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CHINA – DEFINITIVE ANTI-DUMPING DUTIES ON X-RAY SECURITY INSPECTION EQUIPMENT FROM THE EUROPEAN UNION

Report of the Panel

Addendum

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EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION AND GENERAL FACTUAL BACKGROUND

1. The present dispute concerns the definitive anti-dumping measure imposed by the Ministry of Commerce of the People's Republic of China ("MOFCOM") on imports of X-ray security inspection equipment originating in the European Union pursuant to Notice (2011) No 1 of 23 January 2011.

2. Low-energy scanners are primarily used in security checks at transportation infrastructures, such as airports, railway stations and subways, as well as in the protection of public premises. Low-energy scanners for the aviation sector have to meet particularly demanding security requirements. For that reason, in that sector "competition takes place not only on price but also on quality, track record, user friendliness and service". As a result, the aviation sector is generally regarded as a high-end segment commanding higher prices, as compared to the other sectors of the market. The Chinese market for low-energy scanners is supplied by several domestic producers as well as by imports, mainly from the European Union and the United States. The Petition was filed by Nuctech. No other Chinese producer supported the Petition or cooperated in the investigation. As a result, the injury determination is based on data pertaining to Nuctech. Unlike the other Chinese producers, Nuctech has historically focused on high-energy scanners, although it has developed a line of low-energy scanners in recent years. During the POI (2006-2008) Nuchtec's domestic sales of low-energy scanners were concentrated in the low-end and intermediate sectors. Nuctech was a newcomer to the aviation sector and deliberately pursued an aggressive business strategy aimed at rapidly gaining market share. Smiths was the only EU producer who exported the subject products to China during the POI. Smiths did not export any high-energy scanners to China, but only and exclusively low-energy scanners. Unlike Nuctech, Smiths' sales were concentrated in the high-end aviation sector.

3. In the course of the investigation leading to the imposition of the measure at issue the Chinese authorities disregarded some of the most fundamental procedural guarantees provided in the ADA. As a result, the EU exporter was deprived of a fair opportunity to defend adequately its interests. In addition, the measure at issue is based on a manifestly flawed determination of material injury. While the European Union has not submitted any claim with regard to the substantive aspects of the determination of dumping made by the Chinese authorities, this does not mean that the European Union agrees with that determination. Rather, due to the failure of the Chinese authorities to comply with even the most basic transparency requirements imposed by the ADA, the European Union has been unable to understand how the Chinese authorities reached that determination.

II. LEGAL CLAIMS

1. Claim under Articles 6.5.1, 6.4 and 6.2 ADA

4. The European Union submits that, contrary to its obligations under Article 6.5.1 ADA, China failed to require a statement of reasons explaining the exceptional circumstances why summarisation was not possible in its injury analysis, in particular with respect to the statement by the Chinese Public Security Bureau of the Civil Aviation Administration. Furthermore, in certain instances where summaries of confidential information were provided, China, contrary to its obligations under Article 6.5.1 ADA, failed to ensure that they were in sufficient detail to enable a reasonable understanding of the substance of the information submitted. This was the case with respect to

product models in the Petition, Exhibits 8, 9, 10, 11 and 14 attached to the Petition and certain responses and attachments of the Petitioner in the non-confidential version of its Questionnaire Response.

5. Article 6.5.1 ADA imposes an obligation on the investigating authority to request and scrutinise the statements provided by parties seeking confidential treatment for information submitted. The aim of this obligation is to determine whether exceptional circumstances have been established, and whether the reasons provided adequately explain why under the circumstances summarisation is not possible. In the investigation at issue, however, China accepted as adequate non-confidential summaries which did not provide sufficient detail to permit a reasonable understanding. Furthermore, it waived the obligation to provide a non-confidential summary without having requested - let alone having reviewed - the statement of exceptional circumstances that would justify what makes summarisation impossible.

6. In so doing, China also failed to provide a timely and full opportunity for all interested parties to see all the information that was relevant to defend their interests and used by MOFCOM in the anti-dumping investigation, and consequently seriously compromised the ability of the respondents to respond to the petitioner's allegations and adequately defend their interests, contrary to its obligations under Articles 6.4 and 6.2 ADA.

7. Article 6.4 lays down a fundamental due process right, i.e., the right for interested parties to have access to and to see all non-confidential evidence or information that is in the investigating authorities' files. The European Union submits that even if interested parties do not have access to confidential information, they must still be granted access to the non-confidential summary thereof.

