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

AB-2015-4

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

AB-2015-5

*Reports of the Appellate Body*

*Addendum*

This *Addendum* contains Annexes A to C to the Reports of the Appellate Body circulated as document WT/DS454/AB/R; WT/DS460/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of these appeals.

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**LIST OF ANNEXES****ANNEX A**

## NOTICES OF APPEAL AND OTHER APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Japan's Notice of Appeal (DS454)	A-2
Annex A-2	China's Notice of Appeal (DS460)	A-4
Annex A-3	China's Notice of Other Appeal (DS454)	A-7
Annex A-4	European Union's Notice of Other Appeal (DS460)	A-9

**ANNEX B**

## ARGUMENTS OF THE PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Japan's appellant's submission (DS454)	B-2
Annex B-2	Executive summary of China's appellant's submission (DS460)	B-6
Annex B-3	Executive summary of China's other appellant's submission (DS454)	B-12
Annex B-4	Executive summary of the European Union's other appellant's submission (DS460)	B-16
Annex B-5	Executive summary of China's appellee's submission (DS454, DS460)	B-20
Annex B-6	Executive summary of Japan's appellee's submission (DS454)	B-26
Annex B-7	Executive summary of the European Union's appellee's submission (DS460)	B-29

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the United States' third participant's submission (DS454, DS460)	C-2

**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Japan's Notice of Appeal (DS454)	A-2
Annex A-2	China's Notice of Appeal (DS460)	A-4
Annex A-3	China's Notice of Other Appeal (DS454)	A-7
Annex A-4	European Union's Notice of Other Appeal (DS460)	A-9

**ANNEX A-1****JAPAN'S NOTICE OF APPEAL\***  
(DS454)

Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review ("Working Procedures"), Japan hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (WT/DS454/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

For the reasons to be elaborated in its submissions and oral statements to the Appellate Body, Japan appeals the following errors in the issues of law in the Panel Report and legal interpretations developed by the Panel, and requests the Appellate Body to reverse and modify the related findings, conclusions and recommendations of the Panel, and where indicated to complete the analysis.<sup>1</sup>

1. With respect to Japan's claims that the price effects analysis conducted by the Ministry of Commerce of the People's Republic of China ("MOFCOM") is inconsistent with Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"):

- a. The Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in concluding that an investigating authority may complete its analysis of the "effect of the dumped imports on prices" under Article 3.2 by simply finding price undercutting to exist solely based on the consideration of whether subject import prices are mathematically lower than prices of domestic like products, without consideration of whether, by selling at lower prices, subject imports have the effect of giving rise to an actual decrease or prevention of increase in prices in the domestic market for like products, or alternatively taking the place of domestic like products.<sup>2</sup> Japan requests the Appellate Body to reverse and modify the Panel's legal interpretation in this regard, and complete the analysis to find instead that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by concluding an analysis of the "effect of the dumped imports on prices" with a finding of price undercutting for Grade C solely based on a mathematical comparison of imported and domestic Grade C prices.<sup>3</sup>
- b. The Panel erred in interpreting Articles 3.1 and 3.2 of the Anti-Dumping Agreement to mean that it is sufficient under Article 3.2 for an investigating authority to find mathematically lower prices of subject imports at a single point in time during the period of investigation ("POI").<sup>4</sup> Japan requests the Appellate Body to reverse and modify the Panel's legal interpretation in this regard.

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\* This document, dated 20 May 2015, was circulated to Members as document WT/DS454/7.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Japan to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, paras. 7.124-7.130, 7.138, 7.152, 7.155.

<sup>3</sup> This dispute concerns three grades of HP-SSST products: (i) TP347HFG (Grade A); (ii) S30432 (Grade B); and (iii) TP310HNBn (Grade C).

<sup>4</sup> Panel Report, paras. 7.125, 7.139-7.142.

2. With respect to Japan's claims that MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement:

- a. The Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in concluding that an investigating authority may find the required "consequent impact" by finding simply that "the state of the domestic industry shows injury, and the subject imports are sold at prices that undercut certain like products produced and sold by that industry", without any further consideration of the relationship between subject imports and the state of the domestic industry, or the explanatory force of subject imports on the state of the domestic industry, and the logical connection between the volume and price effects found to exist under the Article 3.2 analysis and the state of the domestic industry.<sup>5</sup> Japan requests the Appellate Body to reverse and modify the Panel's legal interpretation in this regard, and complete the analysis to find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the relationship between subject imports and the state of the domestic industry, and by conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses.
- b. The Panel erred in finding that Japan's claim that MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry was outside the Panel's terms of reference.<sup>6</sup> Japan requests that the Appellate Body reverse the Panel's finding in this regard, and complete the analysis to find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine whether subject imports provided explanatory force for the state of the domestic industry.

3. With respect to Japan's claims that MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement:

- c. The Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU by erroneously concluding that Japan has not advanced independent claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement in those instances where the Panel had rejected (or not evaluated) one of Japan's claims under Articles 3.1 and 3.2 concerning MOFCOM's price effects analysis or under Articles 3.1 and 3.4 concerning MOFCOM's impact analysis, as well as by failing to examine and by abstaining from making findings on those independent claims.<sup>7</sup> Japan requests that the Appellate Body complete the analysis to find that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in those instances where Japan's claims under Articles 3.1 and 3.2 concerning MOFCOM's price effects analysis or under Articles 3.1 and 3.4 concerning MOFCOM's impact analysis have been rejected by the Panel or the Appellate Body.

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<sup>5</sup> Panel Report, paras. 7.152-7.155.

<sup>6</sup> Panel Report, para. 6.31 and note 274.

<sup>7</sup> Panel Report, paras. 6.43, 7.192.

**ANNEX A-2****CHINA'S NOTICE OF APPEAL\*  
(DS460)**

1. Pursuant to Articles 16.4 and 17 of the DSU and Rule 20 of the Working Procedures, China hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretations developed in the Report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union* (WT/DS460/R) (Panel Report).
2. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, China is simultaneously filing this Notice of Appeal and its Appellant Submission with the Appellate Body Secretariat.
3. The measure at issue in this dispute concerns anti-dumping duties imposed on imports of High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union. The Ministry of Commerce of China (MOFCOM) issued a final determination finding the existence of dumping that caused injury to the domestic industry by means of MOFCOM Notice No. 72 [2012].
4. Pursuant to Rule 20(2)(d)(iii), the present Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to the ability of China to refer to other paragraphs of the Panel Report in the context of its appeal.
5. China seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the following findings and conclusions of the Panel, with respect to the following errors of law and legal interpretation contained in the Panel Report:
  - a. the Panel's findings and conclusions concerning the consistency of MOFCOM's determination of the amount for selling, general and administrative expenses with China's obligations under the Anti-Dumping Agreement, including Article 2.2.2 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.49, 7.51, 7.64-7.66 and 8.6(a), because of the following errors of law and legal interpretation:
    - i. the Panel acted contrary to Articles 6.2, 7.1 and 11 of the DSU when finding that the European Union's request for the establishment of a panel complied with the requirements of Article 6.2 of the DSU in respect of the European Union's claim that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an amount for selling, general and administrative expenses on the basis of data pertaining to production and sales in the ordinary course of trade of the like product. The Panel erred in concluding that this claim was within its terms of reference and by reaching any findings and conclusions on this claim that was outside its terms of reference. The Panel similarly erred when finding that the Article 2.2.1 arguments in the European Union's submissions relate to a claim that was within its terms of reference;
    - ii. the Panel erred in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement and violated Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement when reaching those findings and conclusions, including when finding that "China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product";

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\* This document, dated 20 May 2015, was circulated to Members as document WT/DS460/7.

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- b. the Panel's findings and conclusions concerning the consistency of MOFCOM's conduct with Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.98-7.101 and para. 8.6(c), including that "China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification", because the Panel erred in its interpretation and application of Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement when reaching those findings and conclusions;
- c. the Panel's findings and conclusions concerning the consistency of MOFCOM's reliance on the market share in the causation analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 6.106, 7.181-7.188, 7.205 and 8.6(d)(iii), including that "MOFCOM improperly relied on the market share of subject imports [...] in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because of the following errors of law and legal interpretation:
- i. in reaching those findings and conclusions the Panel erred in considering that the European Union in its submissions "referred to the relevance of market share data in the context of price effects" and ruled on a matter that was not before it, contrary to Article 11 of the DSU, or in the alternative, made the case for the complainant and acted in violation of the principles governing the burden of proof, the due process requirements, Paragraph 7 of the Joint Working Procedures and Article 11 of the DSU;
  - ii. the Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU when reaching those findings and conclusions, including when finding that MOFCOM's reliance on the market shares is not sufficient to establish that subject imports, through price undercutting, had a relatively big impact on the price of the domestic industry, and a consequent finding of causation consistent with Article 3.5 of the Anti-Dumping Agreement;
- d. the Panel's findings and conclusions concerning the consistency of MOFCOM's non-attribution analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.200-7.205 and 8.6(d)(iv), including that "MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because these are entirely based on the Panel's findings and conclusions contained in paras. 6.106, 7.181-7.188, 7.205 and 8.6(d)(iii) (including the Panel's erroneous rejection of China's reliance on MOFCOM's price correlation finding) that have to be reversed for the reasons set out in subparagraph (c) above;
- e. the Panel's findings and conclusions concerning the consistency of MOFCOM's treatment of confidential information with Article 6.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.290, 7.297-7.303 and 8.6(e), including that "MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement", because of the following errors of law and legal interpretation:
- i. the Panel erred in the interpretation and application of Article 6.5 of the Anti-Dumping Agreement when reaching those findings and conclusions;
  - ii. the Panel applied an erroneous standard of review and failed to make an objective assessment of the facts before it and acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement when reaching those findings and conclusions;

- iii. the internally inconsistent reasoning as regards the consistency of the measure at issue with Article 6.5 and Article 6.5.1 cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU and the Panel disregarded Paragraph 7 of the Joint Working Procedures when reaching those findings and conclusions.

**ANNEX A-3****CHINA'S NOTICE OF OTHER APPEAL \*  
(DS454)**

1. Pursuant to Articles 16.4 and 17 of the DSU and Rule 23 of the Working Procedures, China hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretations developed in the Report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (WT/DS454/R) (Panel Report).
2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, China is simultaneously filing this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat.
3. The measure at issue in this dispute concerns anti-dumping duties imposed on imports of High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the Japan. The Ministry of Commerce of China (MOFCOM) issued a final determination finding the existence of dumping that caused injury to the domestic industry by means of MOFCOM Notice No. 72 [2012].
4. Pursuant to Rule 23(2)(c)(ii)(C), the present Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to the ability of China to refer to other paragraphs of the Panel Report in the context of its appeal.
5. China seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the following findings and conclusions of the Panel, with respect to the following errors of law and legal interpretation contained in the Panel Report:
  - a. the Panel's findings and conclusions concerning the consistency of MOFCOM's reliance on the market share in the causation analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 6.106, 7.181-7.188, 7.205 and 8.1(a)(iii), including that "MOFCOM improperly relied on the market share of subject imports [...] in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because of the following errors of law and legal interpretation:
    - i. in reaching those findings and conclusions, the Panel acted contrary to Articles 6.2 and 7.1 of the DSU since it reached findings and ruled on a claim that was not within its terms of reference;
    - ii. even if assuming that the claim was within the Panel's terms of reference, in reaching those findings and conclusions the Panel erred in considering that Japan in its submissions "referred to the relevance of market share data in the context of price effects" and ruled on a matter that was not before it, contrary to Article 11 of the DSU, or in the alternative, made the case for the complainant and acted in violation of the principles governing the burden of proof, the due process requirements, Paragraph 7 of the Joint Working Procedures and Article 11 of the DSU;
    - iii. the Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU when reaching those findings and conclusions, including when finding that MOFCOM's reliance on the market shares is not sufficient to establish that subject imports, through price undercutting, had a relatively big impact on the price of the domestic industry, and a consequent finding of causation consistent with Article 3.5 of the Anti-Dumping Agreement;

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\* This document, dated 26 May 2015, was circulated to Members as document WT/DS454/8.

- b. the Panel's findings and conclusions concerning the consistency of MOFCOM's non-attribution analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.200-7.205 and 8.1(a)(iv), including that "MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because these are entirely based on the Panel's findings and conclusions contained in paras. 6.106, 7.181-7.188, 7.205 and 8.1(a)(iii) (including the Panel's erroneous rejection of China's reliance on MOFCOM's price correlation finding) that have to be reversed for the reasons set out in subparagraph (c) above;
- c. the Panel's findings and conclusions concerning the consistency of MOFCOM's treatment of confidential information with Article 6.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.290, 7.297-7.303 and 8.1(b), including that "MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement", because of the following errors of law and legal interpretation:
  - i. the Panel erred in the interpretation and application of Article 6.5 of the Anti-Dumping Agreement when reaching those findings and conclusions;
  - ii. the Panel applied an erroneous standard of review and failed to make an objective assessment of the facts before it and acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement when reaching those findings and conclusions;
  - iii. the internally inconsistent reasoning as regards the consistency of the measure at issue with Article 6.5 and Article 6.5.1 cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU and the Panel disregarded Paragraph 7 of the Joint Working Procedures when reaching those findings and conclusions.

**ANNEX A-4****EUROPEAN UNION'S NOTICE OF OTHER APPEAL\*  
(DS460)**

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union (WT/DS460)* (AB-2015-5). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report, and where indicated to complete the analysis<sup>1</sup>:

**I. ADDITIONAL WORKING PROCEDURES ON BCI**

1. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions concerning the designation of Business Confidential Information (BCI).<sup>2</sup> The Panel erred in its interpretation and application of Articles 18.2 and 13.1 of the *DSU* and Articles 17.7 and 6.5 of the *Anti-Dumping Agreement*. The Panel erroneously found that information designated as confidential within the meaning of Article 6.5 of the *Anti-Dumping Agreement* is automatically confidential within the meaning of Article 17.7 of the *Anti-Dumping Agreement* and Article 18.2 of the *DSU* and may be automatically designated as BCI within the meaning of BCI Procedures. The European Union requests the Appellate Body to complete the analysis.

2. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions concerning the provision of an authorizing letter.<sup>3</sup> The Panel erred in its interpretation and application of Articles 18.2 and 13.1 of the *DSU* and Articles 17.7 and 6.5 of the *Anti-Dumping Agreement*. The Panel erroneously found that information designated as confidential within the meaning of Article 6.5 of the *Anti-Dumping Agreement* is automatically confidential within the meaning of Article 17.7 of the *Anti-Dumping Agreement* and Article 18.2 of the *DSU*, and that it may only be disclosed within the meaning of Article 17.7 of the *Anti-Dumping Agreement* on the basis of a formal authorization from the person, body or authority providing such information to the investigating authority in the municipal anti-dumping proceeding. The European Union requests the Appellate Body to complete the analysis.

