. The Panels shall invite third parties to make written submissions prior to the first substantive meeting of the Panels with the parties, in accordance with the timetable adopted by the Panels.

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

18. The third-party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panels shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panels, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panels, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panels, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panels, any questions to a

third party to which it wishes to receive a response in writing. The deadline for receipt of written answers to these questions shall be determined by the Panels.

- d. The Panels may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panels shall send in writing, within a timeframe to be determined by them, any questions to the third parties to which they wish to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panels.

### **Descriptive part**

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

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

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panels. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panels reserve the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panels for which a deadline may not be specified in the timetable.

### **Interim review**

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

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

25. The interim reports, as well as the final reports prior to their official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

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

- a. Each party and third party shall submit all documents to the Panels by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file 8 paper copies of all documents it submits to the Panels. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 3 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the disputes.

- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panels at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to [XXXX@wto.org](mailto:XXXX@wto.org), [XXXX@wto.org](mailto:XXXX@wto.org) and [XXXX@wto.org](mailto:XXXX@wto.org). If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Panels directly on the other parties in paper form and electronically, at the time it transmits such document to the Panels. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panels. A party may provide its submissions only electronically to third parties. Each third party shall serve any document submitted to the Panels directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panels.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panels. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panels' Secretary is notified.
- f. The Panels shall provide the parties with an electronic version of the descriptive part, the interim reports and the final reports, as well as of other documents as appropriate. When the Panels transmit to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the disputes.



**ANNEX A-2****ADDITIONAL WORKING PROCEDURES OF THE PANELS CONCERNING  
BUSINESS CONFIDENTIAL INFORMATION**

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panels. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which could seriously prejudice an essential interest of the person or entity that supplied the information to the Party. In this regard, BCI shall include information that was previously treated by China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.
2. No person shall have access to BCI except a member of the WTO Secretariat or the Panels, an employee of a party or third party, and an outside advisor for the purposes of these disputes to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in these disputes.
3. A party or third party having access to BCI submitted in these Panels proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of these disputes and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.
4. A party or third party submitting or referring to BCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI shall be submitted pursuant to paragraph 26 of the Working Procedures within three working days after the submission of the confidential version containing the BCI.
5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panels before making it that the statement will contain BCI, and the Panels will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted no later than the working day following the meeting where the statement was made. Non-confidential versions of both oral and written statements shall be redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.
6. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.
7. The Panels shall not disclose in its reports or in any other way, any information designated as BCI under these procedures. The Panels may, however, make statements of conclusion based on such information. Before the Panels circulate their final reports to the Members, the Panels will give each party an opportunity to review the reports to ensure that they do not contain any information that the party has designated as BCI.

8. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panels' reports.

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**ANNEX B**

## ARGUMENTS OF JAPAN AND THE EUROPEAN UNION

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**ANNEX B-1****EXECUTIVE SUMMARY OF THE FIRST WRITTEN  
SUBMISSION OF JAPAN****I. INTRODUCTION**

1. This dispute concerns the measures taken by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan.<sup>1</sup> These measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement").

2. To begin, MOFCOM's injury and causation determinations are inconsistent with China's obligations under the Anti-Dumping Agreement. Specifically, MOFCOM failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1; follow the specific requirements set forth in Articles 3.2, 3.4, and 3.5; and conduct a "logical progression of inquiry"<sup>2</sup> in its volume, price effects, impact, and causation analyses.

3. Further, MOFCOM failed to follow several procedural requirements of the Anti-Dumping Agreement. First, MOFCOM failed to disclose information on import and domestic prices and reasoning supporting its price effects finding, inconsistent with Articles 6.9, 12.2, and 12.2.2. Second, MOFCOM treated certain information as confidential without satisfying the requirements of Articles 6.5 and 6.5.1. Third, MOFCOM failed to disclose the pertinent data and calculation methodologies used to determine the existence of dumping and the dumping margins for the investigated Japanese companies, inconsistent with Article 6.9. Fourth, MOFCOM applied facts available to determine the dumping margin for all other Japanese companies without satisfying the requirements of Article 6.8 and Paragraph 1 of Annex II, and also failed to disclose information and reasoning supporting its all others rate determination, inconsistent with Articles 6.9, 12.2, and 12.2.2.

4. Finally, MOFCOM applied provisional measures for a period exceeding four months without having any basis to do so under Article 7.4 of the Anti-Dumping Agreement.

**II. LEGAL ARGUMENT****A. MOFCOM's Determinations of Injury and Causation, and its Associated Disclosure of Essential Facts and Final Determination Notice, Are Inconsistent with China's WTO Obligations in Several Respects****1. MOFCOM's Determinations of Injury and Causation Are Inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement**

- a. Article 3 of the Anti-Dumping Agreement Requires an "Objective Examination" Based on "Positive Evidence", and Calls for a "Logical Progression" of Inquiry*

5. Article 3.1 of the Anti-Dumping Agreement "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".<sup>3</sup> It calls for an injury determination based on "positive evidence" and involving an "objective examination" of

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<sup>1</sup> The subject products are available in three grades: TP347HFG, S30432, and TP310HNB. For simplicity, Japan refers to these grades as Products "A", "B", and "C", respectively. Product A is the least expensive and lowest grade, Product B is in the middle, and Product C is the most expensive and highest grade.

<sup>2</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>3</sup> Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

"three essential components":<sup>4</sup> (i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. These components "are closely interrelated for purposes of the injury determination".<sup>5</sup>

6. Article 3.2 requires that an investigating authority "consider" "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member", and "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree". On the topic of price undercutting, Article 3.2 expressly establishes a *link* between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two.<sup>6</sup>

7. Article 3.4 details the obligation to examine the relationship between subject imports and the state of the domestic industry, which is "analytically akin to the type of link contemplated by the term 'the effect of' under Article 3.2", and "require[s] an examination of the explanatory force of subject imports for the state of the domestic industry".<sup>7</sup> The investigating authority must evaluate *all* fifteen factors listed in Article 3.4. Where there are "positive movements in a number of factors", the investigating authority must provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".<sup>8</sup> Finally, to ensure an "objective" analysis, an investigating authority finding that *a segment* of the domestic industry is impacted by dumped imports cannot automatically extend that conclusion to the *entire* industry without analyzing the impact of dumped imports on the *other segments* that constitute part of that industry, as well as the *industry as a whole*, and providing a *satisfactory explanation* as to why injury to one segment may be extended to the entire industry.<sup>9</sup>

8. Article 3.5 requires an investigating authority to demonstrate "that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. Further, an investigating authority must not attribute injury caused by other known factors to dumped imports, which requires it to separate and distinguish the effects of dumped imports from those of non-attribution factors.<sup>10</sup>

9. The Appellate Body has made clear that Articles 3.1, 3.2, 3.4, and 3.5 "contemplate a *logical progression of inquiry* leading to an investigating authority's ultimate injury and causation determination".<sup>11</sup> Thus, the analyses pursuant to each provision of Article 3 are "closely interrelated"<sup>12</sup>, rather than independent of each other, and an investigating authority can reach a proper injury and causation determination only if it follows the logical progression step by step. This interrelationship finds further support in the word "consequent" in Article 3.1, which suggests that the "impact" to be examined under Article 3.4 is something to follow as a result of, or be logically consistent with, the volume and/or price effects analyses under Article 3.2.

*b. China's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement*

10. After finding on the basis of comparison the imports and domestic prices of the HP-SSST product as a whole that "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products"<sup>13</sup>, MOFCOM proceeded to compare the prices of each grade of subject imports with those of the corresponding domestic like products. This price effects analysis, however, does not involve an objective examination and is not based on positive

<sup>4</sup> Appellate Body Report, *China – GOES*, para. 127.

<sup>5</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

<sup>6</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>7</sup> Appellate Body Report, *China – GOES*, para. 149.

<sup>8</sup> Panel Report, *China – X-Ray Equipment*, para. 7.195 (quoting Panel Report, *Thailand – H-Beams*, para. 7.249).

<sup>9</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. See also *id.*, paras. 191 ff.

<sup>10</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

<sup>11</sup> Appellate Body Report, *China – GOES*, para. 128 (emphasis added).

<sup>12</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

<sup>13</sup> Final Determination, Exhibit JPN-2, p. 53 (emphasis added).

evidence, and is therefore inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In particular: (i) MOFCOM's analysis of the price effects of imported Product C is analytically and factually flawed; and (ii) MOFCOM improperly extended its conclusions concerning the alleged price undercutting effects of Products B and C to the domestic HP-SSST industry as a whole.<sup>14</sup>

*i. MOFCOM's analysis of the price effects of imported Product C is analytically and factually flawed*

11. MOFCOM's finding that in 2010, "the large scale sales of [imports of Product C] at a low price had relatively noticeable price undercutting impact on the domestic sales price of the domestic like products"<sup>15</sup> is flawed, and falls short of an objective examination based on positive evidence, in at least two respects.

12. First, MOFCOM purportedly "t[ook] into consideration the quantitative difference between the import volume of the subject products and the sales volume of domestic like products", but MOFCOM does not explain the criteria and economic methodology used to accommodate those "quantitative differences".<sup>16</sup>

13. Second, MOFCOM grounded its price undercutting conclusion for Product C on the fact that, in 2009, the price of imported Product C was over 10% higher than the sales price of the corresponding like domestic products, but, in 2010, the import price of the subject product "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products".<sup>17</sup> However, according to MOFCOM's own analysis, in 2010 the price of the domestic Product C *increased* by 112.80% from 2009, while the price of the imports of the same grade *decreased* by 36.32%.<sup>18</sup> The fact that the sales prices of domestic Product C more than doubled from 2009 to 2010 explains why, over the course of that year, the price of imported products became relatively low by comparison. In other words, the dynamic relationship of the prices of *both* imported and domestic products shows that imports of Product C did not have a significant undercutting effect on the prices of the corresponding like domestic products. Moreover, substantial record evidence suggests that the domestic sales of Product C were not in competition with the imports of the same grade, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for MOFCOM to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

*ii. MOFCOM improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole*

14. Although MOFCOM determined that "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products"<sup>19</sup> and that imports of Product A did not have a significant price undercutting effect on domestic like products of the same grade, MOFCOM concluded that "*in general*, the products under investigation ... had a relatively noticeable price undercutting effect on the price of domestic like products".<sup>20</sup> In effect, MOFCOM extended its price undercutting findings with respect to Products B and C (the latter of which Japan has demonstrated was itself flawed) to the *whole* domestic industry. MOFCOM's conclusions are unwarranted and strikingly selective.

15. Guidance as to the prices to be compared in the price undercutting analysis under Article 3.2 can be derived from WTO case law on Article 3.4 because the analyses under these provisions are "analytically akin to" one another.<sup>21</sup> In this context, the Appellate Body has said that "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, *all of the other parts that make up the industry, as*

<sup>14</sup> Japan understands that MOFCOM did not find any price effects for Product A, and did not find price depression or price suppression for any products. The ensuing discussion rests on this understanding.

<sup>15</sup> Final Determination, Exhibit JPN-2, p. 54.

<sup>16</sup> Final Determination, Exhibit JPN-2, pp. 53-54.

<sup>17</sup> Final Determination, Exhibit JPN-2, p. 54.

<sup>18</sup> See Japan's First Written Submission, Table 7 at para. 134.

<sup>19</sup> Final Determination, Exhibit JPN-2, p. 53 (emphasis added).

<sup>20</sup> Final Determination, Exhibit JPN-2, p. 54 (emphasis added).

<sup>21</sup> Appellate Body Report, *China – GOES*, para. 149.

*well as examine the industry as a whole*", or they should "provide a *satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry*".<sup>22</sup>

16. Accordingly, MOFCOM's ultimate price undercutting conclusion with respect to the product *as a whole* required proper grounding in its grade-by-grade analysis to be consistent with Articles 3.1 and 3.2. However, MOFCOM found an alleged price undercutting effect for only Products B and C, which represented a *minority sector* of domestic production (i.e., 20.1% during the POI), while it found no price undercutting effect for Product A, which represented the *vast majority* of domestic production (i.e., almost 80% during the POI).<sup>23</sup> Further, MOFCOM did not consider whether imports of each grade had a price effect on like domestic products of *other* grades, and even if it had, the record evidence shows that the different grades of HP-SSST products did not in fact compete with one another in the Chinese market, and therefore could not have had cross-grade price effects. Thus, MOFCOM did not find "significant" (i.e., "important, notable or consequential"<sup>24</sup>) price undercutting within the meaning of Article 3.2, and did not satisfy the good faith and objectivity requirements set out, as an overarching obligation, in Article 3.1.

*c. China's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement*

17. MOFCOM's analysis of the impact of subject imports on the domestic industry is flawed, and falls short of an objective examination, based on positive evidence. In particular: (i) MOFCOM's analysis was at odds with and did not follow from its volume and price effects analyses; (ii) MOFCOM failed to evaluate the role of the magnitude of the margin of dumping; (iii) MOFCOM improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured; and (iv) MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry.

*i. MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses under Article 3.2*

18. Prior to undertaking its impact analysis, MOFCOM found no significant increase in volume, and allegedly found price undercutting effects with respect to only Products B and C. Yet, it conducted an impact analysis by considering the impact of subject imports as a whole on the domestic industry as a whole, presumably on the basis of its flawed and partial price effects analysis for the industry as a whole.<sup>25</sup> However, the Appellate Body has indicated that the volume, price effects, and impact inquiries are "*closely interrelated*";<sup>26</sup> the various paragraphs of Article 3 "*contemplate a logical progression of inquiry*";<sup>27</sup> and Article 3.4 requires "*an examination of the explanatory force of subject imports for the state of the domestic industry*".<sup>28</sup> Moreover, the text of Article 3.1 indicates that the impact of subject imports is contemplated to be the "*consequen[ce]*" of the volume or price effects of the same imports. By conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses and conclusions, MOFCOM therefore failed to conduct an objective examination based on positive evidence in accordance with Articles 3.1 and 3.4.

*ii. MOFCOM failed to examine the magnitude of the margin of dumping*

19. At no point in its analysis did MOFCOM evaluate the significance of the margins of dumping for the impact of subject imports on the Chinese HP-SSST industry. However, under Articles 3.1 and 3.4 the investigating authority "is required to evaluate the magnitude of the margin of

<sup>22</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 204 (emphasis added). See also *id.*, paras. 191 ff.

<sup>23</sup> See Japan's First Written Submission, Table 4 at para. 54.

<sup>24</sup> Panel Report, *US – Upland Cotton*, para. 7.1325. The panel's interpretation was confirmed by the Appellate Body. Appellate Body Report, *US – Upland Cotton*, para. 426.

<sup>25</sup> See Final Determination, Exhibit JPN-2, pp. 63-64.

<sup>26</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115 (emphasis added).

<sup>27</sup> Appellate Body Report, *China – GOES*, para. 128 (emphasis added).

<sup>28</sup> Appellate Body Report, *China – GOES*, para. 149.



dumping and to assess its relevance and the weight to be attributed to it in the injury assessment".<sup>29</sup> MOFCOM therefore acted inconsistently with these provisions.

*iii. MOFCOM improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured*

20. The outcomes of MOFCOM's analysis of the relevant economic factors and indices of the domestic industry as listed in Article 3.4 were mixed<sup>30</sup>, with many of the factors presenting general trends *favorable* for the domestic industry. MOFCOM itself agreed that, at least, production capacity, output, sales volume, market share, employment, labor productivity, and salary per head exhibited positive trends.<sup>31</sup> Yet, after reviewing all the relevant factors, MOFCOM simply concluded that, "[b]ased on the above ... the domestic industry is materially injured".<sup>32</sup> In so doing, MOFCOM appears to have attached a high degree of importance to the other relevant factors highlighting negative aspects of the Chinese HP-SSST industry, while disregarding the many factors suggesting that the Chinese HP-SSST industry was not suffering injury. MOFCOM did not provide any explanation whatsoever regarding the weight attributed to any given factor, nor of the inferences it drew from those factors and indices that were positive for the domestic industry. MOFCOM therefore failed to conduct an objective examination, based on positive evidence, within the meaning of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>33</sup>

*iv. MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry*

21. Finally, in its analysis of all the relevant economic factors, MOFCOM did not engage in an examination of whether the identified state of the domestic industry or market phenomenon had been the impact of subject imports; rather, it only identified the state of the domestic industry or the market phenomenon at issue. Thus, it failed to conduct "an examination of the explanatory force of subject imports for the state of the domestic industry", as the Appellate Body has said is required under Article 3.4.<sup>34</sup>

*d. China's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement*

22. MOFCOM's causation determination is flawed and does not constitute an objective examination of positive evidence as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In particular: (i) the grounds of MOFCOM's causation determination, namely its volume, price effects, and impact analyses, are analytically flawed and factually unsupported; and (ii) MOFCOM failed to separate and distinguish the injurious effects of the decline in domestic demand for HP-SSSTs and the expansion in capacity of domestic producers from the injurious effects of subject imports.

*i. MOFCOM's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of subject imports*

23. The demonstration of a causal relationship between dumping and injury to the domestic industry constitutes the last step in an investigating authority's "logical progression of inquiry"<sup>35</sup> leading to the final injury determination. As such, a finding of causation is *dependent* upon the outcomes of the previous steps of analysis – namely, the volume and price effects of dumped imports and their impact on the domestic industry.

24. However, in the present case: (i) MOFCOM found the volume and market share of imported HP-SSST products did not significantly increase during the POI, and its focus on the market share *retained* by imported products at the end of the POI was improper; (ii) MOFCOM's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic

<sup>29</sup> Panel Report, *China – X-Ray Equipment*, para. 7.183.

<sup>30</sup> See Japan's First Written Submission, Table 6 at para. 66.

<sup>31</sup> Final Determination, Exhibit JPN-2, p. 63.

<sup>32</sup> Final Determination, Exhibit JPN-2, p. 64.

<sup>33</sup> See Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314; Panel Report, *Thailand – H-Beams*, paras. 7.225, 7.249; Panel Report, *China – X-Ray Equipment*, para. 7.216.

<sup>34</sup> Appellate Body Report, *China – GOES*, para. 149.

<sup>35</sup> Appellate Body Report, *China – GOES*, para. 128.



products was fatally flawed; and (iii) MOFCOM's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis of the negative indices. Therefore, it follows, *a fortiori*, that by grounding its causation determination on its volume, price effects, and impact analyses, which did not support a finding of injury, MOFCOM failed to conduct an objective examination, based on positive evidence, of the existence of a causal link between the subject imports and the injury itself, inconsistently with Articles 3.1 and 3.5.

*ii. MOFCOM failed to separate and distinguish the injurious effects of other known factors from the injurious effects of subject imports*

25. MOFCOM agreed that reduced apparent consumption and increased domestic production capacity could have had negative effects on the domestic industry, but it made no attempt to "separat[e] and distinguish[] the injurious effects" of these non-attribution factors "from the injurious effects of the dumped imports", as the Appellate Body has found is required under Articles 3.1 and 3.5.<sup>36</sup> MOFCOM therefore erred.

26. First, despite recognizing that domestic demand for HP-SSST products declined significantly, and acknowledging that this could negatively effect domestic sales prices and other indicators,<sup>37</sup> MOFCOM did not separate and distinguish the injurious effects of this other factor; rather, it simply concluded that "the price undercutting effect of the imports of subject products [was] the reason for the drop in price of domestic like products".<sup>38</sup>

27. Second, MOFCOM recognized that the POI saw a momentous expansion in the production capacity of Chinese producers of HP-SSST products, and such capacity expansion intensified competition and affected the domestic industry's operational metrics.<sup>39</sup> MOFCOM, however, dismissed the relevance of this other factor by observing that "there was no case of oversupply" based on a flawed supply-demand comparison, and by asserting that a main reason for the decrease in return on investment was "reduced pretax profits" rather than "greater average investment as a result of capacity expansion".<sup>40</sup>

**2. MOFCOM's Disclosure of Essential Facts Was Insufficient Under Article 6.9 of the Anti-Dumping Agreement Because It Did Not Adequately Disclose the Import Prices and Domestic Prices Used in MOFCOM's Injury and Causation Analyses**

28. Article 6.9 of the Anti-Dumping Agreement requires disclosure, "before a final determination is made, [of] the essential facts under consideration *which form the basis for the decision whether or not to apply definitive measures*".<sup>41</sup> Here, MOFCOM failed to disclose several pieces of information on import and domestic prices critical to its price undercutting determination<sup>42</sup>, which served as the foundation for its causation determination. MOFCOM's disclosure of certain price trend information was inadequate for this purpose.<sup>43</sup>

**3. MOFCOM's Notice of Final Determination Failed to Satisfy the Requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement With Respect to the Import Prices and Domestic Prices Used in MOFCOM's Injury and Causation Analyses**

29. Article 12.2 of the Anti-Dumping Agreement states that, in a preliminary or final determination, an investigating authority must set out "all issues of fact and law considered material"; and Article 12.2.2 further specifies this obligation as it applies to a final determination, requiring that the investigating authority's final report detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". Here, MOFCOM failed to discharge its obligations under Articles 12.2 and 12.2.2 because it did not provide a report stating all relevant information supporting its imposition of definitive anti-dumping

<sup>36</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 223. See also *id.*, para. 226.

<sup>37</sup> Final Determination, Exhibit JPN-2, pp. 68-70.

<sup>38</sup> Final Determination, Exhibit JPN-2, p. 70.

<sup>39</sup> Final Determination, Exhibit JPN-2, p. 74.

<sup>40</sup> Final Determination, Exhibit JPN-2, p. 74.

<sup>41</sup> Appellate Body Report, *China – GOES*, para. 240 (emphasis in original).

<sup>42</sup> See Japan's First Written Submission, Table 5 at para. 57.

<sup>43</sup> See Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – X-Ray Equipment*, para. 7.409.

duties as part of its Final Determination. Specifically, MOFCOM: (i) disclosed only price trend information while omitting key factual information underlying its price undercutting analysis;<sup>44</sup> and (ii) did not provide the reasoning behind how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis.<sup>45</sup> MOFCOM therefore breached Articles 12.2 and 12.2.2.

**B. MOFCOM's Treatment of Confidential Information Was Improper Under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement Because MOFCOM Lacked Good Cause and Did Not Require Sufficient Non-Confidential Summaries or Explanations as to Why Such Summaries Are Not Possible**

30. With regard to confidential information, Article 6.5 of the Anti-Dumping Agreement requires that "good cause" must be shown for treating information as confidential, and assuming such good cause is shown, Article 6.5.1 requires an interested party to submit sufficient non-confidential summaries or in "exceptional circumstances" indicate it is unable to do so with a statement of the reasons. In the present case, MOFCOM permitted the full texts of the following Appendices to remain confidential despite Petitioners' failure to show "good cause", and therefore China violated Article 6.5: Appendices V and VIII to the Petition; Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012; and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012. Further, Petitioners did not furnish sufficient non-confidential summaries of the following Appendices or any statements as to why such summaries were not possible, and MOFCOM's failure to require such summaries or statements violated Article 6.5.1: Appendices V and VIII to the Petition; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to Petitioners' Supplemental Evidence of 1 March 2012; and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012.<sup>46</sup>

**C. MOFCOM's Disclosures of Essential Facts Were Insufficient Under Article 6.9 of the Anti-Dumping Agreement Because They Did Not Disclose the Data and Calculation Methodologies Used to Determine the Existence of Dumping and the Dumping Margins for SMI and Kobe**

31. China violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose the most basic facts and analyses related to its anti-dumping determination and margin calculations for SMI and Kobe. Specifically, MOFCOM's dumping disclosures present only basic figures for export price and normal value and a narrative summary of the actions purportedly taken to derive these numbers; they present no cost data, no application of adjustments to price, and no evidence of calculation methodology.<sup>47</sup> MOFCOM thus failed to present the "essential facts" in its anti-dumping determination and margin calculations.

**D. MOFCOM's Determination of the Dumping Margin for All Other Japanese Companies, and its Associated Disclosure of Essential Facts and Final Determination Notice, Were Inconsistent with Article 6.8 and Paragraph 1 of Annex II, as well as Articles 6.9, 12.2, and 12.2.2, of the Anti-Dumping Agreement**

32. MOFCOM's determination of the all others rate for Japanese HP-SSST exporters is inconsistent with China's obligations under the Anti-Dumping Agreement. MOFCOM applied facts available in setting the all others rate, but it failed to establish the required conditions before it resorted to facts available. It also failed to make necessary disclosures related to its all others rate determination.

33. First, MOFCOM violated Article 6.8 and Paragraph 1 of Annex II because it determined the dumping margin for Japanese exporters other than SMI and Kobe (i.e., the all others rate) based

<sup>44</sup> See Japan's First Written Submission, Table 5 at para. 57.

<sup>45</sup> See Final Determination, Exhibit JPN-2, pp. 53-54.

<sup>46</sup> See Petition, Exhibit JPN-3; Petitioners' Supplemental Evidence, 1 March 2012, Exhibit JPN-8; Petitioners' Supplemental Evidence, 29 March 2012, Exhibit JPN-9.

<sup>47</sup> See Preliminary Dumping Disclosure to SMI, Exhibit JPN-18 (containing BCI); Preliminary Dumping Disclosure to Kobe, Exhibit JPN-19 (containing BCI); Final Dumping Disclosure to SMI, Exhibit JPN-20 (containing BCI); Final Dumping Disclosure to Kobe, Exhibit JPN-21 (containing BCI); Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22.

on "facts already known and best information available"<sup>48</sup> without notifying those other Japanese exporters of all the information required of them and of the consequences of not submitting that information.

34. Second, China violated Article 6.9 because MOFCOM failed to disclose the "essential facts" related to its determination of the all others dumping rate.<sup>49</sup> In particular, China failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate; and (ii) the particular facts that were used to determine the all others rate itself.

35. Third, as with its Final Dumping Disclosure, MOFCOM's Final Determination also failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate; and (ii) the particular facts that were used to determine the all others rate itself. It repeated only the same statements from the Final Dumping Disclosure that it decided "to use facts already known and best information available to establish the normal value and export price"<sup>50</sup>, and "base its determinations on dumping and dumping margin on facts already known or best information available".<sup>51</sup> Accordingly, MOFCOM failed to meet its obligations under Articles 12.2 and 12.2.2.

#### **E. China's Application of Provisional Measures for a Period Exceeding Four Months Violated Article 7.4 of the Anti-Dumping Agreement**

36. China violated Article 7.4 of the Anti-Dumping Agreement because MOFCOM applied provisional anti-dumping measures from 9 May 2012 to 9 November 2012<sup>52</sup>, a period of six months, without any request by exporters representing a significant percentage of the trade involved to apply provisional measures for a period of six months or any examination by MOFCOM as to whether a duty lower than the margin of dumping would be sufficient to remove injury. In such circumstances, the maximum period allowed for provisional measures by Article 7.4 is four months.

#### **F. China's Anti-Dumping Measures on HP-SSST From Japan Are Inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994**

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

### **III. CONCLUSION**

38. For the foregoing reasons, Japan respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and Anti-Dumping Agreement. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and Anti-Dumping Agreement.

<sup>48</sup> Final Determination, Exhibit JPN-2, p. 35.

<sup>49</sup> See Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22.

<sup>50</sup> Final Determination, Exhibit JPN-2, p. 35.

<sup>51</sup> Final Determination, Exhibit JPN-2, p. 41.