8. Depriving interested parties of the right to access non-confidential summaries by failing to comply with its obligations under Article 6.5.1 restricts the opportunity of interested parties to defend their interests, a right that is due to interested parties pursuant to Article 6.2 ADA.

2. Claim under Articles 6.9, 6.4 and 6.2 ADA

9. The European Union submits that China did not fully disclose all the essential facts which form the basis for the determination of the dumping margin of the European Union's cooperating producer and the essential facts which form the basis for the determination of the residual duty, contrary to its obligations under Article 6.9 ADA. China also failed to disclose all the essential facts that form the basis for the determination of injury, including the analysis of the effects of dumped imports on prices.

10. In addition, China also failed to provide a timely opportunity for all interested parties to see all information that was relevant to defend their interests, and that was used by the authority in the anti-dumping investigation, as required by Article 6.4 ADA. Consequently, China also deprived the interested parties of their full opportunity to defend their interests, a right due under the first sentence of Article 6.2 ADA.

11. First, MOFCOM did not disclose the underlying data and the methodology followed by them in order to establish the existence of price undercutting in the Injury Disclosure, nor the underlying data or the methodology followed in order to consider the existence of price depression. MOFCOM asserted the existence and extent of price undercutting and price depression in its Final Determination and considered it as a factor in its injury determination. As these are facts that form the basis for the decision whether to apply definitive measures, they constitute "essential facts" within the meaning of Article 6.9 ADA and must be disclosed in sufficient time for the parties to defend their interests. This was not done in this case. As the case involves such heterogeneous products, knowing the methodology was of utmost importance for Smiths' defence. It was therefore especially important to

know, how the import and domestic prices were being compared and if MOFCOM ensured that those prices were comparable.

12. Second, MOFCOM did not fully disclose all the essential facts with respect to the export price and the adjustments made thereto. The dumping disclosure is drafted in very general terms which for the most part make the verification of the correctness of the facts and assertions included impossible. With respect to the export price, MOFCOM did not disclose the underlying facts and criteria on the basis of which the adjustments to the export price were made, like the specific amounts of adjustments items, including specific data on the adjusted proportions of expenses incurred by the affiliated distributor.

13. Third, MOFCOM failed to provide to Smiths the actual dumping calculations that it performed for Smiths. The disclosure provides information about the methodology used to calculate the dumping margin and includes a reference to the data used; however, MOFCOM did not explain how the figures were calculated on the basis of the information provided by Smiths and the reasons for the discrepancy between the figures. The European Union submits that the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "essential facts" within the meaning of Article 6.9. Those calculations are both material to the authority's decision and important for the determination. It is clear that without those calculations a decision on the definitive measure could not be taken.

14. Fourth, MOFCOM failed to disclose the essential facts under consideration regarding its calculation of the "all others" dumping rate. MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available in the first place. Furthermore, MOFCOM did not disclose the facts that lead it to conclude that 78.1% is an appropriate residual rate, especially considering that the dumping margin for the cooperating company was significantly lower (i.e. 33.5%). The Dumping Disclosure also provides no explanation as to why MOFCOM could not have publicly summarised the information used or at least identified the calculation methodology it employed.

3. Claim under Article 12.2.2 ADA

15. The European Union submits that China violated Article 12.2.2 ADA because neither in its public notice of the imposition of definitive measures, nor in a separate report, MOFCOM set forth sufficiently detailed explanations for the definitive determinations on dumping and injury, together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected.

16. The European Union makes claims with respect to two "categories" of information that China failed to include in the final public notice or separate report: (i) the reasons for the acceptance or rejection of relevant arguments or claims by Smiths; and (ii) certain relevant information on the matters of fact and law which have led to the imposition of final measures.

17. First, concerning the normal value determination, Smiths submitted in its Comments on the Preliminary Determination various reasons, which could show that the sales to the affiliated companies were not affected by the affiliation relationship, represented a fair market price and were made in the normal course of trade. Although MOFCOM refers in passing to the comments made by Smiths in the context of the final disclosure, it does not provide actual facts or reasoning which would address or rebut Smiths's arguments and evidence, thereby leaving the issue open until the Final Determination. The European Union submits that MOFCOM's Final Determination does not adequately address the submissions by Smiths.

18. Second, concerning the injury analysis, MOFCOM's price effects analysis is based on several assertions about the alleged effects of the price of imported subject products on the price of domestic

like products. MOFCOM's conclusion that the imports under investigation caused significant price effects is an essential component of its affirmative injury determination, which in turn is a prerequisite to China's imposition of definitive measures. However, neither in the Preliminary Determination, nor in the Injury Disclosure, nor in the Final Determination did the investigating authority explain the methodology used in order to calculate the alleged price undercutting or price depression. The European Union submits that the ADA requires that authorities provide more than cursory assertions to justify their decisions to impose definitive antidumping measures.