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\* This document, dated 26 May 2015, was circulated to Members as document WT/DS460/8.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, paras. 7.18-7.25, particularly paras. 7.21 ("... the phrase "confidential information" in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7.") and 7.25 ("... we have decided not to modify paragraph 1 of the BCI Procedures in the manner proposed by the European Union.").

<sup>3</sup> Panel Report, paras. 7.26-7.29, and para. 7.21, particularly the finding that ("... the phrase "confidential information" in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7.") and the interpretation of the phrase "person, body or authority".

## II. ARTICLE 6.2 OF THE DSU

3. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions that, with respect to the European Union's claim under Article 2.2, the panel request did not comply with Article 6.2 of the DSU, because it allegedly did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>4</sup> The Panel erred in its interpretation and application of Article 6.2 of the DSU. The European Union requests the Appellate Body to complete the analysis. However, if the Appellate Body upholds the Panel's findings concerning the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement<sup>5</sup>, or completes the analysis by confirming that claim, then it need not consider this appeal point.

4. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions that, with respect to the European Union's claim under Article 2.2.1.1, the panel request did not comply with Article 6.2 of the DSU, because it allegedly did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>6</sup> The Panel erred in its interpretation and application of Article 6.2 of the DSU. The European Union requests the Appellate Body to complete the analysis. However, if the Appellate Body upholds the Panel's findings concerning the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement<sup>7</sup>, or completes the analysis by confirming that claim, then it need not consider this appeal point.

## III. DUMPING

5. If the Appellate Body reverses the Panel's legal findings and conclusions to the effect that China acted inconsistently with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement<sup>8</sup>, and does not complete the analysis by finding that China acted inconsistently with these provisions, then the European Union appeals the Panel's legal findings and conclusions with respect to Article 6.8 and Annex II, paragraphs 3 and 6.<sup>9</sup> The European Union requests the Appellate Body to reverse and/or modify these legal findings and conclusions. The Panel erred in its interpretation and application of Article 6.8 and Annex II, paragraphs 3 and 6. Investigating authorities are not permitted to disregard rectified data only because it is provided at verification, wholly failing in this respect to exercise their discretion, and base their determinations instead on facts available. The European Union requests the Appellate Body to complete the analysis.

## IV. INJURY

6. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, specifically with respect to the obligation to consider the effect of the price of the dumped imports on the price of the domestic product being compared – and particularly with respect to the question of whether the price of Grade C imports had any significant price undercutting effect on domestic Grade C products.<sup>10</sup> The European Union submits that these legal findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse and/or modify them, and complete the analysis.

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<sup>4</sup> Panel Report, para. 8.9, first sentence. The Panel Report contains a typographical error insofar as para. 8.9 refers to Article 2.2.1 (found within the terms of reference in para. 7.49 of the Panel Report), when it should refer to Article 2.2 (found outside the terms of reference in para. 7.48 of the Panel Report). The European Union also appeals para. 7.48 of the Panel Report, particularly the final sentence. The European Union does not appeal para. 7.47 of the Panel Report.

<sup>5</sup> China's Notice of Appeal, paras. 5(a)(i) and (ii).

<sup>6</sup> Panel Report, para. 8.9, second sentence, insofar as it contains the phrase: "did not reasonably reflect the costs associated with the product under consideration". The European Union also appeals the eighth sentence of para. 7.50 of the Panel Report ("We also note that China accepts ..."), insofar as it does not include the phrase "reasonably reflect the costs associated with the production and sale of the product under consideration", and the final sentence of para. 7.50, insofar as the term "such obligations" does not include that phrase.

<sup>7</sup> China's Notice of Appeal, paras. 5(a)(i) and (ii).

<sup>8</sup> Panel Report, para. 8.6(c) and paras. 7.98-7.101; China's Notice of Appeal, para. 5(b).

<sup>9</sup> Panel Report, para. 8.7(a) and para. 7.102, particularly the final sentence.

<sup>10</sup> Panel Report, para. 8.7(b)(i), first phrase, para. 7.130, and paras. 7.121-7.129.

7. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, specifically with respect to the question of whether MOFCOM's findings of price undercutting in respect of Grades B and C were sufficient to comply with MOFCOM's obligation to consider whether or not the price of the dumped imports had a significant effect on the price of the domestic product.<sup>11</sup> The European Union submits that these legal findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse and/or modify them, and complete the analysis.

8. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Articles 3.1 and Article 3.4 of the Anti-Dumping Agreement, specifically with respect to the assessment of the impact of the dumped imports on the domestic industry.<sup>12</sup> In effect, the Panel erroneously concluded that MOFCOM's failure to comply with the requirements of Article 3.2, as properly understood, and Article 3.5, had no implications for the consistency of the measure at issue with Article 3.4, and that, in this respect, there were no independent claims under Article 3.5. The European Union submits that these findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse and/or modify them, and complete the analysis.

9. The European Union appeals – pursuant to Article 11 of the DSU – certain of the Panel's legal findings and conclusions concerning Articles 3.1 and Article 3.5 of the Anti-Dumping Agreement, specifically with respect to the assessment of causation.<sup>13</sup> The European Union submits that, in this respect, the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. It wrongly concluded that the European Union had not made relevant independent claims under Article 3.5, and it failed to assess those claims and arguments. The European Union requests that the Appellate Body reverse and/or modify these legal findings and conclusions, and complete the analysis.

## V. PROCEDURAL ISSUES

10. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Article 6.9 of the Anti-Dumping Agreement, specifically with respect to the obligation to adequately disclose essential facts – and particularly with respect to the data underlying MOFCOM's determination of dumping with respect to SMST and Tubacex.<sup>14</sup> The European Union submits that these legal findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse or modify them, and complete the analysis.

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<sup>11</sup> Panel Report, para. 8.7(b)(i), second phrase, para. 7.143, and paras. 7.136-7.142.

<sup>12</sup> Panel Report, para. 8.7(b)(ii), first phrase, paras. 7.152-7.155 and para. 7.170, penultimate sentence.

<sup>13</sup> Panel Report, para. 7.192, particularly the final sentence.

<sup>14</sup> Panel Report, para. 8.7(d)(i) and paras. 7.234-7.236, particularly para. 7.236.



**ANNEX B**

## ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Japan's appellant's submission (DS454)	B-2
Annex B-2	Executive summary of China's appellant's submission (DS460)	B-6
Annex B-3	Executive summary of China's other appellant's submission (DS454)	B-12
Annex B-4	Executive summary of the European Union's other appellant's submission (DS460)	B-16
Annex B-5	Executive summary of China's appellee's submission (DS454, DS460)	B-20
Annex B-6	Executive summary of Japan's appellee's submission (DS454)	B-26
Annex B-7	Executive summary of the European Union's appellee's submission (DS460)	B-29

**ANNEX B-1****EXECUTIVE SUMMARY OF JAPAN'S APPELLANT'S SUBMISSION  
(DS454)****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 high-performance stainless steel seamless tubes ("HP-SSST") from Japan. Japan appeals because the Panel erred in its legal interpretation of Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, and failed to make an objective assessment of the matter before it consistent with Article 11 of the DSU.

**II. JAPAN'S CLAIMS THAT MOFCOM'S PRICE EFFECTS ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT**

A. The Panel erred in concluding that an investigating authority may find a price effect under Articles 3.1 and 3.2 by finding price undercutting based solely on a mathematical comparison of import and domestic prices

2. Articles 3.1 and 3.2 indicate that an investigating authority must examine the existence of an "effect" of subject imports on domestic prices (i.e., a price effect). In this respect, the second sentence of Article 3.2 requires an investigating authority to "consider" whether there has been significant price undercutting, significant price depression, or significant price suppression. However, a finding of "price undercutting" does not end the price "effect" inquiry, or "necessarily give decisive guidance" as confirmed by the final sentence of Article 3.2. Moreover, the mere fact of subject import prices mathematically lower than comparable domestic prices does not, in and of itself, provide a "meaningful basis" for conducting a further causation analysis under Article 3.5.<sup>1</sup>

3. Japan requests that the Appellate Body reverse and modify the Panel's interpretation to make clear that Articles 3.1 and 3.2 require an investigating authority to objectively examine the "effect" of the dumped imports on the prices of the domestic like products (i.e., an actual decrease or prevention of increase in domestic prices), and not merely find mathematically lower prices of subject imports.

4. Here, MOFCOM based its price effect finding for Grade C solely on finding Grade C import prices to be about 50% below Grade C domestic prices in 2010. MOFCOM provided no analysis as to how such finding may have resulted in an actual "effect" on domestic Grade C prices. MOFCOM ignored the fact that domestic prices rose by 112.80% between 2009 and 2010 to give rise to a situation where import prices were lower than domestic prices, which may better be described as domestic overpricing. Thus, Japan requests that the Appellate Body complete the analysis and conclude that MOFCOM's price effect analysis in respect of Grade C was inconsistent with Articles 3.1 and 3.2.

B. The Panel erred in concluding that it is sufficient under Articles 3.1 and 3.2 for an investigating authority to find mathematically lower prices of subject imports at a single point in time during the POI

5. The Panel's interpretation of Articles 3.1 and 3.2 is further problematic because it suggests that it is sufficient for an investigating authority to find mathematically lower prices of subject imports ("price undercutting" as the Panel understands it) at a single point in time during the POI, and thereafter proceed with the remainder of its injury analysis.<sup>2</sup> However, such an interpretation risks rendering the price effect analysis inutile. Japan requests that the Appellate Body reverse and modify the Panel's interpretation of Articles 3.1 and 3.2 to make clear that it is insufficient under those provisions for an investigating authority to simply find mathematically lower prices of subject imports at a single point in time during the POI.

<sup>1</sup> Appellate Body Report, *China – GOES*, paras. 144-145, 149, and 154.

<sup>2</sup> Panel Report, para. 7.125.

### III. JAPAN'S CLAIMS THAT MOFCOM'S IMPACT ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

- A. The Panel erred in concluding that an investigating authority may find an impact under Articles 3.1 and 3.4 by simply finding the domestic industry in an injurious state and subject imports sold at prices that undercut certain domestic like products

6. Articles 3.1 and 3.4 require an investigating authority to examine the "consequent impact" of the dumped imports on the domestic industry through the "evaluation" of the various factors and indices specified in Article 3.4. Thus, an investigating authority must assess whether the observed changes in the state of the domestic industry are an effect or influence of the dumped imports. The Appellate Body has confirmed that an investigating authority must assess the relationship between subject imports and the state of the domestic industry, or the "explanatory force of subject imports for the state of the domestic industry", under Article 3.4.<sup>3</sup> Furthermore, as suggested by the word "consequent", there must be a logical connection between the results of the volume and price effects analyses under Article 3.2 and the impact analysis under Article 3.4.<sup>4</sup>

7. Japan requests that the Appellate Body reverse and modify the Panel's interpretation to make clear that Article 3.4 requires an assessment of the relationship between subject imports and the state of the domestic industry, or the "explanatory force", and a logical connection between the Article 3.2 volume and price effects inquiries and the Article 3.4 impact inquiry.

8. Here, MOFCOM should have focused its Article 3.4 assessment on those aspects of the domestic industry that could "logically" have been impacted by the volume and price effects it found under its Article 3.2 analysis. MOFCOM failed to do so. Japan therefore requests that the Appellate Body complete the analysis and find that MOFCOM's impact determination was inconsistent with Articles 3.1 and 3.4.

- B. The Panel erred in concluding that Japan's claim regarding MOFCOM's failure to examine whether subject imports had explanatory force for the state of the domestic industry was outside the Panel's terms of reference

9. The Panel also erred in finding Japan's claim regarding MOFCOM's failure to examine whether subject imports provided "explanatory force" for the state of the domestic industry under Articles 3.1 and 3.4 to be outside its terms of reference. The Panel explained that it failed to see a reference to this claim in Japan's Panel Request.<sup>5</sup> However, based on Japan's Panel Request read as a whole, as well as Japan's submissions and statements throughout the Panel proceedings, the Panel should have been able to recognize Japan's claim regarding "explanatory force", which is merely a different expression of the "consequent impact" or "the impact of subject imports on the domestic industry"<sup>6</sup> referred to in Japan's Panel Request. Moreover, there is no indication that China's ability to defend itself was prejudiced.

10. Therefore, Japan requests that the Appellate Body reverse the Panel's conclusion and find instead that this claim was within the Panel's terms of reference. Japan further requests that the Appellate Body complete the analysis and find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 because it failed to examine whether subject imports provided "explanatory force" for the state of the domestic industry.

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

<sup>4</sup> Appellate Body Report, *China – GOES*, para. 128. *See also id.*, para. 143.

<sup>5</sup> Panel Report, para. 6.31 and note 274.

<sup>6</sup> *See* Appellate Body Report, *China – GOES*, para. 149.

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#### IV. JAPAN'S CLAIMS THAT MOFCOM'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

- A. The Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU by failing to examine Japan's claims of independent violations of Articles 3.1 and 3.5 arising from MOFCOM's price effects and impact analyses

11. Japan's independent claims under Articles 3.1 and 3.5 were properly made and demonstrated before the Panel, and their independent nature was evident from the specific content of the claims, as well as the context of the provisions in question. Japan also repeatedly asserted the independent nature of these claims. Nonetheless, the Panel erroneously concluded that Japan had not advanced such independent claims and failed to examine, and abstained from making findings on, those claims. The Panel therefore failed to make an objective assessment of the matter before it and erred under DSU Article 11.