<sup>52</sup> See Preliminary Determination Notice, Exhibit JPN-6, Section II; Final Determination Notice, Exhibit JPN-1, Sections II, III, IV.

**ANNEX B-2****EXECUTIVE SUMMARY OF THE SECOND WRITTEN  
SUBMISSION OF JAPAN****I. INTRODUCTION**

1. The measures taken by the Government of the People's Republic of China ("China") – particularly by China's investigating authority, the Ministry of Commerce of the People's Republic of China ("MOFCOM") – in imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement").

**II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 OF THE ANTI-DUMPING AGREEMENT****A. Legal and Factual Overview Regarding Injury and Causation**

2. On the legal side, Article 3.1 of the Anti-Dumping Agreement sets forth the "three essential components" of the injury and causation analysis: "(i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products".<sup>1</sup> Subsequent paragraphs of Article 3 set forth a detailed inquiry into the three essential components, with the goal of each inquiry being to understand whether each component has been satisfied so as to justify an ultimate finding that subject imports are causing injury to the domestic industry. These inquiries must thus proceed in a "logical progression".<sup>2</sup>

3. Article 3.2 provides that investigating authorities must consider "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member", and "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". Thus, with regard to price effects, Article 3.2 sets forth three possible price effect factors that the investigating authority must consider: price undercutting, price depression, and price suppression. And because the final sentence of Article 3.2 provides that "[n]o one or several of these factors can necessarily give decisive guidance", it should be evident that the consideration of one or more of the three possible price effect factors does not necessarily lead to an affirmative price effects determination. Finally, the price effects inquiry must be conducted with respect to the prices of the domestic like product as a whole, given that Article 3.1 specifies that the inquiry relates to "the effect of the dumped imports on prices in the domestic market for like products".

4. Article 3.4 provides that the investigating authority must examine "the impact of the dumped imports on the domestic industry concerned" and must consider "all relevant economic factors and indices having a bearing on the state of the industry". As Article 3.4 calls for an examination of impact "on the domestic industry concerned", the impact inquiry must be conducted with respect to the domestic industry as a whole. However, to proceed in a logical progression, the impact analysis must proceed on the premise that the segments of the domestic industry producing certain like products with respect to which no volume or price effects have been found have not been impacted by the dumped imports. Article 3.4 also requires an examination of "the explanatory force of subject imports for the state of the domestic industry"<sup>3</sup>, for which the magnitude of the margins of dumping and the degrees of the volume and price effects found to exist are highly relevant.

<sup>1</sup> Appellate Body Report, *China – GOES*, para. 127.

<sup>2</sup> Appellate Body Report, *China – GOES*, paras. 127-128.

<sup>3</sup> Appellate Body Report, *China – GOES*, para. 149.

5. Finally, Article 3.5 sets forth the ultimate question that the investigating authority must answer: whether "dumped imports are, through the effects of dumping ... causing injury within the meaning of this Agreement". Under Article 3.5, proper volume, price effects, and impact analyses may provisionally reveal causation. That provisional conclusion must then be confirmed through a proper non-attribution analysis.

6. On the factual side, there are three critical sets of relevant facts. First, MOFCOM found no increase in the volume of subject imports, but rather that subject import volumes declined significantly during the period of investigation ("POI"). Second, MOFCOM did not find any effects on the prices of domestic Product A (which accounted for 80%<sup>4</sup> of domestic HP-SSST production during the POI) by imports of Product A or by imports of Products B and C. Third, MOFCOM's 2010 price undercutting conclusion for Product C lacked factual support, because MOFCOM ignored the facts that the price differential in 2010 arose because domestic Product C prices *increased* by 112.80% while imported Product C prices *decreased* by 36.32% between 2009 and 2010, and that domestic Product C gained market share.<sup>5</sup> More fundamentally, MOFCOM never established a competitive relationship between imported and domestic Product C and the available facts suggested that both products were not in competition.

## **B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2**

7. Under Articles 3.1 and 3.2, an investigating authority must find an actual decrease or prevention of increase in prices in the domestic market for like products by virtue of competition with dumped imports in order to justify imposing anti-dumping duties on subject imports. The considerations of price undercutting, price depression, and price suppression explore all possible ways in which dumped imports may produce a decrease or prevention of increase in domestic prices. As for price undercutting, such a determination cannot be based solely on the existence of a mathematical price difference, but requires the investigating authority to show that dumped imports had the effect of placing some downward pressure on domestic prices by selling at lower prices. But even if the undercutting inquiry reveals some downward pressure on domestic prices, for a proper finding of "price effects", the investigating authority must still find subject imports gave rise to an actual decrease or prevention of increase in domestic prices, examining factors such as the magnitude of the margins of dumping and the extent of the price differential between the dumped imports and the domestic like products.

### **1. MOFCOM Erred in Its Price Undercutting Conclusion for Product C**

8. MOFCOM's 2010 price undercutting conclusion for Product C was flawed because it was based on comparing import prices with a trivial quantity of domestic prices, and because the 2010 price differential arose due to a 112.80% *increase* in domestic prices and a 36.32% *decrease* in import prices relative to 2009, while domestic Product C gained market share.<sup>6</sup>

9. The increase in domestic market share and the increase in domestic prices between 2009 and 2010 demonstrate that imported Product C did not place any downward pressure on domestic Product C prices in 2010 and did not cause an actual decrease or prevention of increase in domestic Product C prices in 2010. Moreover, the trivial quantity of domestic sales, vast difference between import and domestic prices, and inverse price movements between the imported and domestic products should have revealed to MOFCOM that price comparisons could not support a price undercutting conclusion for Product C for 2010. Or, at a minimum, these facts should have revealed that, to reach an objective price undercutting conclusion, MOFCOM had an obligation to establish the competitive relationship between, and accordingly the price comparability of, imported and domestic Product C in 2010 before reaching such a price undercutting conclusion.

10. China now argues that MOFCOM did find that imported and domestic Product C were in competition with one another, and that imports of Product C at undercutting prices prevented domestic producers from selling Product C.<sup>7</sup> However, MOFCOM's consideration of the competition between imported and domestic Product C was done in the context of its "like product"

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<sup>4</sup> Japan's first written submission, para. 148.

<sup>5</sup> Final Determination, Exhibit JPN-2, pp. 44, 52-54.

<sup>6</sup> See Japan's first written submission, paras. 130-139; Japan's opening statement at the first meeting of the Panel, paras. 63-73.

<sup>7</sup> See China's response to Panel question No. 35.



determination.<sup>8</sup> MOFCOM did not, as the Anti-Dumping Agreement requires, separately ensure a competitive relationship between products (and therefore price comparability) before undertaking price comparisons for purposes of a price undercutting determination.<sup>9</sup>

11. Further, even if it were sufficient to support its injury analysis, MOFCOM's like product analysis contains several important shortcomings: (i) MOFCOM did not consider the unanimous statements by the importers that subject imports and domestic like products were not substitutable; (ii) MOFCOM's final determination contains only blanket references to the documents China cites and does not provide any explanation as to how these documents support MOFCOM's conclusion, and moreover, MOFCOM withheld as confidential the entirety of several of these documents; and (iii) the sole piece of evidence that China discusses in relation to the price effect of Product C relates to competition between domestic and imported Product B<sup>10</sup>, which is not pertinent to the analysis of Product C.

12. Additionally, China appears to suggest that MOFCOM's conclusion from its causation analysis that "the domestic industry was virtually unable to sell domestically as a 'result' of dumped imports, sold at undercutting prices, holding a very high market share" supported its price undercutting conclusion for Product C.<sup>11</sup> However, MOFCOM's conclusion from its causation analysis cannot support its price effects finding, particularly in the absence of any reference in MOFCOM's price effects analysis to that conclusion.<sup>12</sup> Moreover, MOFCOM's conclusion from its causation analysis was a general conclusion about the domestic industry as a whole and not a specific conclusion about Product C.

13. Finally, even if domestic and imported Product C were in a competitive relationship in 2010 that justified making price comparisons in that year, the facts still do not support proper price undercutting and price effects findings in respect of Product C within the meaning of Articles 3.1 and 3.2. The increase in domestic market share and the vast increase in domestic prices between 2009 and 2010 demonstrate that imported Product C did not place any downward pressure on domestic Product C prices in 2010 and certainly did not cause any actual decrease or prevention of increase in domestic Product C prices in 2010.

## **2. MOFCOM Erred in Extending Its Price Undercutting Conclusions for Products B and C to the Domestic Like Product as a Whole**

14. MOFCOM improperly extended its (flawed) price undercutting conclusions for Products B and C to the domestic like product as a whole.<sup>13</sup> MOFCOM did not find any effects on the prices of domestic Product A (which accounted for almost 80% of domestic HP-SSST production during the POI), yet it reached a general price undercutting conclusion.

15. China now submits that MOFCOM found cross-grade price effects that justified extending its price undercutting conclusions for Products B and C to the domestic like product as a whole<sup>14</sup>, because MOFCOM found that Products A, B, and C "belong to the same category of products" and that "the price changes of the three are to a certain extent correlated with one another".<sup>15</sup> However, the discussion in MOFCOM's final determination that China cited, which addresses product scope, does not contain the facts or logic that China now relies upon for its argument. MOFCOM's consideration of price effects also does not cross-reference its earlier product scope findings regarding price correlation.<sup>16</sup> Even if it did implicitly, correlation is not the same as causation. To establish the latter, MOFCOM needed to ensure a competitive relationship between the products, which it failed to do. Finally, even if such a competitive relationship existed, MOFCOM never examined price differentials between any of the imported and domestic grades to determine whether those differentials could have given rise to any price effects on domestic Product A.

<sup>8</sup> See China's response to Panel question No. 35, paras. 113-123.

<sup>9</sup> See Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.66.

<sup>10</sup> See China's response to Panel question Nos. 35 and 37, paras. 123 and 127.

<sup>11</sup> See China's response to Panel question No. 35, paras. 111-112.

<sup>12</sup> See Final Determination, Exhibit JPN-2, pp. 52-57.

<sup>13</sup> See Japan's first written submission, paras. 140-153; Japan's opening statement at the first meeting of the Panel, paras. 46-62.

<sup>14</sup> See China's response to Panel question Nos. 44, 45, 46, 50.

<sup>15</sup> Final Determination, Exhibit JPN-2, pp. 48-49.

<sup>16</sup> See Final Determination, Exhibit JPN-2, pp. 52-57.

**C. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4**

16. MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) it did not logically progress from MOFCOM's volume and price effects analyses; (ii) MOFCOM failed to evaluate the magnitude of the margin of dumping; (iii) MOFCOM did not provide a thorough and persuasive explanation of why and how the domestic industry's negative indicators outweighed the positive ones; and (iv) MOFCOM did not examine whether subject imports had "explanatory force" for the state of the domestic industry.<sup>17</sup>

17. Japan adds three points to further establish the flaws in MOFCOM's impact analysis. First, MOFCOM found no increase in the volume of dumped imports and no proper price effects in relation to Product A, so MOFCOM should have conducted its impact analysis on the premise that the domestic industry segment producing Product A could not have been impacted by dumped imports, which it failed to do. Second, MOFCOM did not properly find price effects in relation to Product C either, so it also had no basis to consider that dumped imports impacted the domestic industry segment producing Product C. Third, MOFCOM never considered whether the extent of the price undercutting it found to exist for Products B and C or the magnitudes of the dumping margins for Products B and C could have had explanatory force for any of the domestic industry's observed negative indicators.

**D. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5**

18. MOFCOM's causation analysis was flawed because it did not logically progress from its volume, price effects, and impact analyses, and because it improperly attributed injury to subject imports without separating and distinguishing other known factors.<sup>18</sup>

19. Regarding causation, China submits that Article 3.5, rather than Article 3.2, requires consideration of the relationship between the dumped imports and the domestic industry as a whole. Japan does not agree, but notes that MOFCOM's causation analysis merely reiterated the considerations it made pursuant to its Article 3.2 and Article 3.4 analyses<sup>19</sup>, so China's argument lacks factual support.

20. Regarding non-attribution, because MOFCOM's volume, price effects, and impact inquiries did not progress logically, the outcome of MOFCOM's causation inquiry necessarily includes injury to the domestic industry caused by other factors. Moreover, as for MOFCOM's actual non-attribution analysis, MOFCOM conducted it with respect to all grades of HP-SSST taken together, without considering the possibility that other factors may have influenced different segments of the market differently. In this regard, MOFCOM should have conducted distinct non-attribution analyses with regard to Product A on the one hand, and Products B and C on the other. Specifically, with regard to Product A, MOFCOM should have examined whether and how the expansion of domestic production capacity caused injury to the domestic industry, given that the subject imports had no impact on domestic producers of Product A. And with regard to Products B and C, MOFCOM should have considered the effects of the decline in domestic demand.

**E. Conclusion Regarding Injury and Causation**

21. Thus, the Panel should find MOFCOM's injury and causation determinations are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, and should make findings with respect to each of Japan's claims without exercising judicial economy.

**III. MOFCOM LACKED PROPER BASIS FOR ITS USE OF FACTS AVAILABLE TO DETERMINE THE ALL OTHERS RATE, THEREBY VIOLATING ARTICLE 6.8 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT**

22. Article 6.8 requires that before resorting to facts available, an investigating authority must find that an interested party has refused access to or not provided necessary information, or has significantly impeded the investigation. Article 6.8 incorporates by reference Annex II, entitled

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<sup>17</sup> See Japan's first written submission, paras. 157-185; Japan's opening statement at the first meeting of the Panel, paras. 74-83.

<sup>18</sup> See Japan's first written submission, paras. 186-233; Japan's opening statement at the first meeting of the Panel, paras. 84-104.

<sup>19</sup> See Final Determination, Exhibit JPN-2, pp. 65-67.

"Best Information Available in Terms of Paragraph 8 of Article 6". Paragraph 1 of Annex II requires that before resorting to facts available, an investigating authority must "specify in detail the information required from any interested party and the manner in which that information should be structured", and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available". Paragraph 7 of Annex II also provides that facts available must be used with "special circumspection", and that a "less favourable" result may be obtained "if an interested party does not cooperate and thus relevant information is being withheld". "[S]pecial circumspection" means that the "the agency's discretion is not unlimited", and that "the facts to be employed are expected to be the 'best information available'".<sup>20</sup> This means that, "there can be no better information available to be used in the particular circumstances".<sup>21</sup>

23. Here, MOFCOM did not provide the notice required by Paragraph 1 of Annex II through its Initiation Notice or its anti-dumping questionnaire to justify its use of facts available to calculate the all others rate for unknown Japanese exporters. MOFCOM's Initiation Notice requested far less information than required to calculate a dumping margin. And Japan disagrees that MOFCOM's alleged "publication" of the anti-dumping questionnaire on its website satisfied its notice obligations<sup>22</sup>, because China's own laws and regulations have no provision for "publish[ing]" questionnaires in an anti-dumping investigation.<sup>23</sup>

24. Further, MOFCOM did not demonstrate the lack of cooperation by those unknown Japanese exporters, as required by Article 6.8.

25. Finally, despite having two dumping margins comparable in quality and relevance, MOFCOM chose to "apply the highest dumping margin found for the Japanese respondents" as the all others rate.<sup>24</sup> MOFCOM's only stated that the reason for doing so was "[o]ut of consideration for a unified approach to determine the rates for other companies".<sup>25</sup> MOFCOM, therefore, did not exercise "special circumspection" in determining the all others rate.

#### **IV. MOFCOM'S DISCLOSURE OF ESSENTIAL FACTS AND NOTICE OF FINAL DETERMINATION DID NOT SATISFY THE REQUIREMENTS OF ARTICLES 6.9, 12.2, AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT**

##### **A. Panels and the Appellate Body Have Provided Ample Guidance Regarding the Requirements of Articles 6.9, 12.2, and 12.2.2**

26. Article 6.9 of the Anti-Dumping Agreement requires the disclosure of "essential facts", meaning "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures".<sup>26</sup> Thus, China is simply wrong when it asserts that Article 6.9 requires disclosure of only "a *summary* of the 'essential facts'".<sup>27</sup> China is also wrong that the "case law does not yet provide conclusive guidance" as to what Article 6.9 requires.<sup>28</sup> To the contrary, the case law – including from *China – GOES*, *China – X-Ray Equipment*, *China – Broiler Products*, and *EC – Salmon (Norway)* – clearly establishes the obligations under Article 6.9 (as well as Articles 12.2 and 12.2.2).

27. Further, Article 12.2 states that, with respect to a final determination, an investigating authority must provide a notice or separate report sufficiently setting out "all issues of fact and law considered material by the investigating authorities". And Article 12.2.2 specifies that the

<sup>20</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

<sup>21</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289 (quoting Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166).

<sup>22</sup> See China's first written submission, paras. 573, 584, 593.

<sup>23</sup> See G/ADP/N/1/CHN/2/Suppl.3 (20 October 2004) and G/ADP/N/1/CHN/2/Suppl.1 (18 February 2003).

<sup>24</sup> Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, p. 19.

<sup>25</sup> Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, p. 19. See also Final Determination, Exhibit JPN-2, p. 35.

<sup>26</sup> Appellate Body Report, *China – GOES*, para. 240. See also Panel Report, *EC – Salmon (Norway)*, para. 7.796.

<sup>27</sup> China's first written submission, para. 651 (emphasis in original) (quoting Appellate Body Report, *China – GOES*, para. 249).

<sup>28</sup> China's first written submission, para. 654.



investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".

28. Finally, where confidentiality is a concern, the disclosure obligations under Articles 6.9, 12.2, and 12.2.2 "should be met by disclosing non-confidential summaries".<sup>29</sup>

**B. MOFCOM Violated Article 6.9 with Respect to the Dumping Margins for SMI and Kobe**

29. MOFCOM violated Article 6.9 of the Anti-Dumping Agreement because it failed to disclose the data and calculation methodologies used to determine the existence of dumping and the dumping margins for Sumitomo Metal Industries, Ltd. ("SMI") and Kobe Special Tube Co., Ltd. ("Kobe"), which are properly "essential facts".<sup>30</sup> China submits that Japan's claims are only "general allegations" and "not substantiated"<sup>31</sup>, but Japan fails to see how it could further substantiate a claim that certain "essential facts" are *missing* from MOFCOM's disclosure documents.<sup>32</sup> China also argues that MOFCOM's disclosure documents included all of the necessary "essential facts"<sup>33</sup>, but China only reiterates the brief narrative descriptions that MOFCOM provided in its disclosure documents, which were insufficient. Further, China asserts that the interested parties should have been able to fully understand their own dumping margin determinations in order to defend their interests from the brief narrative summaries that MOFCOM provided and, presumably, each party's own data submissions to MOFCOM.<sup>34</sup> However, this information does not permit each party to understand which data MOFCOM used to determine that party's dumping margin and to comment on that determination so as to defend its interests.<sup>35</sup>

**C. MOFCOM Violated Articles 6.9, 12.2, and 12.2.2 with Respect to the Dumping Margin for All Other Japanese Companies**

30. MOFCOM violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement by failing to disclose: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate for unknown Japanese exporters; and (ii) the particular facts that were used to determine the all others rate itself, including the facts underpinning the dumping margin for Kobe that MOFCOM used as the all others rate and the facts that justified using Kobe's dumping margin for the all others rate.<sup>36</sup>

31. With regard to the facts leading to the use of "facts available", MOFCOM never made a finding of non-cooperation with respect to the unknown Japanese exporters to which it applied the all others rate, let alone disclosed the facts that may have supported such a finding, whether in its disclosure documents or final determination.

32. With regard to the facts used to determine the all others rate, MOFCOM stated that it equated the all others rate with the highest rate determined for an investigated respondent, which was Kobe's rate.<sup>37</sup> However, MOFCOM failed to disclose all the "essential facts" used to determine Kobe's rate, so MOFCOM also failed to disclose all the "essential facts" used to determine the all others rate.

33. Additionally with regard to the facts used to determine the all others rate, an investigating authority must use the "best information available" and "special circumspection", and may not resort to "adverse inferences". The facts underpinning MOFCOM's determination that the highest dumping margin for an investigated respondent was the "best information available" for determining the all others rate are therefore "essential" or "material" facts that must be disclosed. MOFCOM's analysis of those facts to reach the conclusion that the highest dumping margin was the "best information available" also arguably constituted reasoning that required disclosure pursuant

<sup>29</sup> Appellate Body Report, *China – GOES*, paras. 247, 259.

<sup>30</sup> See Japan's first written submission, paras. 290-297. See also Japan's response to Panel question

No. 71.

<sup>31</sup> China's first written submission, para. 666.

<sup>32</sup> See Japan's first written submission, paras. 290-297.

<sup>33</sup> China's first written submission, paras. 669-673.

<sup>34</sup> China's first written submission, paras. 674-676.

<sup>35</sup> See Panel Report, *Guatemala – Cement II*, para. 8.229.

<sup>36</sup> See Japan's first written submission, paras. 307-319.

<sup>37</sup> See Final Dumping Disclosure to Japanese Embassy, Exhibit JPN-22, Section III.2.

to Article 12.2.2.<sup>38</sup> But MOFCOM never disclosed the facts or reasoning behind why the highest calculated dumping margin was the "best information available" for determining the all others rate.

**D. MOFCOM Violated Articles 6.9, 12.2, and 12.2.2 with Respect to the Import Prices and Domestic Prices Used in the Injury and Causation Analyses**

34. MOFCOM violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement by failing to disclose several pieces of information critical to its price effects determination, which served as the basis for MOFCOM's ultimate injury and causation determinations. China tries to justify those failures, but those justifications are without merit. First, for those instances for which no price comparisons were made or no price undercutting was found, China argues the missing price and price differential information did not constitute "essential facts" that required disclosure.<sup>39</sup> However, the missing information was certainly "salient for a contrary outcome"<sup>40</sup> and "considered [by MOFCOM in its] process of analysis and decision-making"<sup>41</sup>, and therefore required disclosure. Second, China argues that some of the missing price information was confidential<sup>42</sup>, but MOFCOM had an obligation to disclose sufficiently detailed non-confidential summaries in a coherent way to permit interested parties to defend their interests.<sup>43</sup> Third, China argues that the -3% to -28% range of underselling that MOFCOM disclosed for Product B for the entire 2008 to 2010 period was sufficient,<sup>44</sup> but MOFCOM should have been able to disclose a separate underselling margin for Product B for each year. Finally, China argues that how MOFCOM accommodated important "quantitative differences" was a methodological question that did not require disclosure<sup>45</sup>, but MOFCOM had an obligation to disclose the facts that constituted the "quantitative difference" and the reasons why MOFCOM could take this into account.

**V. MOFCOM LACKED GOOD CAUSE FOR WITHHOLDING CONFIDENTIAL INFORMATION, AND DID NOT REQUIRE SUFFICIENT NON-CONFIDENTIAL SUMMARIES OR EXPLANATIONS AS TO WHY SUCH SUMMARIES ARE NOT POSSIBLE, INCONSISTENT WITH ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT**

**A. MOFCOM Violated Article 6.5 of the Anti-Dumping Agreement**

35. China violated Article 6.5 of the Anti-Dumping Agreement because Petitioners did not demonstrate "good cause", and MOFCOM did not objectively examine Petitioners' attempted demonstrations of "good cause", with respect to the confidential treatment of Appendices V and VIII to the Petition, Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012, and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012.

36. China argues that an investigating authority "enjoys a considerable margin of discretion in its examination of a request for confidential treatment and determining whether 'good cause' has been shown, provided the outcome is not unreasonable".<sup>46</sup> However, notwithstanding an investigating authority's discretion, it still "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".<sup>47</sup> Here, beyond the name of the third party providing Appendix V to the Petition, MOFCOM failed to scrutinize Petitioners' confidentiality requests to determine objectively whether Petitioners had established "good cause" for treating the four reports at issue as entirely confidential.

37. China also asserts that "Petitioners did not only request confidential treatment out of concern for the impact on the third parties' businesses", but "provided several other reasons" for

<sup>38</sup> See Panel Report, *China – X-Ray Equipment*, para. 7.472. See also Panel Report, *China – Broiler Products*, para. 7.528.

<sup>39</sup> China's first written submission, para. 686. See also China's response to Panel question No. 75, para. 191.

<sup>40</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>41</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.796.

<sup>42</sup> China's first written submission, para. 686.

<sup>43</sup> Appellate Body Report, *China – GOES*, paras. 240, 247, 259.

<sup>44</sup> China's first written submission, paras. 685-686. See also China's response to Panel question Nos. 72, 75, 76, 77.

<sup>45</sup> China's first written submission, para. 693.

<sup>46</sup> China's first written submission, para. 725.

<sup>47</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 539.

doing so.<sup>48</sup> However, China cited no underlying documents submitted by Petitioners to support its assertions; none of China's points serve as evidence of efforts by MOFCOM during the investigation to scrutinize Petitioners' confidentiality requests; some of the alleged other reasons simply reiterate concerns regarding the third parties' businesses; and the facts that the reports were obtained by Petitioners for remuneration or that confidentiality was requested by third parties cannot automatically constitute "good cause" under Article 6.5.

38. Finally, China argues that the four reports at issue were also "by nature" confidential.<sup>49</sup> But even if true, that would not absolve MOFCOM of its obligation to scrutinize Petitioners' confidentiality requests and to objectively determine that "good cause" exists for treating the full texts of these four reports as confidential before doing so.

#### **B. MOFCOM Violated Article 6.5.1 of the Anti-Dumping Agreement**

39. China violated Article 6.5.1 of the Anti-Dumping Agreement because Petitioners did not furnish sufficient non-confidential summaries or any statements as to why such summaries were not possible, and MOFCOM failed to require such summaries or statements, with respect to several documents submitted by Petitioners.<sup>50</sup> China argues that Petitioners' non-confidential summaries of Appendices V and VIII to the Petition, Appendix 59 to Petitioners' Supplemental Evidence of 1 March 2012, and the Appendix to Petitioners' Supplemental Evidence of 29 March 2012 were sufficient.<sup>51</sup> China further argues that Petitioners provided statements as to why summarization is not possible with respect to Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, and 58 to Petitioners' Supplemental Evidence of 1 March 2012<sup>52</sup>, or, alternatively, that Petitioners provided sufficient non-confidential summaries of these Appendices.<sup>53</sup>

40. With respect to the first group of documents, China's contention that the non-confidential summaries of these reports were sufficient is erroneous, as Japan has separately argued.<sup>54</sup> With respect to the second group of documents, even if the short statements that Petitioners provided justify confidential treatment, they are not statements as to why summarization is not possible, and they are not sufficient non-confidential summaries because they do not summarize the "*substantive content*" of those appendices.<sup>55</sup>

#### **VI. CHINA APPLIED PROVISIONAL MEASURES FOR A PERIOD EXCEEDING FOUR MONTHS, THEREBY VIOLATING ARTICLE 7.4 OF THE ANTI-DUMPING AGREEMENT**

41. China has not attempted to rebut Japan's claim that China violated Article 7.4 of the Anti-Dumping Agreement by applying provisional anti-dumping measures for a period of six months, so Japan considers that there is no dispute in this regard.

#### **VII. CONCLUSION**

42. For the foregoing reasons and those set forth in Japan's previous written and oral submissions in this dispute, Japan maintains its request that the Panel find China's measures at issue to be inconsistent with China's obligations under the GATT 1994 and Anti-Dumping Agreement, and recommend that China bring its measures into conformity with those obligations pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

<sup>48</sup> China's first written submission, para. 728.