19. Third, MOFCOM also failed to satisfy its obligation under Article 12.2.2 ADA to provide "the reasons for the acceptance or rejection of the relevant arguments or evidence by the exporters and importers". Smiths questioned the credibility of the data submitted by the Petitioner on which the investigating authority based itself in order to find injury of domestic industry. In addition, Smiths also made a number of pertinent arguments concerning MOFCOM's injury analysis in view of China's obligations under Articles 3.4 ADA. However, nowhere in the Injury Disclosure Document or the Final Determination did MOFCOM identify the facts underlying its conclusions.

20. Fourth, MOFCOM's Injury Disclosure did not address the elements raised by Smiths and the reasons for the rejection of Smiths's arguments. Smiths addressed the establishment of the causal link between the injury to the domestic industry and the dumped imports in its Injury Brief and in its Comments on the Injury Disclosure. In particular, Smiths listed several factors which the investigating authority should take into account in assessing the existence of the causal link.

21. Fifth, In the Preliminary Determination, MOFCOM preliminarily arrived at a dumping margin of 48.2 % for Smiths and a residual duty of 71.8 %. MOFCOM provided some narrative explanation in the Preliminary Determination regarding the dumping margins. It did not, however, release the calculations it performed. The Final Disclosure, prior to the Final Determination, also did not include the calculations performed by MOFCOM. In the Final Determination, without releasing or making available the calculations upon which it based its decision, MOFCOM determined a final dumping margin of 33.5 % for Smiths and imposed a residual duty of 71.8 %. The European Union submits that where calculations, and the data underlying those calculations, have not been made available at the stage of disclosure within the meaning of Article 6.9 ADA, not only revisions or modifications of the calculations, and the data underlying them, but the calculations in their entirety constitute relevant information, which has lead to the imposition of the final measures and would consequently have to be set out and explained in the public notice or through a separate report. MOFCOM's failure during the investigation to make available the calculations and data it used to calculate the margins for the cooperating producer and all other producers respectively was therefore inconsistent with Article 12.2.2 ADA.

4. Claim under Articles 3.1 and 3.2 ADA

22. The Final determination of injury rests upon the findings that dumped imports had "an evident undercutting and depressing effect on the price of the domestic like products". The European Union submits that MOFCOM's findings of price undercutting and price depression and, consequently, its determination of injury is not based on an "objective examination" of "positive evidence", contrary to the obligation imposed upon the investigating authorities by Articles 3.1 and 3.2 ADA. Instead, the methodology used by the Chinese authorities in order to consider the existence of price undercutting and price depression was manifestly inaccurate and biased against the EU exporter.

23. Throughout the investigation, Smiths explained repeatedly and at length that low-energy scanners and high-energy scanners have very different physical characteristics, end uses and prices and do not compete with each other. In spite of this, MOFCOM concluded in its Preliminary Determination that the characteristics and functions of high-energy scanners and low-energy scanners are "almost the same" and that all the differences invoked by Smiths resulted, in essence, from mere

differences "in packaging". MOFCOM also failed to take into account the important differences among the various types of products falling within the category of low-energy scanners, which are reflected in substantial price differences.

24. In their initial submissions to MOFCOM, neither Nuctech nor Smiths had made any reference to the existence of price undercutting. MOFCOM nonetheless concluded in the Final Determination that in 2006 and 2007 undercutting was "large" and "serious", whereas in 2008 the prices of imported products were "slightly higher" than the prices of domestic products, while still "at a low level". These findings were reached by following a manifestly inadequate methodology involving the use of weighted average unit values for all the products under investigation, which failed to take into account the differences between the different types of scanners.

25. Likewise, MOFCOM's finding of price depression was the result of applying a flawed methodology involving the use of weighted average unit values for all the products under investigation. MOFCOM disregarded the opinion of Nuctech, which had stressed in various occasions that "because the prices of different types of Subject Products vary significantly, the change in the average price cannot show a trend in prices". Furthermore, the levels of price depression mentioned by MOFCOM in the Final Determination are about three times higher than those calculated by Nuctech on the basis of its own price data for its two most representative models of low-energy scanners.