12. In light of the Panel's violation of DSU Article 11, Japan requests that the Appellate Body complete the analysis and, unless the Appellate Body agrees with Japan pursuant to the arguments above that one or more of the following result in violations of Articles 3.2 or 3.4, Japan requests that the Appellate Body find that MOFCOM violated Articles 3.1 and 3.5 because:

- MOFCOM improperly found imports of Grade C had explanatory force for price undercutting effects on domestic Grade C;
- MOFCOM improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole;
- MOFCOM improperly found the domestic industry as a whole to be impacted by subject imports despite finding no price effects with respect to Grade A; and
- MOFCOM failed to examine whether subject imports had explanatory force for the state of the domestic industry.<sup>7</sup>

#### V. CONCLUSION

13. For the foregoing reasons, Japan requests that the Appellate Body:

- reverse the Panel's legal interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement<sup>8</sup>, and modify it to provide that an investigating authority may not find the requisite "effect of the dumped imports on prices" by simply: (i) finding price undercutting to exist solely based on the consideration of whether subject import prices are mathematically lower than prices of domestic like products, without consideration of whether, by selling at lower prices, subject imports have the effect of taking the place of domestic like products or giving rise to an actual decrease or prevention of increase in prices in the domestic market for like products; or (ii) finding mathematically lower prices of subject imports at a single point in time during the POI;
- complete the legal analysis and find that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by concluding its Article 3.2 analysis with a finding of price undercutting for Grade C solely based on a mathematical comparison of imported and domestic Grade C prices;
- reverse the Panel's legal interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement<sup>9</sup>, and modify it to provide that an investigating authority may not find the requisite "impact of the dumped imports on the domestic industry" by simply finding that "the state of the domestic industry shows injury, and the subject imports are sold at prices that undercut certain like products produced and sold by that industry", without any further consideration of the relationship between subject imports and the state of the

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<sup>7</sup> Japan's interim comments, para. 61.

<sup>8</sup> Panel Report, paras. 7.124-7.130, 7.138-7.142, 7.152, 7.155.

<sup>9</sup> Panel Report, paras. 7.152-7.155.

domestic industry, or the explanatory force of subject imports on the state of the domestic industry, and the logical connection between the volume and price effects found to exist under the Article 3.2 analysis and the state of the domestic industry;

- reverse the Panel's finding that Japan's claim that MOFCOM erred under Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it failed to examine whether subject imports provided explanatory force for the state of the domestic industry was outside the Panel's terms of reference<sup>10</sup>, and find instead that this claim was properly within the Panel's terms of reference;
- complete the legal analysis and find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by: (i) conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses under Article 3.2; and (ii) failing to examine whether subject imports provided explanatory force for the state of the domestic industry;
- find that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU by erroneously concluding that Japan has not advanced independent claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement in those instances where the Panel had rejected (or not evaluated) one of Japan's claims under Articles 3.1 and 3.2 concerning MOFCOM's price effects analysis or under Articles 3.1 and 3.4 concerning MOFCOM's impact analysis, as well as by failing to examine and by abstaining from making findings on those independent claims<sup>11</sup>; and
- complete the legal analysis and find that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in those instances where Japan's claims under Articles 3.1 and 3.2 concerning MOFCOM's price effects analysis or under Articles 3.1 and 3.4 concerning MOFCOM's impact analysis have been rejected by the Panel or the Appellate Body.

14. In addition, Japan requests that the Appellate Body recommend that China bring its measures found to be WTO-inconsistent into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.

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<sup>10</sup> Panel Report, para. 6.31 and note 274.

<sup>11</sup> Panel Report, paras. 6.43, 7.192.

**ANNEX B-2****EXECUTIVE SUMMARY OF CHINA'S APPELLANT'S SUBMISSION<sup>1</sup>  
(DS460)**

1. China appeals certain findings and conclusions contained in the report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union* (DS460). China takes issue with a number of errors of legal reasoning, interpretation and application of the provisions of the *Anti-Dumping Agreement* and the *DSU*, which led the Panel to erroneous findings and conclusions. For the reasons set out in China's submissions during the Panel proceeding and for the reasons laid down in this submission to the Appellate Body, China appeals, and requests the Appellate Body to reverse, the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report.

2. As regards the violation of Article 2.2.2 of the Anti-Dumping Agreement found by the Panel, China submits the following. The relevant part of the European Union's panel request expressly limited its claims to the claims that MOFCOM did not determine the amounts for SG&A and profits on the basis of:

- the records of the exporters/producers under investigation; and
- the actual data of the exporters/producers under investigation.

3. This is clear from the first sentence of the panel request which refers to an alleged violation "*because* China did not determine the amounts for administrative, selling and general costs and for profits on the basis of records and actual data by the exporters or producers under investigation". The express limitation is reinforced by the European Union's repetition of these two claims once more in the narrative description, preceded by the wording "in particular".

4. The Panel therefore erred and acted contrary to Articles 6.2 and 7.1 of the *DSU* in finding that the European Union's claim that the SG&A amounts are not based on data pertaining to the production and sales in the ordinary course of trade was included in the European Union's panel request. This position applies irrespective of whether or not the provisions at stake contain multiple obligations. However, in any event, Article 2.2.2 of the *Anti-Dumping Agreement* contains multiple and distinct obligations.

5. The Panel further errs in relying on an alleged reference to Article 2.2.1 to conclude that China would have been put "on notice that below-cost sales [...] will be an issue in this dispute". First, following the reasoning set out above, the claim under Article 2.2.1 is equally outside the Panel's terms of reference. However, even assuming this claim was within the Panel's terms of reference, the Panel erred in relying on the "reference" to Article 2.2.1. There was no "reference" from Article 2.2.2 to Article 2.2.1 in the panel request. Moreover, "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" cannot take the form of merely mentioning a different provision. For a "reasonably informed reader", the "reference" to Article 2.2.1 at best suggested that the European Union thought that MOFCOM *erroneously excluded* certain sales that had to be considered as being in the ordinary course of trade from the SG&A determinations, rather than *wrongly included* sales that were not in the ordinary course of trade.

6. Consequently, the Panel's findings in paras. 7.64-7.66 of its Report relate to a claim that was not within the Panel's terms of reference. Even assuming the claim was within the Panel's terms of reference, the Panel erred in its interpretation and application of Article 2.2.2 of the

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<sup>1</sup> In accordance with the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings, China hereby specifies the word count of the executive summary as well as of its written submission. The total word count (including footnotes) of the executive summary amounts to 3,724. The total word count (including footnotes) of the present Appellant Submission (excluding the executive summary) amounts to 38,860.

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Anti-Dumping Agreement and violated Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement by reaching the conclusion that "by using SGA data based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value", MOFCOM failed to base the SG&A amounts on "actual data pertaining to production and sales in the ordinary course of trade of the like product".

7. The Panel failed to set out and explain its assessment of how and why China allegedly violated the requirement to base the SG&A amount on data that is actual and/or the requirement to base the SG&A amount on data that pertain to production and sales in the ordinary course of trade, contrary to its duties under Articles 11 and 12.7 of the DSU.

8. Moreover, the Panel's interpretation of Article 2.2.2 as requiring an investigating authority not to base the SG&A amount on data that were not used for the determination of the cost of production amount is erroneous. The Panel's reasoning seems to be based on the premise that costs of production that are not used for the calculation of the cost of production in the normal value determination are necessarily not "actual" and/or do not pertain to "sales in the ordinary course of trade". This is, however, incorrect.

9. The Panel failed to engage in the required assessment to analyze whether the SG&A amount was based on data that was actual and whether it was based on data pertaining to production and sales in the ordinary course of trade. To the extent that the Appellate Body would consider that the Panel implicitly engaged in an assessment of this sort, China submits that this was carried out contrary to Article 11 of the DSU. China considers that an objective assessment of the methodology to obtain the SG&A amount would have led the Panel to conclude that China complied with its obligations to "base" the SG&A amount is on data that is "actual" and pertains to "production and sales in the ordinary course of trade".

10. As regards the violation of Article 6.7 and Paragraph 7 of Annex I to the Anti-Dumping Agreement found by the Panel, China submits that the panel erred in its interpretation and application of these provisions. First, Article 6.7 and Paragraph 7 of Annex I do not contain an obligation for an investigating authority not to act contrary to the main purpose of the verification visit. In creating this obligation, the Panel is reading words into Article 6.7 and Paragraph 7 that are simply not there and disregarding the syntax of the relevant sentences. China is not suggesting that the Anti-Dumping Agreement contains no obligations of relevance to the information that an investigating authority must accept and take into account. Rather, it submits that any such obligations are not found in Article 6.7 or Paragraph 7 and that this conclusion is supported by the unwarranted nature of a distinction between the obligations of an investigating authority in terms of information gathering, depending on how it decides to satisfy itself of the accuracy of information submitted (by means of a verification visit or otherwise).

11. Second, even if assuming that Article 6.7 and Paragraph 7 do contain a prohibition against acting contrary to the purpose of a verification visit (*quod non*), this does not mean that an investigating authority must verify all information provided or obtain all further details unless it has a valid reason not to do so. If anything, these provisions can be read as prohibiting an investigating authority who carries out an investigation from doing anything that does not qualify as verifying information or obtaining further details. Third, even if assuming that Paragraph 7 of Annex I compels an investigation authority to accept all information unless it has a valid reason not to do so, China submits that the fact that the information is submitted in disregard of the procedures determined beforehand by the investigating authority (including the requirement to put forward new information at the start of the verification visit) does constitute a "valid reason".

12. In relation to the Panel' conclusion that China violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of subject imports in determining a link between subject imports and material injury to the domestic industry, China submits the following.

13. With respect to Articles 3.1 and 3.5, the European Union claimed (in addition to its claims with respect to the non-attribution analysis) that MOFCOM's causation determination lacked any foundation in MOFCOM's analysis of the volume, price effects and impact of subject imports. As regards the price effects analysis based claim and impact analysis based claim, the

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European Union made purely consequential<sup>2</sup> claims based on the alleged violations of Articles 3.2 and 3.4.

14. When addressing the independent Article 3.5 claim with respect to volume, the Panel dismissed the claim as presented by the European Union (that is, the alleged reliance on volume effects and/or the alleged disregard of the absence of such volume effects in MOFCOM's causation analysis) in unambiguous terms.<sup>3</sup> That should have been the end of the Panel's evaluation of MOFCOM's reliance on the market share of subject imports.

15. The Panel, however, continued on its own motion by finding a violation of Article 3.5 in relation to MOFCOM's findings concerning the impact of price effects on the domestic industry (which MOFCOM qualified *inter alia* by reference to the volume of imports found to be made at undercutting prices). However, as found by the Panel itself, the only claim raised by the European Union in relation to the price effects relied upon by MOFCOM in its causation determination is a claim that is purely consequential to its claim under Article 3.2.

<sup>16.</sup> The fact that the European Union's claim in relation to volume did not address in any way the violation eventually found to exist by the Panel is evident from the fact that MOFCOM's finding in relation to which the Panel found a violation (that is, that "the imports of the subject products had a relatively big impact on the price of the domestic like products") was not even referenced by the European Union when setting out its claims and arguments.

17. China submits that the Panel made an error when ruling on this unarticulated claim, in relation to which no arguments were presented by the complainants, and by finding a violation of Articles 3.1 and 3.5 on this basis. In doing so, the Panel acted inconsistently with the requirement of Article 11 of the DSU to make an objective assessment "of the matter before it".

18. The Panel found that China violated Articles 3.1 and 3.5 of the AD Agreement by finding that subject imports through price undercutting, taking into account the market share of the imports made at undercutting prices, had a relatively big impact on the price of the domestic like products and therefore caused injury to the domestic industry. The claim underlying the finding of violation is different from the one put forward by the European Union that the absence of volume effects (in the form of a significant increase in dumped imports) and/or the presence of "positive" volume effects (in the form of a drop in dumped imports) precluded MOFCOM from: (i) relying on volume effects in its causation determination; and (ii) reaching an affirmative causation finding.

19. The violation found by the Panel did not even refer to the absence of such a significant increase or, more generally, to the relevance of (the absence of) volume effects for the causation analysis. Rather, it related to MOFCOM's finding concerning the impact of the price effects on the domestic industry, in relation to which MOFCOM considered that the volume of imports made at undercutting prices was a relevant consideration.

20. The Panel acted *ultra petita* in reaching its findings in paras. 7.181-7.188 of its Report and ruled on a claim that was not articulated and in relation to which no arguments were submitted. Consequently, the Panel failed to make an objective assessment of "the matter before it" as required by Article 11 of the DSU.

21. Moreover, China submits in the alternative that the Panel erred in law by making the case for the complainant and ruling on a claim for which the complaining party has failed to make a *prima facie* case, and that the Panel failed in its duty to respect due process under Article 11 of the DSU. Even if it is found that the European Union presented a claim that allowed the Panel to find the violation it did, the European Union failed to make a *prima facie* case and the Panel made the case on the complainant's behalf by finding a violation. In doing so, the Panel reached its findings in a manner inconsistent with the rules on burden of proof and in violation of Article 11 of the DSU. Equally, contrary to its duty under Article 11, the Panel failed to ensure that the due process rights of China were respected in the way in which it reached its findings.

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<sup>2</sup> Panel Report, para. 7.192.

<sup>3</sup> Panel Report, para. 7.180.

22. The Appellate Body's findings in previous disputes make it clear that in order to present a *prima facie* case, a complaining party must put forward sufficient arguments. Moreover, in the words of the Appellate Body, "a *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim".<sup>4</sup> In order to do so, a complaining party has to, *inter alia*, relate facts to its legal arguments.<sup>5</sup>

23. Even assuming that the Panel correctly concluded that the European Union "referred to the relevance of market share data in the context of price effects" and that this reference would be sufficient to present a claim and bring this claim within the matter before the Panel (*quod non*), this reference cannot be considered as providing any arguments, let alone as providing sufficient arguments to make a *prima facie* case.

24. The alleged claim certainly lacks argumentation in relation to each of the elements of this claim, *inter alia* because of the absence of any relating of the facts to the legal arguments under Article 3.5. The European Union does not even refer to the main finding of MOFCOM addressed by the Panel when finding the violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, that is, that taking into account the market share "the imports of the subject products had a relatively big impact on the price of the domestic like products". As such, the European Union certainly fails to relate this finding to its (inexistent) legal arguments under Article 3.5 that could lead to the violation found by the Panel.

25. By relieving the complainant from the necessity of establishing a *prima facie* case, the Panel erred in law.<sup>6</sup>

26. Turning to the substance of the Panel's findings (even if assuming the Panel was in a position to reach these findings, *quod non*), the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and violated Article 11 of the DSU by concluding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because "MOFCOM's reference to the market shares held by subject imports is not sufficient to establish that subject imports, through price undercutting, had "a relatively big impact on the price of the domestic like products", and therefore caused injury to the domestic industry through their price effects".

27. The Panel reached this finding of violation on the basis of a combination of two elements. First, the Panel finds that "MOFCOM failed to account for the fact that the market share of subject imports had actually dropped from around 90% in 2008 and 2009 to around 50% in 2010 and H12011, and that domestic market shares increased correspondingly". China submits that this completely disregards the section of MOFCOM's Final Determination dealing with causation and distorts the findings reached by MOFCOM, contrary to the Panel's duty under Article 11 of the DSU. Moreover, the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement to the extent that it concluded that MOFCOM's overview of the evolution of the market share and its conclusion that, despite ("although") the evolution of the (absolute and relative) volume of imports, the share itself "remained high", was not sufficient to act as an objective and impartial investigating authority.