<sup>49</sup> China's first written submission, para. 732.

<sup>50</sup> See Japan's first written submission, paras. 265-289.

<sup>51</sup> China's first written submission, paras. 742-746, 757-763.

<sup>52</sup> China's first written submission, paras. 747, 764-767.

<sup>53</sup> See China's first written submission, note 791.

<sup>54</sup> See Japan's responses to Panel question Nos. 68 and 69.

<sup>55</sup> Panel Report, *China – X-Ray Equipment*, para. 7.342. (emphasis added)

**ANNEX B-3****EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN  
AT THE FIRST PANEL MEETING****I. INTRODUCTION**

1. This dispute concerns the measures taken by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan. These measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

**II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH CHINA'S ANTI-DUMPING AGREEMENT OBLIGATIONS**

2. Despite MOFCOM's limited disclosures, it is evident that MOFCOM's injury and causation determinations violate the Anti-Dumping Agreement and GATT 1994.

**A. Description of the Subject Imports and Domestic Like Product**

3. There are three grades of subject products in increasing order of price and quality: Products A, B, and C. MOFCOM found the domestic like product to consist of all three grades<sup>1</sup>, but that does not mean that differences in price and quality among the grades are not relevant in the injury and causation analysis.<sup>2</sup> Importantly, during the period of investigation ("POI"), virtually 100% of subject imports were of Products B and C – the ultra-supercritical products – while only about 20% of domestic HP-SSST products consisted of Products B and C. Thus, the overwhelming majority (about 80%) of the domestic like products consisted of Product A – the supercritical product.<sup>3</sup> In short, subject imports supplied a different segment of the market than the bulk of the domestic like products, so did not compete with the bulk of those products.

**B. Legal Requirements for an Affirmative Injury and Causation Determination**

4. Pursuant to Article 3 of the Anti-Dumping Agreement and the Appellate Body's guidance, an affirmative injury and causation determination requires: (i) a significant increase in the volume of dumped imports and/or an effect of dumped imports on prices in the domestic market for like products; (ii) a consequent impact of these dumped imports on domestic producers of such products; and (iii) a finding that injury to the domestic industry was caused by the dumped imports, and not by other known factors. In order for the inquiry to progress logically and ultimately lead to the imposition of antidumping duties on the entirety of dumped imports subject to investigation, each subsequent step of the analysis must logically connect with the preceding steps of the analysis.<sup>4</sup>

**C. Summary of MOFCOM's Injury and Causation Determinations**

5. With regard to volume, MOFCOM found subject import volumes declined significantly during the POI on all measures. With regard to price effects, MOFCOM found only price undercutting with respect to Products B and C, and on that basis concluded that "in general, ... [t]he imports of the subject products had a relatively noticeable price undercutting effect on the price of domestic like products". With regard to impact, MOFCOM conducted its analysis with respect to the domestic industry as a whole, and although it found a mix of positive and negative indicators, it concluded that the domestic industry was materially injured. Finally, MOFCOM reached an affirmative causation determination on the basis of: (i) the high market share of imports; (ii) the price undercutting conclusions with respect to Products B and C; and (iii) the

<sup>1</sup> Final Determination, Exhibit JPN-2, pp. 23-28.

<sup>2</sup> See Panel Report, *China – X-Ray Equipment*, paras. 7.50-7.51, 7.65.

<sup>3</sup> See Japan's first written submission, para. 54, Table 4, and para. 148.

<sup>4</sup> See Appellate Body Report, *China – GOES*, para. 128.

impact conclusion with respect to the domestic industry as a whole. MOFCOM also concluded that other known factors did not break the causal link between dumped imports and injury to the domestic industry.<sup>5</sup>

#### **D. Inconsistency of MOFCOM's Injury and Causation Determinations with the Anti-Dumping Agreement**

##### **1. Summary of Japan's Arguments**

6. Japan's particular arguments are set forth in its first written submission.<sup>6</sup>

##### **2. Response to China's Arguments**

7. Next, Japan explains why China has failed to rebut Japan's *prima facie* case that MOFCOM's injury and causation determinations are inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. At the outset, Japan notes that China misinterprets the "positive evidence" obligation of Article 3.1 as being an obligation that relates to only "the quality of the evidence".<sup>7</sup> To the contrary, this obligation relates to not only the quality of the evidence, but also the *existence* and *pertinence* of that evidence. Here, in several instances, MOFCOM failed to support its determinations with any evidence or with pertinent evidence, let alone quality evidence, for which reason the Panel should find MOFCOM's injury and causation determinations to be inconsistent with Article 3.1.

##### *a. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement*

8. Regarding Japan's argument that MOFCOM improperly reached the conclusion that subject imports had a price undercutting effect on the domestic like product as a whole, first, in China's view, the comparison must focus on the prices of the dumped imports, meaning the relevant consideration is MOFCOM's apparent finding that 70% or even 100% of dumped imports were sold at undercutting prices.<sup>8</sup> However, the Anti-Dumping Agreement and the Appellate Body make clear that the focus of the Article 3.2 price effects inquiry is not only on the prices of subject imports, but also on the prices of domestic like products, as well as the relationship between the two.<sup>9</sup> Thus, to determine whether price undercutting existed, and to justify the subsequent conclusions that MOFCOM reached regarding injury and causation to the domestic industry as a whole, MOFCOM had an obligation to consider the extent to which the subject imports it found to be sold at lower prices may have had an effect on prices in the domestic market for like products. Since MOFCOM found no price undercutting for Product A, which accounted for about 80% of domestic production, and which did not compete with Products B and C, MOFCOM had no basis to find price effects pursuant to Articles 3.1 and 3.2 with respect to the domestic market for like products.

9. Second, China justifies basing its price effects conclusion on finding price undercutting for only about 20% of the domestic like product by invoking the fact that the second sentence of Article 3.2 uses the term "a like product", instead of "the like product".<sup>10</sup> However, Article 3.1, which specifies the "essential components"<sup>11</sup> of the analysis, specifies the requirement for an investigating authority to determine "the effect of the dumped imports on prices in *the* domestic market for like products"<sup>12</sup>, meaning the like product as a whole.

10. Third, China suggests that MOFCOM found imports of Products B and C caused effects on domestic prices of Product A based on the fact that Products A, B and C "belong to the same category of products" (i.e., are the domestic "like product"), as well as Petitioners' statement

<sup>5</sup> See Final Determination, Exhibit JPN-2, pp. 43-77.

<sup>6</sup> See Japan's first written submission, paras. 122-234. Japan clarifies that, notwithstanding the title of Section V.A.1.b.ii of its first written submission, Japan's argument in that section is in fact that MOFCOM improperly extended the price effects conclusion it made for only a portion of the domestic like product, as defined by MOFCOM, to *the domestic like product as a whole*.

<sup>7</sup> China's first written submission, paras. 234-235.

<sup>8</sup> China's first written submission, paras. 338-341.

<sup>9</sup> See Appellate Body Report, *China – GOES*, paras. 127-128, 138, 147, 154.

<sup>10</sup> China's first written submission, paras. 347-351.

<sup>11</sup> Appellate Body Report, *China – GOES*, para. 127.

<sup>12</sup> Emphasis added.



regarding "correlation" between the prices of Products A, B and C.<sup>13</sup> However, to find cross-grade price effects merely based on a "like product" determination and Petitioners' unverified statement is not a finding based on "positive evidence" and an "objective examination"<sup>14</sup>, especially given record evidence showing the lack of competition between Product A and Products B and C. And even if a correlation were proved, that does not establish that price movements of one product caused price movements of the other products.

11. Regarding Japan's argument that MOFCOM's price undercutting conclusion for Product C was analytically and factually flawed, first, China argues that a price undercutting finding may be based solely on the factual difference between import and domestic prices, without considering the "effect" of imports.<sup>15</sup> This is incorrect. Under a proper reading of Articles 3.1 and 3.2, consideration of the "effect" of imports (i.e., the "explanatory force" of imports)<sup>16</sup> is relevant for not only price suppression and depression, but also undercutting. Thus, an inquiry into "price undercutting by the dumped imports" requires assessing whether dumped imports are having the *effect* of taking the place of domestic like products by selling at lower prices or of rendering domestic prices less firm<sup>17</sup>, and not just of whether dumped imports are mathematically priced lower. Here, given the facts, including the opposite trends in price and volume of imported and domestic Product C<sup>18</sup>, MOFCOM's price undercutting conclusion for Product C is clearly not objective or based on positive evidence.

12. Second, China argues that the "similar quantitative difference" of greater than 99% import market share for Product C in 2009 and 2010 justifies price comparisons, and ultimately a price undercutting conclusion, for Product C for those two years.<sup>19</sup> Japan fails to see how, without a meaningful quantity of both import and domestic sales, any objective price undercutting conclusion could be reached with respect to a particular product.

*b. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement*

13. Regarding Japan's argument that MOFCOM's impact analysis did not logically progress from its volume and price effects analyses, China submits Article 3.4 requires an impact analysis with respect to the domestic industry as a whole.<sup>20</sup> However, the successive provisions of Article 3 "contemplate a logical progression of inquiry"<sup>21</sup>, and Article 3.4 is concerned with "the relationship between subject imports and the state of the domestic industry".<sup>22</sup> Here, MOFCOM was required to ensure a logical progression from its volume and price effects findings to its impact and causation analyses, which it failed to do.

14. Regarding Japan's argument that MOFCOM failed to evaluate the magnitude of the margin of dumping, China argues that Article 3.4 does not require such an evaluation<sup>23</sup>, but China is wrong.<sup>24</sup> Moreover, MOFCOM evaluated the magnitude of the margin of dumping only in deciding if cumulation was appropriate, not in its injury assessment<sup>25</sup>, and so erred.

15. Regarding Japan's argument that MOFCOM did not provide a thorough and persuasive explanation of why and how the domestic industry's negative indicators outweighed the positive

<sup>13</sup> China's first written submission, paras. 365-367.

<sup>14</sup> See Panel Report, *China – X-Ray Equipment*, para. 7.65.

<sup>15</sup> China's first written submission, paras. 285-299.

<sup>16</sup> See, e.g., Appellate Body Report, *China – GOES*, paras. 138, 149.

<sup>17</sup> See *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 30 January 2014, <http://www.oed.com/view/Entry/211547> (defining "undercut" as "[t]o supplant ... by selling at lower prices" or "[t]o render unstable; to render less firm, to undermine").

<sup>18</sup> Notably, in 2009, imported Product C prices were *above* domestic Product C prices by 10%, and imported Product C prices ended up being below domestic Product C prices in 2010 by about 50% because domestic prices *increased* by 112.80% while import prices *decreased* by 36.32%. See Japan's first written submission, paras. 133-135.

<sup>19</sup> China's first written submission, paras. 267-281.

<sup>20</sup> China's first written submission, paras. 390-391, 393-400.

<sup>21</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>22</sup> Appellate Body Report, *China – GOES*, para. 149.

<sup>23</sup> China's first written submission, para. 424.

<sup>24</sup> See Panel Report, *China – X-Ray Equipment*, para. 7.183.

<sup>25</sup> See China's first written submission, para. 426 (citing Final Determination, Exhibit JPN-2, pp. 41-42).

ones, China wrongly asserts that it undertook the requisite evaluation.<sup>26</sup> Rather, MOFCOM simply restated its factual conclusions regarding each factor, and juxtaposed those factual conclusions using a variety of transitional terms.<sup>27</sup>

16. Regarding Japan's argument that MOFCOM did not examine whether subject imports had explanatory force for the state of the domestic industry, very little<sup>28</sup> is needed to establish that MOFCOM simply failed to undertake this requisite inquiry.<sup>29</sup>

*c. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement*

17. Regarding Japan's argument that MOFCOM's causation analysis did not logically progress from its volume, price effects, and impact analyses, China argues it was permitted to consider the subject imports' high market share in its causation analysis.<sup>30</sup> However, Article 3.5 requires causation to be based on the particular effects of dumping specified in Articles 3.2 and 3.4, which with respect to volume require "a significant increase in dumped imports". Article 3.5 also requires "an examination of all relevant evidence", which must include the sharp decline in import volumes found by MOFCOM. As for the link between MOFCOM's price effects and impact conclusions and its causation determination, the flaws in those conclusions already discussed also undermine MOFCOM's causation determination.<sup>31</sup>

18. Regarding Japan's argument that MOFCOM improperly attributed injury to subject imports, and not to other known factors, MOFCOM did not properly "separate and distinguish":<sup>32</sup> (i) the decline in domestic demand; and (ii) the expansion of domestic production capacity. With respect to Products B and C, there is no contradiction in Japan's argument,<sup>33</sup> because it is undeniable that domestic demand for these products decreased significantly during the POI, which caused significant decreases in import volume and domestic sales volume, as well as prices.<sup>34</sup> Thus, whatever injury the approximately 20% of the domestic industry producing Products B and C may have been suffering was evidently the result of a significant decrease in domestic demand. As for Product A, there were only trivial imports of Product A during the POI<sup>35</sup>, and MOFCOM never found volume or price effects on the domestic industry with respect to Product A. Thus, MOFCOM should have presupposed that injury to the 80% of the domestic industry producing Product A should be attributed to factors other than dumped imports. Here, that other factor was evidently the known expansion of domestic production capacity. China has presented no arguments that dismiss the role of capacity expansion as a non-attribution factor.<sup>36</sup>

### III. MOFCOM VIOLATED SEVERAL PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AGREEMENT

19. China violated its procedural obligations with respect to: (i) the disclosure of essential facts; (ii) the notice provided with MOFCOM's final determination; (iii) the determination of the all others rate; (iv) the treatment of confidential information; and (v) the application of provisional measures. China's arguments in its FWS cannot overturn this conclusion.

### IV. TRANSLATION ISSUES

20. With regard to translation issues, none of China's objections has any impact on Japan's claims and arguments. Japan's views on China's alternative translations are expressed in Exhibit JPN-29 submitted to the Panel on February 18.

<sup>26</sup> China's first written submission, paras. 447-453.

<sup>27</sup> See Final Determination, Exhibit JPN-2, p. 63.

<sup>28</sup> See China's first written submission, para. 460.

<sup>29</sup> See Appellate Body Report, *China – GOES*, para. 149.

<sup>30</sup> China's first written submission, para. 516.

<sup>31</sup> See Panel Report, *China – X-Ray Equipment*, para. 7.239.

<sup>32</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

<sup>33</sup> See China's first written submission, para. 550.

<sup>34</sup> See Japan's first written submission, para. 54, Table 4, and para. 57, Table 5.

<sup>35</sup> See Japan's first written submission, para. 54, Table 4.

<sup>36</sup> See China's first written submission, paras. 557-561.

**V. CONCLUSION**

21. Japan respectfully requests the Panel to find that China's measures are inconsistent with the GATT 1994 and Anti-Dumping Agreement. Moreover, Japan respectfully requests the Panel to make findings with respect to each of Japan's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy.



**ANNEX B-4****EXECUTIVE SUMMARY OF THE STATEMENTS OF JAPAN  
AT THE SECOND PANEL MEETING****I. INTRODUCTION**

1. Japan has already established why the measures by the Ministry of Commerce of the People's Republic of China ("MOFCOM") imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). In the oral statement we review the principal issues at stake in this dispute, and address the few new points by China that merit response.

**II. MOFCOM'S INJURY AND CAUSATION DETERMINATIONS ARE INCONSISTENT WITH CHINA'S ANTI-DUMPING AGREEMENT OBLIGATIONS****A. Overview of Key Facts Related to Injury and Causation**

2. There are three sets of critical facts pertaining to injury and causation.<sup>1</sup> First, MOFCOM found no increase in the volume of subject imports, but rather a significant decreasing trend during the period of investigation ("POI"). Second, MOFCOM found no price effects on Product A, which accounted for almost 80% of domestic HP-SSST production during the POI, yet reached a general price effects conclusion for the domestic like product as a whole. Third, MOFCOM found price undercutting for Product C in 2010, despite several facts indicating that there was no competitive relationship between imported and domestic Product C that could justify making price comparisons, and thus that imports of Product C could not actually be having an effect on prices of domestic Product C.

**B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement****1. Legal Requirements for a Price Effects Finding**

3. As for the legal requirements for price effects<sup>2</sup>, to begin, "price undercutting" cannot be found based on a mathematical price difference alone; rather, it requires a showing that dumped imports had an effect of placing downward pressure on domestic prices by selling at lower prices. A competitive relationship between the dumped imports and domestic like products whose prices are being compared is critical for finding "price undercutting".

4. That said, Articles 3.1 and 3.2 require an investigating authority to determine whether *price effects* exist. Under Article 3.2, price undercutting, price depression, and price suppression are three factors to be considered, but "[n]o one or several of these factors can necessarily give decisive guidance". As such, a "price undercutting" finding may provide guidance for determining whether price effects exist, but it is not sufficient. The United States concurs.<sup>3</sup> Thus, even if "price undercutting" is found, *price effects* cannot be found unless dumped imports gave rise to an actual decrease or prevention of increase in prices in the domestic market for like products. This requires an investigating authority to find both a price differential and degree of competition between the dumped imports and domestic like products, and also consider other relevant factors.

5. Finally, Articles 3.1 and 3.2 require an investigating authority to determine "the effect of the dumped imports on prices *in the domestic market for like products*".<sup>4</sup> This is plainly a reference to the entire domestic market, meaning that the price effects to be found at this stage of the inquiry must be with respect to the domestic like product as a whole.

<sup>1</sup> See Japan's second written submission, paras. 12-16.

<sup>2</sup> See Japan's second written submission, paras. 17-28.

<sup>3</sup> United States' response to Panel question No. 7, paras. 19-20.

<sup>4</sup> Emphasis added.

## 2. MOFCOM Improperly Found Price Effects for Product C

6. On MOFCOM's price effects finding for Product C, the record evidence does not support a price undercutting or price effects conclusion for Product C; rather, it indicates that there was no competitive relationship between imported and domestic Product C.<sup>5</sup>

7. China argues that because Japan has not challenged MOFCOM's "like" product finding under Article 2.6 of the Anti-Dumping Agreement, it is precluded from raising a lack of competitive relationship between imported and domestic Product C under Articles 3.1 and 3.2.<sup>6</sup> However, China ignores *China – X-Ray Equipment*, where the panel distinguished between the competitiveness considerations under Article 2.6 and Article 3.2.<sup>7</sup> Importantly, "like" products – or even sub-groupings of "like" products – do not always compete with one another in the actual market, so a complainant may raise competitive relationships and price comparability for a price undercutting analysis under Article 3.2 without challenging likeness under Article 2.6. Here, for Product C, the trivial quantity of domestic sales, vast difference between import and domestic prices, inverse price movements between imported and domestic products, and unanimous statements of domestic importers as to a lack of substitutability between imported and domestic products should have revealed that domestic and imported Product C were not in fact in a competitive relationship, and therefore their prices were not in fact comparable, for purposes of finding price undercutting for Product C.

8. China also argues that it found a competitive relationship between imported and domestic Product C sufficient to support its price undercutting determination for Product C.<sup>8</sup> As Japan has explained: (i) MOFCOM's consideration of the competitive relationship was in the context of its "like product" determination, and therefore inapposite; (ii) MOFCOM never considered the unanimous statements by importers that subject imports and domestic like products were not substitutable; (iii) MOFCOM never explained how any of the documents China references actually support its conclusion, and withheld several of these documents as entirely confidential; and (iv) the particular evidence and conclusions that China references are not specific to Product C.<sup>9</sup> China now quotes one importer as stating that it did not buy domestic products in 2010 because "the price of imports was more competitive"<sup>10</sup>, but this importer clearly intended to state that imported and domestic products were not commercially substitutable in the actual market.<sup>11</sup> Without some evidence of the actual degree of competition between imported and domestic Product C, MOFCOM could not have objectively found that the price differential it observed between imported and domestic Product C in 2010 could have actually had effects on prices of domestic Product C.

## 3. MOFCOM Improperly Extended Its Price Effects Conclusions for Products B and C to the Domestic Like Product as a Whole

9. MOFCOM improperly extended the price effects conclusions it reached for Products B and C to the domestic like product as a whole.<sup>12</sup> China attempts to justify MOFCOM's conclusion by reference to: (i) MOFCOM's apparent finding of a price correlation between the different HP-SSST grades; and (ii) alleged evidence of the substitutability of Product A by Products B and C.<sup>13</sup> Japan finds it difficult to understand how *higher* priced imports of Products B and C could have price *undercutting* effects on *lower* priced domestic Product A.

10. On China's first point, as explained<sup>14</sup>, MOFCOM's brief analysis came in its scope determination, and moreover, correlation itself does not establish that lower prices of imported Products B and C pushed down prices of domestic Product A. As for Petitioners' assertion that a

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<sup>5</sup> See Japan's first written submission, paras. 130-139; Japan's opening statement at the first meeting of the Panel, paras. 63-73; Japan's second written submission, paras. 30-37.

<sup>6</sup> See China's second written submission, paras. 97-104.

<sup>7</sup> See Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.67.

<sup>8</sup> See China's second written submission, paras. 105-115.

<sup>9</sup> See Japan's second written submission, paras. 33-37.

<sup>10</sup> China's second written submission, para. 114 (quoting Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, p. 3).

<sup>11</sup> Babcock & Wilcox Questionnaire Response, Exhibit JPN-15, questions 19, 22.

<sup>12</sup> See Japan's first written submission, paras. 140-153; Japan's opening statement at the first meeting of the Panel, paras. 46-62; Japan's second written submission, paras. 38-46.

<sup>13</sup> See China's second written submission, paras. 138-156.

<sup>14</sup> See Japan's second written submission, paras. 39-42.

decrease in Product B and C prices "will certainly drive down" Product A prices<sup>15</sup>, this assertion makes little sense because Product A can perform reliably in supercritical boilers but not ultrasupercritical boilers, while Products B and C are essential for ultrasupercritical boilers<sup>16</sup>, so there is a technical dichotomy between these products.

11. On China's second point of substitutability, MOFCOM never addressed this issue in its price effects analysis, and even if it found substitutability, it never examined the degree of substitutability and the extent of the price differential between Product A and Products B and C in its determination. China's reference to evidence that Products B and C could substitute for Product A<sup>17</sup> is misleading, because it plainly served to establish that lower-grade Product A could not physically substitute for higher-grade Products B and C in ultrasupercritical boilers; it did not establish actual *commercial substitutability*.

12. Japan emphasized that such an argument is rather an ex post rationalization.<sup>18</sup> China's position on the requirements under Article 3.2 naturally suggests that MOFCOM considers that it is not obligated to find either a volume effect or a price effect of the dumped imports on domestically produced Product A. Thus, it is doubtful that MOFCOM did engage in the inquiry of the effect of the dumped imports on domestically produced Product A while MOFCOM considered it non-obligatory. We are aware that China submits that MOFCOM can rely on its finding in the scope analysis later in its price effect analysis.<sup>19</sup> Japan agrees an investigating authority can rely on its finding in a prior part of its determination. It is obvious, however, that such a reliance on a prior finding should have been explicitly mentioned in the relevant part of the Final Determination, in light of the requirement for an objective examination based on positive evidence under the Anti-Dumping Agreement. China's ex post rationalization cannot cure deficiencies in MOFCOM's original Final Determination.

### **C. MOFCOM's Impact Analysis Is Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement**

13. MOFCOM's impact analysis violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) it did not logically progress from MOFCOM's volume and price effects analyses; (ii) MOFCOM failed to evaluate the magnitude of the margin of dumping; (iii) MOFCOM did not adequately explain why and how the domestic industry's negative indicators outweighed the positive ones; and (iv) MOFCOM did not examine whether subject imports had "explanatory force" for the state of the domestic industry.<sup>20</sup> Japan already rebutted much of what China argues on this topic.<sup>21</sup> China's view that Article 3.4 does not require a separate evaluation of "factors affecting domestic prices" and "the magnitude of the margin of dumping"<sup>22</sup> is not consistent with a Vienna Convention interpretation of Article 3.4, because it fails to address why Article 3.4 explicitly references these factors. Rather, Article 3.4 requires examination of "the explanatory force of subject imports for the state of the domestic industry"<sup>23</sup>, and for this purpose, examination of the "factors affecting domestic prices" and "the magnitude of the margin of dumping" is highly pertinent.

### **D. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

14. MOFCOM's causation analysis violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it did not logically progress from its volume, price effects, and impact analyses, and because MOFCOM improperly attributed injury to subject imports without separating and distinguishing other known factors.<sup>24</sup> Again, Japan already rebutted much of what China argues on

<sup>15</sup> See China's second written submission, para. 140 (quoting Final Determination, Exhibit JPN-2, p. 48).

<sup>16</sup> See Japan's opening statement at the first meeting of the Panel, para. 8.

<sup>17</sup> See China's second written submission, paras. 143-150.

<sup>18</sup> See Japan's closing statement at the first meeting of the Panel.

<sup>19</sup> *Ibid.*, para. 12.

<sup>20</sup> See Japan's first written submission, paras. 157-185; Japan's opening statement at the first meeting of the Panel, paras. 74-83; Japan's second written submission, paras. 50-53.

<sup>21</sup> See China's second written submission, paras. 168-206.

<sup>22</sup> See China's second written submission, paras. 182-188.

<sup>23</sup> Appellate Body Report, *China – GOES*, para. 149.

<sup>24</sup> See Japan's first written submission, paras. 186-233; Japan's opening statement at the first meeting of the Panel, paras. 84-104; Japan's second written submission, paras. 56-61.

this topic.<sup>25</sup> On non-attribution, China now argues that Article 3.5 requires an investigating authority to provide only "reasonable explanations as to why the injurious effects of certain factors are not sufficient to break the causal link".<sup>26</sup> However, in *US – Hot-Rolled Steel*, the Appellate Body made clear that an investigating authority must identify the "nature and extent" of the injurious effects of the non-attribution factor and the dumped imports, and distinguish the two.<sup>27</sup> Here, different factors were at work in different segments of the domestic HP-SSST market, yet MOFCOM failed to consider any possibility that this was the case. For Product A, increasing domestic demand combined with decreasing domestic prices indicated a typical oversupply situation, where an expansion of domestic production capacity surely contributed to the domestic industry's injury. For Products B and C, there is no dispute that domestic demand declined sharply, which also contributed to the domestic industry's injury. Yet MOFCOM failed to separate and distinguish the injurious effects of these non-attribution factors in the different segments of the market.

### III. MOFCOM VIOLATED SEVERAL PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AGREEMENT

#### A. MOFCOM's Use of Facts Available to Determine the All Others Rate Violated Article 6.8 and Annex II of the Anti-Dumping Agreement

15. MOFCOM's use of facts available to determine the all others rate for unknown Japanese exporters violated Article 6.8 and Annex II of the Anti-Dumping Agreement for three reasons:<sup>28</sup> (i) MOFCOM failed to provide the requisite notice before using facts available; (ii) MOFCOM did not demonstrate the lack of cooperation by unknown Japanese exporters before using facts available; and (iii) MOFCOM failed to use the "best information available" and exercise "special circumspection".