26. In essence, in view of the manifest differences among the products covered by the investigation, and in particular between low-energy and high-energy scanners, it was clearly inadequate for the Chinese authorities to examine the existence of price undercutting and price depression without taking into account those differences. Regarding price undercutting and price depression, the glaring discrepancy between, on the one hand, the informed views of the two main interested parties with a direct knowledge of the market and, on the other hand, the results yielded by MOFCOM's chosen methodology should have alerted any objective and unbiased investigating authority, had it still been necessary, to the fact that the methodology was grossly inaccurate and unreliable.

5. Claims under Articles 3.1 and 3.4 ADA

27. The European Union submits that China violated Articles 3.1 and 3.4 ADA since MOFCOM failed to make an objective examination, on the basis of positive evidence, of the effect of the dumped imports on prices in the domestic market for like products and the consequent impact of these imports on domestic producers of such products, including the factors listed in Article 3.4.

28. First, MOFCOM failed to base its evaluation on positive evidence. There are discrepancies between the information submitted by the domestic industry (defined as Nuctech) and the data reflected in MOFCOM's Final Determination which called into question the reliability of such data.

29. Second, MOFCOM failed to examine all relevant factors listed in Article 3.4 ADA. In particular, MOFCOM did not refer explicitly or implicitly, and thus failed to evaluate, the magnitude of the margin of dumping. As a consequence, MOFCOM failed to make a proper evaluation of the state of the domestic industry.

30. Third, MOFCOM failed to take into account the differences between high-energy and low-energy scanners when examining various injury factors. MOFCOM's use of weighted average values in the injury factors was manifestly inadequate for considering the existence of material injury in the present case.

31. Fourth, MOFCOM failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the Chinese industry. In particular, in view of an overwhelming majority of factors showing a positive movement in the state of the domestic industry, MOFCOM should have provided a compelling explanation of whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the POI. Instead, MOFCOM merely referred to the positive factors in passing and then focused on some (allegedly) negative factors to conclude the existence of material injury, without examining how positive factors were outweighed by other negative factors. Moreover, MOFCOM failed to examine all factors in the proper context, making contradictory observations in a not-even-handed manner. Finally, MOFCOM failed to take into account all facts and arguments on the record relating to the state of the domestic industry. Consequently, MOFCOM failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the Chinese industry.

32. In essence, MOFCOM ignored the actual state of the domestic industry (defined as the Petitioner, Nuctech). MOFCOM found material injury based on some (arguably) negative factors and a doubtful overall evaluation of not even all the relevant economic factors in this case. The evidence on the record showed that Nuctech had recently made huge investments in order to enter the low-energy scanner market. Its start-up situation together with its aggressive pricing strategy led Nuctech to incur some losses between 2006 and 2008, although Nuctech already (or almost) achieved break-even in 2008, despite the constant reduction of the domestic sales prices. Nuctech's strategy proved successful in obtaining significant increases in sales volume, sales revenue and market share. Moreover, at the same time, Nuctech was embarking on expanding its business abroad, which generated some additional losses. Likewise, such an expansion led to an increase in inventory since, the bigger the market, the bigger the need to have products in stock to quickly supply them to customers. Thus, Nuctech reflected a state of an industry that was entering into a new product market, following an aggressive business strategy, also in an international context, and that was about to or already achieving profits towards the end of the POI. Nuctech also reflected a state of an industry that was visibly growing, with increasing output, increasing sales volume and revenue, increasing market share and high productivity.

33. Rather than acknowledging this situation, MOFCOM found that Nuctech was in a state of suffering material injury. And it did so by relying on questionable figures, making contradictory statements, evaluating economic factors in a not-even-handed manner, ignoring the overall context of all the relevant economic factors having a bearing on the state of the domestic industry and thus failing to provide reasoned and adequate explanations on its material injury finding.

6. Claims under Articles 3.1 and 3.5 ADA

34. The European Union submits that China violated Articles 3.1 and 3.5 ADA because MOFCOM failed to make an objective determination, on the basis of all relevant evidence before the authorities, that the dumped imports were, through the effects of dumping, causing injury.

35. First, MOFCOM failed to properly examine the causal relationship between dumped imports and the material injury found. In particular, MOFCOM's consideration of the volume of dumped imports as "large" or "great" was improper when examined in context. Moreover, by evaluating evidence (specifically, i.a., domestic sales prices) relating to both high-energy and low-energy scanners in its causation assessment, MOFCOM attributed to the dumped imports (consisting only of low-energy scanners) effects that could not have been caused by them. Further, MOFCOM's reliance on the low price of domestic sales was misguided in view of the uncontested fact that in 2008 the price of EU imports was higher than the domestic sales price. MOFCOM also failed to provide a reasoned and adequate explanation in the present case, where there was no correlation between the dumped imports and the negative effects observed on the domestic industry.