28. Second, the Panel found that MOFCOM failed to provide an "examination or analysis" of "how the 90% market shares of Grade B and C subject imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, notwithstanding the fact that the bulk of domestic production was of Grade A, the sales and market share of domestic Grade A increased, the negligible market share of subject imports of Grade A and the absence of cross-grade price effects, and despite the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B imports". China understands that the Panel's consideration that MOFCOM's finding of price correlation was not sufficient to demonstrate cross-grade price effects is the basis for the Panel's conclusion that MOFCOM failed to provide the required examination or analysis.

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<sup>4</sup> Appellate Body Report, *US – Gambling*, para. 140. (emphasis original)

<sup>5</sup> Appellate Body Report, *US – Gambling*, para. 140.

<sup>6</sup> Appellate Body Report, *EC – Hormones*, para. 108.

29. The Panel rejects China's reliance on MOFCOM's finding of price correlation for a combination of four elements. However, the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and violated Article 11 of the DSU in relation to each of these four elements that together led to its rejection of China's reliance on MOFCOM's finding of price correlation.

30. To the extent that the Appellate Body may consider that the Panel also took issue with elements other than MOFCOM's finding of price correlation (despite the absence of any discussion by the Panel of such elements), China submits that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU by means of its implicit findings, if any, that MOFCOM did not or not sufficiently assess:

- that "the sales and market share of domestic Grade A increased"; and
- "the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B imports".

31. The Panel's findings and conclusions concerning MOFCOM's non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement are entirely based on the Panel's findings and conclusions concerning MOFCOM's reliance on the market share. Therefore, these have equally been reached in error and should be reversed.

32. As regards the Panel's finding of violation of Article 6.5 of the Anti-Dumping Agreement, China submits that the Panel erred in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. First, the Panel erred in law when interpreting Article 6.5 as requiring an investigating authority to explain its conclusions as regards its examination of the requests for confidential treatment and/or why it considers such confidential treatment is warranted.

33. The Appellate Body found that an investigating authority "must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".<sup>7</sup> However, it never endorsed the interpretation that the authority must explain its conclusions about the examination of the requests for confidential treatment. In this respect, China considers that the panel's findings in *Mexico – Steel Pipes and Tubes* provide correct guidance as to whether or not Article 6.5 requires an investigating authority to explain its conclusions. The panel in that dispute held that there was no obligation requiring the investigating authority to provide any explanation regarding its assessment and scrutiny of an alleged showing of "good cause", beyond the obligation to grant confidential treatment if "good cause" is shown.

34. Second, the Panel wrongly applied the standard of review and failed to make an objective assessment of the facts of the case, contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. By limiting its review to the explanations provided by MOFCOM (possibly even to the explanations on the published record) and not taking into account (and drawing inferences from) the facts on the record, the Panel acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. All facts on the record lead to the inevitable conclusion that MOFCOM did objectively assess good cause and scrutinize the petitioners' showing.

35. China points out that the panel in *Mexico – Steel Pipes and Tubes* was presented with a situation similar to that before the present Panel, but made a completely opposite finding. The panel in *Mexico – Steel Pipes and Tubes* concluded that there was no violation of Article 6.5 of the Anti-Dumping Agreement concerning the treatment of requests for confidentiality, notwithstanding the fact that the record did not contain *any* explanation of the investigating authority's evaluation in this regard.<sup>8</sup>

<sup>7</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 539.

<sup>8</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.395 and 7.399.

36. Also, the Panel applied the wrong standard of review in coming to its position that, by examining the Petitioners' requests in order to determine whether MOFCOM complied with the obligations in Article 6.5 of the Anti-Dumping Agreement, this would amount to a *de novo* review. This would not have amounted to a *de novo* review, but merely an assessment as to whether the facts before MOFCOM could have reasonably supported its conclusion that "good cause" was shown and that the granting of confidential treatment was, accordingly, warranted.

37. The Panel's internally inconsistent reasoning as regards the consistency of the measure at issue with Article 6.5 and Article 6.5.1 "cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU".<sup>9</sup> Moreover, the Panel disregarded Paragraph 7 of the Joint Working Procedures.

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<sup>9</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 894.

**ANNEX B-3****EXECUTIVE SUMMARY OF CHINA'S OTHER APPELLANT'S SUBMISSION<sup>1</sup>  
(DS454)**

1. China appeals certain findings and conclusions contained in the report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (DS454). China takes issue with a number of errors of legal reasoning, interpretation and application of the provisions of the *Anti-Dumping Agreement* and the *DSU*, which led the Panel to erroneous findings and conclusions. For the reasons set out in China's submissions during the Panel proceeding and for the reasons laid down in this submission to the Appellate Body, China appeals, and requests the Appellate Body to reverse, the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report.

2. In relation to the Panel's conclusion that China violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of subject imports in determining a link between subject imports and material injury to the domestic industry, China submits the following.

3. With respect to Articles 3.1 and 3.5, Japan claimed (in addition to its claims with respect to the non-attribution analysis) that MOFCOM's causation determination lacked any foundation in MOFCOM's analysis of the volume, price effects and impact of subject imports. The price effects analysis based claim and impact analysis based claim were purely consequential<sup>2</sup> claims based on the alleged violations of Articles 3.2 and 3.4.

4. When addressing the independent Article 3.5 claim with respect to volume, the Panel dismissed the claim as presented by Japan (that is, the alleged reliance on volume effects and/or the alleged disregard of the absence of such volume effects in MOFCOM's causation analysis) in unambiguous terms.<sup>3</sup> That should have been the end of the Panel's evaluation of MOFCOM's reliance on the market share of subject imports.

5. The Panel, however, continued on its own motion by finding a violation of Article 3.5 in relation to MOFCOM's findings concerning the impact of price effects on the domestic industry (which MOFCOM qualified *inter alia* by reference to the volume of imports found to be made at undercutting prices). However, as found by the Panel itself, the only claim raised by Japan in relation to the price effects relied upon by MOFCOM in its causation determination is a claim that is purely consequential to its claim under Article 3.2.

6. The fact that Japan's claim in relation to volume did not address in any way the violation eventually found to exist by the Panel is evident from the fact that MOFCOM's finding in relation to which the Panel found a violation (that is, that "the imports of the subject products had a relatively big impact on the price of the domestic like products") was not even referenced by Japan when setting out its claims and arguments.

7. China submits that the Panel made an error when ruling on this unarticulated claim, in relation to which no arguments were presented by the complainants, and by finding a violation of Articles 3.1 and 3.5 on this basis. First of all, this claim that was not within the Panel's terms of reference since it was not addressed in Japan's request for the establishment of a panel as required by Articles 6.2 and 7.1 of the *DSU*. Japan's panel request expressly limits its claims under Article 3.5 (other than those relating to the non-attribution analysis) to three claims, which did not

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<sup>1</sup> In accordance with the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings, China hereby specifies the word count of the executive summary as well as of its written submission. The total word count (including footnotes) of the executive summary amounts to 2,679. The total word count (including footnotes) of the present Appellant Submission (excluding the executive summary) amounts to 27,926.

<sup>2</sup> Panel Report, para. 7.192.

<sup>3</sup> Panel Report, para. 7.180.

include the claim in relation to which the Panel found a violation. The limitations regarding the scope of claims included in the narrative of a panel request will determine a panel's terms of reference and, accordingly, this claim was not within the Panel's terms of reference.

8. Even if assuming that this claim was within the Panel's terms of reference, the Panel acted inconsistently with the requirement of Article 11 of the DSU to make an objective assessment "of the matter before it".

9. The Panel found that China violated Articles 3.1 and 3.5 of the AD Agreement by finding that subject imports through price undercutting, taking into account the market share of the imports made at undercutting prices, had a relatively big impact on the price of the domestic like products and therefore caused injury to the domestic industry. The claim underlying the finding of violation is different from the one put forward by Japan that the absence of volume effects (in the form of a significant increase in dumped imports) and/or the presence of "positive" volume effects (in the form of a drop in dumped imports) precluded MOFCOM from: (i) relying on volume effects in its causation determination; and (ii) reaching an affirmative causation finding.

10. The violation found by the Panel did not even refer to the absence of such a significant increase or, more generally, to the relevance of (the absence of) volume effects for the causation analysis. Rather, it related to MOFCOM's finding concerning the impact of the price effects on the domestic industry, in relation to which MOFCOM considered that the volume of imports made at undercutting prices was a relevant consideration.

11. The Panel acted *ultra petita* in reaching its findings in paras. 7.181-7.188 of its Report and ruled on a claim that was not articulated and in relation to which no arguments were submitted. Consequently, the Panel failed to make an objective assessment of "the matter before it" as required by Article 11 of the DSU.

12. Moreover, China submits in the alternative that the Panel erred in law by making the case for the complainant and ruling on a claim for which the complaining party has failed to make a *prima facie* case, and that the Panel failed in its duty to respect due process under Article 11 of the DSU. Even if it is found that Japan presented a claim that allowed the Panel to find the violation it did, Japan failed to make a *prima facie* case and the Panel made the case on the complainant's behalf by finding a violation. In doing so, the Panel reached its findings in a manner inconsistent with the rules on burden of proof and in violation of Article 11 of the DSU. Equally, contrary to its duty under Article 11, the Panel failed to ensure that the due process rights of China were respected in the way in which it reached its findings.

13. The Appellate Body's findings in previous disputes make it clear that in order to present a *prima facie* case, a complaining party must put forward sufficient arguments. Moreover, in the words of the Appellate Body, "a *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim".<sup>4</sup> In order to do so, a complaining party has to, *inter alia*, relate facts to its legal arguments.<sup>5</sup>

14. Even assuming that the Panel correctly concluded that Japan "referred to the relevance of market share data in the context of price effects" and that this reference would be sufficient to present a claim and bring this claim within the matter before the Panel (*quod non*), this reference cannot be considered as providing any arguments, let alone as providing sufficient arguments to make a *prima facie* case.

15. The alleged claim certainly lacks argumentation in relation to each of the elements of this claim, *inter alia* because of the absence of any relating of the facts to the legal arguments under Article 3.5. Japan does not even refer to the main finding of MOFCOM addressed by the Panel when finding the violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, that is, that taking into account the market share "the imports of the subject products had a relatively big impact on the price of the domestic like products". As such, Japan certainly fails to relate this finding to its (inexistent) legal arguments under Article 3.5 that could lead to the violation found by the Panel.

<sup>4</sup> Appellate Body Report, *US – Gambling*, para. 140. (emphasis original)

<sup>5</sup> Appellate Body Report, *US – Gambling*, para. 140.

16. By relieving the complainant from the necessity of establishing a *prima facie* case, the Panel erred in law.<sup>6</sup>

17. Turning to the substance of the Panel's findings (even if assuming the Panel was in a position to reach these findings, *quod non*), the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and violated Article 11 of the DSU by concluding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because "MOFCOM's reference to the market shares held by subject imports is not sufficient to establish that subject imports, through price undercutting, had "a relatively big impact on the price of the domestic like products", and therefore caused injury to the domestic industry through their price effects".

18. The Panel reached this finding of violation on the basis of a combination of two elements. First, the Panel finds that "MOFCOM failed to account for the fact that the market share of subject imports had actually dropped from around 90% in 2008 and 2009 to around 50% in 2010 and H12011, and that domestic market shares increased correspondingly". China submits that this completely disregards the section of MOFCOM's Final Determination dealing with causation and distorts the findings reached by MOFCOM, contrary to the Panel's duty under Article 11 of the DSU. Moreover, the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement to the extent that it concluded that MOFCOM's overview of the evolution of the market share and its conclusion that, despite ("although") the evolution of the (absolute and relative) volume of imports, the share itself "remained high", was not sufficient to act as an objective and impartial investigating authority.

19. Second, the Panel found that MOFCOM failed to provide an "examination or analysis" of "how the 90% market shares of Grade B and C subject imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, notwithstanding the fact that the bulk of domestic production was of Grade A, the sales and market share of domestic Grade A increased, the negligible market share of subject imports of Grade A and the absence of cross-grade price effects, and despite the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B imports". China understands that the Panel's consideration that MOFCOM's finding of price correlation was not sufficient to demonstrate cross-grade price effects is the basis for the Panel's conclusion that MOFCOM failed to provide the required examination or analysis.

20. The Panel rejects China's reliance on MOFCOM's finding of price correlation for a combination of four elements. However, the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and violated Article 11 of the DSU in relation to each of these four elements that together led to its rejection of China's reliance on MOFCOM's finding of price correlation.

21. To the extent that the Appellate Body may consider that the Panel also took issue with elements other than MOFCOM's finding of price correlation (despite the absence of any discussion by the Panel of such elements), China submits that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU by means of its implicit findings, if any, that MOFCOM did not or not sufficiently assess:

- that "the sales and market share of domestic Grade A increased"; and
- "the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B imports".

22. The Panel's findings and conclusions concerning MOFCOM's non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement are entirely based on the Panel's findings and conclusions concerning MOFCOM's reliance on the market share. Therefore, these have equally been reached in error and should be reversed.

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<sup>6</sup> Appellate Body Report, *EC – Hormones*, para. 108.

23. As regards the Panel's finding of violation of Article 6.5 of the Anti-Dumping Agreement, China submits that the Panel erred in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. First, the Panel erred in law when interpreting Article 6.5 as requiring an investigating authority to explain its conclusions as regards its examination of the requests for confidential treatment and/or why it considers such confidential treatment is warranted.

24. The Appellate Body found that an investigating authority "must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".<sup>7</sup> However, it never endorsed the interpretation that the authority must explain its conclusions about the examination of the requests for confidential treatment. In this respect, China considers that the panel's findings in *Mexico – Steel Pipes and Tubes* provide correct guidance as to whether or not Article 6.5 requires an investigating authority to explain its conclusions. The panel in that dispute held that there was no obligation requiring the investigating authority to provide any explanation regarding its assessment and scrutiny of an alleged showing of "good cause", beyond the obligation to grant confidential treatment if "good cause" is shown.

25. Second, the Panel wrongly applied the standard of review and failed to make an objective assessment of the facts of the case, contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. By limiting its review to the explanations provided by MOFCOM (possibly even to the explanations on the published record) and not taking into account (and drawing inferences from) the facts on the record, the Panel acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. All facts on the record lead to the inevitable conclusion that MOFCOM did objectively assess good cause and scrutinize the petitioners' showing.