#### B. MOFCOM's Disclosure of Essential Facts and Notice of Final Determination Violated Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement

16. MOFCOM's disclosure of essential facts and notice of final determination are inconsistent with Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement in three respects. First, MOFCOM violated Article 6.9 because it failed to disclose the data and calculation methodologies used to determine the existence of dumping and the dumping margins for SMI and Kobe.<sup>29</sup> Second, MOFCOM violated Articles 6.9, 12.2, and 12.2.2 by failing to disclose, in connection with its determination of the all others rate: (i) the facts justifying the use of "facts available"; (ii) the data and calculation methodologies underpinning the dumping margin for Kobe, which MOFCOM used as the all others rate; and (iii) the facts justifying the use of the highest dumping margin for an investigated respondent as the all others rate.<sup>30</sup> Third, MOFCOM violated Articles 6.9, 12.2, and 12.2.2 by failing to disclose several pieces of information regarding import prices and domestic prices critical to its price effects determination.<sup>31</sup>

#### C. MOFCOM's Treatment of Confidential Information Violated Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

17. As for MOFCOM's treatment of confidential information: first, MOFCOM violated Article 6.5 of the Anti-Dumping Agreement because Petitioners did not demonstrate "good cause", and MOFCOM did not objectively examine Petitioners' attempted demonstrations of "good cause", with respect to the confidential treatment of the full texts of four appendices submitted by Petitioners; and second, China violated Article 6.5.1 of the Anti-Dumping Agreement because Petitioners did not furnish sufficient non-confidential summaries or any statements as to why such summaries were not possible, and MOFCOM failed to require such summaries or statements, with respect to

<sup>25</sup> See China's second written submission, paras. 207-242.

<sup>26</sup> China's second written submission, para. 229.

<sup>27</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

<sup>28</sup> See Japan's first written submission, paras. 302-306; Japan's second written submission, paras. 63-81.

<sup>29</sup> See Japan's first written submission, paras. 290-297; Japan's second written submission, paras. 89-95.

<sup>30</sup> See Japan's first written submission, paras. 307-319; Japan's second written submission, paras. 96-104.

<sup>31</sup> See Japan's first written submission, paras. 235-264; Japan's second written submission, paras. 105-113.

several documents submitted by Petitioners.<sup>32</sup> Furthermore, China stated that in its first written submission, it explained that the Petitioners provided "good cause" for the confidential treatment of the four appendices, but such explanation cannot be found in any document on the record including the Final Determination. Japan thus presented a prima facie case that China failed to scrutinize whether the confidentiality request shows "good cause" at the time of the investigation. It is incumbent on China to rebut this prima facie case by presenting evidence that MOFCOM did scrutinize confidential requests by Petitioners in a manner argued by China, but China has not done so.

**D. China's Application of Provisional Measures for a Period Exceeding Four Months Violated Article 7.4 of the Anti-Dumping Agreement**

18. Finally, China has not objected to Japan's claim that China violated Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for more than four months.

**IV. CONCLUSION**

19. Japan maintains that China's measures are inconsistent with its obligations under the GATT 1994 and the Anti-Dumping Agreement. Japan respectfully requests that the Panel make findings with respect to *each* of Japan's claims under the GATT 1994 and the Anti-Dumping Agreement, including each claim under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, without exercising judicial economy as to any of Japan's claims.

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<sup>32</sup> See Japan's first written submission, paras. 265-289; Japan's second written submission, paras. 114-134.

**ANNEX B-5****EXECUTIVE SUMMARY OF THE FIRST WRITTEN  
SUBMISSION OF THE EUROPEAN UNION****I. INTRODUCTION AND GENERAL FACTUAL BACKGROUND**

1. The present dispute concerns China's measures imposing anti-dumping duties on certain high-performance stainless steel seamless tubes ("HP-SSST") from the European Union, as set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2012] (the "Preliminary Determination notice") and Notice No. 72 [2012] (the "Final Determination notice"), including any and all annexes and any amendments thereof.

2. The product under investigation is high-performance stainless steel seamless tubes of particular specification and having such features as high endurance strength, good structure stability, anti-steam oxidation and excellent corrosion resistance at high temperature (HP-SSST). The main applications of HP-SSST are in superheaters and reheaters of supercritical and ultra-supercritical boilers. The terms supercritical and ultra-supercritical describe the pressure of the water inside the boiler. There are three types of HP-SSST, with various names according to different national standards regimes and producers' designations:

<b>Table 1: HP-SSST Product Identification</b>				
<b>Product</b>	<b>ASTM grade/ASTMUNS steel number</b>	<b>China National Standard GB5310-2008</b>	<b>Mannesmann serial number</b>	<b>Sumitomo serial number</b>
<b>A</b>	<b>TP347HFG (S34710)</b>	08Cr18Ni11NbFG	DMV347HFG	347HFG
<b>B</b>	<b>S30432</b>	10Cr18Ni9NbCu3BN	DMV304HCu	Super304H
<b>C</b>	<b>TP310HNBn (S31042)</b>	07Cr25Ni21NbN	DMV310N	HR3C

3. In this submission, the European Union refers to Products "A", "B", and "C". The three types of HP-SSST are noticeably different.

**II. THRESHOLD ISSUE: REQUEST THAT THE PANELS AMEND TWO ASPECTS OF THE BCI PROCEDURES**

4. The European Union objects to the Panels automatically classifying as BCI in these WTO panel proceedings information that was submitted as BCI in the anti-dumping proceeding (unless in the public domain).<sup>1</sup>

5. First, the question of designation is ultimately a matter that must rest with the WTO adjudicator and cannot be delegated to any other entity or person. Second, the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm, because the DSU provides expressly that it does not regulate the capacity of a Member to disclose statements of its own position to the public. The BCI Procedures in this case include a statement that BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. Thus, in this case, the issue of designation for this particular category of information is delegated, in absolute terms, not just to a particular party, but to a particular firm. It means that there is no guarantee that a balanced and proportionate approach to designation will be adopted. The European Union considers that this statement in the BCI Procedures is WTO inconsistent.

6. The European Union requests that the relevant sentence in paragraph 1 of the BCI Procedures be modified to read: "In this regard, parties and third parties are encouraged to designate as BCI information that was previously submitted to China's Ministry of Commerce

<sup>1</sup> Joint Working Procedures of the Panels, Annex 1, Additional Working Procedures of the Panels Concerning Business Confidential Information ("BCI Procedures"), paragraphs 1 and 2.

("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes." Furthermore, the European Union requests that a final sentence be added to paragraph 1 of the BCI Procedures as follows: "In case of disagreement, the Panels shall decide on BCI designation".

7. The European Union objects to the requirement that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to the Panels. The European Union considers that the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm.

8. The European Union requests that paragraph 2 of the BCI Procedures be deleted or amended to read as follows: "The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue in these disputes, the party may also provide, with a copy to the other parties, an authorizing letter from the entity. That letter may authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue".

9. To the extent that the Panels, and eventually the Secretariat, are concerned about protecting the WTO from any consequences of disclosure, a provision along the following lines would be sufficient: "Each party and third party shall be solely responsible for ensuring its own compliance with any applicable confidentiality rules and solely responsible for the confidentiality designation it makes when submitting information to the Panel, and any consequences thereof".

### **III. PROCEDURAL CLAIMS**

#### *1. Claim under Articles 6.5 and 6.5.1 ADA*

10. The European Union submits that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission.

11. With respect to Article 6.5 of the Anti-Dumping Agreement, the European Union submits that China acted inconsistently with this provision because China permitted the full texts of the relevant documents to remain confidential without a showing of good cause. The European Union submits that the concern regarding the potential disruption of these third parties' businesses could have been addressed by simply withholding the names of the third parties providing these reports, as well as perhaps the names of any entities that provided information to the third parties that prepared these reports, at least to the extent that the information in the reports would be referred to or relied on by the Applicant or the investigating authority.

12. With respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union submits that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible.

#### *2. Claim under Article 6.7 and Annex I, paragraph 1 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement*

13. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 1 of the Anti-Dumping Agreement because China refused to take into account information relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable, which was appropriately submitted so that it could have been used in the investigation without undue difficulties, and which was supplied in a timely fashion.



14. At the verification, SMST submitted to the investigating authorities that certain financial expenses had been inadvertently double-counted in the SMST Dumping Questionnaire Response, and adduced corrected information that was duly verified. The only reason provided by China in the SMST Final Disclosure and in the Final Determination for refusing to take the corrected information into account was that SMST did not raise this point before the verification started.

3. *Claim under Articles 6.4 and 6.9 of the Anti-Dumping Agreement*

15. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping, injury and causation determinations. In particular, China failed to disclose information on dumping calculations and import and domestic prices essential to its price effects finding. Consequently, interested parties were unable properly to defend their interests.

16. Essential facts supporting an anti-dumping margin determination include the data underlying the margin calculations and adjustments to the data. These facts also include information on the calculation methodology, for example, the formulas used in calculations and the data applied in those formulas. China's anti-dumping disclosures contain none of this information. This lack of disclosure critically impaired the interested parties' defence to the dumping determination and dumping margin calculations. Without the missing data and calculation methodology information, they could not present the necessary rebutting arguments or address the errors in China's analyses.

17. China failed to disclose several pieces of information critical to its price effects determination. Specifically, China failed to disclose: (i) complete information about the import prices it used in its price effects analysis (although an import price for Product C could be derived from other information supplied by China); (ii) any domestic prices; (iii) the percentage change in the domestic price of Product C in the first half of 2011 as compared with the first half of 2010 (this is particularly disconcerting because it would appear that in fact there were no sales of Product C by the Applicants during the first half of 2011); (iv) the margins of overselling for Product A and the HP-SSST product as a whole (to the extent that there were relevant domestic sales); and (v) the margin of overselling or underselling for Product C in the first half of 2011.

4. *Claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement*

18. *Dumping determinations:* The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination.

19. The Final Determination did not provide "sufficient detail" on its justification for applying facts available in its all others rate determinations because it provided no detail. At no point in the proceeding did China disclose the factual basis or the legal reasoning supporting its definitive assessment of the all others rates. In failing to provide this information, China failed to satisfy the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

20. *Injury determination:* China did not provide all of the relevant information and reasoning supporting its price undercutting conclusions. Specifically, its finding of price undercutting: (i) omitted key factual information; and (ii) did not provide the reasoning behind one critical aspect of its price comparisons by type. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties.

**IV. SUBSTANTIVE CLAIMS – DUMPING DETERMINATIONS**

1. *Claim under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement*

21. The European Union claims that, in the measure at issue, China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) or in a manner that reasonably reflects the costs associated with the production and sale of Product B (DMV 304HCu).



22. The European Union submits that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement because the amounts for administrative, selling and general costs were not based on actual data pertaining to production and sales in the ordinary course of trade of the like product, and particularly Product B (DMV 304HCu), by SMST, as recorded in SMST QR Table 6-5 and duly verified.

23. China's error is compounded by the fact that, as outlined above, the unrepresentative and rejected data that China disclosed during consultations that it did use from SMST QR Table 6-3 (DMV 304HCu (EU)) did not pertain to production and sales in the ordinary course of trade, as required by Article 2.2.2 of the Anti-Dumping Agreement. The European Union finds further support for its claim in the immediate context of Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement.

2. *Claim under Article 2.4 of the Anti-Dumping Agreement*

24. The European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N). China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it relied for its findings of dumping on a comparison of export prices and domestic prices that included different product mixes without taking any steps to control for differences in physical characteristics affecting comparability or making necessary adjustments.

3. *Claim under Article 6.8 and Annex II, paragraph 1 of the Anti-Dumping Agreement*

25. As a consequence of the preceding substantive dumping claims, and as a consequence of any possible substantive consequences of the above procedural claims insofar as they relate to dumping, and given that the "facts available" used by China to establish the EU all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the EU all others rate, also acting, in this respect, inconsistently with the above cited provisions of the Anti-Dumping Agreement, and inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement. Furthermore, China acted inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement because it determined the dumping margin for other EU and Japanese exporters based on facts available without notifying them of all the information required and of the consequences of not submitting that information.

**V. SUBSTANTIVE CLAIMS – INJURY DETERMINATION**

26. The European Union submits that China's determinations with respect to injury and causation are inconsistent with China's obligations under Article 3 of the Anti-Dumping Agreement – particularly Articles 3.1, 3.2, 3.4, and 3.5 – in that they do not stem from an objective evaluation, based on positive evidence, of the facts on the record, and do not satisfy all of the requirements of those provisions.

27. The European Union submits that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because:

28. (i) China's analysis of the price effects of imported Product C is analytically and factually flawed. The data indicates that domestic sales volume of Product C during the investigation period was very small compared to import volume. Under such circumstances, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for China to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

29. (ii) China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. China found *some* price undercutting limited to a *minority* industry sector that *does not actually compete* with other sectors which must be read in the context of the general finding that the *vast majority* of the domestic production of HP-SSST was not subject to any price undercutting effect by the subject imports.

30. Second, the European Union submits that China's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because:

31. (i) China's impact analysis did not logically follow from its volume and price effects analyses and conclusions; When, as in this particular case, an investigating authority *has itself elected* to conduct an analysis of volume and price effects by type, and where *the outcome of that analysis already indicates lack of injury with respect to two out of three product types, including the product type predominantly produced by the domestic industry*, that is a matter that must at least be *addressed* in the impact analysis.

32. (ii) China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment. At no point of the investigation did China evaluate the significance of the margins of dumping, properly calculated, for the impact of the imports on the Chinese HP-SSST industry.

33. (iii) China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. The Final Determination is silent as to why China disregarded the relevance of the majority of the factors and indices having a positive bearing on the state of the domestic industry.

34. Third, the European Union submits that China's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because:

35. (i) China's causation determination lacks any foundation in its volume, price effects, and impact analyses. The European Union submits that China reached its conclusion concerning the existence of a "causal link" between HP-SSST imports and the injury suffered by the domestic industry despite the fact that: (a) the volume and market share of imported HP-SSST products did not significantly increase; (b) China's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis on the negative indices.

36. (ii) China failed to separate and distinguish the injurious effects of two other known factors that were causing injury to the domestic industry, namely the decline in domestic demand for HP-SSST and the expansion of the production capacity of the domestic HP-SSST industry.

## **VI. OTHER CLAIMS**

### *1. Claim under Article 7.4 of the Anti-Dumping Agreement*

37. By applying provisional measures for six months in the given circumstances, China acted inconsistently with Article 7.4.

### *2. Consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994*

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

## **VII. REQUEST THAT PANEL EXERCISE RIGHT PURSUANT TO ARTICLE 13.1 OF THE DSU**

39. The European Union respectfully requests that the Panel exercise its right to seek information from China pursuant to Article 13.1 of the DSU. Article 13.1 of the DSU gives the Panel the right to seek information from any body that it deems appropriate, and requires Members to respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

40. In these proceedings, the only explanation given by China for failing to comply with its WTO obligations concerning disclosure and making information available is alleged confidentiality. The European Union has explained why this is not a valid explanation, also given the possibility of preparing non-confidential summaries. However, now that this Panel has adopted procedures to

protect Business Confidential Information, there is clearly no longer any basis for China not to provide the necessary information.

41. In these panel proceedings, the European Union does two things. First, the European Union asks that the Panel draw the reasonable and logical conclusions from the procedural inconsistencies that the European Union identified with respect to the substantive aspects of the measure at issue. For example, the European Union explained that China has breached its procedural obligations with regard to the disclosure of the essential facts relating to the injury determination, and particularly the price-undercutting finding with respect to Product B. Our submission is that, as a consequence, the price-undercutting analysis with respect to Product B is unreliable, and the European Union asks the Panel to make a finding to that effect. Thus, what the European Union seeks from China in terms of implementation is not merely disclosure. Rather, the European Union seeks: disclosure; a full opportunity for all interested parties and Members to comment and defend their interests; and a consequent re-assessment of this aspect of the injury determination, and thus of the injury determination as a whole. The European Union asks the Panel to make it clear that this is what China is expected to do.

42. Second, at the same time, already in these proceedings, the European Union seeks full and proper disclosure from China (duly protected by the BCI rules now in place). The European Union respectfully requests the Panel to exercise its right under Article 13.1 of the DSU to seek from China information equivalent to the full disclosure that should have been made, that is, of all the essential facts, having particular regard to the concerns raised by the European Union and Japan, and given the BCI procedures in place. In this respect, the European Union insists particularly (but not only) on the price-undercutting finding with respect to Product B. The European Union asks that China provide complete, specific and precise information on the import and domestic products that were compared, including full product descriptions, dates of transactions, volumes, prices and terms of each transaction, and any adjustments.

#### **VIII. REQUEST THAT PANEL MAKE A SUGGESTION PURSUANT TO ARTICLE 19.1 OF THE DSU**

43. The European Union will be seeking steps to ensure that this measure is rectified and eventually dis-applied "immediately" (to borrow the language of Article 21.3 of the DSU) and in any event as soon as possible. Accordingly, the European Union respectfully requests the Panel to formulate suggestions to that effect, and reserves the right to request or re-iterate specific suggestions as the proceedings go forward.

#### **IX. CONCLUSION**

44. For the reasons set forth in the submission, the European Union respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

**ANNEX B-6****EXECUTIVE SUMMARY OF THE SECOND WRITTEN  
SUBMISSION OF THE EUROPEAN UNION****I. INTRODUCTION**

1. In this second written submission, the European Union further explains why it requests the Panel to find that China's measures imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement of the WTO.

**II. STANDARD OF REVIEW**

2. Both parties agree with regards to the standard of review. However, the European Union rejects China's assertion according to which the European Union has not made a *prima facie* case and refers to the reasons put forward in its submissions.

3. The European Union is willing to respond to any questions on the matter the Panel may have.

**III. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES**

A. *Absolute delegation of the authority and obligation to determine BCI designation to a firm submitting information to the investigating authority in a domestic anti-dumping proceeding*

4. The European Union contends that the BCI procedures, by providing automatic classification as BCI of information that was originally submitted as BCI in the context of municipal anti-dumping proceedings in the current WTO proceedings, are WTO inconsistent. The European Union considers that such a decision should be based on objective criteria. In other words, in the view of the European Union, it is for a Member to seek designation of information as BCI and it is for the adjudicator to make a designation after an assessment based on objective criteria.

5. The European Union puts forward a harmonious interpretation of the relevant DSU rules together with the provisions of the Anti-Dumping Agreement. Article 18 of the DSU sets out the general principle of due process in the context of the WTO dispute settlement system. It prohibits *ex parte* communication with a panel and states that written submissions to a panel are confidential but shall be made available to the parties to the dispute. In the view of the European Union, this is also confirmed by the joint reading of Article 6.5 of the Anti-Dumping Agreement and footnote 17, which confirm that even information designated as confidential by the investigating authority may be disclosed, provided that it is adequately protected.

6. The European Union considers the issue to be a fundamental one and to touch upon one of the cornerstones of rule-of-law based judicial systems. The European Union argues that, by allowing an interpretation of the provisions above mentioned in a way contrary to the reading advanced in its submissions, the system would allow a situation in which information submitted to adjudicators is not available to the other litigant, and this would amount to a breach of the fundamental principle of due process.

7. The European Union understands that it is always necessary to strike a balance between various interests, namely: confidentiality, the interest of being in a position to make administrative and judicial determinations, due process. Such balance, however, has to be conducted independently and objectively by the panel.

*B. The imposition of an obligation on the submitting Member to obtain prior written authorisation from another entity or firm*

8. The European Union claims that BCI procedures are WTO inconsistent insofar as they require a party to seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to a Panel. The European Union rejects China's reading of Articles 6.5 and 17.7 of the Anti-Dumping Agreement, according to which these provisions impose an obligation to automatically confer BCI status in WTO dispute settlement proceedings to information classified as confidential before national investigating authorities.

9. The European Union claims that this does not guarantee a balanced and proportionate approach to BCI designation.

*C. China's request relating to the timing of objections to translations*

10. The European Union requests that paragraph 10 of the Working Procedures be amended, so to make it clear that it does not contain an absolute rule to raise objections to translations promptly in writing no later than next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing. China agrees.

**IV. PROCEDURAL CLAIMS**

*A. Designation of information as confidential without good cause and failure to require sufficient non-confidential summaries: Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement*

**1. Designation of information as confidential without good cause: Article 6.5 of the Anti-Dumping Agreement**

11. The European Union claims that China's treatment of confidential information submitted by the applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission. China claims that the European Union has not made a *prima facie* case and has not specified the documents to which its claims relate. The European Union rejects these arguments and points out that China, in its first written submissions, had shown to be aware of the documents to which the claim relates and that the European Union and Japan shared the same claim with respect to these reports.

12. The European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submissions, the Applicants provided no summary of any other contents of these reports, including the methodologies utilized by the third party institutes to obtain these data or the underlying evidence they relied upon. This, according to the European Union, contrasts with the Panel Report in *China-X-Ray Equipment* about the necessity to summarise the substance of each type of confidential information in cases where multiple type of information are designated as confidential. The European Union respectfully requests the Panel to reject China's arguments and affirm the claims made by the European Union and Japan.

**2. Failure to require sufficient non-confidential summaries: Art. 6.5.1 of the Anti-Dumping Agreement**

13. The European Union claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible.

14. In particular, China submits that two of the reports are themselves already summaries. According to China, they contain no information regarding methodologies and no underlying evidence and China describes them as being based on "non-existent information". The European Union casts doubts that affirming that documents are based on "non-existent

information" could be helpful for China's arguments. In the view of the European Union, indeed, such fact provides strong indication of substantial inconsistencies linked to procedural irregularities.

15. The European Union considers that China has failed to provide a statement of reasons as to why further summarisation is not possible that is consistent with Article 6.5.1 of the Anti-Dumping Agreement.

*B. SMST dumping determination, failure to take into account relevant information provided during the verification: Art. 6.7 and Annex I, paragraph 7 and Art. 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement*

16. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement because China refused to take into account information which was relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable and was appropriately submitted. China claims to have refused to take the corrected information into account because SMST did not raise this point before the verification started.

17. The European Union bases its procedural claim on the fact that information was rejected exclusively because it was submitted at verification. The European Union does not argue that investigating authorities should not have discretion as to the information they should accept, but it only claims that they should be open to do so if it does not impede the verification.

*C. Inadequate disclosure and failure to inform interested parties of the essential facts under consideration: Articles 6.4 and 6.9 of the Anti-Dumping Agreement*

## **1. With respect to the dumping determinations**

18. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations. China claims that the European Union has not made a *prima facie* case of violation of Article 6.4 of the Anti-Dumping Agreement because no request for information was made. China also argues that the European Union failed to make a *prima facie* case with respect to the violation of Article 6.9 of the Anti-Dumping Agreement, because the arguments of the European Union would amount to general allegations.

19. The European Union rejects China's argument according to which lack of understanding as to how, for instance, the normal value in the case of SMST was calculated, is unreasonable and, therefore, should allow non-disclosure. The European Union, in fact, argues that it was not possible for multiple parties, all acting in good faith, to understand how the calculation was made, and to know which numbers were used by MOFCOM to conduct its calculations. The European Union considers that knowing the actual number used in the case of SMST would permit to SMST to understand how the calculation was made, and allow it to defend its interests accordingly. *Vice versa*, in the current situation, SMST and the European Union are unable to do so.

## **2. With respect to the injury determination**

20. With respect to the injury determination, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations. China claims that the summaries it provided are sufficient and the European Union rejects this argument because such information was partial and argues that there were other available means to address the understandable concerns for disclosure and, at the same time, to allow exporters to understand the facts and defend their interests accordingly. With respect to the claim by China whereby the European Union has acknowledged, in particular, that Product A import price in 2008 was confidential, the European Union argues that it has never considered MOFCOM to be entitled to treat the data in its entirety as confidential and that the latter should have provided the exporters with –at least- meaningful price range.

21. With respect to China's argument regarding the underselling of Product B, the European Union remains of the view that MOFCOM should have disclosed a number for each year and claims that China has failed to do so in response to Panel Question 76.

*D. Failure to set forth or otherwise make available in sufficient detail the findings and conclusions: Articles 12.2 and 12.2 of the Antidumping Agreement*

### **1. With respect to the dumping determination**

22. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive antidumping duties against the investigated imports as part of its Final Determination. According to the European Union, China has not provided valid justification for its failure to reveal why it resorted to facts available and how it determined the highest dumping margin found for the relevant exporters that received an individual margin to be the appropriate one.

23. The European Union is not persuaded by the response provided by China according to which it is sufficient to state that facts available were used with respect to firms that did not submit a questionnaire. According to the European Union, this simply amounts to a restatement of the facts and does not provide indication for the underlying reasoning.

24. The European Union requests the Panel to reject China's arguments and to affirm the claims made by the European Union and Japan.

### **2. With respect to the injury determination**

25. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with regards to injury and causation determination. Specifically, China's finding of price undercutting omitted key factual information and did not provide the reasoning behind one critical aspect of its price comparisons by type. The European Union claims that the information provided by China was not sufficient.

26. The European Union recognizes that Art. 12.2.2 of the Anti-Dumping Agreement requires an authority to pay due regard to confidentiality. However, it claims that there is no apparent reason why China did not –at least- disclose non-confidential summaries, so to permit a comparison of import prices by type and total product basis.

## **V. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS**

*A. SMST dumping determination, normal value for product B (DMV 304HCu), SG&A, failure to use actual data reasonably reflecting costs, use of unrepresentative and rejected data concerning samples: Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement*

27. The European Union comments, in its rebuttal, on China's Responses to the Panel's Questions.

28. As regards Question 7, the European Union claims that China is incorrect to assert that the Appellate Body Report in *EC – Bed Linen* supports its position in these proceedings. In its Second Written Submissions, the European Union highlights many flaws in the understanding by China of the Report above mentioned with regards to the interpretation of Article 2.2.2 of the Anti-Dumping Agreement. Furthermore, the European Union rejects the view of China according to which the Panel request by the European Union is inconsistent with Art. 6.2 DSU because, allegedly, it did not provide a brief summary of the legal basis of the complaint. The European Union argues that this was not the case, as it provided a sufficiently detailed summary and eventually points out to the differences between a Panel request and first submissions, which China seems to neglect.

29. As regards Question 8, the European Union argues that China is incorrect to assert that the Panel Report in *US – Corrosion-Resistant Steel Sunset Review* supports its position in these proceedings. The European Union claims that the report, in fact, confirms that the Panel must take



into account whether the ability of the respondent to defend itself has been prejudiced, given the actual course of the panel proceedings. The European Union considers that China has had ample opportunity to respond but chose to remain silent on the substance of the matter.

30. With reference to Question 22, the European Union disagrees with China about its argument according to which anything that is "used" by a firm automatically becomes "actual data pertaining to production and sales in the ordinary course of trade". The European Union cannot accept the consequences of such reasoning, which would lead to a situation in which the determination of the amounts for administrative, selling and general costs and profits would depend upon whether or not particular information or data would be "used" by the firm being investigated.

31. With regards to Question 23, the European Union challenges China's assertion according to which SMST did not request the investigating authority not to use the relevant Table 6-3 SG&A. According to the European Union, the translations of the requests by SMST to which China refers are redundant and lead to meaningless results, as that would mean that SMST had requested not to use the data in the "constructed cost" calculation, and the expression "constructed cost" never appears in the Anti-Dumping Agreement.

32. Regarding Question 24, the European Union reaffirms the concerns it had already made explicit in its oral Statement and in its responses to the Panel Questions on the coefficients applied to the calculation.

*B. SMST dumping determination, product C (DMV 310N), failure to make a fair comparison, failure to adjust for different product mixes: Article 2.4 of the Anti-Dumping Agreement*

33. The European Union claims that China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices. In its rebuttal, the European Union focuses on commenting China's responses to the Panel's Questions.

34. With regards to Question 12, the European Union acknowledges that China agrees with the summary of the former's claims and arguments.

35. Concerning Question 14, the European Union claims that China declined to answer with respect to the remainder of the evidence referenced in footnote 195 of the First Written Submission of the European Union. It adds that the Panel can and should proceed on the basis that the information provided by the European Union was actually verified by MOFCOM. The European Union considers MOFCOM to have not ensured a fair comparison and thus to have acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

36. With reference to Question 15, the European Union challenges the view of China according to which SMST did not provide evidence regarding the price differences. It also adds that SMST was merely seeking that the authority take the necessary steps to ensure a fair comparison.

37. Concerning Question 16, the European Union claims that MOFCOM, according to Article 2.4 of the Anti-Dumping Agreement, should have made sure that the basket of transactions used to calculate normal value included only those products that were comparable to the product sold in China. The European Union argues that the Appellate Body Report in *EC – Fasteners (China)* supports the same conclusion, and that MOFCOM did not act accordingly.

38. Finally, with regards to Question 17, the European Union, contrary to what China argues, claims that SMST did provide the necessary information.

*C. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph I of the Anti-Dumping Agreement*

39. The European Union had claimed that China improperly relied on "facts available" when establishing the EU all others rate. China responded that, in its view, even if it is true that the dumping margin for SMST was calculated in a WTO inconsistent manner, no provision of the Anti-Dumping Agreement would require China to make an adjustment. The European Union claims that

if China would nevertheless maintain an all others rate like the one it has applied, it would be in violation of Article 6.8 of the Anti-Dumping Agreement.

**VI. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION**

*A. Summary of the applicable legal framework: Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement*

40. As submitted before, the European Union considers that the Appellate Body Report *China – GOES*, and in particular its paragraphs 126-128, are highly pertinent for the issues under consideration.

*B. Price effects: Articles 3.1 and 3.2 of the Anti-Dumping Agreement*

41. The European Union claims that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The European Union argues that two aspects deserve to be separately addressed: i) whether the definition of price undercutting involves not just a price differential but also an element of price effect; ii) *how* an investigating authority is required to establish through its price undercutting enquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports.

42. As for the first issue, the European Union sees China's replies to be in contradiction with each other as to whether a price effect is needed in order to have a "price undercutting". The European Union is of the view that the definition of price undercutting is such that a price effect needs to be present, like China seems to have asserted in its response to Panel Question 31(c).

43. As regards the second issue, China seems to be of the view that an investigating authority is never obliged to investigate questions of effect if only a price differential can be established, whereas the European Union is of the opposite view.

44. The European Union considers that possibly consensus could be reached on the first issue and that parties could be left to argue about the second aspect.

**1. China' analysis of price-undercutting with respect to product C is flawed**

45. China argues that the European Union did not challenge "MOFCOM's findings about the like product", so that such findings are, in the view of China, incontestable. The European Union rebuts that. It is bringing a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and as part of this it is challenging MOFCOM's determination that imports of Product C were in competition with domestically produced Product c in the Chinese market.

46. The European Union argues that, as regards the Chinese analysis undertaken as part of the like product determination, it does not amount to an objective examination based on positive evidence either. Even assuming that in 2010 imported Product C and domestic Product C were in adjacent or slightly overlapping markets, the evidence on the record would still not have allowed for a finding of price undercutting in the sense of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

**2. China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole**

47. China claims that it established correlation among the prices of the three grades of HP-SSST on the basis of positive evidence. The European Union claims that China's price effects analysis does not contain any examination of cross-grade price effects. The conclusions regarding price correlation which China refers to were made in respect to the scope of the investigation, and were not referred to in the price effects analysis.

48. The European Union points to the significant price differences between imported Products B and C and domestic Product A. In neglecting such price differentials, China –in the view of the European Union- has not conducted an objective examination.

C. *Impact on domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement and D. Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement*

49. The European Union refers back to its First Written Submission and to its First Opening Oral Statement.

**VII. OTHER CLAIMS**

A. *Application of provisional measures in excess of four months: Article 7.4 of the Anti-Dumping Agreement*

50. China acknowledges the claim by the European Union according to which it has violated Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for a period exceeding four months, but it does not respond. The European Union respectfully requests the Panel to find in favour of the European Union on this issue.

B. *Consequential claims: Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994*

51. China does not respond on the claims made by the European Union under Article 1 of the Anti-Dumping Agreement and Article VI GATT 1994. The European Union respectfully requests the Panel to find in favour of the European Union on this issue.

**VIII. CONCLUSION**

52. The European Union respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

**ANNEX B-7****EXECUTIVE SUMMARY OF THE STATEMENT OF THE  
EUROPEAN UNION AT THE FIRST PANEL MEETING****I. INTRODUCTION**

1. In this Oral Statement we first address the various threshold issues. We will then address some dumping issues. Finally, we turn to some of the main injury issues.

**II. THRESHOLD ISSUE: REQUEST THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES**

A. *Request that the panel amend two aspects of the BCI Procedures*

2. The European Union submits that two aspects of the BCI Procedures are WTO inconsistent and requested the BCI Procedures to be amended accordingly.

3. (i) The BCI Procedures are WTO inconsistent as they automatically classify as BCI information that was submitted as BCI in the municipal anti-dumping proceeding. The question of designation should be subject to objective criteria established and eventually applied by the WTO adjudicator. The BCI Procedures take this matter out of the hands of the adjudicator. There is no guarantee that a balanced and proportionate approach to designation will be adopted. It contradicts the fact that it is for the Member to seek designation (or not).

4. (ii) The BCI Procedures are WTO inconsistent as they provide that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings. This requirement takes out of the hands of the submitting Member and eventually the adjudicator the question of what may be submitted in DSU proceedings. It provides a proxy for unlawfully delegated designation, because whatever the correct designation, a firm could simply withhold authorisation.

5. China submits that the EU request is "flawed". However, it provides no explanation of why that is supposed to be the case. The same is true of China's assertion that this is demonstrated by the case-law cited by the European Union.

6. China observes that the Panel in the cited case-law has decided that additional protection for BCI is justified. That is correct. However, this is not the matter that has been placed before the Panel by the European Union.

7. China submits that the Panel has ensured the necessary balance because it has required the submission of non-confidential summaries. Yet, it does not explain how the filing of non-confidential summaries is supposed to bear on the issues.

8. China submits that panels have the authority to adopt BCI procedures pursuant to Article 12.1 of the DSU. The European Union does not disagree. However, our point is that they must do so in a manner that is consistent with the DSU.

9. China submits that the protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. However, the European Union is not arguing that the protection afforded by the BCI Procedures diminishes the protection afforded by the DSU.

10. China submits that a Member's ability to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. However, we do not argue that a Member's ability to designate information as confidential is impaired.

11. Finally, China asserts that the Panel's approach is consistent with Article 6.5 of the AD Agreement. The AD Agreement recognises that the interest in confidentiality must be taken into account. Nevertheless, designation of information as confidential is not something absolutely in the hands of the submitting firm, but depends on the investigating authority being satisfied that

good cause has been shown and that such designation is warranted; even then designation remains discretionary. Also, the rule is against disclosure to competitors, not adjudicators.

*B. China's request relating to the timing of objections to translations*

12. China requests the Panel to amend paragraph 10 of the Working Procedures so that it provides that objections to translations should be raised promptly in writing no later than the next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing.

13. The WTO Agreement is authentic in English, French and Spanish and these are the languages in which litigation is conducted and adjudications delivered. Nevertheless, evidence placed on the record in some other language is still evidence placed on the record, i.e. evidence of fact. However, translation is not a pure question of fact. Translation is about meaning, and the meaning of municipal law is a mixed question of law and fact (i.e. a legal characterisation of the facts). Article 17.6 of the DSU indicates that issues of law and legal interpretations, that is, including translation issues, can be raised on appeal. Therefore, a panel's working procedures may not provide that a party is absolutely precluded from raising a translation issue on appeal.

14. The European Union understands that translation is a particular type of issue, of a preliminary nature, and that it may be reasonable to expect parties to raise any obvious translation issues early. This is similar to so-called preliminary issues. Parties are expected to raise them at a sufficiently early stage. Nevertheless, there is no absolute bar to them being raised later, including in appeal proceedings.

15. The particular difficulty with translation issues is that their significance may not always be apparent until such time as particular terms are set in the context of a particular adjudication. The European Union would also observe that there are no circumstances in which it would make sense to win a case based on an incorrect translation.

16. The European Union has understood that paragraph 10 of the Working Procedures is not an absolute rule, since it uses the term "should". Therefore, the request is not necessary, because the provision as drafted is not absolute. If the Panel considers the requested amendment, then (1) there should be no absolute rule and in any event two weeks is too short and (2) a balanced approach should be adopted.

**III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS**

*A. SMST dumping determination, Product C, failure to make a fair comparison, failure to adjust for different product mixes: Article 2.4 AD Agreement*

17. China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value. In calculating normal value for Product C, China compared two baskets with a very different product mix.

18. China's focus on what occurred during the investigation is not helpful, since what really matters is whether or not, objectively, China ensured a fair comparison. In any event, China's insistence on the content of SMST's Dumping Questionnaire Response is odd. China accepts that SMST raised the point in a timely manner. In this respect, China does not allege any procedural deficiency, nor could it, since the measure at issue itself expressly records the fact that SMST raised the point.

19. China's submission that SMST's request was "tied-to the original low volume claim" is inaccurate and irrelevant. The request was a stand-alone request. Even if it would have been "tied-to" some other request, in failing to ensure a fair comparison, the measure is inconsistent with Article 2.4 of the AD Agreement.

20. China's argument that SMST failed to provide "a modicum of an indication" of an impact on price comparability should be rejected. The point raised by SMST is expressly dealt with in the measure at issue. It is stated that SMST presented *evidence proving* that the relevant transactions related to a product that was *different* from the products exported to China. SMST demonstrated that, also because of the very thin dimensions of the products, they require more extensive

rolling/drawing resulting in higher cost. Obviously, the use of processing technology, including rolling/drawing, involves costs and the greater the use of such technology, the greater the costs. SMST also provided the specific documents relating to these transactions.

*B. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph 1 of the AD Agreement*

21. As a consequence of the preceding substantive dumping claims and possible substantive consequences of the procedural claims, and given that the "facts available" used by China to establish the all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the all others rate, acting inconsistently with Article 6.8 and Paragraph 1 of Annex II of the AD Agreement. Furthermore, China acted inconsistently with this provision, because it determined the dumping margin for other exporters based on facts without notifying them of all the information required and of the consequences of not submitting that information. China argues that, even if the dumping margin for SMST was calculated in a WTO inconsistent manner, *no provision* of the AD Agreement would require China to make a consequent adjustment to the all others rate. This assertion is wrong. If the current dumping margin calculated for SMST of 11.1% would be demonstrated to be WTO inconsistent, and the re-determination would fix it at a lower amount, then it would no longer be a determined "fact". Accordingly, "11.1%" would no longer be a "fact" "available" within the meaning of Article 6.8 of the AD Agreement.

**IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION**

22. China's determinations with respect to injury and causation are inconsistent with Article 3 of the AD Agreement, in particular Articles 3.1, 3.2, 3.4, and 3.5. In *China – GOES* the Appellate Body stated that the different paragraphs of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination". Most of China's inconsistencies are a breach of this required "logical progression of inquiry".

*A. Price effects: Articles 3.1 and 3.2 of the AD Agreement*

23. China's determination violates Articles 3.1 and 3.2 of the AD Agreement in two respects. First, China's analysis of the price effects of imported Product C is flawed. Second, China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole.

*1. China's analysis of price-undercutting with respect to Product C is flawed*

*(a) Article 3.2 requires "price undercutting", not just a "price differential per se"*

24. MOFCOM erroneously concluded that imports of Product C had "price undercutting effects on the corresponding like domestic products".

25. China argues that "any factual elements other than the price differential between the import price and domestic price are irrelevant". Yet, a "price differential *per se*" is only a **snapshot** that looks at import prices and domestic prices.

26. The key question is whether any "price differential *per se*" will suffice, or whether one has to consider whether the "price differential *per se*" has the effect of price undercutting.

27. It follows clearly from the statements of the Appellate Body in *China – GOES* that Article 3.2 of the AD Agreement contains *three* price effects: (1) price undercutting; (2) price depression; (3) price suppression; and not just a "price differential *per se*" and two price effects. When the Appellate Body refers to price depression and price suppression, it calls these "the last two price effects" in Article 3.2, presuming that price undercutting is also a "price effect". Price undercutting was not at issue in the *China - GOES* case, but the Appellate Body considers that the focus of Article 3.1 of the AD Agreement on price effects colours the whole of Article 3.2 of the AD Agreement. Given that "price effects" inform the whole of Article 3.2 of the AD Agreement, it is equally appropriate that, in conducting an analysis of price undercutting, one is required to consider whether a first variable – that is, a price differential *per se* – has explanatory force for the occurrence of a second variable – that is, price undercutting.

28. Interpreting Article 3.2 as requiring a consideration of the relationship between a price differential *per se* and a potential price undercutting does not duplicate the causation analysis under Article 3.5. Both provisions posit different inquiries. The analysis pursuant to Article 3.5 concerns the causal relationship between subject imports and injury to the domestic industry. The analysis under Article 3.2 concerns the relationship between a price differential *per se* and an alleged price undercutting, i.e. subject imports and domestic prices.

29. In this case, there are strong reasons to doubt that a price differential *per se* had explanatory force for any alleged price undercutting. The inverse price movements, the vast difference in import and domestic price levels and the trivial volume of domestically produced Product C, all suggest that imports of Product C were not in competition with domestically produced Product C.

(b) Allegations that "similar quantitative difference" justifies price comparison

30. China considers that in 2009 and 2010 the imports of Product C held a similar market share, and that, on this basis, it was "meaningful" to compare the prices in spite of the tiny amount of domestic sales. Yet, showing that the market share of Product C was tiny in both years, does not show anything but the fact that these domestic sales were outlier transactions not just in one year but in both years.

2. *China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic industry as a whole*

31. China extended its conclusions concerning the price undercutting of Products B and C to the domestic industry as a whole, although it only found some price undercutting limited to a minority industry sector that does not actually compete with other sectors, in the context of the general finding that the vast majority of the domestic production was not subject to any price undercutting effect. China could have examined "all of the other parts that make up the industry" by conducting a cross-type analysis of price effects. Instead, it selected the minority sub-categories of the like domestic products where it found price undercutting effect and unduly extended its findings to the whole group of like domestic products.

32. The question is whether the focus of the price effects inquiry under Article 3.2 is only on the prices of subject imports, or also on the prices of domestic like products. Both the Appellate Body in *China - GOES* as well as the panel in *China - X-Ray Equipment* have clarified this issue. The test required under a price undercutting analysis relates to the effect of such imports on domestic prices. It is insufficient to study whether all of the subject imports are sold at undercutting prices. The analysis needs to include the effect of such imports on domestic prices.

33. There was evidence in the record that the products were not in competition with each other. Thus, an additional analysis was required in order to extend the price undercutting findings for Products B and C to Product A.

B. *Impact on domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement*

34. First, China's impact analysis did not logically follow from its volume and price effects analyses and conclusions. When an investigating authority has itself elected to conduct an analysis of volume and price effects by type, and where the outcome of that analysis already indicates lack of injury with respect to two out of three product types, that matter must at least be addressed in the impact analysis.

35. Second, China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment.

36. Third, China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. Instead of a thorough and persuasive explanation as to whether the negative factors outweighed the at least seven positive factors, China simply enumerates the different factors.



*C. Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement*

37. China's causation determination lacks any foundation in its volume, price effects, and impact analyses. China reached its conclusion despite the fact that: (a) the volume and market share of imported products did not significantly increase; (b) China's analysis of the undercutting effect of imported products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete.

38. Second, China failed to separate and distinguish the injurious effects of two other known factors, namely the decline in domestic demand and the expansion of the production capacity of the domestic industry.

**ANNEX B-8****EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION  
AT THE SECOND PANEL MEETING****I. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI PROCEDURES**

1. The European Union has submitted that the BCI Procedures are WTO inconsistent insofar as they provide for the automatic classification as BCI of information that was submitted as confidential in the municipal anti-dumping proceeding.

2. In the first place, we do not agree with China that, if the firm is unwilling to designate the information as non-confidential or provide a non-confidential summary, the only option for the investigating authority is to disregard such information. Article 6.5.2 does not *require* the authority to disregard such information; it merely provides for that *discretion*.

3. The DSU does provide for designation by Members (not firms or investigating authorities). However, the concept of confidentiality is an objective one.

4. For similar reasons, the European Union has also submitted that the BCI Procedures are WTO inconsistent insofar as they provide that a party must provide prior written authorisation from the entity that submitted such information in the anti-dumping proceedings.

5. In its Second Written Submission China argues that such a letter is "necessary" to "allow" an investigating authority to comply with its obligations under Article 6.5 of the Anti-Dumping Agreement. However, seeking to include such a rule in the BCI procedures does not "allow" anything. Rather, it seeks to ***impose*** an obligation on the European Union. Whatever obligations may bear on an investigating authority pursuant to Article 6.5, it is not the purpose of these proceedings to hand down a ruling on the interpretation of Article 6.5 ***and its application by the European Union***. No such matter is within the Panel's terms of reference.

6. What must govern the particular issue raised in *these proceedings* is Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement.

**II. PROCEDURAL CLAIMS**

7. As set out in our First Written Submission, the European Union, like Japan, claims that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, with respect to certain specific documents.

8. As set out before, the European Union considers that China is not permitted to engage in *ex-post* rationalisation at this stage of the process.

9. With respect to China's assertion that it disclosed "a large part of the original text", the European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submission, the Applicants provided no summary of any other contents of these reports.

10. We also recall that, with respect to this group of Appendices, the Applicants did not explain why a summary of other aspects of these reports, including the methodologies utilized therein or underlying evidence, could not be provided.

11. As set out in our First Written Submission, with respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union, like Japan, claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible, with respect to the documents specified therein.

12. We do not understand why China believes that affirming that the documents are based on "non-existent information" might be helpful to China's case. The whole purpose of these transparency provisions is to provide the interested parties with the opportunity to assess and

challenge the factual assertions, evidence and arguments on which petitioners and the investigating authority base themselves.

13. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account certain information corrected to eliminate double counting. China responded to this *procedural* claim by focussing on the substance.

14. Focussing on the *procedural* claim, our claim is based on the terms of the measure at issue itself, which simply records rejection of the information *solely* on the grounds that it was submitted at verification.

15. We believe that China's submissions in these very proceedings demonstrate that to be the case, because it is simply a matter of reconciling Tables 6-6 to 6-8 with Table 6-5, by ensuring that, in compiling Table 6-5, no double counting takes place. We seek only that the Panel take such steps as may be necessary in order to ensure that China understands that it should ensure that no such double counting occurs in the re-determination.

16. As set out in our First Written Submission, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations.

17. First, China states that: "It is difficult for China to rebut the arguments of Japan and the European Union, since they fail to mention the formulas that MOFCOM allegedly failed to disclose". The heart of the problem is that it is impossible for the European Union and Japan to set out the detail of matters that MOFCOM has not disclosed in the first place.

18. Second, the heart of the disagreement between the Parties is now crystal clear. China considers that Article 6.9 only covers the factual basis for inference, not the inferences themselves. We disagree for the reasons we have given before. Our conclusion is that China is simply wrong to assert that something loses its quality as a fact simply because it is inferred.

19. With respect to the injury determinations, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations.

20. With respect to China's argument that the complainants have acknowledged that the Product A import price in 2008 was confidential, we refer to our Response to Panel Question 73.

21. With respect to China's argument that there were only two domestic producers and this made disclosure of a range impossible, the European Union disagrees. Elsewhere in its submissions China expressly recognises the possibility of providing a range that does not consist of the minimum and maximum prices actually charged. This method would therefore have permitted China to provide a range.

22. Similarly, China's argument to the effect that each producer would have known the average domestic price of the other is not convincing, because it would not be possible for one producer to extract the average *weighted* domestic price of the other producer from the data.

23. Finally, the European Union does not agree with China that the question of whether or not there were other ways of providing the data whilst respecting confidentiality is irrelevant.

24. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the all others rate and the use of facts available.

25. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information

supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the injury and causation determinations. As the Appellate Body did in *China – GOES*, the Panel in the present case should not accept China's use of price change data in place of the data that actually are relevant to its determination that import prices "noticeabl[y]" undercut domestic prices.

26. Second, China also failed to satisfy its obligations under Articles 12.2 and 12.2.2 because with regard to its price comparison of imported and domestically produced Product C, China failed to provide any detail on how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis. The European Union recognizes that Article 12.2.2 requires an authority to pay due regard to confidentiality. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data or price ranges that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties, in line with what the Appellate Body stated in *China – GOES*.

### III. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

27. The European Union claims that China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) in a manner that reasonably reflects the costs associated with the production and sale in the ordinary course of trade of Product B (DMV 304HCu).

28. We cannot agree with China that the fact that we have demonstrated that the calculation is based on aberrational sample transactions, without this being contested by China, is irrelevant. We cannot agree with China that the fact that the coefficients are not actual data pertaining to production and sales in the ordinary course of trade is irrelevant. We cannot agree with China that the fact that Table 6-5 was verified whilst Table 6-3 was not with respect to SG&A is irrelevant. We cannot agree with China that the fact that SMST repeatedly requested MOFCOM to disregard the SG&A in Table 6-3 and directed it instead to Table 6-5 is irrelevant. We cannot agree with China that the fact that China has sought to insert the term "this" into the translation of the disclosure document when it is not there is irrelevant. We cannot agree with China that the fact that China only now provides the information relevant to the calculation is irrelevant. We cannot agree with China that the reasonableness of the SG&A amounts used by China is irrelevant. And most of all, we cannot agree with China that the circumstances do not require it to re-visit the measure and correct the error, in good faith.

29. The position with respect to the coefficients is also clear. According to China, anything "used" by a firm is, by definition, actual data pertaining to production and sales in the ordinary course of trade; and in any event it is sufficient for the purposes of Article 2.2.2 if the amounts are based *in part* on actual data pertaining to production and sales in the ordinary course of trade. We have explained why we disagree with both of these assertions, which we think are obviously wrong.

30. No doubt if the European Union had written the entire provision out in its Panel Request (as well as expressly referring to Article 2.2.2), instead of simply providing a brief summary, in accordance with the terms of Article 6.2 of the DSU, we would now be facing an (equally unmeritorious) claim of failure to consult, pursuant to Article 4 of the DSU. China cannot profit from its totally inadequate disclosure in the municipal anti-dumping proceedings in order to engineer a situation where it can try to pressure Members back to square one (causing substantial additional delay).

31. To recall, the European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N).

32. Specifically, as we have already indicated with respect to costs of production, we note that Table 6-3 (DMV 310N (EU)) contains the cost of production of Product C per month. Table 4-2, Domestic (regional) Sales, cells K5 and K6 state that the two sales were made on 15 October 2010 and 17 November 2010 and were the only sales of Product C made in those months. Cells E18 and F18 of Table 6-3 (DMV 310N (EU)) demonstrate that the cost of production for those months

is about twice as high as the cost of production in April and May 2011. In April and May 2011 Product C was sold in representative quantities. We also note that in December 2010 two samples were delivered to customers. These samples were correctly excluded from the normal value by China. They represented the only product C produced in December 2010 and the cost of production is extremely high, as it is for the production of the samples of Product B.

#### IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

33. The European Union claims that China's determinations with respect to injury and causation are inconsistent with China's obligations under Article 3 of the Anti-Dumping Agreement, in particular Articles 3.1, 3.2, 3.4, and 3.5.

34. In the view of the EU, the term "price undercutting" poses two interpretative challenges: The first question to be addressed relates to what constitutes "price undercutting". The EU maintains that price undercutting, by definition, involves not just a "price differential" but also an element of "price effect". The second question is: *How* is an investigating authority required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports?

35. The key difference seems to be that China considers that any mere "price differential" amounts to a "price effect". The EU, on the other hand, considers that there may be situations where a mere "price differential" does not contain a "price effect". Therefore, the key interpretative question on this issue would be: Is it sufficient to simply establish a price differential? The European Union has adduced a number of reasons for its position. The most pertinent usage of the word "undercut" is: "To supplant [...] by selling at lower prices". "To supplant" means "Chiefly of things: to take the place of, succeed to the position of, supersede". The European Union has already described in detail how the relevant sentence in Article 3.2 of the Anti-Dumping Agreement refers to "effect". Suffice it to say here that the sentence starts with the words "With regard to the effect of the dumped imports on prices" and hence clearly refers to three price effects, and not to two price effects (in the form of price depression/suppression) and a non-price effect.

36. A finding of "price undercutting" thus requires a finding of a price differential plus a finding of a price effect. There can be no price effect if there is no competitive relationship between the dumped imports and the domestic like product. There are other factors that may impact the finding of a price effect.

37. The European Union considers that in a case where an investigating authority has strong reasons to doubt the presence of undercutting, the investigating authority needs at least *to discuss* the evidence pointing to the absence of such effect.

38. As pointed out before, the European Union considers that China's analysis of the price effects of imported Product C is erroneous, and falls short of an objective examination, based on positive evidence. In the view of the European Union, China confuses two different types of analysis. The consideration that is undertaken pursuant to Article 2.6 of the Anti-Dumping Agreement is not identical with the requirement "under Article 3.2 of the Anti-Dumping Agreement [...] to consider whether the prices are actually comparable".

39. The European Union argues that China improperly extended its price undercutting findings with respect to Products B and C to the whole industry to conclude that imports of HP-SSST products had a price undercutting effect on like domestic products.

40. China's arguments fall into two categories: On the one side, China argues that its alleged finding of "price correlation" justified such an extension. On the other side, China argued that there was evidence of substitutability of Product A by Products B and C.

41. As regards the price correlation argument, the EU addressed the essence of these arguments already in its Second Written Submission.

42. Turning to China's "substitutability" argument, given that we are in a trade context, what matters is *commercial substitutability* in the real world, not theoretical substitutability in a world where commercial aspects would not matter.

43. As regards China's impact analysis, the European Union refers back to its previous statements. Article 3.4 explicitly refers to a number of factors, and does not contain anything capable of supporting China's "on the one hand [...] on the other hand"- distinction.

44. As regards Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the European Union refers back to its previous statements.

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**ANNEX C**

ARGUMENTS OF CHINA

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**ANNEX C-1****EXECUTIVE SUMMARY OF THE FIRST WRITTEN  
SUBMISSION OF CHINA****1. THE EUROPEAN UNION'S CLAIMS REGARDING MOFCOM'S DUMPING DETERMINATION****1.1 MOFCOM's determination of the SG&A and its consistency with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement**

1. The bulk of the claims made by the European Union under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement are outside the Panel's terms of reference. In accordance with paragraph 8 of the Working Procedures of the Panels, China respectfully submits a request for preliminary ruling in this respect. The European Union's claims that are within the Panel's terms of reference are flawed by an incorrect depiction of the facts, as available to MOFCOM at the time it made its determination. MOFCOM used the SG&A amount that was reported by SMST in the *only table* of the questionnaire in which SMST was required to report the *actual unit SG&A amount for each specific grade* of the product under consideration, distinguishing between sales to the European Union and sales to China. SMST itself stated that these were the actual data for SG&A. Importantly, during the procedure SMST never requested that the SG&A data in Table 6-3 should not be used, nor did it submit an alternative per grade SG&A amount. The European Union's erroneous claim that MOFCOM did not explain the source of the SG&A amount may relate, *inter alia*, to a translation mistake in Exhibit EU-25 (BCI).