26. China points out that the panel in *Mexico – Steel Pipes and Tubes* was presented with a situation similar to that before the present Panel, but made a completely opposite finding. The panel in *Mexico – Steel Pipes and Tubes* concluded that there was no violation of Article 6.5 of the Anti-Dumping Agreement concerning the treatment of requests for confidentiality, notwithstanding the fact that the record did not contain *any* explanation of the investigating authority's evaluation in this regard.<sup>8</sup>

27. Also, the Panel applied the wrong standard of review in coming to its position that, by examining the Petitioners' requests in order to determine whether MOFCOM complied with the obligations in Article 6.5 of the Anti-Dumping Agreement, this would amount to a *de novo* review. This would not have amounted to a *de novo* review, but merely an assessment as to whether the facts before MOFCOM could have reasonably supported its conclusion that "good cause" was shown and that the granting of confidential treatment was, accordingly, warranted.

28. The Panel's internally inconsistent reasoning as regards the consistency of the measure at issue with Article 6.5 and Article 6.5.1 "cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU".<sup>9</sup> Moreover, the Panel disregarded Paragraph 7 of the Joint Working Procedures.

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<sup>7</sup> Appellate Body Report, *EC – Fasteners (China)*, para 539.

<sup>8</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.395 and 7.399.

<sup>9</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 894.

**ANNEX B-4****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION  
(DS460)****I. BCI****A. Designation of BCI**

1. The EU appeals the Panel's findings on the designation of BCI. The question of designation should be subject to objective criteria established and applied by a WTO adjudicator. It cannot be delegated to any other entity or person. Whilst a WTO adjudicator may give close attention to the views of a Member, an investigating authority or a firm, and whilst what may have occurred during the domestic proceedings might provide a reasonable starting point, it cannot form the basis for an *absolute* rule. By providing otherwise in its BCI Procedures the Panel acted inconsistently with Articles 18.2 and 13.1 DSU and Article 17.7 ADA.

**B. Authorizing Letter**

2. The EU appeals the Panel's findings concerning the authorizing letter. The additional confidentiality obligation is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm. The BCI Procedures in this case originally included a statement that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings. The EU considers that such statements in BCI Procedures are WTO inconsistent. Although the Panel partially addressed the concern raised by the EU, in doing so it built upon and re-affirmed certain legally erroneous findings that it had already made regarding Articles 17.7 and 6.5 ADA.

**II. ARTICLE 6.2 DSU****A. Article 2.2 ADA**

3. The EU conditionally appeals the Panel's finding that, with respect to Article 2.2, the panel request did not comply with Article 6.2 DSU. The Panel Report fails to take into account the introductory language of Article 2.2.2, which establishes a clear link between Article 2.2 and Article 2.2.2. It is clear from Article 2.2.2 that it concerns "the amounts for administrative, selling and general costs and for profits". This refers directly back to the phrase in Article 2.2 "a reasonable amount for administrative, selling and general costs and for profits." It is therefore clear that a measure at issue that would not comply with Article 2.2.2 would also not comply with Article 2.2, insofar as it refers to "a reasonable amount for administrative, selling and general costs and for profits." This is confirmed by the final sub-paragraph of Article 2.2.2. Evidently, "the amounts for administrative, selling and general costs and for profits" determined for the purposes of Article 2.2.2 must always be reasonable, as that term appears in both Article 2.2.2 and in Article 2.2.

**B. Article 2.2.1.1 ADA**

4. The EU conditionally appeals the Panel's finding that, with respect to Article 2.2.1.1 (and the language "reasonably reflect the costs associated with the production and sale of the product under consideration"), the panel request did not comply with Article 6.2 DSU. The Panel first finds that Article 2.2.1.1 contains multiple obligations, and breaks that provision down into three sentences. Noting the narrative in the panel request and China's acceptance, the Panel then finds that, with respect to the following element of Article 2.2.1.1, the EU claim complied with Article 6.2 DSU and was *within* the Panel's terms of reference: "For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation ...". These findings have not been appealed. The error that the Panel makes is to divide the relevant obligation in two, or to fail to take into account the clearly interlinked nature of the two relevant parts of Article 2.2.1.1. It is evident from Article 2.2.1.1 that, insofar as is

relevant for the purposes of the present discussion, there is a single obligation, namely: "For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation ... provided that such records ... reasonably reflect the costs associated with the production and sale of the product under consideration."

### III. DUMPING

#### A. *Rejection of SMST's rectification request*

5. If the Appellate Body reverses the Panel's finding to the effect that China acted inconsistently with Article 6.7 and Annex I, paragraph 7 ADA, then the EU appeals the Panel's findings with respect to Article 6.8 and Annex II, paragraphs 3 and 6. MOFCOM rejected certain information presented by SMST at verification for the sole reason that it was presented at the verification.

6. In this respect, the EU claimed that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 1. The EU further claimed that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6. In rejecting the EU claims under Article 6.8 and Annex II, paragraphs 3 and 6, the Panel reasoned that MOFCOM did not rely on facts available. However, whether or not a measure at issue involves a reliance on facts available is not determined subjectively by reference to whether or not the measure at issue states that it does or does not rely on facts available. Rather, this question is determined objectively. Objectively, as soon as an investigating authority reasons that an interested party has refused access to or otherwise not provided necessary information within a reasonable period or has significantly impeded the investigation, then it is reasoning that the conditions provided for in Article 6.8 are present.

### IV. INJURY

#### A. *Articles 3.1 and 3.2 ADA: The effect of the price of the dumped imports on the price of the domestic product*

7. The EU appeals the Panel's findings concerning Articles 3.1 and 3.2 ADA with respect to the obligation to consider the effect of the price of the dumped imports on the price of the domestic product.

8. The Panel finds that the obligations at issue can be met, and were met in this case, "*purely*" on the basis of the fact that, in 2010, the price of the dumped imports was below the price of the domestic product. That is, in essence, no more than a "photograph" of the juxtaposition of the two prices. This represents a legally erroneous interpretation and application of these obligations. Given MOFCOM's decision to conduct a grade-by-grade analysis, the obligations require the importing Member to "consider" *more* than the mere juxtaposition of the price of the dumped imports and the price of the domestic product. The importing Member must consider whether such juxtaposition, together with other relevant facts, such as specifically identified quantitative differences, inverse price movements, a sudden and substantial increase in the domestic price, an increase in the market share of domestic Grade C product and an absence of substitutability, have explanatory force for the *effect* of the price of the dumped imports on the price of the domestic products.

9. Several observations support that submission. First, the introductory language of the phrase in Article 3.2 at issue. Second, the fact that the same phrase appears in Article 3.1(a) ADA. Third, the term "price undercutting", which reinforces the language of the opening phrase. Fourth, we disagree with the Panel's assumption that simply because a photograph of the juxtaposition between the price of the imported product and the price of the domestic product reveals that the first is less than the second, one can *assume* that the lower price is having an effect on the higher price. Fifth, we find further support for our position in the first occurrence of the term "otherwise" in the second sentence of Article 3.2. The presence of this term confirms that "price undercutting" is not a necessary pre-condition for determining the existence of price depression or suppression. Sixth, we find further support for our interpretation in the term "significant", in the sense of explanatory force for the effect of the price of the imported product on the price of the domestic product. Seventh, we find further support for our interpretation in the opening phrase of Article 3.5. Eighth, we find further support for our position in the Appellate Body Report in *China* –

GOES. Ninth, we disagree with the Panel's statement that the term "has been" supports its conclusion.

*B. Articles 3.1 and 3.2 ADA: MOFCOM's findings of price undercutting*

10. The EU appeals the Panel's findings concerning Articles 3.1 and 3.2 ADA with respect to the question of whether MOFCOM's findings of price undercutting in respect of Grades B and C were sufficient to comply with MOFCOM's obligation to consider whether or not the price of the dumped imports had a significant effect on the price of the domestic product.

11. The Panel's reasoning conflates and obscures two different things: the abstract definition of the imported product (ABC or A, B and C separately) and the *corresponding* domestic like product; and the actual distribution of the import and domestic data within Grades A, B and C. There were no relevant imports of Grade A. Most of the domestic sales were Grade A. Yet MOFCOM found that price undercutting by imported Grades B and C had a *significant effect* on the domestic product, without conducting any cross-grade analysis. The Panel accepts this conclusion only on the basis of its erroneous finding that Articles 3.1 and 3.2 do not require any consideration of the *effect* of the price of the dumped product on the price of the domestic product.

12. If an investigating authority sets out to address the *ultimate* question of whether or not the price of the imported product (ABC) had a significant price undercutting effect on the domestic product (ABC), it must adopt a consistent and coherent line of reasoning that starts with the imported product (ABC) and ends with a determination that relates to the domestic product (ABC). If, by way of intermediary step, an investigating authority decides to make a grade-by-grade analysis, it must also proceed in a consistent and coherent manner. At this intermediary step, if there is no price undercutting for Grade A, an investigating authority cannot just arbitrarily discard, ignore or pass in silence over this intermediate result.

13. If an investigating authority, having found price undercutting for Grades B and C, wishes to proceed to the final step in its overall analysis (ABC), by aggregating the results of the intermediary steps, it must do so in a coherent and consistent manner, and having regard to the obligation to consider the *effect* of the price of the dumped imports. This means that the investigating authority must address the question of why, notwithstanding the absence of any price undercutting for Grade A, there is a *significant price undercutting effect* for the domestic product ABC. This means that the investigating authority must consider the competitive relationship between A and BC.

*C. Articles 3.1 and 3.4 ADA: The impact on the domestic industry*

14. The EU appeals the Panel's findings concerning Articles 3.1 and 3.4 ADA with respect to the assessment of the impact of the dumped imports on the domestic industry.

15. The Panel's approach to the question before it in this case was from the perspective of a so-called bifurcated analysis. That is, a situation in which the analysis is divided into two steps. In the first step the material injury is assessed pursuant to Article 3.4. In a second step, pursuant to Article 3.5, the investigating authority considers whether the dumped imports caused the material injury, separating, distinguishing and discounting the non-attribution factors. The difficulty with the Panel's approach is that it does not take into consideration the concept of a so-called unitary analysis. A unitary analysis recognises that it is highly problematic to distinguish between the concept of injury and the concept of causation, precisely because only what is caused by the dumped imports *is correctly characterised as injury within the meaning of footnote 9 ADA*.

16. What this implies is that, if, in the application of Article 3.5, an investigating authority determines that a particular thing is a non-attribution factor, *at the same time* anything caused by that non-attribution factor *is not injury within the meaning of footnote 9 ADA*. This necessarily means that it is not part of the "impact of the dumped imports on the domestic industry" within the meaning of Article 3.4. The Panel dealt with this issue by reasoning that, with respect to this matter, the complainants had made no independent claims under Article 3.5. However, both Article 3.4 and Article 3.5 are pertinent to the issue raised by the complainants, in the sense that both contain obligations that must be complied with.

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D. *Articles 3.1 and 3.5 ADA: Causation*

17. The EU appeals – pursuant to Article 11 DSU – certain of the Panel's findings concerning Articles 3.1 and Article 3.5 ADA with respect to the assessment of causation.

18. Among its claims under Articles 3.1 and 3.5 ADA, the EU claimed that MOFCOM's causation determination did not involve an objective examination and was not based on positive evidence because it was made in the absence of a significant increase in the volume of dumped imports, and was based on MOFCOM's flawed price effects and impact analyses. In response to a question from the Panel seeking clarification the EU made clear that its Article 3.5 claims were not merely dependent on its Article 3.2 and 3.4 claims. We explained that while a violation of Article 3.2 and/or Article 3.4 would lead to a consequential violation of Article 3.5, the EU had made several independent claims of violation under Articles 3.1 and 3.5.

19. The Panel found that MOFCOM's causation determination was inconsistent with Article 3.5 due to its improper reliance on the market share of subject imports, and it found a consequential violation of Article 3.5 as a result of the inconsistencies it had found under Articles 3.2 and 3.4. However, the Panel declined to evaluate whether independent violations of Articles 3.1 and 3.5 arose in those instances where it had rejected (or not evaluated) one of the EU claims under Articles 3.1 and 3.2 or Articles 3.1 and 3.4. On this point, the Panel agreed that "many of the issues raised by the complainants in the context of their Article 3.2 and 3.4 claims could, in our view, form the basis for independent claims under Article 3.5". That said, and despite the EU response to Panel Question 88, the Panel concluded that the EU had not advanced any independent Article 3.5 claims concerning MOFCOM's price effects and impact analyses. In so doing, the Panel failed to make an objective assessment of the matter before it as required by Article 11 DSU.

V. **PROCEDURAL ISSUES**

A. *Article 6.9 ADA: Essential facts*

20. The EU appeals the Panel's findings concerning Article 6.9 ADA with respect to the obligation to adequately disclose essential facts – particularly with respect to the data underlying MOFCOM's determination of dumping with respect to SMST and Tubacex.

21. The 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, the formulas used in calculations and the data applied in those formulas. China's anti-dumping disclosures contain none of this information.

22. Specifically, we disagree with the Panel when it finds that Article 6.9 does not require the disclosure of the "entirety" of the essential facts. There is no such qualification in Article 6.9. Article 6.9 rather requires disclosure of all the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Furthermore, we disagree with the Panel when it finds that an investigating authority is *excused* from disclosing the essential facts if they are already in the possession of the interested party. There is no such qualification in Article 6.9. When the investigating authority has *selected* from amongst the facts originally provided by the interested party, the interested party has no way of knowing which facts have been selected. Mere possession of the data set from which the facts have been selected is insufficient for the interested party to defend its interests.