2. Moreover, MOFCOM simply could not use the SG&A data in Table 6-5, since this data was not broken down per grade. Also, SMST itself had reported the specific SG&A amount in Table 6-3 for EU sales, and MOFCOM was not allowed to disregard it without any valid ground.

3. The SG&A data used by MOFCOM must be considered actual, since, far from being "arbitrarily determined" by MOFCOM, the SG&A amount had been provided by SMST as actual data. As such, MOFCOM used "actual data of the exporter or producer under investigation" that related to the product at issue. Furthermore, the data were based on the records of SMST. The SG&A data in Table 6-3 had been reported by SMST, stating that "[t]he figures reported in Table 6-3 were taken from cost calculations for the individual orders of subject merchandise produced during the POI".

**1.2 MOFCOM's dumping determination for SMST's sales of Grade C and its consistency with Article 2.4 of the Anti-Dumping Agreement**

4. In order to ensure a fair comparison, MOFCOM opened the dialogue with SMST with the questionnaire, in which MOFCOM asked multiple questions on the products, prices, adjustments, costs, production processes and other relevant items and clearly informed SMST on how it should make a request for adjustment. All of SMST's answers and supporting documents provided in its questionnaire response, without any exception, demonstrated beyond any reasonable doubt that there were no physical differences that had an impact on price comparability between Grade C exported to China and Grade C sold domestically by SMST. During the investigation, SMST never informed MOFCOM that these answers in its questionnaire response were wrong, nor why this would have been the case. During the investigation, SMST never lodged any substantiated request in relation to a fair comparison concerning sales of Grade C, and therefore, the claim presented by the European Union must fail. SMST merely lodged several contradictory and incoherent statements concerning first, low volume sales and, second, low volumes sales of tubes with differences in diameter and, finally, just sales of tubes with differences in diameter.

5. Therefore, MOFCOM's decision against taking into account SMST's unsubstantiated statements presented subsequent to its questionnaire response, and to rather base its findings on the clear and consistent information contained in the questionnaire response, is consistent with China's obligations under Article 2.4 of the Anti-Dumping Agreement.

**1.3 MOFCOM's determination of SMST's dumping margin, as consistent with Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement**

6. The European Union's claims under Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement relate to an alleged double-counting of administrative expenses. However, an examination of the facts makes it clear that there was simply no double-counting in the dumping margin determination.

7. Moreover, Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement cannot be construed as containing a requirement to accept all information provided during a verification visit. The fact that a verification visit's purpose may be "to verify information provided or to obtain further details" does not imply that an investigating authority is *compelled* to verify information provided or to obtain further details, let alone that it prescribes any approach that must be followed to pursue that objective. As such, Article 6.7 and Annex I of the Anti-Dumping Agreement leave a significant margin of discretion to investigating authorities. With respect to the alleged use of facts available, it suffices to say that MOFCOM simply did not rely on any SG&A amount in which there allegedly was a double-counting. Article 6.8 of the Anti-Dumping Agreement and Annex II are thus irrelevant to the case at hand, since MOFCOM did not make any determinations on the basis of "facts available".

**2. CLAIMS REGARDING MOFCOM'S INJURY DETERMINATION**

**2.1 Consistency of MOFCOM's consideration of price effects with Articles 3.1 and 3.2 of the Anti-Dumping Agreement**

8. With respect to MOFCOM's consideration of the price effects of Grade C, MOFCOM did explain the methodology used to take into account the quantitative difference for the Grade C price effects consideration, contrary to the allegations made by Japan and the European Union. In any event, the argument made by Japan and the European Union blurs the lines between the substantive requirements laid down in Articles 3.1 and 3.2 and the procedural obligations set out in other provisions.

9. In addition, Japan and the European Union's claim is based on an incorrect understanding of the nature of the price undercutting consideration under Article 3.2 of the Anti-Dumping Agreement. The factual existence of price undercutting by the dumped imports is considered in itself to have an effect on domestic prices. A finding of price undercutting is a purely factual consideration, which only requires a comparison of prices. Thus, any factual circumstances other than the price difference that exists between the import price and domestic price of Grade C (for instance, the increase in the prices of domestic Grade C) are irrelevant for the price undercutting consideration. Moreover, Article 3.2 of the Anti-Dumping Agreement does not require an investigating authority to establish what caused the price undercutting (for instance, an increase of the domestic price or a decrease of the import price). Finally, the allegation that imports of Grade C were not in competition with the domestically produced Grade C is legally irrelevant and completely disregards MOFCOM's findings and in-depth analysis of this matter.

10. By claiming that MOFCOM improperly extended its conclusions concerning the price undercutting by Grade B and Grade C to the "domestic industry" "as a whole", Japan and the European Union misrepresent the nature of the price undercutting consideration in two main ways. First, they erroneously presume that the price undercutting consideration under Article 3.2 of the Anti-Dumping Agreement must be made with respect to the *domestic industry*, whereas it relates to the prices of the dumped imports as compared with the *price of a like product*. As such, the price effects consideration concerns the relationship between subject imports and a variable other than the domestic industry, that is, *domestic prices*. The assessment of the effects of the price undercutting on the domestic industry as a whole is relevant as to whether there is a causal link between the prices of the dumped imports and the impact on the domestic industry, in the *causation* analysis, not in the price undercutting consideration.

11. Second, considering that price undercutting had to be found with respect to the like product *as a whole* is at odds with the wording of Article 3.2 of the Anti-Dumping Agreement. A textual analysis, in particular with respect to the use of the indefinite article (as opposed to the abundant references to the concept of "like product" with use of the definite article in other

provisions), reveals that for the price undercutting consideration, the prices of the dumped imports must be compared with the prices of *some* like products. Moreover, the consideration under Article 3.2 of the Anti-Dumping Agreement focuses on price undercutting *by the prices of the dumped imports*. MOFCOM's consideration revealed that virtually all dumped imports were made at undercutting prices. Japan and the European Union's position is also at odds with the purpose of the price effects consideration, which will logically progress through the impact analysis towards the causation analysis.

12. In addition, far from being selective, MOFCOM's methodology on the basis of which it limited its price undercutting examination to "matching" models was objective and in line with Article 3.2.

## **2.2 Consistency of MOFCOM's analysis of the impact on the domestic industry with Articles 3.1 and 3.4 of the Anti-Dumping Agreement**

13. Any degree of "selectiveness" alleged to exist by Japan logically follows from the explicit requirements of the relevant provisions of the Anti-Dumping Agreement. Moreover, any differences between the approach under Article 3.2 and the approach under Article 3.4 may have to be assessed under Article 3.5 of the Anti-Dumping Agreement, which "links" both elements. In addition, Japan erroneously postulates that there existed a "segment of the domestic industry producing Products B and C" and a "segment of the domestic industry producing Product A" as well as a "domestic industry sector" per grade.

14. The European Union also claims that MOFCOM's impact analysis was improperly based on its flawed price effects analysis because the data relating to Grade A and Grade C are non-attribution factors. This reveals clearly that the European Union's argument concerns the non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement, or, at best, the causation analysis in general.

15. With respect to the evaluation of the margin of dumping, it is factually incorrect that MOFCOM did not evaluate this in the part of the Final Determination relating to the injury determination. In addition, similar to what was confirmed by case law for the evaluation of the "factors affecting prices", Article 3.4 does not as a general rule require an evaluation of the magnitude of the margin of dumping beyond the analysis of this factor as required by the provisions of the Anti-Dumping Agreement dealing specifically with the dumping margin. With respect to the conclusion reached by MOFCOM, the Final Determination provides a solid reflection of MOFCOM's reasoned evaluation of the weight and relevance of all factors. MOFCOM concluded that the weight and relevance of the positive factors fell short of those of the negative factors. This is something very different from the allegation that MOFCOM "disregarded" positive factors.

16. Finally, MOFCOM did not fail to examine whether subject imports provided explanatory force for the state of the domestic industry. The interpretation put forward by Japan creates an obligation that simply cannot be found in Article 3.4 of the Anti-Dumping Agreement. Moreover, a correct overview of the facts shows that MOFCOM properly examined the explanatory force, even under Japan's misguided interpretation.

## **2.3 The consistency of MOFCOM's causation determination with Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

17. In its causation analysis, MOFCOM duly established a link between its price effects consideration and the impact analysis. The effects of price undercutting by the dumped imports on the domestic industry must be assessed by an investigating authority, *inter alia* taking into account how it defined the like product and the product concerned for the purposes of this investigation. MOFCOM had found in this respect that the three grades constitute a "single product" with correlation between their prices.

18. With respect to the importance attached to the market share, consistently with its finding under Article 3.2, MOFCOM stated as a first point in its causation analysis that imports of the subject products from the EU and Japan showed year-on-year declines. MOFCOM however continued its analysis and found that in order to assess the impact of the price undercutting by dumped imports on the domestic industry, it had to take into account the volume of imports made at undercutting prices. In line with the findings of the panel in *EC – Tube or Pipe Fittings*, MOFCOM

analyzed the key variables to derive an understanding about the impact of the price undercutting on the domestic industry, i.e. the quantity of sales at undercutting prices and the margin of undercutting. Contrary to allegations put forward by Japan and the European Union, Article 3.5 of the Anti-Dumping Agreement certainly allows an investigating authority to attach importance to the volume of imports. Indeed, an investigating authority is obliged to consider all relevant evidence.

19. Moreover, an analysis of MOFCOM's findings reveals that it was reasonable in concluding that the decline in apparent consumption and the capacity expansion did not break the causal link established between the dumped imports and the material injury. The conclusions reached by MOFCOM are reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and constitute meaningful explanations of the nature and extent of the injurious effects of reduced apparent consumption.

### **3. CLAIMS REGARDING MOFCOM'S DETERMINATION OF THE ALL OTHERS RATE**

20. By means of the Initiation Notice and the different forms by which this was communicated, MOFCOM fulfilled its obligations under paragraph 1 of Annex II and was entitled to use facts available with respect to those exporters/producers that did not come forward and/or did not respond to the questionnaire. A very similar situation was addressed by the panel in *China – Broiler Products*, which explicitly dismissed Japan's misplaced reliance on the notion that MOFCOM could not substitute information with facts available, other than the information requested in the Initiation Notice. This conclusion is reinforced by the publication of the questionnaire on MOFCOM's website, which included a similar notice that if the information was not timely supplied, then facts available could be used. In view of the above, the claim must be rejected that MOFCOM failed to comply with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement.

21. As regards Article 6.4 of the Anti-Dumping Agreement, this alleged infringement must be dismissed, as the European Union does not present a *prima facie* case. The European Union limits its arguments under this provision to simply a bare reference to this provision.

22. The claim on the basis of Article 6.9 of the Anti-Dumping Agreement must equally fail since MOFCOM adequately disclosed the facts leading to the conclusion that the use of facts available was warranted (the failure of various interested parties to respond to the Initiation Notice by means of the registration form and/or the failure to respond to the questionnaire) as well as the facts used to determine the all others rate (the highest dumping margin of the Japanese responding companies for the all others rate for Japan, and it used the highest dumping margin of the EU responding companies for the all others rate for the European Union). Similar comments apply to the alleged violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

### **4. CLAIMS REGARDING MOFCOM'S DISCLOSURE DOCUMENTS AND FINAL DETERMINATION**

23. The European Union fails to make a *prima facie* case for the alleged inconsistency with Article 6.4 because it fails to show that MOFCOM denied an interested party's request to see information used by the authorities.

24. Japan and the European Union's claims with respect to the dumping determinations under Article 6.9 of the Anti-Dumping Agreement are only supported by general allegations, which are not substantiated in any way by means of a specific reference to the disclosure documents. A complaining party may not simply submit evidence in the form of exhibits, accompanied by some general allegations and expect the panel to divine from it a claim of WTO-inconsistency. This implies that no *prima facie* case has been made. In any event, the examples provided by China demonstrate that the general allegations relied upon by Japan and the European Union are factually incorrect and that MOFCOM satisfied its obligations under Article 6.9.

25. Japan and the European Union's claims in relation to the injury and causation determinations must equally fail. With respect to Article 6.9, MOFCOM disclosed all "essential facts", and as concerned "essential facts" for which it was bound by confidentiality obligations, it provided sufficient non-confidential summaries, *inter alia* in the form of a range of the confidential margins. With respect to the claims under Articles 12.2 and 12.2.2, similarly, MOFCOM included all

"relevant information on the matters of fact" where appropriate, in the form of a proper non-confidential summary.

## 5. CLAIMS REGARDING MOFCOM'S TREATMENT OF CONFIDENTIAL INFORMATION

26. With respect to the alleged violation of Article 6.5 of the Anti-Dumping Agreement, the European Union fails to specify the documents for which it alleges that confidential treatment was improperly granted and fails to refer to the statements considered by MOFCOM as providing "good cause". Accordingly, it fails to make a *prima facie* case. In relation to Japan's claim, the facts of this case show that the Petitioners did not only request confidential treatment out of concern for the impact on the third parties' businesses. Rather, they provided several other reasons justifying the confidential treatment of the four appendices at issue. As such, their concern could not have been sufficiently addressed by withholding the names of the third parties. Moreover, in line with the Petitioners' request and as revealed by the non-confidential versions of the four appendices at issue, the confidential treatment did *not* concern the entirety of the four appendices at issue *on a blanket basis*. Rather, the non-confidential versions lodged by the Petitioners included a large part of the original text. MOFCOM acted consistently with Article 6.5 of the Anti-Dumping Agreement.

27. In relation to the claim under Article 6.5.1 of the Anti-Dumping Agreement, the Petitioners provided a broad range of details in the concerned non-confidential summaries and/or statements as to why summarization was not possible. With respect to the appendices the confidential treatment of which is challenged by Japan under Article 6.5, the non-confidential versions clearly disclose more than merely the final data, as alleged by Japan and the European Union, but also provide further summaries or even integral parts of the information contained in each original (confidential) report. They are certainly sufficiently detailed to provide a "reasonable understanding" of the substance of the information submitted in confidence. With respect to the Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, the translation provided by Japan and the European Union does not correctly reflect the original Chinese version. As a matter of fact, the column "Note and non-confidential summary" provides a statement of reasons as to why further summarization is not possible.

## 6. OTHER ISSUES

28. The European Union brings a request for the amendment of the BCI Procedures adopted by the Panels. China considers that the Panels have, after discussing the matter with the parties to the disputes, determined that additional protection was justified in this case and specified the form that this additional protection would take. Moreover, the BCI procedures are in line with Article 6.5 of the Anti-Dumping Agreement. As such, there is nothing WTO inconsistent about the content of the BCI Working Procedures as adopted by the Panels in accordance with Article 12.1 of the DSU and they do not need to be amended in this respect.

29. The European Union further requests that the Panel exercise its right to seek information, as well as to make a suggestion for implementation, pursuant to Articles 13.1 and 19.1 of the DSU respectively. While China does not call into question the Panel's discretion to decide whether or not to exercise its rights under Articles 13.1 and 19.1 of the DSU, it does not consider it appropriate to do so in this dispute.

30. China respectfully requests the Panels to amend paragraph 10 of the Working Procedures of the Panels, to ensure a more even-handed treatment of both the complainants and the defendant in this dispute with respect to the timeframe within which objections to translations should be raised.

## 7. CONCLUSION

31. For the reasons set forth in its submission, China requests that the Panel in DS454 and the Panel in DS460 reject the claims of respectively Japan and the European Union in their entirety and find that MOFCOM's determinations in the underlying investigation were fully consistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994.

**ANNEX C-2****EXECUTIVE SUMMARY OF THE STATEMENT OF  
CHINA AT THE FIRST PANEL MEETING**

Mr. Chairman, distinguished Members of the Panels,

1. The People's Republic of China ("China") would like to thank you for agreeing to serve on these Panels. China also takes this occasion to thank the Secretariat for its valuable assistance. In this oral statement, China will briefly touch upon some key factual and legal issues in this dispute, leaving as much time as possible for answering any questions the Panels may have.

**1. THE ANTI-DUMPING INVESTIGATION AT ISSUE**

2. The single product under consideration includes three grades, with Grade A as the low-end grade and Grade B and Grade C as the high-end grades. On the import side, Grade B represented over 70% of the imports of the product under consideration, with Grade C making up the bulk or all of the remaining imports. The domestic industry produced and sold all three grades. However, sales of the low-end Grade A represented a large share of its sales since its ability to sell Grade B and Grade C was hampered by unfair competition from imports.

3. The dumped imports from Japan and the European Union still held a market share of around 50%, and their prices decreased year-on-year. The imports were found to be made at undercutting prices. Imports of Grade B (representing over 70% of total imports) were made at prices that were up to 28% lower than the domestic sales price. Imports of Grade C were found to be made at undercutting prices as well. For Grade A, it was not possible to compare prices because of the quantitative difference between imports and domestic sales in 2008 and the absence of import sales in other years. As such, there was price undercutting by all grades that were actually imported by Japan and the European Union in years other than 2008 (that is, Grade B and Grade C).

4. Faced with these imports at undercutting prices, the domestic industry was suffering injury. MOFCOM's analysis revealed the presence of a number of positive indicators, but its assessment showed that the negative indicators outweighed the positive factors.

5. In its assessment of the causal link, MOFCOM took into account that the import volume decreased, as revealed by the volume effects analysis. However, when assessing the impact of the price undercutting on the domestic industry, MOFCOM did take into consideration that the dumped imports made at undercutting prices still held significant market shares. The imports of Grade B and Grade C made it practically impossible for the domestic industry to sell the high-end grades of the product under consideration. The fall in the (undercutting) import price of the high-end grades resulted in a significant fall in the domestic sales price that the domestic industry managed to charge in these high-end grades. The fall in price of the imported high-end grades also impacted the sales price at which the domestic industry could sell the low-end product grade (Grade A).

**2. KEY LEGAL ISSUES AT STAKE**

6. One of the key elements vitiating the claims by Japan and the European Union is the failure to respect the inherently different nature of the inquiries under paragraphs 2, 3 and 5 of Article 3 of the Anti-Dumping Agreement and the relationship between those inquiries. Assessment of the WTO consistency of the different steps in an injury analysis, such as the price effects consideration and the impact assessment, should be made according to the obligations in the paragraph that governs such specific step. Japan and the European Union's claims, however, conflate those obligations contained in the specific paragraphs with one another or simply transpose the obligations contained in one paragraph to a different step in the injury analysis.

7. This is clearly revealed by the fact that Japan and the European Union allege that MOFCOM has erroneously extended its conclusion concerning price undercutting of Grade B and Grade C to the "domestic industry as a whole". A similar misunderstanding affects Japan's claim with respect to the impact assessment under Article 3.4 of the Anti-Dumping Agreement. Japan fails to

acknowledge that the focus of the price effects consideration and the impact assessment are inherently different. Considerations that may result from these differences, if any, need to be addressed in the causation analysis under Article 3.5 of the Anti-Dumping Agreement, not in the impact assessment under Article 3.4.

8. Another factor which undermines the position of Japan and the European Union is the apparent lack of understanding of the inherently different nature of a price undercutting consideration, on the one hand, and a price depression or suppression analysis, on the other hand.

9. China would like to stress once again the importance of assessing the European Union's dumping claims on the basis of a correct, complete and contemporaneous overview of the factual elements relating to these claims. This factual overview reveals that if any mistakes were made in relation to the dumping matters at stake, these were made by the EU exporter concerned, not by the investigating authority. Whether or not a different determination would have or should have been reached by MOFCOM in the absence of the mistakes by the EU exporter, is not an assessment to be made by the Panel. The Panel should assess the European Union's claims on the basis of an analysis of the record at the time of the determination.

### **3. THE EUROPEAN UNION'S RESPONSE TO CHINA'S REQUEST FOR PRELIMINARY RULING**

10. In response to China's request for a preliminary ruling on the terms of reference, the European Union, instead of focusing on the procedural matter at stake, addresses a wide range of substantive aspects which are of no relevance whatsoever to the procedural question posed to the Panel. China notes that the response to China's request for a preliminary ruling is not the appropriate medium to raise additional substantive arguments.

11. Each of the four provisions listed in the European Union's request for the establishment of a panel contains multiple obligations. Where a provision contains only a single obligation, a simple reference to the provision may be a sufficient summary of the legal basis of the complaint. Where a provision, such as those at stake contains multiple obligations, a panel request may need to specify which of the obligations is being challenged. If so, it goes without saying that the obligations identified represent the totality of the claims before the panel under the provisions in question. This is the situation presently before the Panel in DS460. The summary of the legal basis of the complaint of the European Union is expressly limited, by the use of the words "in particular", to the obligations for the SG&A to (1) reflect the records of the exporter and (2) be based on actual data.

12. The arguments presented by the European Union in its response to the request for preliminary ruling must fail. No summary of the legal basis of the claims at stake was included in the panel request. Since the request for the establishment of a panel clearly limited the European Union's claims regarding the SG&A to two specific obligations, China obviously limited the preparation of its defence to these specific obligations. This precluded China from including arguments about other obligations in its first written submission. The absence of a legal summary of the basis of the complaint for the other claims raised by the European Union in its first written submission did not only result in a prejudice to China. As a result of this absence, the request for the establishment of the panel equally failed to fulfil its function of informing the third parties of the basis for the complaint and precluded WTO Members from assessing whether they had a substantial interest in the matter before the Panel.

13. In its response, the European Union includes a number of allegations which are irrelevant to the subject matter of the requested preliminary ruling. China will clarify once again in writing why the allegations of the European Union are factually incorrect. However, at this stage, China considers that the decision on the preliminary ruling should focus on the procedural matter at stake and not on the surprisingly confused substantive inaccuracies put forward by the European Union.



**ANNEX C-3****EXECUTIVE SUMMARY OF THE SECOND WRITTEN  
SUBMISSION OF CHINA****1. MOFCOM'S DETERMINATION OF THE SG&A AND ITS CONSISTENCY WITH ARTICLES 2.2, 2.2.1, 2.2.1.1 AND 2.2.2 OF THE ANTI-DUMPING AGREEMENT**

1. The European Union's submissions during the Panel process leave it unclear as to exactly which claims the European Union is raising, how these claims relate to each other, and which arguments relate to which claims. The lack of any clarity and precision in relation to how the European Union is developing its claims in its first written submission, in any event, is of limited importance to the present dispute, given the high level of precision and clarity of the claims included in the European Union's request for the establishment of a panel. The latter expressly limits its claims under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement to the claims that the SG&A amounts "do not reflect the records and the actual data". The use of the word "in particular" makes this even clearer.

2. The request for the establishment of a panel by the European Union is thus, in the words of the panel in *US – Corrosion-Resistant Steel Sunset Review*, "not unclear and does not lack specificity: it is absolutely and clearly mute with respect to the issue of whether" the SG&A amounts, for instance, are based on data that pertain to "production and sales in the ordinary course of trade". As such, it is "insufficient on its face to provide the foundation sought by" the European Union.<sup>1</sup>

3. There are two claims within the Panel's terms of reference. First, the European Union claims that the SG&A amounts used by MOFCOM for the determination of SMST's constructed normal value for Grade B are not "based on actual data". China does not consider that it can be reasonably disputed that the SG&A amounts used by MOFCOM "built upon" or "construct upon" the costs of production. It also cannot be disputed that these costs of production are actual. As a result, it is clear that the SG&A amounts used by MOFCOM for the determination of the constructed normal value of Grade B of SMST were "based on" the cost of production and thus based on "actual data".

4. Whether or not the coefficients used are also actual data is irrelevant, since in any event, the SG&A amount were "based on" actual data. Article 2.2.2 does not require the SG&A amount to be actual data in itself. Nevertheless, for the sake of good order, China points out that the coefficients also constitute "actual data". The coefficients are "the internal rates used by SMST in preparing price/cost calculations for orders" and were used by SMST in its daily operations and, accordingly, are data that pertained to acts, existed in fact, are real, and were in existence at the time. Therefore, the coefficients are actual data. If figures used for constructed value determinations would no longer be considered to be based on actual data, as from the moment that they would be allocated on the basis of coefficients, this would have unwarranted systemic consequences.

5. Second, the European Union seems to claim that the SG&A amounts for Grade B in the EU market provided by SMST in table 6-3 are not based on SMST's records. The *New Shorter Oxford English Dictionary* defines "record" as "[...] knowledge or information preserved in writing, [...] a written or otherwise permanently recorded account of a fact or event [...] Also, a document [...] on which such an account is recorded [...]; in pl., a collection of such accounts, documents, etc."<sup>2</sup> The production costs and the coefficients are clearly part of SMST's records in this sense.

**2. MOFCOM'S DUMPING DETERMINATION FOR SMST'S SALES OF GRADE C AND ITS CONSISTENCY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT**

6. In line with its practice, MOFCOM used the product types (or "baskets of transactions") proposed by the exporter to minimize the need for adjustments by using. In addition, MOFCOM

<sup>1</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para.7.53.

<sup>2</sup> The New Shorter Oxford English Dictionary, Exhibit CHN-15, Vol. II, p. 2506.

requested the exporters to make substantiated requests for adjustments for any differences that affect price comparability. The product types set by SMST and the absence of any need for adjustments as stated by SMST were the two parameters that MOFCOM relied upon to ensure a fair comparison. At no point during the investigation did SMST request to amend the product types (or the "basket of transactions") used for the determination of the normal value. SMST also never requested any adjustment. Assuming that physical differences affected price comparability, SMST failed to comply with its obligation "to make substantiated requests for "due allowance", whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability".<sup>3</sup> By contrast, MOFCOM fully complied with its obligation to ensure a fair comparison. A very similar claim was addressed in *EU – Footwear (China)* and the findings in that case show that no violation of Article 2.4 can be found in the present dispute.

7. This is true, even if assuming that SMST demonstrated that the physical differences identified in the course of the investigation affected price comparability. Moreover, in any event, SMST did not demonstrate that these physical differences affected price comparability. SMST demonstrated the existence of physical differences (that is, a differences in outer diameter). However, it did not even attempt to demonstrate that these differences affect price comparability. The European Union cannot point to a single piece of evidence submitted by SMST to demonstrate an impact on price comparability (which is a consideration separate from different prices).

### **3. MOFCOM'S DETERMINATION OF SMST'S DUMPING MARGIN IS CONSISTENT WITH ARTICLE 6.7 AND ANNEX I, PARAGRAPH 7 AND ARTICLE 6.8 AND ANNEX II, PARAGRAPHS 3 AND 6 OF THE ANTI-DUMPING AGREEMENT**

8. The alleged double-counting issue is non-existent and the claims presented by the European Union thus lack any factual basis. In any event, Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement do not contain any obligation for an investigating authority to accept information, let alone any claim, presented to it during the verification visit. Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement relate to the situation in which determinations are made based on the facts available. MOFCOM simply did not rely on any alleged double-counting and, as such, did not make any determinations on the basis of the alleged facts available.

9. Moreover, in the absence of any double-counting, the alleged procedural violation did not and could not have had any adverse impact on the European Union, as there is no case of nullification or impairment of the European Union's rights. The facts of this case rebut the presumption of nullification or impairment laid down in Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

### **4. CLAIMS REGARDING MOFCOM'S PRICE UNDERCUTTING CONSIDERATION**

#### **4.1 The consistency of MOFCOM's consideration of price undercutting by imports of Grade C with Articles 3.1 and 3.2 of the Anti-Dumping Agreement**

10. While MOFCOM's finding of likeness does not necessarily imply that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration,<sup>4</sup> it does imply that there is "likeness" between the grade included in the basket of domestic goods that was explicitly found to be "like" the corresponding grade included within the scope of the product under consideration. In the present case, this is even more evident, in view of MOFCOM's finding that the corresponding grades are "basically identical" and "substitutable". The fact that the complainants did not challenge MOFCOM's findings relating to the competitive relationship under Article 2.6 of the Anti-Dumping Agreement results in the irrelevance of this aspect under Article 3.2. Japan and the European Union must take, as a given, the competitive relationship between the domestically produced Grade C and the imported Grade C.

11. Moreover, MOFCOM analyzed at length the competitive relationship between the imported grades and the corresponding domestically produced grades. This discussion was included in the Final Determination when addressing the like product determination, in relation to which the

<sup>3</sup> Panel Report, *EU – Footwear (China)*, para. 7.278.

<sup>4</sup> Panel Report, *China – X-Ray Equipment*, para. 7.65.

interested parties logically raised this issue. Obviously, "in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination".<sup>5</sup> In view of the complete absence of any discussion of MOFCOM's findings, it is clear that no *prima facie* case has been made by the complainants.

12. In view of the above, no finding can be made in this dispute that MOFCOM failed to properly establish the competitive relationship between imported Grade C and domestically produced Grade C. This is irrespective of whether or not the Panels consider that there should be "explanatory force" or that a price differential will always constitute an effect. In this respect, as addressed in previous submissions, China considers that Article 3.2 allows an investigating authority to find (or to presume conclusively) price undercutting in case the dumped import prices are below the comparable domestic prices. No additional "effect" consideration is required since price undercutting is in itself an effect. An important element reflecting the manifest unreasonableness of the complainants' interpretation is the disregard of the inherently different nature of a price undercutting consideration and a price depression/suppression consideration.

13. The complainants further rely on the allegation that the sales of Grade C were "outlier transactions". However, Japan and the European Union fail to provide any evidence for the alleged "outlier" nature of the sales of Grade C and, as such, do not substantiate their claims. Moreover, the outlier nature of sales may be relevant from the supply-side perspective, but this is not the case from the demand-side perspective (for the customer when making its purchasing decisions). Also, Article 3.2 provides no methodological guidance on how to consider price effects.<sup>6</sup>

#### **4.2 The consistency with Articles 3.1 and 3.2 of the Anti-Dumping Agreement of MOFCOM's overall consideration of price undercutting by imports of the product under consideration**

14. MOFCOM found a price correlation between the different grades making up the product under consideration and the domestic like product. On this basis, MOFCOM found that Grade A should not be excluded from the scope of the product under consideration. The price correlation and the effect of imports of Grade B and Grade C at undercutting prices on prices of Grade A is a matter of elementary economics. In order for dumped imports to have an effect on prices of like products, the dumped imports should be able to substitute the domestic like products. For MOFCOM's overall price undercutting consideration in the case at hand, the relevant question is thus whether or not the high-end grades (Grade B and Grade C) are capable of substituting the low-end grade (Grade A). The possibility to substitute the low-end grades by the high-end grades of HP-SSST is evident and was referred to during the investigation by interested parties, including the exporters.

15. Therefore, no violation can be found of Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to MOFCOM's overall price undercutting consideration. This is irrespective of whether or not price effects need to be considered for the like product "as a whole" as alleged by Japan and the European Union. In any event, Japan and the European Union's legal interpretation and reliance on the price effects on the like product "as a whole" are erroneous, as explained at length in China's previous submissions.

### **5. CONSISTENCY OF MOFCOM'S ANALYSIS OF THE IMPACT ON THE DOMESTIC INDUSTRY WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT**

16. The price undercutting by imports of Grade B and Grade C had an effect on prices of the domestically produced Grade A, given the substitutability and resulting price correlation between these three grades. As such, it is irrelevant as to whether an impact assessment should be carried out on any basis other than focusing on the domestic industry as a whole and/or should be accompanied by additional explanations in case price effects were considered on a per grade basis. This is because the circumstances that would allegedly lead to such additional inquiries are simply not present in the case at hand.

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<sup>5</sup> Panel Reports, *US – Softwood Lumber VI*, para. 7.136, *US – Countervailing Duty Investigation on DRAMS*, footnote 264.

<sup>6</sup> See for instance Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.292; *EC – Fasteners (China)*, para. 7.328.

17. In any event, any alleged degree of "selectiveness" of MOFCOM's approach logically arises from the explicit requirements of the relevant provisions of the Anti-Dumping Agreement, rather than from any bias or attempt to inflate the chances of maximizing an affirmative finding of injury. MOFCOM considered price undercutting on a grade-by-grade basis, in line with its obligation under Article 3.2 of the Anti-Dumping Agreement to ensure comparability of the prices being compared. In its impact assessment, MOFCOM focused on the impact on the domestic industry as a whole, consistent with its obligation under Article 3.4 of the Anti-Dumping Agreement. In no way did MOFCOM determine its approach "depending on which approach would maximize the chance of finding injury to the domestic industry". This approach was furthermore in line with the logical progression of inquiry leading to an investigating authority's ultimate decision on whether or not dumped imports are causing injury to the domestic industry.

18. For the reasons explained in China's first written submission, MOFCOM's evaluation of the magnitude of the margin of dumping was sufficient for the purposes of Article 3.4 of the Anti-Dumping Agreement and MOFCOM properly found that the domestic industry was injured. Finally, MOFCOM did ensure the explanatory force, to the extent required. This is true even under Japan's erroneous interpretation. China's explanation in this respect is not an "post hoc attempt" but is rather taken from the Final Determination itself.

## **6. THE CONSISTENCY OF MOFCOM'S CAUSATION DETERMINATION WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT**

19. MOFCOM logically progressed its inquiry, starting from its product scope and like product findings, via its price effects consideration and impact assessment, leading towards this final conclusion under Article 3.5 of the Anti-Dumping Agreement.

20. When assessing the impact of price undercutting on the domestic industry, MOFCOM relied on the high market share of the dumped imports. This, however, does not imply that MOFCOM relied on a significant increase of dumped imports under Article 3.2 of the Anti-Dumping Agreement to find causation under Article 3.5. Indeed, a distinction must be made between MOFCOM's conclusion that there was no significant increase in the volume of the dumped imports under Article 3.2 of the Anti-Dumping Agreement and MOFCOM's reliance on the fact that dumped imports retained a high market share under Article 3.5. Article 3.5 of the Anti-Dumping Agreement certainly allows an investigating authority to attach importance to the volume of imports in this context. The appropriateness of MOFCOM's approach is also confirmed by the finding of the panel in *EC – Tube or Pipe Fittings*.<sup>7</sup>

21. A finding that imports decreased does not compel an investigation authority to conclude that the domestic industry did not suffer any material injury or that any injury suffered by the domestic industry could not be caused by the subject imports. Moreover, the present situation appears to be a textbook example of a case in which a causal link can be found, despite the lack of a significant increase in dumped imports.

22. MOFCOM's non-attribution analysis was consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The explanations provided by MOFCOM constitute "meaningful explanations of the nature and extent of the injurious effects"<sup>8</sup> of reduced apparent consumption. The complainants' allegations fail in relation to the irrelevance of trends in domestic demand for Grade A. Grade B and Grade C can substitute Grade A. Therefore, demand for Grade A is obviously a relevant consideration.

23. MOFCOM further made a reasonable conclusion that the effects of the expansion of capacity were not sufficient to break the causal link between dumped imports and material injury.

## **7. OTHER CLAIMS**

24. With respect to claims raised by Japan and the European Union in relation to the all others rate, China considers that it complied with all its obligations in this respect. In relation to the consequential claims by the European Union, China points out that the alleged violations at the basis of these claims are inexistent. In any event, the European Union takes issue with the

<sup>7</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.277.

<sup>8</sup> Appellate Body Report, *US – Lamb*, para. 186.

particular "facts available" relied upon. This is a matter that should be assessed under paragraph 7 of Annex II, the only provision dealing with the substantive quality of the "facts available" that are relied upon. No claim is made under this provision. To the extent the European Union is requesting the Panel to make a finding of violation consequential to any alleged procedural violations, China points out that exactly because "it is in the nature of a procedural claim that one does not know what the substantive consequences may eventually be of remedying the procedural effect", a procedural claim cannot lead to a consequential finding of a substantive violation.

25. China has demonstrated, in considerable detail, that its disclosure documents and Final Determination are consistent with its obligations under Articles 6.4, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. With respect to the calculation methodology, China considers that the wording of Article 6.9 of the Anti-Dumping Agreement is clear, in the sense that it only covers "essential facts" and does not cover reasoning. In the context of Article 6.9, a "calculation methodology" forms part of the investigating authority's reasoning, and does not amount to a fact in any event. Japan appears to concede that the calculation methodology is "not entirely distinct from legal interpretation". This implies that the calculation methodology does not fall within the notion of "fact", since facts do not "have any overlap whatsoever with legal interpretation". The European Union's the position that inferences drawn from relied upon facts can still constitute "facts" for the purposes of Article 6.9 of the Anti-Dumping Agreement is contradicted by the findings of the panel in *EC – Salmon (Norway)*, which described a "fact" as "[a] thing assumed or alleged as a basis for inference".<sup>9</sup> Article 6.9 thus only covers the factual basis for inference, not the inferences themselves.

26. MOFCOM's treatment of confidential information submitted by the Petitioners was consistent with China's obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. In this respect, the Anti-Dumping Agreement imposes no obligation on an investigating authority to explain why it considers that confidential treatment is warranted. Moreover, Japan and the European Union are both mistaken in claiming that the potential disruption of the third parties' businesses could have been sufficiently addressed by withholding their names. Such approach would not have addressed the concerns of the Petitioners or the third parties in question regarding the full disclosure of the four concerned appendices, as is evident on the face of the Petitioners' request for confidential treatment.

27. The Petitioners provided detailed and adequate non-confidential summaries of the four appendices at issue, explaining the content of the reports, including information and data. Regarding the other 32 additional Appendices to the Petitioners' Supplemental Evidence of 1 March 2012, a description of the information contained therein is provided. A statement is also provided as to why summarization of the content of those appendices was not possible, due to confidentiality considerations with regard to business secrets.

## **8. CONCLUSION**

28. For the reasons set forth in its submissions, China requests that the Panel in DS454 and the Panel in DS460 reject the claims of respectively Japan and the European Union in their entirety and find that MOFCOM's determinations in the underlying investigation were fully consistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994.

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<sup>9</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.805.

**ANNEX C-4****EXECUTIVE SUMMARY OF THE STATEMENTS OF  
CHINA AT THE SECOND PANEL MEETING****1. MOFCOM'S OVERALL PRICE UNDERCUTTING CONSIDERATION**

1. The consistency of MOFCOM's grade-by-grade price undercutting consideration with WTO law is confirmed by the use of the indefinite article in relation to the concept of "like product" in Articles 3.1 and 3.2. Regarding the complainants' reliance on the definite article before "domestic market", Article 3.1 does not speak about the effect of the dumped import on *the* domestic market, but on the effect on *prices* in that domestic market. The reference to "the" domestic market clarifies that these "prices" referred to by an indefinite article must relate to "the" domestic market for like products. China's interpretation is also in line with the role that the price undercutting consideration plays in the logical progression of inquiry leading towards a possible affirmative finding of injury caused by dumped imports. The consideration under Article 3.2 must allow an investigating authority to understand the undercutting that occurs and the frequency and magnitude of that undercutting. This will enable it to logically progress its inquiry towards an assessment of the extent of the impact of price undercutting on the domestic industry under Article 3.5, taking into account the nature of the injury found to exist under Article 3.4.<sup>1</sup>

2. Even if assuming that somehow, an investigating authority would be required under Article 3.2 to find price undercutting for the like product as a whole (*quod non*), no violation can be found in the case at hand because of the substitutability of Grade A by Grade B and/or Grade C and the resulting price correlation. The potential to substitute as well as the actual occurrence of substitution was referred to several times by the Japanese exporter SMI itself.

**2. MOFCOM'S PRICE UNDERCUTTING CONSIDERATION OF GRADE C**

3. Any price differential that is found between comparable products will constitute price undercutting for the purposes of Article 3.2 and will constitute an effect as such. The wording of Article 3.2 supports such position; that is, in order to find price undercutting, it suffices to find a price differential between comparable products.

4. Japan and the European Union read the Appellate Body's findings in *China – GOES* in isolation of the qualifications given by the Appellate Body. The Appellate Body explicitly found that for price undercutting, the inquiry as to the "effect" consists of a price comparison - "a comparison be made between the two" - without any need for an additional inquiry. Even if assuming that any additional inquiry as to the "effect" was actually required (*quod non*), the arguments relied upon by the complainants cannot lead to a finding of violation because of MOFCOM's extensive assessment of the competitive relationship in its like product assessment.

5. China is not claiming that a likeness finding implies that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration. Rather, China is stating that an explicit finding of likeness between the imported grades with their corresponding domestic grades implies that domestic Grade C is "like", and thus in competition with, the imported Grade C. Products for which the prices are comparable for the purposes of Article 3.2 are a subset of like products. Like products are in turn a subset of competitive products, as found by the Appellate Body in *Korea – Taxes on Alcoholic Beverages*. China is thus not arguing that a finding that products are "like" will always suffice to ensure price comparability, as the complainants attempt to portray China's arguments. However, to the extent that the complainants consider that there was a lack of price comparability under Article 3.2 in the present dispute, this claim is actually based on an alleged lack of competitive relationship. Given the specific likeness finding for domestic Grade C and imported Grade C, these cannot be considered as not comparable for the purpose of Article 3.2 because of an alleged absence of a competitive relationship.

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<sup>1</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.277.

### 3. SG&A DATA FOR SMST'S NORMAL VALUE FOR GRADE B

6. In relation to the terms of reference matter, China is not taking issue with the European Union for failing to cite the full wording of the relevant provisions. Rather, China takes issue with the European Union's attempt to raise additional claims after it had explicitly limited its panel request to an alleged inconsistency in relation to two specific obligations.

7. The irrelevance of the European Union's artificial distinction between the "actual data" reference in Article 2.2.2 and the "actual amounts" reference in Article 2.2.2(ii) is clear from the findings of the panel in that case (*EC – Bed Linen*).<sup>2</sup> The European Union further misrepresents the panel's findings in *US – Corrosion-Resistant Steel Sunset Review*, while the parallels between these two cases are striking:<sup>3</sup> although the two claims - actual data and ordinary course of trade - may have the same legal basis - Article 2.2.2 - the European Union expressly limited its panel request to the actual data requirement. The panel in that dispute also stated that "we do not believe it is necessary to examine the issue of prejudice to the United States by any alleged "lack of specificity" in the Panel request".<sup>4</sup> Furthermore, the European Union reprimands China for allegedly disclosing the content of the consultations. In addition to being contrary to established case law, it is the European Union's own first written submission that mentions several times that China disclosed the exact number and the source during the consultations.

8. With respect to the claims within the Panel's terms of reference, Article 2.2.2 requires SG&A to be "based on" actual data. It cannot seriously be disputed that the SG&A amounts used by MOFCOM are in fact "founded" on, "built upon" or are "supported by" the costs of production.<sup>5</sup> It also cannot be disputed that these costs of production are "actual" in that these "existed in act or in fact" and were "in existence at the time".

### 4. FAIR COMPARISON FOR SMST'S DUMPING DETERMINATION FOR GRADE C

9. The European Union is claiming that in the circumstances of the present case, without any evidence of impact on price comparability and in the absence of any request to do so, an investigating authority must spontaneously amend the product types used. In particular, the European Union claims that when "an exporter has presented evidence of differences in physical characteristics and prices, an investigating authority" must amend the product types to ensure that the products sold on the domestic market with differences are not used to calculate normal value.<sup>6</sup>

10. In extending findings under Article 3.2 to the fair comparison requirement under Article 2.4, the European Union refers to the Appellate Body's findings in *EC – Fasteners*.<sup>7</sup> Interestingly, these findings confirm the discretion of an investigating authority as to the methodology it follows to ensure fair comparison. Further confirmation can be found in the panel's findings in *EC – Footwear*.<sup>8</sup> In that dispute, the panel dismissed the position that the product types or "basket" definitions should reflect "all the characteristics of the product which may have affected price comparability". China considers that the use of the product types submitted by SMST is an important element in determining MOFCOM's compliance with Article 2.4. China does, however, consider that it is not possible to exclude certain products from the scope of the investigation on the basis of Article 2.4.

11. SMST never demonstrated any impact of the alleged physical differences on price comparability. The European Union seems to argue that an investigating authority should spontaneously analyze all data received and carry out several calculations to identify possible differences in costs of production, even if it has not been directed to this data or the required calculations by the exporter. This would inevitably impose an unreasonable burden on investigating authorities.

<sup>2</sup> Panel Report, *EC – Bed Linen*, para. 6.99.

<sup>3</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53.

<sup>4</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53.

<sup>5</sup> Appellate Body Report, *EC – Hormones*, para. 163.

<sup>6</sup> European Union's second written submission, para. 127.

<sup>7</sup> European Union's second written submission, footnote 148.

<sup>8</sup> Panel Report, *EC – Footwear*, paras. 7.280 – 7.283.

**5. OTHER CLAIMS**

12. With respect to the dumping disclosure, it is not sufficient for the complainants to "point to the fact that they do not disclose the essential facts". A decision by the complainants to remain silent about China's submissions cannot result in a finding of violation, especially as China rebutted these general statements in specific terms. The methodology of MOFCOM's disclosure did permit interested parties to understand how the calculation had been made (see for instance SMST's comments on the Preliminary Dumping Disclosure (Exhibit EU-19 (BCI)), paragraphs 3 to 4).

13. In relation to the injury disclosure and final determination, with respect to those grades and time periods for which no price comparisons were made in the absence of domestic sales or imports, there was no price differential information. As such, the information on import prices could not have led to a contrary outcome in the price undercutting consideration. Regarding confidential information that may have required disclosure, an appropriate non-confidential summary may take the form of "a non-confidential range [of] the percentage difference between the average unit values", which is exactly what MOFCOM did in the present case.<sup>9</sup>

14. Regarding MOFCOM's use of facts available for the "all others rate", compliance should be assessed with respect to the exporters existing at the time, and not with respect to exporters that did not exist at the time when the measures were adopted, and who may or may not have subsequently come into existence. Japan further invokes for the first time, in paragraphs 76 to 81 of its second written submission, a violation of Paragraph 7 of Annex II. China is concerned by this claim, as it is clearly outside the Panel's terms of reference.

15. China recalls that the prospective nature of the WTO dispute settlement system precludes a suggestion such as the one requested by the European Union, since Article 19.1 of the DSU simply requires that a measure is brought into compliance, not that any preceding non-compliance is restored.

16. With respect to a number of claims, the complainants have developed their arguments in different ways and/or have engaged in a more detailed analysis than the other complainant. As a result, for those claims, China considers it appropriate that the findings of each of the Panels are set out separately, taking into account that it is for each complainant separately to make a *prima facie* case.

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<sup>9</sup> China's first written submission, paras. 685 and 692.



**ANNEX D**

ARGUMENTS OF THIRD PARTIES

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**ANNEX D-1****THIRD-PARTY STATEMENT OF THE REPUBLIC OF KOREA**

1. On behalf of the Republic of Korea, I first would like to extend my sincere gratitude to the members of the Panel for providing us a chance to present our view on the issues that we think are important in this case. This anti-dumping case casts some serious questions with respect to the anti-dumping investigations procedure which may affect the defending rights of the exporters and ultimately the final determinations by the authorities. We hope the Panel guides us through this case with wisdom as to how the investigating authorities should conduct their anti-dumping investigations.

2. Among various issues, Korea would like to raise two issues which are (1) When can the investigating authorities determine the dumping margin on the basis of facts available for all other companies and (2) When does the burden of proof with regard to the fair comparison obligation under Article 2.4 of the AD Agreement shift to exporters from the investigating authorities. Korea will discuss the two issues in order.

**When can investigating authorities determine the dumping margin on the basis of facts available under Article 6.8 of the AD Agreement for all other companies**

3. The European Union claimed that the use of facts available is permitted in the calculation of an all others rate, provided that some efforts are made in terms of seeking to identify other firms or specifying the consequences of not providing information. Korea agrees with the European Union on that in order to apply facts available for calculating dumping margin, certain conditions must be met under Article 6.8 and Annex II of the AD Agreement.

4. Furthermore, Korea would like to emphasize that the dumping margin for those firms which were willing to be investigated but were excluded from the sample group according to Article 6.10 of the AD Agreement should be calculated in accordance with Article 9.4 of the AD Agreement.

5. We hope the Panel could shed light on the requirements for the authorities to calculate dumping margin with facts available, and the firms to which such dumping margins could be applied.

**When does the burden of proof or fair comparison obligation under Article 2.4 of the AD Agreement shift to exporters from the investigating authorities**

6. European Union claims that in calculating normal value for model Product C according to Table 1 on page 4 of its First Written Submission, China reflected the value of goods that were different from the goods sold for export to China. China responds that, although it is true that under Article 2.4 of the AD Agreement the obligation to ensure a fair comparison lies on the investigating authorities and not the exporters, exporters also have an important role to play in the process and since the SMST did not raise any issue on prices between Product C and the goods incorrectly compared, the investigating authorities cannot be deemed to have breached Article 2.4 of the AD Agreement.

7. According to the European Union, the compared goods are much thinner than Product C and their usages are different. While Product C is used in a primary boiler system, incorrectly compared goods cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves.

8. We believe that the burden under Article 2.4 of the AD Agreement to ensure a fair comparison does not shift to the exporters just because the exporters did not claim that there is a price difference between the export product and the product under authority's consideration for calculating the normal value. Especially, the last sentence of Article 2.4 of the AD Agreement states that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

9. In this case, all the Parties agree that the SMST has claimed the difference in physical characteristics between the export product and the product considered for calculating the normal value. If such a factual claim was raised at the time of the investigation, through which an investigating authority could have thrown suspicion on the issue of fair comparison, the investigating authority should have evaluated further to determine whether the product it has chosen for the comparison was appropriate, and if it did not, the investigating authority's obligation of fair comparison under Article 2.4 of the AD Agreement could not be deemed to have been released.

10. We hope the Panel to provide us with a criterion that is applicable in determining the moment when the fair comparison obligation of the investigating authorities under Article 2.4 of the AD Agreement shifts to exporters.

**ANNEX D-2****THIRD-PARTY STATEMENT OF THE  
KINGDOM OF SAUDI ARABIA****I. INTRODUCTION**

1. Thank you, Mr. Chairman and Members of the Panel. The Kingdom of Saudi Arabia would like to take this opportunity to provide its views on the proper interpretation of the Anti-Dumping Agreement. In particular, the Kingdom will address: (i) the use of recorded costs in dumping margin calculations; (ii) the "fair comparison" obligation; and (iii) the injury determination's "logical progression".

**II. AN INVESTIGATING AUTHORITY IS OBLIGATED TO ACCEPT AN EXPORTER'S RECORDED COSTS EXCEPT IN LIMITED CIRCUMSTANCES**

2. First, Article 2.2.1.1 of the Anti-Dumping Agreement imposes a "positive obligation"<sup>1</sup> on an investigating authority to use an exporter's recorded costs subject *only* to the two conditions stated in that provision. There is no other basis to reject exporters' costs, and WTO panels have consistently held that an investigating authority is required to use recorded costs if these two conditions are met.<sup>2</sup> This obligation rests solely on the investigating authority and applies to all of Article 2.2.

3. The two conditions are provided in the first sentence of Article 2.2.1.1. The first condition is that the exporter's records are "in accordance with the generally accepted accounting principles of the exporting country".

4. The second condition is that these records "reasonably reflect the costs associated with the production and sale of the product under consideration". The second condition is met where there is a sufficiently close relationship between the recorded cost and the actual cost to the company for the production and sale of the product at issue.<sup>3</sup> The phrase "reasonably reflect" does not permit an investigating authority to substitute its subjective preference as to the recording of an exporter's costs, nor does the phrase permit the authority to question whether the costs recorded are "reasonable". Instead, "the test for determining whether a cost can be used in the calculation of 'cost of production'" is simply "whether it is 'associated with the production and sale' of the like product".<sup>4</sup> Thus, for example, the Panel in *US – Softwood Lumber V* stated that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the *market value* of those [costs]"; to accept this premise "would require [the Panel] to read into the text words which are simply not there".<sup>5</sup>

**III. A "FAIR COMPARISON" REQUIRES COMPARABILITY OF THE EXPORT PRICE AND ITS PARTICULAR NORMAL VALUE**

5. Next, the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement obligates an investigating authority to ensure comparability between an investigated product's export price and normal value. The Kingdom wishes to highlight several aspects of the required "comparison" for the Panel's consideration.

6. First, a proper definition of "like product" is necessary to ensure that a price comparison is "fair". Article 2.1 of the Anti-Dumping Agreement requires that the determination of dumping be a comparison of the export price to the domestic price of a "like product". Article 2.6 defines "like

<sup>1</sup> Panel Report, *US – Softwood Lumber V*, para. 7.237.

<sup>2</sup> See, e.g., Panel Reports, *EC – Salmon (Norway)*, para. 7.483 and *US – Softwood Lumber V*, para. 7.23.

<sup>3</sup> Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, paras. 7.393, 7.423; see also Panel Report, *EC – Salmon (Norway)*, para. 7.483.

<sup>4</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.483.

<sup>5</sup> Panel Report, *US – Softwood Lumber V*, para. 7.321 and fn. 446 (citing Appellate Body Report, *India – Quantitative Restrictions*, para. 94). (emphasis original)

product" as "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The phrases "alike in all respects" and "closely resembling" show that the adjusted values that form the basis for a determination of dumping should depart as little as possible from actual prices in the markets at issue.

7. Second, "normal value" must be specific to the exported product and its unique product and pricing characteristics. In defining dumping of an exported product, Article 2.1 refers to "its" normal value; Article 2.4 refers twice to "the" normal value. The consistent use of the possessive or the definite article in referring to "normal value" is intentional: the Anti-Dumping Agreement requires an investigating authority to determine the normal value, of a particular "like product", that most closely reflects the unique characteristics and pricing structure of the particular exported product.

8. Third, the comparison contemplated by Article 2.4 is a comparison of two values that are defined in relation to each other. This follows from the text of Article 2: a determination of dumping requires "price comparability". Although this term is a unitary concept like "fair comparison", the consistent use of "comparability" or "comparable" in conjunction with "price" is significant.