**ANNEX B-5****EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION<sup>1</sup>**  
**(DS454, DS460)**

1. At the outset, China emphasizes that consolidation of the appellate proceedings should not lead to any consolidation of the complaints by Japan and the European Union in the respective DS454 and DS460 disputes.
2. As regards the European Union's conditional appeal of the Panel's findings in DS460 that the European Union's panel request did not comply with Article 6.2 of the DSU with respect to the European Union's claims under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, China submits the following.
3. China is, even following the conclusion of the Panel proceedings, at a loss as to understanding the exact elements of the claim(s) of the European Union, both in relation to the SG&A determination in general and specifically with respect to Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. The European Union's statements in its submissions before the Panel call into question whether the European Union made any claims at all under these provisions, since the European Union appears to rely on these provisions only as context. In any event, the contrast between the lack of clarity and precision of the European Union's submissions during the Panel process and the clarity and precision of the European Union's panel request is striking.
4. In China's view, in order to verify whether a claim falls within the Panel's terms of reference, a two-step approach should be followed. First, the claims included in the panel request should be identified. In this respect, the European Union's request for the establishment of a panel 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 (and profit) amounts do not reflect the records and the actual data.
5. Second, it should be determined whether the claim(s) at stake are covered by the scope of the description of the claims included in the panel request. This is not the case. Article 2.2 does not relate to whether the SG&A or profit amounts are based on "actual data by the exporters or producers under investigation" or on "the records [...] of the exporter or producers under investigation". There is also no brief summary of the legal basis of the complaint in relation to the alleged obligation for the SG&A to "reasonably reflect the costs associated with the production and sale".
6. Accordingly, the European Union's panel request fails to explain succinctly how or why the measure at issue is considered by the European Union to be violating the WTO obligations in question. As such, it is not even a matter of whether or not the brief summary suffices to present the problem clearly. The brief summary is simply absent.
7. China also notes that the European Union's first written submission confirms the meaning of the terms used in its panel request, as being distinct from its claims that the Panel found to be outside its terms of reference. The Panel also correctly found that Article 2.2 contains multiple obligations. Moreover, China has suffered a prejudice caused by the deficiencies in the European Union's panel request, as well as by the European Union's deficient submissions. Finally, the European Union fails to read its panel request as a whole. Rather, it seems to read the reference in the narrative to "the amounts for administrative, selling and general costs and for profits" in wilful isolation of the remaining part of the narrative ("on the basis of records and actual data by the exporters or producers under investigation").

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<sup>1</sup> In accordance with the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings, China hereby specifies the word count of the executive summary as well as of its written submission. The total word count (including footnotes) of the executive summary amounts to 4,085. The total word count (including footnotes) of the present appellee submissions (excluding the executive summary) amounts to 45,123.

8. China disagrees with the European Union's allegations in its conditional appeal of the Panel's findings regarding the European Union's claims under Article 6.8 and Paragraphs 3 and 6 of Annex II of the Anti-Dumping Agreement. The European Union disagrees with the Panel's finding that there was no factual basis for and no evidence on the Panel record in support of the European Union's claim that MOFCOM relied on the allegedly erroneous and uncorrected data in making its determination. Whether or not there was evidence on the Panel record that MOFCOM relied on uncorrected and erroneous data when making its determination is a factual determination by the Panel. The European Union failed in this respect to make a claim under Article 11 of the DSU (in its notice of other appeal or in its other appellant's submission). Therefore, whether or not the Panel made an objective assessment of the facts before it is not properly raised on appeal by the European Union and, accordingly, falls outside the scope of appellate review.

9. The European Union does not explain how, why or where the Panel erred in its legal interpretation of Article 6.8 and Paragraphs 3 and 6 of Annex II of the Anti-Dumping Agreement, nor does it indicate how, why or where the Panel misapplied such interpretation. China considers that the European Union's failure to contest an issue of law covered in the Panel Report or a legal interpretation developed by the Panel (taking into account the absence of a claim under Article 11 of the DSU) should suffice to reject the European Union's appeal, in view of Article 17.6 of the DSU.

10. In any event, the Panel's interpretation and application was correct. In order to trigger the applicability of Article 6.8, "determinations", by definition, must be "made on the basis of the facts available". The European Union seems to suggest that the Panel concluded that MOFCOM did not rely on facts available because the measure at issue did not state that it relied on facts available. Such suggestion is baseless. Indeed, paragraph 7.102 of the Panel Report (or even more broadly section 7.4.3.4 containing the entire "evaluation by the Panel" of the claim at stake as well as another claim) does not contain a single reference to the Provisional Determination and/or the Final Determination (that is, the measure at issue), let alone to the absence of any explicit reliance on facts available in the measure at issue. The uncontested facts and factual findings made by the Panel show that MOFCOM undeniably made its determination on the basis of evidence contained in the records that was submitted by SMST, rather than on the basis of the facts available.

11. As regards the Panels' rejection of the complainants' claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C subject imports sold at lower prices were placing downward pressure on domestic prices of Grade C, China submits that these findings should be upheld.

12. At the outset, China considers that it is important to focus upon the subject matter of this appeal. Japan and the European Union challenge the Panels' legal interpretation that, with respect to price undercutting, an investigating authority will satisfy the relevant requirements by considering whether subject imports sell at lower prices than *comparable* domestic prices. In order to assess the correctness of the specific legal interpretation that is the subject matter of this appeal and the application thereof, the comparability of the import and domestic prices that have been compared should thus be taken as accepted.

13. As regards the first inquiry under Article 3.2 (price undercutting), an investigating authority is instructed to consider "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product". Accordingly, this inquiry thus consists of a comparison of prices, which will reveal whether there "has been" a significant price undercutting. Article 3.2 does not require any consideration of the cause of the price undercutting (for instance, a decrease in the price of dumped imports and/or an increase in the domestic price), nor of the consequences of such price undercutting (for instance, lost sales, price depression or price suppression). The fact that no additional consideration is required in this respect is even clearer when comparing the wording concerning the first kind of inquiry with the wording used for the second kind of inquiry (price depression or suppression). If the drafters had intended to require a similar consideration for the first kind of inquiry, as required for the second kind of inquiry, they would have used the same wording and the same syntax to describe both kinds of inquiries. In China's view, the importance of the absence of the wording "whether the effect of" and the lack of the syntactic relationship expressed by the terms "to depress prices and "[to] prevent price increases" is confirmed by the Appellate Body's findings in *China – GOES*.

14. A mathematical difference between comparable prices is the inquiry explicitly provided for in view of assessing the "effect of the dumped imports on prices" referred to in Articles 3.1 and 3.2. The use of the wording "effect of the dumped imports on prices" thus does not suggest the presence of any other required consideration beyond the comparison between prices for price undercutting. This is because the inquiry into the effect that links the subject imports with the prices of the domestic like products consists precisely of such comparison.

15. Japan and the European Union consider that a situation in which the domestic price increased can be better described as "price overcutting" or "overpricing by domestic products". This is erroneous for several reasons, including the fact that if price A is higher than price B, this necessarily means that price B is lower than price A. These are simply two sides of the same coin, but still reveal the relationship between the two prices. It is exactly this relationship or link between the import prices and the domestic prices that, according to the Appellate Body, an investigating authority should inquiry into under Article 3.2.

16. Moreover, the interpretation proposed by Japan and the European Union thus renders meaningless the wording "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" as well as the use of the "otherwise". The interpretation no longer addresses two distinguishable situations but rather addresses one specific situation (depression/suppression) that can be present in several circumstances, without raising the need to list all of these circumstances.

17. Japan also contests the Panel's legal interpretation because it allegedly may be construed to mean that it is sufficient under Articles 3.1 and 3.2 for an investigating authority to find mathematically lower prices of subject imports at a single point in time during the POI. China fails to find any such construction by the Panel in the paragraphs referred to by Japan. The Panel did not make any findings about the length of the period during which price undercutting should be found, as Japan never made a claim in this respect.

18. China submits that the European Union's appeal concerning the Panel's findings leading it to conclude that MOFCOM did not act inconsistently with Articles 3.1 and 3.2 by allegedly having improperly extended its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole should be rejected.

19. The European Union had argued before the Panel that MOFCOM improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole (ABC). The European Union's position before the Appellate Body is no longer that an investigating authority is always required to reach an ultimate price undercutting determination that relates to the domestic product (ABC). Rather, according to the European Union's latest views, an investigating authority is required to reach an ultimate price undercutting determination that relates to the domestic product ABC if the investigating authority sets out to address the ultimate question of whether or not the price of the imported product (ABC) had a significant price undercutting effect on the domestic product (ABC).

20. China has been unable to identify an interpretation of the Panel according to which an investigating authority, acting in the way described by the European Union, would have acted consistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The Panel reached no findings on this, simply because this was not an issue at stake before the Panel. China recalls that Appellate Body proceedings are limited to issues of law covered in the panel report and legal interpretations developed by the panel.

21. In any event, an investigating authority might first attempt to assess the presence of price undercutting by dumped imports as a whole in respect of the domestic like product as a whole, but then subsequently adopt a grade-by-grade methodology because the authority realizes that its initial methodology would not result in a comparison of *comparable* prices. Such an approach would not fail to be objective, nor lack a basis in positive evidence.

22. Moreover, even if assuming that such methodology would result in chunks of data or questions remaining unconsidered, this does not affect the evidentiary basis or objective assessment if such data and questions do not require an assessment under Article 3.2. The European Union explicitly agrees that the relevant provisions permit an investigating authority

to consider price undercutting on the basis of Grades A, B and C separately. China fails to see why this conclusion would be any different, simply because an investigating authority had first attempted to consider price undercutting for the domestic like product as a whole. China also recalls that the Panel's findings are clearly premised on the fact that the grade-by-grade comparison was the appropriate methodology to ensure price comparability.

23. Finally, the Panel's factual findings confirm that, even if assuming the European Union's interpretation would be upheld, there would be no violation by MOFCOM.

24. Japan incorrectly submits that the Panel erred in finding that its claim regarding the explanatory force was outside its terms of reference. Japan acknowledges that this claim is separate from the claim that MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses. However, it simultaneously contends that the logical connection with the results of its Article 3.2 volume and price effects analyses and the explanatory force are merely different expressions or explanations of the same concept. If the concepts are identical, China fails to see why Japan felt compelled to fault the Panel for failing to address this fourth independent claim.

25. Japan also appeals the Panel's findings under Articles 3.1 and 3.4 in relation to Japan's claim that MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses. Japan's appeal essentially consists of a reintroduction of its claim concerning the absence of any explanatory force. Indeed, the relevant part of Japan's other appellant submission refers abundantly to the notion of explanatory force. China submits that for this reason, Japan's appeal should fail.

26. In any event, the Panel's findings should be upheld. China considers that the obligation to derive an understanding of the impact of the dumped imports on the domestic industry must be distinguished from the obligation to determine that the dumped imports are causing injury. Moreover, in order to reach an affirmative causation determination under Article 3.5, dumped imports must not be found to be the only cause of injury, nor the predominant cause of injury. Rather, an investigating authority can only find a causal link if it duly demonstrates that the dumped imports are *a cause* of injury. Since the assessment under Article 3.4 will be used as a basis for the causation determination under Article 3.5, this necessarily implies that the Article 3.4 assessment must allow an investigating authority to derive an *understanding* about whether or not the dumped imports could be *a cause* of injury.

27. Article 3.4 thus does not require an investigating authority to determine that the injury found to exist under Article 3.4 is caused by the dumped imports, nor that such injury can be attributed exclusively to the dumped imports. Rather, Article 3.4 requires an examination that allows an investigating authority to find that there is injury and that dumped imports can be considered to have "explanatory force" for part of the injury found to exist. It is important to distinguish such "explanatory force" from a determination of causation. Indeed, the wording "explanatory force" suggests that the dumped imports should be able to "serve, or intended to serve, as an explanation". It does not imply that the dumped imports are determined to actually explain the (or part of the) injury. The latter determination is to be reached in Article 3.5.

28. In view of the above, the Panel's interpretation is entirely consistent with the requirement to engage in an assessment of the relationship between subject imports and the state of the domestic industry or the explanatory force of subject imports for the state of the domestic industry. There is no need for a premise that those grades/time periods for which no price effects were found were not impacted by subject imports. Indeed, part of the injury found to exist for the domestic industry as a whole under Article 3.4 may relate to other factors that affect the performance of the domestic industry in respect of those like products for which no undercutting was found. However, this does not detract from the explanatory force of the dumped imports for part of the injury found to exist.

29. The European Union's appeal of the Panel's findings under Articles 3.1 and 3.4 is based on the approach adopted by the Panel, which the European Union refers to as a bifurcated analysis. According to the European Union, the Panel should have adopted a so-called unitary analysis. However, the European Union fails to see that the Panel was required to carry out an analysis as to the consistency of the measure at issue with Article 3.4 of the Anti-Dumping Agreement, taking

into account its standard of review under Article 17.6(i) of the Anti-Dumping Agreement. By faulting the Panel for having adopted a two-step (or "bifurcated") approach, the European Union is essentially faulting the Panel for not having carried out a *de novo* review. The European Union further claims that only what is caused by the dumped imports is correctly characterised as injury within the meaning of footnote 9 of the Anti-Dumping Agreement. However, this disregards the wording of footnote 9 itself and ignores the reference to "injuries" caused by "other factors" in Article 3.5.

30. Both Japan and the European Union allege that the Panels failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, in finding that the complainants did not raise independent claims under article 3.5 (other than reliance on the market share and non-attribution analysis). In this respect, China submits, first, that the requests for the establishment of a panel do not contain any independent claims. Indeed, the wording "flawed" presupposes a finding that the analysis is found to be violating Articles 3.2 and 3.4 of the Anti-Dumping Agreement. Reading the panel requests as a whole, it is even clearer that the alleged flawed price effects and impact analyses refer to the alleged violations of Articles 3.2 and 3.4. Consequently, if the Panels would have found that the complainants did make independent claims, it should have found these to be outside its terms of reference.

31. Second, even if assuming that the panel requests would have contained independent claims, such claims must be made explicitly in the submissions to a panel. Japan and the European Union, however, failed to do so. Japan and the European Union's (other) appellant's submissions should have at least identified relevant statements in their submissions to the Panels, in which they would have clearly stated independent claims. Their failure to do so should be sufficient to deny their request to the reverse the Panels' findings.

32. There is nothing in Japan's or the European Union's (other) appeal to suggest that the Panels' assessment was inaccurate, let alone not objective. The complainants erroneously consider that *Philippines – Distilled Spirits* is instructive as regards the Panels' supposed failure to make an objective assessment of the matter before it, as required by Article 11 of the DSU. In *Philippines – Distilled Spirits*, there was no disagreement as to whether or not the claim was duly made before the panel. Rather, the discussion concerned whether or not the complainant had requested that the panel address its claim (which was duly made) (i) in any event, or (ii) only in the alternative. Finally, even the application of the approach of the Appellate Body in this dispute leads to the conclusion that the Panels' assessment was consistent with Article 11 of the DSU.

33. The European Union further erroneously alleges that the Panel erred in its findings concerning Article 6.9 of the Anti-Dumping Agreement as regards MOFCOM's disclosure of the data underlying the dumping determination. The European Union fails to contest any issue of law actually covered in the Panel Report or any legal interpretation actually developed by the Panel (taking into account the absence of a claim under Article 11 of the DSU). In the few instances where the European Union expresses a disagreement with what it considers to be a Panel finding, it is in fact simply distorting the Panel's findings. Therefore, the European Union's appeal should be rejected, in view of Articles 17.6 and 17.13 of the DSU.