9. Article 2 repeatedly emphasizes the comparability of two interrelated values. Article 2.1 defines dumping as the situation in which a product's export price is "less than the comparable price" of the like product consumed in the exporter's home market. Article 2.2 permits an investigating authority to depart from the like product's home-market sales prices where "such sales do not permit a proper comparison" and to use a "comparison with a comparable price of the like product" exported to a third country. Footnote 2 refers to the need for a "proper comparison", and Article 2.5, which addresses shipments through an intermediate country, underscores an investigating authority's obligation to base the dumping determination on a "comparable price". Finally, the language of Article 2.4, and the emphasis on the "comparison" throughout, underscores the importance of ensuring that a dumping calculation accounts for all differences that affect price comparability. This exercise, which is required by the text of Article 2.4, does not permit an investigating authority to ignore any similarity or difference that might affect "comparability".

10. The jurisprudence therefore has established that artificially modifying the prices of certain export transactions is not a "fair comparison"<sup>6</sup>. This principle should be equally applicable to normal value because both it and export price affect price comparability, which is the core objective of the dumping calculation. As such, an impermissible price comparison may result, for example, from using values other than the exporter's own prices to establish normal value, from comparing products that are too different to be considered "like", or from adjusting only one value for factors that affect both the normal value and the export price equally.

#### **IV. AN INVESTIGATING AUTHORITY IS REQUIRED TO DETERMINE INJURY BASED ON A "LOGICAL PROGRESSION" OF ANALYSIS**

11. Finally, on the subject of injury, the Kingdom is of the view that an investigating authority's determination under Article 3 of the Anti-Dumping Agreement must establish a logical progression of analysis among its "essential components" in order to constitute the requisite "objective examination" of "positive evidence".

12. Article 3.1 lists the injury determination's three "essential components". The subsequent paragraphs of Article 3 elaborate on these components, their relationship with each other, and how they must fit into the "overall framework of an injury determination".<sup>7</sup> The sequential analysis contemplated by Article 3 and its repeated emphasis on the "same imports" establish that the injury components are "closely interrelated"<sup>8</sup> and work together to produce a "logical" conclusion about whether subject imports caused material injury to the domestic industry. As the Appellate Body has stated, the various provisions of Article 3 "contemplate a logical progression of

<sup>6</sup> See Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

<sup>7</sup> Appellate Body Report, *China – GOES*, paras. 127-128.

<sup>8</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

inquiry leading to an investigating authority's ultimate injury and causation determination".<sup>9</sup> This inquiry entails sequential analyses of subject imports' volume effects and price effects under Article 3.2 and then their impact on the domestic industry under Article 3.4. Finally, under Article 3.5, these elements are "linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated".<sup>10</sup>

13. Although an investigating authority enjoys discretion as to the methodologies employed to determine injury under Article 3, its examination of the impact of subject imports on the domestic industry under Article 3.4 will constitute an "objective examination" only where it logically progresses from the assessment of those imports' volume effects and price effects under Article 3.2. This follows from three requirements of Article 3, which establish an analytical and evidentiary linkage between Articles 3.2 and 3.4.

14. First, the text of Article 3 states that an investigating authority is required to examine the same group of dumped imports under Articles 3.2 and 3.4. The Appellate Body has recognized and confirmed this point.<sup>11</sup>

15. Second, Article 3.4 requires an investigating authority to examine the same dumped imports as were considered under Article 3.2 in order to properly assess whether those imports have "explanatory force ... for the state of the domestic industry".<sup>12</sup> Thus, an investigating authority "must derive an understanding"<sup>13</sup> of the impact of the subject imports – the same imports that have been found under Article 3.2 to have produced volume and price effects – on the domestic industry in that market.

16. Third, the investigating authority's examination of the "explanatory force" of the dumped imports for the state of the domestic industry will constitute an "objective examination" only where it represents a "logical progression" from the examination of those same imports' volume effects and price effects under Article 3.2.<sup>14</sup> The inquiry under Article 3.4 complements and conforms to the analyses carried out under Article 3.2 in order to produce the ultimate conclusion on causation under Article 3.5. This analysis necessarily involves a linkage between the identified volume and price effects and the state of the domestic industry. Indeed, the Panel in *China – Broiler Products* noted that the examination of the situation of the domestic industry under Article 3.4 is "inextricably linked" to the "earlier examination of the price effects of subject imports" under Article 3.2. The Panel therefore ruled that implementation of the Panel's findings with respect to Article 3.2 would require the reexamination of the original determination concerning the impact of subject imports on the domestic industry under Article 3.4.<sup>15</sup>

## V. CONCLUSION

17. Mr. Chairman, this concludes the Kingdom's statement. I thank you for your attention.

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<sup>9</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>10</sup> Ibid.

<sup>11</sup> Appellate Body Report, *China – GOES*, para. 127.

<sup>12</sup> Ibid. para. 149. See also Panel Reports, *China – X-Ray Equipment*, para. 7.254; and *China – Broiler Products*, fn. 822.

<sup>13</sup> Appellate Body Report, *China – GOES*, para. 149.

<sup>14</sup> Appellate Body Report, *China – GOES*, para. 149.

<sup>15</sup> Panel Report, *China – Broiler Products*, para. 7.555.

## ANNEX D-3

## THIRD-PARTY STATEMENT OF TURKEY

## TABLE OF CASES

Short Name	Full Citation
<i>US – DRAMS (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999
<i>Thailand – H Beams (AB)</i>	Appellate Body Report, <i>Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/AB/R, adopted 29 November 2005
<i>Mexico – Pipes and Tubes AD Duties (Panel)</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS184/AB/R, adopted 24 July 2007
<i>EC – Fasteners (Panel)</i>	Panel Report, <i>European Communities-Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners</i> , WT/DS397/R, adopted 29 September 2010
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>Communities-Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners</i> , WT/DS397/R/AB, adopted 28 July 2011
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel From The United States</i> , WT/DS414/R, adopted 16 November 2012
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel From The United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>China – Broiler Products (Panel)</i>	Panel Report, <i>Anti-Dumping and Countervailing Duty Measures on Broiler Products From The United States</i> , WT/DS427/R, adopted 25 September 2013

## I. INTRODUCTION

Mr. Chairman, Distinguished Members of the Panel,

1. The Republic of Turkey (hereinafter referred to as "Turkey") would like to thank the Panel for the opportunity to present her views in this proceeding on the dispute among the People's Republic of China (hereinafter referred to as China), the European Union (hereinafter referred to as the EU) and Japan.

2. Turkey would like submit its third party opinion due its interest on the correct and coherent interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the "ADA").

3. In this statement Turkey will focus on two issues: Whether paragraph 1 of Article 3 of the ADA envisages hierarchy among the paragraphs 2, 4 and 5 in course of an injury and causation analysis; and the legal interpretation of the phrase "*best endeavor*" within the context of the use of "*facts available*" based findings vis-à-vis "*unknown exporters*".

## II. THE QUESTION CONCERNING "LOGICAL PROGRESSION" IN ANALYSIS ON INJURY AND CAUSATION IN DUMPING INVESTIGATIONS

Mr. Chairman,

4. As underlined numerous times in Panel<sup>1</sup> and Appellate Body Reports<sup>2</sup>, Article 3.1 of the ADA acts like a chapeau of the remaining paragraphs of Article 3 putting the investigating authority under the responsibility to undertake its injury/causation examination objectively by relying on positive evidence. The investigating authority has to act in accordance with the overarching principles of Article 3.1 every time it assesses the volume and trend of dumped imports; evaluates the price effect of these imports on the domestic industry and analysis the impact of dumped imports on the state of the domestic industry.

5. Article 3.1 reads as follows;

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

6. The EU and Japan highlight in their written submission that the word "*consequent*" bridges the evaluation on the volume and price effect of the dumped imports with the conclusions on impact of such imports on the economic performance of the domestic producers.<sup>3</sup> It is understood from this statement that the investigating authority is obliged to show initially the absolute or relative increase of volume of dumped imports and the adverse price effect of these imports before moving to establish the negative impact of these imports on the economic indicators of the domestic industry.

7. Turkey acknowledges that this pattern of evaluation is frequently used by investigating authorities in their analysis of injury and causation. Turkey's concern, however, does not relate to whether such an approach is warranted under Article 3 but to the question whether this system, named as "*logical progression*", paves way to a legal obligation that confines the investigating authority to stop its injury and causation analysis in the event that the authority concludes that there is no absolute/relative increase in the volume of dumped imports and/or no price undercutting, depression or suppression caused by dumped imports. Is the authority blocked to proceed to the next stage of the assessment, namely the analysis of the economic state of the domestic industry, if it finds that paragraph 2 of Article 3 is not legally satisfied?

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<sup>1</sup> Panel Report, *Mexico – Pipes and Tubes AD Duties*, para. 7.247; Panel Report, *EC – Fasteners*, para. 7.323.

<sup>2</sup> AB Report, *Thailand – H Beams*, para. 106; AB Report, *EC – Fasteners*, para. 414; AB Report, *China – GOES*, para. 126.

<sup>3</sup> EU's first written submission, para. 218; Japan's first written submission, para. 121.



8. Turkey's position is not affirmative on this issue. As underscored by the Appellate Body<sup>4</sup> the injury analysis should be an exercise of the cross-consideration of the volume of the dumped imports; the price effect of the dumped imports on the prices of the domestic producers and evaluation of the economic state of the domestic industry. In that framework, our legal interpretation does not point out an obligation to follow a hierarchy or sequence among these components of injury analysis.

9. Often, the investigating authorities begin their injury analysis by evaluating the volume and price trend of the product under consideration originating in the country under investigation. Assessment on the price effect of imports and the state of the domestic industry comes at the second phase. Such a pattern, however, should not lead to the conclusion that the investigating authority is legally bound to pass first the stage concerning the volume and price effect of dumped imports to proceed to the coming phases of the injury analysis.

10. As clearly identified in the first sentence of paragraph 5 of Article 3 the essence of causality should be the negative effects of dumped imports on the domestic industry, through the act of dumping, as set forth in paragraphs 2 and 4 of Article 3. The examination should include all relevant evidence before the authorities including those that weaken the causality between dumped imports and injury incurred by the domestic industry. Furthermore the investigating authority is also obliged to focus on known factors other than the influence of dumped imports to identify whether these factors erode the link between dumping and injury.

11. To concentrate on "other factors" the investigating authority has to finish first its evaluation on the "primary factors" which relate to the impact of dumped imports. Without finishing its work on the "main factors" causing injury, how can the authority evaluate "other known factors" as formulated in paragraph 5 of Article 3? Turkey conceives that the legal mechanics of paragraph 5 requires the authority to undertake a full-fledge examination of different parts of the injury analysis without keeping any relevant information out of the scope.

12. Nevertheless, this legal interpretation should not be comprehended as that the authority is obliged to continue the investigation even though it identifies that there is no significant increase in imports; no adverse price affect or no erosion in the economic parameters of the domestic industry. What Turkey underscores is that the authority should complete its examination comprehensively, by including all aspects of the injury analysis, before reaching the conclusion that it terminates the investigation due to the absence of legal requirements as stipulated in paragraph 2 and 4 of Article 3.

13. In light of the principles stipulated in paragraph 1 and 5 of Article 3, Turkey would like to emphasize once more that injury-causality analysis should be undertaken with a comprehensive approach without singling out any significant, verifiable and objective factor that may weaken or strengthen the injury determination and causation analysis between dumped imports and injury.

### **III. THE NOTION OF "BEST ENDEVOUR" CONCERNING THE USE "FACT AVAILABLE" IN "ALL OTHERS" RATE**

14. The question whether the investigating authority has the discretion to use "facts available" based calculations and findings vis-à-vis unknown exporters was one of the heavily addressed issues in panels *China – GOES*<sup>5</sup> and *China-Broiler Products*.<sup>6</sup>

15. Considering the time-limits, Turkey will not reiterate her position on this issue but would like to stress that She is in line with the latest ruling in the WTO case law pointing out that it will be difficult for a member to determine an appropriate anti-dumping margin for certain unknown producers/exporters and apply an anti-dumping measure if "facts available" based calculations cannot be used for "unknown" producers/exporters.<sup>7</sup>

16. Turkey, however, would like to share briefly her position concerning the threshold of "best endeavor" that the investigation authority has to pass to conclude that all effort was shown to identify unknown producer/exporters, importers and other interested parties.

<sup>4</sup> AB Report, *China – GOES*, para. 127.

<sup>5</sup> Panel Report, *China – GOES*, paras. 7.384-7.386.

<sup>6</sup> Panel Report, *China – Broiler Products*, para. 7.305.

<sup>7</sup> Panel Report, *China – Broiler Products*, para. 7.305.

17. Pursuant to paragraph 1 of Article 6 of the ADA all interested parties in an anti-dumping investigation shall be given notice of the information required and ample opportunity to present in writing all evidence which they consider is relevant. Furthermore, as requested in paragraph 1 of Annex II of the ADA the information required from any interested party should be in specific detail and the interested party should be informed on possible consequences if the desired information is not supplied in reasonable time.

18. Even though there are certain clear-cut rules on the content of the communication, neither paragraph 8 of Article 6 nor Annex II of the ADA shed light on the form of the requested information or the medium of communication the investigation authority should use.<sup>8</sup> Such components of the investigation are left to the discretion of the investigating authority which is obliged to act in goodwill and respect due process rules as well as defense rights of the interested parties in context of Article 6 of the ADA.

19. In practice, it is known that the starting point for the investigating authority to identify foreign producer/exporters is the petition itself. In most cases the authority expects the petitioning domestic industry to come up with the identities of the foreign producers/exporters because of the assumption that these domestic producers would possess the most accurate information on the market, their competitors and pricing trends. At this stage the investigating authority will be under the legal obligation to check the adequacy and accuracy of the information in line with paragraph 6 of Article 6 of the ADA. As addressed by the WTO jurisprudence, however, such an obligation is not absolute and the investigating authority has the leeway to satisfy as to the accuracy and adequacy of the information in a number of ways without resorting to some type of formal verification. In that manner, relying on the reputation of the source is considered as one of these ways. In line with WTO case law there is no expectation of the verification of the accuracy of each piece of information which would render the investigation unmanageable<sup>9</sup>. Nevertheless, Turkey understands that the investigating authority has to show the utmost caution on the accuracy and adequacy of the submitted information as expected from an objective and even-handed authority.

20. Except the foreign companies shown in the petition, the question whether the authority has to pin point each and every foreign producer/exporter that exported the subject merchandise in the period of investigation is the essence of the discussion on "best endeavor". In light of the latest rulings in WTO jurisprudence<sup>10</sup> Turkey maintains that even though the authority is under the obligation to check the accuracy of the submitted information and extend its examination if it is not fully satisfied with the submitted information; there is no legal obligation to further its works to such extremes to identify each unknown producer/exporter.

21. As a matter of fact, in investigations where the industry is fragmented on both importer and exporter side the investigating authority should not be held legally responsible for not directly communicating<sup>11</sup> to each and every producer/exporter or not showing the highest enthusiasm to get in touch with these exporters. Furthermore, considering the textual reading of Article 5, 6 and Annex II of the ADA as well as the recent holdings in WTO case law, in such cases, it would be unreasonable to conclude that the authority has no discretion to use facts available based findings vis-à-vis unknown exporters for the reason that it did not display the best endeavor to contact them. As accurately pointed out, the investigating authority will not be in the position to draw a line between two types of "unknown" producers/exporters, namely those who exist and are exporting but refuse to appear and those who are not exporting in period of investigation.<sup>12</sup>

22. To summarize, Turkey would like to stress that the margins of the "best endeavor" to identify unknown producer/exporters, importers and other interested parties should be evaluated within the merits of each case before reaching a conclusion that the investigating authority was well warranted to rely on "fact available" based calculations and findings vis-à-vis these producer/exporters.

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<sup>8</sup> Panel Report, *China – Broiler Products*, para. 7.301; Panel Report, *China – GOES*, para. 7.386.

<sup>9</sup> Panel Report, *US – DRAMS*, para. 6.78.

<sup>10</sup> Appellate Body Report, *Mexico – Rice*, para. 251; Panel Report, *China – Broiler Products*, para. 7.302.

<sup>11</sup> Panel Report, *China – Broiler Products*, para. 7.304.

<sup>12</sup> Panel Report, *China – Broiler Products*, footnote 498.

**IV. CONCLUSION**

23. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of ADA Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

**ANNEX D-4****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS  
OF THE UNITED STATES****I. PROCEDURAL AND TRANSPARENCY REQUIREMENTS OF GATT ARTICLE 6****a. Designation of Confidential Information and Requirement for Public Summaries under Articles 6.5 and 6.5.1 of the AD Agreement**

1. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that the parties to an investigation must be given a full and fair opportunity to see relevant information and to defend their interests. At the same time, investigative authorities may need to protect confidential information. Indeed, in AD investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities, upon good cause shown, to ensure the confidential treatment of such information. Article 6.5.1 balances the need to protect such information against the disclosure requirements of other Article 6 provisions. It provides that an investigating authority, if it accepts confidential information, must provide or otherwise assure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries of that information, significant prejudice to the ability of companies and Members to defend their interests could occur.

**b. Acceptance of Certain Information Presented during Verification**

2. The main purpose of "on-the-spot investigation" conducted pursuant to AD Article 6.7 is to verify the information already submitted or obtain further detail. On-the-spot investigations are not opportunities for interested parties to submit a significant amount of new information.

3. The United States notes that Paragraph 7 of Annex I provides that a firm is entitled to prepare for the on-the-spot investigation and contemplates that an investigating authority may request that a firm provide additional information, including potentially minor corrections or clarifications to information already submitted.

4. With respect to what must be accepted by the investigating authority, Article 6.8 and Annex II provide that an investigating authority may make determinations on the basis of facts available when information is not submitted in a reasonable time. The investigating authority is not required to use information in circumstances including when the information is submitted in an untimely fashion and when its acceptance would cause difficulties in the conduct of the investigation. Accordingly, whether any information proffered at verification should be accepted will be a fact-specific inquiry.

**c. Alleged Inadequate Disclosure and Failure to Inform Parties of the Essential Facts under Consideration in Violation of AD Articles 6.4 and 6.9**

5. The United States recalls that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States agrees with the EU that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. The United States agrees that there is no "disclosure" of confidential information within the meaning of Article 6.5 if the investigating authority is providing the confidential information only to the party that submitted it. To the extent that there may be aspects of the calculation that may not be able to be disclosed because they contain another interested party's confidential information, the second clause of Article 6.4 explicitly excludes from the disclosure requirements such information treated as confidential under Article 6.5.

6. With respect to Article 6.9, the United States notes that the calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating

authority's imposition of final measures. Without such information, no affirmative determination could be made and no definitive duties could be imposed. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

7. Furthermore, with respect to the determination of the existence and margin of dumping, the investigating authority must disclose the data used in: (1) the determination of normal value (including constructed value); (2) the determination of export price; (3) the sales that were used in the comparison between normal value and export prices; (4) any adjustments for differences which affect price comparability; and (5) the formulas that were applied to the data. All of these would be "essential" facts within the meaning of Article 6.9.

8. Contrary to China's arguments, the fact that a party has provided information to the investigating authority does not mean that the exporter knows with certainty which of that information will be used and in what capacity. Moreover, China's claim that all that is required is a summary of the essential facts is a misreading of Article 6.9, which require that an investigating authority provide the essential facts underlying its determination and not merely a stated conclusion based on these facts.

9. For injury determination, the United States notes that Article 6.9 considers information on the price levels for domestically produced products and comparison between the prices for this product and the imports under consideration to be essential facts for price effect findings.

**d. Use of Facts Available to Determine the Dumping Margins with respect to All Other Companies in Alleged Breach of Article 6.8 and Paragraph 1 of Annex II**

10. The United States recalls that Article 6.8 establishes that an investigating authority may only resort to facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. An investigating authority may not assign a margin based on facts available when the authority has not requested the information in the first place. Thus, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. In other words, exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.

11. Article 6.8 should be read together with paragraph 1 of Annex II, which requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use facts available. These provisions together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.

**II. ALLEGED FAILURE TO SET FORTH OR OTHERWISE MAKE AVAILABLE IN SUFFICIENT DETAIL CERTAIN FINDINGS AND CONCLUSIONS WITH RESPECT TO THE ALL OTHERS RATE AND THE INJURY DETERMINATION IN VIOLATION OF AD ARTICLES 12.2 AND 12.2.2**

12. With respect to the dumping determination, Article 12.2 provides that, in a preliminary or final determination, the investigating authority must provide notice or a separate report setting out "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Article 12.2.2 further provides that for a final determination, an investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".

13. The factual and legal bases for the investigative authority to resort to facts available with respect to all other exporters that it did not examine constitute material issues of fact and law considered. These issues go to the very heart of the determination of what margin to apply to unexamined exporters. Consequently, Article 12.2 requires that the investigative authority provide in sufficient detail the findings and conclusions that lead to application of facts available. Similarly, Article 12.2.2 requires, among other things, the that the investigative authority provide "all

relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculations of the "all others" rate.

14. With respect to the injury determination, the United States notes that, pursuant to Article 12.2.2, any facts related to the price comparisons of the subject imports and domestic products are relevant information on the matters of fact that an investigating authority should disclose in its final determination.

### **III. ALLEGED BREACH OF ARTICLE 2 OF THE AD AGREEMENT IN THE CALCULATION OF DUMPING MARGINS**

#### **a. Determinations of SG&A Costs Should be Based, Whenever Possible, on Sales Made in the Ordinary Course of Trade Pursuant to AD Article 2.2.2**

15. Article 2.2.2 provides that an investigating authority should, where possible, base SG&A and profit on sale of the like product made in the ordinary course of trade. If, and only if, such sales in the ordinary course of trade are unavailable, Article 2.2.2 then provides alternative methodologies for determining SG&A and profit.

16. The EU argues that MOFCOM breached Article 2.2.2 because it based SG&A on certain sample sales and these sales were outside the ordinary course of trade. However, there are many reasons to find a normal value sales transaction not in the ordinary course of trade. The AD Agreement does not require an investigating authority to treat all sample sales as outside the ordinary course of trade. Instead, the investigating authority must evaluate the record evidence to determine whether it supports finding that the sample sale was concluded on terms and conditions that are incompatible with normal commercial practice for sales of the like product, in the market in question, at the relevant time.

#### **b. Investigating Authorities Shall Normally Calculate Cost on the Basis of Records Kept by the Exporters When the Costs are in Accordance with Generally Accepted Accounting Principles (GAAP) and Reasonably Reflect Cost Pursuant to AD Article 2.2.1.1**

17. The United States considers Article 2.2.1.1 to require an investigating authority to normally calculate costs on the basis of records kept by an exporter or producer's books and provided that the books and records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. If the evidence in this dispute establishes that the records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration, MOFCOM would have been obligated to use those records pursuant to Article 2.2.1.1 or obligated to provide a reason supported by the record evidence to depart from the "normal" methodology provided for in Article 2.2.1.1.

#### **c. An Investigating Authority Should Conduct Model Matching to Ensure a Fair Comparison Pursuant to AD Article 2.4**

18. Article 2.4 sets forth the overarching obligation of an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. A fair comparison requires the investigating authority to strive to compare similar products as well as transactions. In finding the correct set of products to compare, the investigating authority must conduct an exercise such as a model matching exercise. When subject merchandise consists of two or more significantly diverse product models, investigating authorities will match foreign-like products and home-market products using model match criteria to assure accurate price comparisons within but not across relevant product categories. Because model matching ensures that only sales of products with similar physical characteristics are compared to each other or necessary adjustments for the differences are made, some sort of model matching exercise is an essential component of establishing a fair comparison.

19. Generally, the investigating authority has the obligation to seek information regarding differences in physical characteristics that may affect price comparability in order to make a fair comparison. The investigating authority can fulfill this obligation by asking parties to: 1) identify and explain the differences in physical characteristics and 2) identify which of those differences in

physical characteristics may affect price comparability. If an investigating authority sought such information, but an exporter or producer merely identified differences in physical characteristics between the products at issue without claiming that those differences affected price, then the investigating authority need not independently undertake an analysis of the differences in physical characteristics to determine whether they affected price comparability.

#### **IV. INJURY DETERMINATION**

##### **a. Evaluation of the Margin of Dumping**

20. The United States notes that Articles 3.1 and 3.4 do not require an authority to evaluate the *significance* of dumping margins. Neither article requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way.

##### **b. Import Volumes and Causation Determinations**

21. With regard to Article 3.2, the United States disagrees with EU and Japan to the extent they assert that an authority may not attach significance to the fact that imports "retain" a significant share of the market over the period. Although Article 3.2 does specify that an authority "shall consider whether there has been a significant increase in dumped imports", either on an absolute or relative basis, it does not expressly or implicitly prevent an authority from considering in its analysis the fact that imports have a significant market share level. In a situation in which significant volumes of subject imports are having a significant adverse impact on domestic prices, the existence of significant import volumes or market share is obviously one item of "relevant evidence" that an authority may want to consider in its Article 3.5 analysis.

##### **c. Application of Provisional Measures for a Period Exceeding Four Months**

22. The text of Article 7.4 provides that without request from a sufficient percentage of exporters or the imposition of a lesser duty, an investigating authority may not impose provisional measures for a period exceeding four months. To the extent that MOFCOM applied provisional measures for six months without a request by exporters representing a significant percentage of the trade involved and without MOFCOM examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the United States agrees that China breached Article 7.4.

##### **d. The EU's Proposed Amendments to the BCI Procedures and the Request that the Panel Seek Confidential Information Pursuant to DSU Article 13.1**

23. Article 6.5 expressly provides that, once an investigating authority accepts information as confidential, the investigating authority must not disclose such information without the specific permission of the party submitting it. No provision of the AD Agreement or the DSU creates an exception that would permit information that the investigating authority accepted as confidential in the underlying investigation be disclosed within the context of a WTO proceeding without the specific permission of the party submitting that information to the investigating authority.

24. Protecting confidential information, including by securing the specific permission of the party submitting the information, is crucial to the proper functioning of trade remedy proceedings. If the protections in Article 6.5 were treated as non-applicable in the context of a dispute, parties could be deterred from disclosing confidential information to investigating authorities, potentially impeding or frustrating the proceeding. It is also important to recognize that confidential information often raises significant domestic sensitivities. For example, in order to ensure confidential information stays properly protected, consistent with WTO obligations, Members may have domestic legal provisions that impose penalties, including criminal penalties, on government officials that disclose such information without authorization. The Panel should not request that a party supply BCI information from the underlying proceeding absent the specific permission of the party that submitted it.

**V. THE PANEL'S TERMS OF REFERENCE**

**a. Sufficiency of a Panel Request Assessed in Light of the Disclosure Afforded to the Interested Member and the Discussion during the Administrative Proceedings**

25. The level of disclosure provided in the underlying proceeding can affect the sufficiency of a complaining Member's panel request. Compliance with DSU Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances". Such circumstances would include the level of disclosure provided in the underlying proceeding.

26. In contrast, the United States disagrees that the sufficiency of a panel request must be assessed in the light of the discussion between the investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue. The argumentation at the administrative proceeding level is not relevant in evaluating the sufficiency of a panel request. Using the issues raised before the investigating authorities during the administrative proceedings would be contrary to DSU Article 6.2, which requires a Member to present the problem clearly to the responding party and other Members (including those deciding whether to become third parties). It is not enough that a Member is aware of the possible universe of issues which may be raised as claims before a panel; the specific issue must be made clear in the panel request. A responding party and other Members are entitled to a clear presentation of the problem. They are not required to guess.

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