34. In any event, the Panel's interpretation and application of Article 6.9 was correct. Article 6.9 does not specify in which manner (other than timely) the authorities shall "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". In requiring that a narrative description not leave uncertainty as to the essential facts under consideration, the Panel appropriately focused on the respondents' ability to defend their interests.

35. China also finds support for the Panel's interpretation in the wording of Article 6.9, which provides that the obligation is to "*inform* all interested parties of the essential facts". This is different from the word "provide". Consequently, under Article 6.9, an investigating authority may not necessarily be under an obligation to *provide* interested parties with certain actual data under certain circumstances where these are already in their possession. However, the investigating authority still remains under the obligation to *inform* such interested parties of the essential facts under consideration.

36. The European Union takes issue with the BCI Procedures and certain legal interpretations and findings made by the Panel when examining the European Union's request that the Panels amend two aspects of such BCI Procedures. During the Panel proceedings, this was essentially an issue between the European Union and the Panel. This issue was, and still is, unrelated to the dispute between the European Union and China.

37. China notes that, in respect of its appeal on this issue, the European Union is not requesting that the Appellate Body make findings that would result in DSB rulings and recommendations with respect to China's anti-dumping measures imposed on imports of HP-SSST. Therefore, China considers it unnecessary for the Appellate Body to examine this issue, as such examination would not contribute to the prompt or satisfactory settlement of this matter or contribute to secure a positive solution to this dispute. China further notes that the BCI Procedures exclusively governed the Panels' proceedings, which have been concluded.

38. China considers that, pursuant to Article 1.2 and Appendix 2 of the DSU, Article 17.7 of the Anti-Dumping Agreement is the most relevant provision governing confidentiality in the context of panel proceedings concerning disputes under the Anti-Dumping Agreement. China considers that "confidential information" under Article 17.7 refers to information submitted as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement in the context of the underlying anti-dumping proceedings. In China's view, as a matter of WTO law, regardless of whether or not this is confirmed in a panel's BCI Procedures, information submitted as confidential to an investigating authority should by definition be designated as confidential before a panel examining the underlying anti-dumping proceedings. Such information should not be disclosed without specific permission or formal authorization of the party having submitted it in the underlying anti-dumping proceedings.

**ANNEX B-6****EXECUTIVE SUMMARY OF JAPAN'S APPELLEE'S SUBMISSION  
(DS454)****I. INTRODUCTION**

1. China claims that the Panel erred under the Anti-Dumping Agreement, DSU, and Joint Working Procedures by concluding that the Ministry of Commerce of the People's Republic of China ("MOFCOM") violated Articles 3.1 and 3.5 and Article 6.5 of the Anti-Dumping Agreement in imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan. For the reasons stated below, the Appellate Body should reject China's claims of error in their entirety.

**II. THE PANEL DID NOT ERR WHEN FINDING THAT MOFCOM ACTED INCONSISTENTLY WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT IN ITS CAUSATION AND NON-ATTRIBUTION ANALYSES**

2. First, China's arguments that Japan never raised, articulated, or made a *prima facie* case regarding the claim that MOFCOM's reliance on the market share of subject imports was insufficient in the context of its price effects findings to establish a causal link<sup>1</sup> are entirely without merit. To the contrary, Japan properly raised this claim in its Panel Request, particularly when Japan's Panel Request is considered "*as a whole*" and "*in the light of attendant circumstances*".<sup>2</sup> Specifically, Japan addressed the fundamental problem with MOFCOM's causation analysis that it assessed none of the "effects of dumping, as set forth in paragraph[] 2" as required under Article 3.5, i.e., the *dynamic* trends in the volume of subject imports and the prices of the domestic like products. Further, Japan properly articulated this claim and made a *prima facie* case regarding this claim throughout its submissions to the Panel, beginning with its first written submission.<sup>3</sup> China appears to improperly divide Japan's claim and arguments into pieces, isolating the "market share based causation claim" in the context of the price effects analysis from the rest of Japan's claim. Such an argument is rooted in China's own faulty understanding that this issue must be treated in total isolation from other issues arising under Article 3.5, and thus without merit. The Panel therefore acted appropriately in its analysis and conclusions at paragraphs 7.181-7.188 of the Panel Report, and did not violate Articles 6.2, 7.1, and 11 of the DSU and Paragraph 7 of the Joint Working Procedures.

3. Second, China takes issue with the substance of the Panel's findings at paragraphs 7.181-7.188 of the Panel Report, arguing that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU.<sup>4</sup> China's arguments, however, have no merit.

4. Importantly, most, if not all, of China's arguments in Section 2.2 of its other appellant submission implicate the "panel's appreciation of facts and evidence", which the Appellate Body has explained are arguments that fall under Article 11 of the DSU.<sup>5</sup> However, China does not establish that any of the Panel's analysis at paragraphs 7.181-7.188 of the Panel Report rises to the level of "deliberate disregard" or "willful distortion" of the evidence required for the Appellate Body to find that the Panel failed to make an objective assessment under Article 11 of the DSU.<sup>6</sup>

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<sup>1</sup> China's other appellant submission, paras. 49-102.

<sup>2</sup> Appellate Body Report, *US – Carbon Steel*, para. 127 (emphases added).

<sup>3</sup> See Japan's comments on China's interim comments, para. 9.

<sup>4</sup> China's other appellant submission, paras. 114-171.

<sup>5</sup> Appellate Body Report, *China – GOES*, para. 183.

<sup>6</sup> Appellate Body Report, *EC – Hormones*, para. 133.

5. Turning to China's particular arguments, regarding the Panel's finding that MOFCOM failed to account for the fact that the market share of subject imports had dropped in its causation analysis<sup>7</sup>, the mere recitation of facts in MOFCOM's final determination does not constitute the "reasoned and adequate" and "unbiased and objective" analysis that an investigating authority is obligated to conduct.<sup>8</sup> Further, regarding the Panel's dismissal of MOFCOM's finding of price correlation as a sufficient basis for demonstrating cross-grade price effects<sup>9</sup>, the mere recitation by MOFCOM in its discussion pertaining to the product under consideration of petitioners' argument that "the price changes of the three [grades] are to a certain extent correlated with one another"<sup>10</sup> does not as a matter of inference, logic, and obviousness lead to the conclusion that MOFCOM sufficiently found cross-grade price effects to justify its causation determination. China's argument is also faulty as it conflates theoretical *physical* substitutability with the *actual* substitutability relevant for a price effects analysis.

6. Third, China makes a purely consequential argument regarding the Panel's non-attribution findings<sup>11</sup>, which should fail because Japan has demonstrated that the Panel's causation findings should not be reversed. That said, the Panel's observations at paragraphs 7.202-7.203 of the Panel Report *in addition* to the fundamental flaw in MOFCOM's causation determination support the Panel's non-attribution findings. Therefore, even if the Appellate Body reverses the Panel's causation findings based on China's arguments in this appeal, the Appellate Body has no basis to reverse the Panel's non-attribution findings.

### **III. THE PANEL DID NOT ERR WHEN FINDING THAT MOFCOM ACTED INCONSISTENTLY WITH ARTICLE 6.5 OF THE ANTI-DUMPING AGREEMENT BY FAILING TO OBJECTIVELY ASSESS "GOOD CAUSE" OR SCRUTINIZE PETITIONERS' SHOWING OF "GOOD CAUSE" FOR CONFIDENTIAL TREATMENT OF INFORMATION**

7. First, China claims that the Panel interpreted Article 6.5 so as to obligate an investigating authority to explain its reasons for the grant of confidential treatment.<sup>12</sup> However, the Panel did not find an affirmative obligation on MOFCOM to provide an explanation; rather, from the evidence before it, the Panel found that China had not discharged its burden to establish that MOFCOM undertook an objective assessment of good cause for confidential treatment.

8. Second, China alleges that the Panel employed an erroneous standard of review by limiting its review to the explanations provided by MOFCOM and by not drawing inferences in favor of China from certain other facts identified by China.<sup>13</sup> As an initial matter, the Panel assessed not only MOFCOM's explanation, but also other facts and evidence before it. Further, the question before the Panel was whether MOFCOM undertook an objective assessment, not whether the Panel itself could reach the conclusion that "good cause" existed for confidential treatment. Here, none of the facts referenced by China points to *any* assessment by MOFCOM, let alone an objective one.

9. Third, China alleges that the Panel Report is internally inconsistent, on account of the Panel not taking issue with the absence of any explanation by MOFCOM while making findings on the claim under Article 6.5.1.<sup>14</sup> However, in its Article 6.5.1 analysis, the Panel found a lack of material on the record that MOFCOM could have scrutinized, and consequently, a violation of Article 6.5.1. By contrast, under Article 6.5, petitioners had made statements that alleged good cause for confidential treatment, so the Panel proceeded to examine whether MOFCOM in fact objectively assessed that material.

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<sup>7</sup> China's other appellant submission, paras. 116-124.

<sup>8</sup> See Panel Report, *China – Autos (US)*, para. 7.4 (citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186; Appellate Body Report, *US – Lamb*, para. 103).

<sup>9</sup> China's other appellant submission, paras. 125-170.

<sup>10</sup> China's other appellant submission, para. 135 (citing Final Determination, Exhibit JPN-2, p. 48).

<sup>11</sup> China's other appellant submission, paras. 173-176.

<sup>12</sup> China's other appellant submission, paras. 191-197.

<sup>13</sup> China's other appellant submission, paras. 201-206.

<sup>14</sup> China's other appellant submission, paras. 208-210.

10. Finally, China alleges that it was in response to the Panel's Question 67 that Japan first argued that MOFCOM had not "objectively assessed and determined the showing of good cause by the petitioners"<sup>15</sup>, and therefore the Panel improperly set out the case and arguments for Japan on this issue. However, an allegation that confidential treatment was extended without "good cause being shown" is merely another manner of expressing that the investigating authority failed to undertake an objective assessment as to whether good cause had been shown.

#### **IV. CONCLUSION**

11. For the foregoing reasons, Japan respectfully requests that the Appellate Body reject China's claims of error in their entirety.

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<sup>15</sup> China's other appellant submission, note 210.

**ANNEX B-7****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION  
(DS460)****I. EU THIRD PARTICIPANT SUBMISSION IN DS454**

1. This submission is also the second part of the EU's Third Participant Written Submission in the appeal proceedings in DS454.

**II. REQUEST CONCERNING CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION**

2. The EU respectfully requests the Appellate Body to draft the Appellate Body Report so as to avoid express reference to information designated as confidential in the EU Appellee Submission.

**III. ARTICLE 6.2 OF THE DSU**

3. With respect to Article 2.2.2, the statement in the panel request is consistent with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

4. First, the specific "legal basis" is clearly stated. Second, what is provided in the narrative is a *summary* of the legal basis of the complaint, which is shorter than the provision itself. The summary included both the *opening* and *closing* phrases, which was a reasonable way capturing the interlinked language sandwiched between them. Third, Article 6.2 of the DSU permits a *brief* summary. The EU complied with this requirement. Fourth, Article 6.2 of the DSU merely requires that the summary of the legal basis of the complaint be *sufficient*, which, in all the circumstances, was the case. Fifth, in this respect, the panel request contained a brief summary of the legal basis of the complaint sufficient to present *the problem* clearly. The problem was that MOFCOM could not have determined the amounts for SG&A based on actual data pertaining to production and sales in the ordinary course of trade by SMST. Finally, the panel request was completed by references to Articles 2.2, 2.2.1 and 2.2.1.1. In short, China, having no defence on the substance, makes a simple matter appear far more complex than it actually is. On the substance, China does not contest that planned coefficients were applied to the COP of the free samples, doubling the SG&A for Grade B. Instead, in the Panel proceedings, China made a series of unreasonable and untenable allegations about the procedural conduct of the municipal anti-dumping proceedings in an attempt to blame SMST and excuse MOFCOM. And it persists in attempting to artificially divide up the obviously interlinked terms of Article 2.2.2; and de-contextualise the obviously interlinked provisions cited in the panel request.

5. There is only one obligation in Article 2.2.2, not four, as China would have it, or forty-eight, which is what China's arguments imply. Article 2.2.2 is the preferred option for calculating SG&A, the others being set out in Articles 2.2.2(i), 2.2.2(ii) and 2.2.2(iii), each providing a single basis for calculation or complaint. The term "actual data" is unique to Article 2.2.2 and directed China to that provision. In any event, the relevant terms in Article 2.2.2 are interlinked, this being the only meaningful interpretation available. The EU did not expressly limit its panel request, through the use of the terms "because" or "in particular", it merely provided a brief summary of the legal basis of the complaint. The references to Article 2.2.1 (with its single obligation regarding the ordinary course of trade); Article 2.2 (with its single reference to SG&A amounts being reasonable); and Article 2.2.1.1 (with its reference to reasonable costs) – all support the EU position. The case law also supports the EU position.

#### IV. DUMPING

##### A. MOFCOM'S failure to take into account certain information provided during the verification

6. The EU is not aware of any investigating authority in any jurisdiction that operates a general and absolute rule according to which no rectification or clarification can ever be provided at verification. Any such rule would have to operate even-handedly for all interested parties, including the domestic industry. It would also surely be inconsistent with the ADA, which sets out in Article 6.7 and Paragraph 7 of Annex I the procedures that shall apply, which envisage the receipt of such information. In any event, absent such a general rule in municipal law, it is evident that an investigating authority cannot simply cherry-pick the occasions on which, from time-to-time, it invokes and applies such an absolute rule, subsequent to the verification, *without offering any assessment of the objective criteria and circumstances that might or might not justify such refusal*. This conclusion is all the more compelling in this case, given the Panel's findings, not appealed by China, that MOFCOM expressly and specifically requested SMST to prepare documents relating *inter alia* to Table 6-5, but later rejected them without any additional explanation. And the Panel's further findings, also not appealed by China, that, as a matter of fact, MOFCOM actually received and verified the information during the verification, leaving one completely at a loss to understand how this issue might conceivably have impeded or delayed the conduct of the municipal anti-dumping proceedings in any way. Most of China's appeal is built around misstatements of what the Panel actually found.

##### B. Article 2.2.2 of the ADA

7. The position is far less complicated than China suggests. All China needs to do in the compliance review is to use the actual data pertaining to production and sales in the ordinary course of trade by SMST, contained in Tables 6-5 to 6-8, which is the only thing that was verified. In this way China can ensure that the measure taken to comply complies with Article 2.2.2. China's remaining arguments are largely a re-iteration of its arguments concerning the scope of the panel request, and should be similarly dismissed. China has not been treated in a manner that does not comport with "the principles of fundamental fairness". There has been no breach of due process or lack of disclosure by the Panel. There is no breach of Article 11 of the DSU.

8. The origin of what occurred was the express request by SMST, which MOFCOM accepted, not to use in the constructed normal value calculations the COP in Table 6-3 for Grade B sales in the EU, because such COP was abnormally high due to the inclusion of the two free samples. The only pertinent particularity of the transactions that is recorded on the Panel record is the fact that the COP was abnormally high due to the two free samples. The Panel was therefore correct to state that this point was undisputed. The Panel engaged in a reasonable and legally correct interpretation and application of Article 2.2.2 to the specific facts of this case. There is clearly a "logical connection" between the unreliability of the COP of the samples for the purposes of determining COP and SG&A. The Panel did not err in reasoning that an unbiased and objective investigating authority could not have assumed the corrective potential of the relevant coefficients without any supporting analysis or evidence.

#### V. INJURY – ARTICLES 3.1 AND 3.5 OF THE ADA

9. The EU made a *prima facie* case. China did not bring a claim under Articles 6.2 and 7.1 of the DSU. Further, the EU properly articulated this claim and made a *prima facie* case regarding this claim throughout its submissions to the Panel, beginning with its First Written Submission. The Panel therefore acted appropriately in its analysis and conclusions. It is uncontested that the EU properly raised this claim in its panel request. Nothing in the EU's panel request limits the claim raised by the EU under Articles 3.1 and 3.5 of the ADA to a "volume analysis based claim" that only takes issue with an affirmative finding of causation despite the absence of volume effects and given the presence of "positive" volume effects, and a "price effects analysis based claim and impact analysis based claim" that is "purely consequential" to the alleged violations of Articles 3.2 and 3.4.

10. Moreover, the brief summary in the EU's panel request clearly indicates that the EU did raise the causation claim regarding MOFCOM's reliance on the market share of subject imports in the context of its price effects analysis. The brief summary in the panel request clearly addresses the problem. As such, based on MOFCOM's Final Determination as written, even if MOFCOM relied on the market share of subject imports only in the context of its price effects analysis, the assessment of the market share retained by subject imports at the end of the POI is not by itself sufficient to support or justify a finding of causation.

11. The EU did argue that it is erroneous for an investigating authority to take the market share retained by subject imports into consideration in its Article 3.5 causation analysis, which the Panel rejected at paragraph 7.180 of the Panel Report. However, as the Panel then correctly recognized at paragraphs 7.181-7.188 of the Panel Report, this was not the only argument the EU made in respect of the relevance of the market share retained by subject imports for the causation analysis. Rather, in its First Written Submission, the EU argued that MOFCOM should have considered the absence of a significant increase in subject imports in respect of its assessment of the price effects in its causation analysis under Articles 3.1 and 3.5.

12. The EU, in its First Written Submission, specifically cited MOFCOM's explanation, and then argued that MOFCOM's analysis is flawed because "while agreeing that the absence of a significant increase in imported products under investigation is not, in and of itself, sufficient to prevent a conclusion that the domestic industry is being injured, the EU submits that this factor *cannot be stripped of all significance*", and, as the EU asserted in its oral statement at the first substantive meeting, causation must relate to the specific effects of dumping that were the subject of the analysis under Articles 3.2 and 3.4, a context in which the EU referred expressly to MOFCOM's failure to find cross-grade price effects. In short, (i) in its Final Determination, MOFCOM relied on the market share retained by subject imports in reaching its conclusion that "the imports of the subject products had a relatively noticeable impact on the price of domestic like products"; and (ii) the EU, in response, argued that this specific part of MOFCOM's causation analysis is flawed because MOFCOM did not properly consider the absence of a significant increase in imported products as a factor which is at odds with and attenuating the alleged "impact on the price of domestic like products".

13. Most, if not all, of China's arguments in Section 4.2 of its Appellant Submission implicate the "panel's appreciation of facts and evidence". The Appellate Body has explained that such arguments fall under Article 11 of the DSU. China does not establish that any of the Panel's analysis at paragraphs 7.181-7.188 of the Panel Report rises to the level of "deliberate disregard" or "wilful distortion" of the evidence required for the Appellate Body to find that the Panel failed to make an objective assessment under Article 11 of the DSU. The Appellate Body should therefore reject China's arguments. The EU submits that the Panel's analysis at paragraphs 7.181-7.188 was sound and fully consistent with the factual record at hand.

14. In addition, the EU disagrees with China that the Panel's non-attribution findings at paragraphs 7.200-7.204 of the Panel Report "are entirely based on the findings in relation to MOFCOM's determination of a causal link". China appears to claim that the Panel's non-attribution findings are consequential based on the fact that the Panel referenced certain "circumstances" relating to MOFCOM's causation analysis. However, China's claim is not correct. The Panel did find that a flawed causation analysis results in a flawed non-attribution analysis at paragraph 7.201 of the Panel Report, but the Panel did not end its analysis there. "In light of the fundamental flaw in MOFCOM's causation determination" the Panel considered it "not necessary [...] to address every aspect of the parties' non-attribution arguments in detail". However, at paragraphs 7.202-7.203 the Panel did address certain additional aspects of the EU's non-attribution arguments. The Panel's observations at paragraphs 7.202-7.203 in addition to the fundamental flaw in MOFCOM's causation determination are among the "above reasons" referenced by the Panel at paragraph 7.204 that constitute the basis for the Panel's ultimate finding.

15. The Panel's observations at paragraphs 7.202-7.203 are clearly independent from the Panel's causation analysis. These observations confirm that China's argument that the Panel's non-attribution findings are "entirely based on the findings in relation to MOFCOM's determination of a causal link" must be rejected. Further, China has presented no argument that the additional reasons described at paragraphs 7.202-7.203 of the Panel Report do not support the Panel's conclusion that MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the ADA. Consequently, even if the Appellate Body reversed the Panel's causation findings based

on China's arguments in this appeal, the Appellate Body would have no basis to reverse the Panel's finding that MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the ADA due to the reasons described at paragraphs 7.202-7.203 of the Panel Report.

## VI. PROCEDURAL ISSUES: ARTICLE 6.5 OF THE ADA

The Panel did not find that Article 6.5 of the ADA obliges an investigating authority to explain its decision to grant confidential treatment. In fact, the Panel's finding was that, in the absence of any explanation by MOFCOM, the Panel had no basis to conclude that MOFCOM properly determined that the petitioners had shown good cause for their requests for confidential treatment. This is not a finding that Article 6.5 contains an obligation to provide an explanation, but a finding that China had not provided any evidence to support its assertion that MOFCOM undertook an objective assessment of good cause for confidential treatment, an obligation that China acknowledges is contained in Article 6.5.

16. In the present case, the question before the Panel was whether MOFCOM undertook an objective assessment of the alleged good cause offered by petitioners for confidential treatment. It would have been unreasonable to expect the EU to prove the negative, or to prove that "an unbiased and objective investigating authority could not have reached the particular conclusion". The EU did not have access to any information or evidence relating to the decision making of MOFCOM, which, owing to their designation as confidential, were in the exclusive possession of China.

17. In this context, the Panel considered the evidence before it. Since the statement by MOFCOM merely summarized the arguments of petitioners, without evidencing *any* assessment by MOFCOM, let alone an objective one, the Panel ruled that there was no evidence of an objective assessment by MOFCOM. This is evident, for example, from the Panel's explanation that "there is *no evidence*, and *China has not demonstrated otherwise*, that MOFCOM objectively assessed the 'good cause' alleged for confidential treatment, and scrutinized the petitioners' requests". The EU submits that the Panel was correct in reaching this conclusion.

18. The Panel did not employ an erroneous standard of review and could not infer that MOFCOM objectively assessed the alleged good cause. China's argument is based on a false premise, because the Panel assessed not only MOFCOM's explanation, but also other facts and evidence before it. Further, as noted by the Appellate Body in EC – Fasteners (China), under Article 6.5, "[g]ood cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party". Therefore, the question before the Panel was whether MOFCOM undertook an objective assessment, as required by Article 6.5, not whether the Panel itself could reach the conclusion that "good cause" existed for confidential treatment. To answer this question, the Panel had to review how MOFCOM dealt with the request, a matter it needed to determine from the investigation record. It would have been inappropriate for the Panel to undertake a *de novo* assessment and determine for itself whether good cause existed.

19. In any case, as the Panel correctly concluded, there were no facts on the record that would warrant an inference that MOFCOM undertook an objective assessment. The three facts that China points to are: (i) the existence of a request for confidentiality; (ii) the grant of the request; and (iii) the mention of the request and the reasons advanced by petitioners in the investigation record. None of these facts points to *any* assessment by MOFCOM, let alone an objective one. The obligation under Article 6.5 to engage in an objective assessment would be meaningless if the mere facts that a request was made, was noticed by the investigating authority, and was granted, would sustain an inference of objective assessment. In fact, objective assessment is the intervening stage between an investigating authority taking notice of a request and granting it. The mere granting of the request cannot serve as evidence that the investigating authority undertook an objective assessment of the existence of good cause for confidential treatment, because that precludes the possibility that the investigating authority improperly granted the request in the absence of such an objective assessment.

There is no internal inconsistency in the Panel's treatment of claims under Articles 6.5 and 6.5.1. The EU notes the ruling of the Appellate Body in *EC – Fasteners (China)* that an investigating authority is obliged to scrutinize the reasons advanced by a party for not supplying non-confidential summaries. The EU further notes that, in this regard, there may be similarities between the obligations of an investigating authority under Articles 6.5 and 6.5.1. However, a precondition for triggering the obligation of the authority to scrutinize the reasons advanced for not supplying non-confidential summaries is the existence of a statement by the relevant party pertaining to such reasons. In other words, where the party concerned has not placed on record *any* reason for not supplying non-confidential summaries, it would be impossible for an investigating authority to scrutinize such reasons, and it would be futile for a panel addressing a claim under Article 6.5.1 to examine whether the authority undertook such scrutiny. Therefore, where a panel finds that the concerned party did not advance *any* reasons for not supplying non-confidential summaries, the panel would make a finding of violation of Article 6.5.1, without undertaking the impossible task of examining whether the authority scrutinized such non-existent reasons. This is not a *de novo* scrutiny by the Panel of the reasons stated by the concerned party for their adequacy, but a factual examination of whether there was *any* material that the investigating authority could scrutinize.

20. This was the scenario before the Appellate Body in *EC – Fasteners (China)*, which China cites in support of its proposition. China claims that the Appellate Body in that case examined statements provided by certain parties who claimed that they could not provide a non-confidential summary, and did not require an analysis by the investigating authority. The paragraph that China cites states: "*Neither of the statements provided by Agrati or Fontana Luigi indicated why the information for which no non-confidential summary was provided presented an 'exceptional circumstance' to justify the lack of a summary, nor did either statement provide reasons explaining why summarization of a particular category of information was not possible.*" This was an instance where the Appellate Body found that there was no material before the investigating authority to scrutinize; a further examination as to whether the investigating authority undertook a scrutiny of non-existent information would have been pointless.

21. The Panel did not set out the case and arguments for the EU. China's arguments in this respect are based on its erroneous understanding of the nature of the analysis under Article 6.5. The grant of confidential treatment under Article 6.5 is contingent on good cause being shown by the applicant. Whether good cause has been shown is a matter to be objectively assessed by the investigating authority. As explained above, it would be improper for a panel to undertake a *de novo* analysis on this matter. Therefore, an allegation that confidential treatment was extended without good cause being shown is merely another manner of expressing that the investigating authority failed to undertake an objective assessment as to whether good cause had been shown by the applicant. China's attempt to draw a distinction between the two issues rests on China's erroneous interpretation of Article 6.5, which would allow a panel to undertake a *de novo* assessment of good cause. The EU has already explained why that interpretation is incorrect.

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**ANNEX C**

ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the United States' third participant's submission (DS454, DS460)	C-2

**ANNEX C-1****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION  
(DS454, DS460)****I. ARTICLES 6 AND 17 OF THE ANTI-DUMPING 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, the protection of confidential information is essential to the appropriate functioning of an antidumping proceeding. Here, various aspects of those transparency and confidentiality requirements are being challenged before the Appellate Body.

2. Citing Article 6.5 and 17.7 of the AD Agreement, the Panel amended the BCI Procedures to clarify that BCI "shall include information that was previously submitted to MOFCOM as BCI in the anti-dumping investigation at issue in these disputes." The Panel's amendment with respect to BCI information was consistent with Articles 6.5 and 17.7. The United States, however, does not agree with the EU's proposed interpretation of Articles 6.5 and 17.7.

3. The Panel also reached a conclusion as to Article 6.5.1, which requires that an investigating authority must provide or otherwise assure that accepted confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. The Panel erred in its interpretation of 6.5.1 because the article does not provide that the investigating authority must explain why good cause has been demonstrated for an objective assessment of confidentiality to have occurred.

4. The Panel's interpretation of Article 6.7 and Paragraph 7 of Annex I is under appeal as well. The U.S. view is that while there is no affirmative obligation for an investigating authority to accept all information presented during verification, it is also not entitled to reject information on the sole ground that such information was proffered at verification.

5. Additionally at issue is the Panel's interpretation of Article 6.9, which provides for the disclosure of "essential facts" underlying an investigating authority's antidumping determination to the interested parties. The Panel incorrectly found that China satisfied its obligations under Article 6.9. In the view of the United States, MOFCOM did not sufficiently make available underlying data it used to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.

**II. ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT**

6. The parties made claims under the Article 2 provisions of the AD Agreement. Article 2.2.2 provides that the amounts for SG&A and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. To the extent that MOFCOM relied on sample sales that it had already excluded in other dumping calculations to establish SG&A when information on sales in the ordinary course of trade was available, the United States agrees with the Panel's findings that China acted inconsistently with Article 2.2.2.

**III. ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT**

7. The parties have appealed various aspects of the Panel's analysis of MOFCOM's injury determination. Under Article 3.2, the Panel correctly rejected the arguments of the European Union and Japan in concluding that an investigating authority may consider the significance of price undercutting by subject imports separately from its determination of price depression or suppression.

8. The Panel's views regarding the analysis of the impact by dumped imports on the domestic industry is inconsistent with Article 3.4. The text of Article 3.4 requires investigating authorities to examine the impact of subject imports on an industry, and not just the state of the industry. An investigating authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends.

9. As to the arguments made by Japan and the EU under Article 3.5, China is incorrect in arguing that the Panel decided on a matter that had not been raised by the complainants. It is clear from the submissions that Japan and the EU both properly submitted these claims to the Panel.

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