36. Second, MOFCOM also failed to conduct a proper non-attribution analysis. MOFCOM provided a "check-list" of other factors, most of them irrelevant to the case, and failed to evaluate the other possible known causal factors raised by interested parties. MOFCOM also failed to make an objective assessment of the relevant other known factors actually examined since there was evidence on the record manifestly contrary to its findings.

37. Third, due to the inconsistencies with Articles 3.1, 3.2 and 3.4 mentioned in the previous Sections of this submission, the European Union equally considers that MOFCOM's causation determination is also inconsistent with Article 3.5 ADA.

38. In essence, MOFCOM attributed all the negative effects observed under Articles 3.2 (price undercutting/price depression) and 3.4 (material injury) to the dumped imports, concluding that none of the other known factors were the source of injury. In other words, MOFCOM found that the large volume of dumped imports caused serious effects on the production and operations of domestic X-Ray security inspection equipment, sharp reductions in sales price, huge losses of pre-tax profit, a negative rate of return, largely increased inventory overhang, a 25.08% reduction (despite an initial increase) in workforce from the beginning to the end of the POI, and failure to recover huge investment.

39. The European Union considers that MOFCOM artificially attributed the material injury to the dumped imports. The EU imports were not "large" or "great" in volume but modest when seen in the context of domestic consumption and the much higher increase in domestic sales volume. Moreover, since in 2008 the price of EU imports was higher than the domestic sale price, the European Union fails to understand how MOFCOM's conclusion that the EU imports caused all the price-related effects can meet the standard of providing a reasoned and adequate explanation. Put simply, if there was no undercutting and there was nothing (other than Nuctech's own aggressive pricing strategy) preventing the domestic industry from increasing its prices and thus obtaining higher sales revenue and profits and a return on investment, the European Union considers that MOFCOM's attribution of the material injury to the EU imports is inconsistent with Articles 3.1 and 3.5 ADA. Such violation becomes more flagrant when MOFCOM disregarded the actual causes for any negative condition of the domestic industry, as stood out from the record.

III. CONCLUSIONS AND RELIEF REQUESTED

40. The European Union requests the Panel to find that the measure at issue is inconsistent with the following provisions of the ADA:

(A) Articles 6.5.1, 6.4 and 6.2 ADA because the Chinese authorities: (i) failed to ensure with respect to certain confidential information submitted by the petitioner in the petition and its annexes, and the investigation questionnaire and its annexes, that non-confidential summaries of confidential information were sufficiently detailed to enable a reasonable understanding of the substance of the information submitted; and (ii) failed to require a statement of reasons explaining exceptional circumstances why summarisation was not possible with respect to a statement by the Chinese Public Security Bureau of the Civil Aviation Administration.

(B) Articles 6.9, 6.4 and 6.2 ADA because the Chinese authorities: (i) failed to provide interested parties with information about the essential facts under consideration for the determination of injury; (ii) failed to provide interested parties with information about the essential facts under consideration for the determination of normal value and export price; (iii) failed to provide interested parties with information about the essential facts under consideration for the calculation of the dumping margin for the cooperating producer; and (iv) failed to provide interested parties with information about the essential facts under consideration for the calculation of the residual duty.

(C) Articles 12.2.2 ADA because: (i) neither in the public notice of the imposition of definitive measures, nor in a separate report, the Chinese authorities set forth sufficiently detailed explanations for the methodology used in the establishment of the normal value; together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected; (ii) neither in the public notice of the imposition of definitive measures, nor in a separate report, the Chinese authorities set forth sufficiently detailed explanations for all the considerations relevant to the injury determination; together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected; and (iii) neither in the public notice of the imposition of definitive measures, nor in a separate report, the Chinese authorities made available the calculations and data used to calculate the margins for Smiths, as well as the calculations and underlying data on which it relied to determine the residual duty.

(D) Articles 3.1 and 3.2 ADA, because the Chinese authorities failed to make an objective examination on the basis of positive evidence of the price effects of dumped imports.

(E) Articles 3.1 and 3.4 ADA, since the Chinese authorities: (i) failed to base its evaluation of the relevant factors and indices having a bearing on the state of the domestic industry on positive evidence and thus failed to make an objective examination of the impact of dumped imports on the Chinese industry; (ii) failed to examine all relevant factors listed in 3.4 ADA, in particular, the magnitude of the margin of dumping; and (iii) failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the state of the Chinese industry.

(F) Articles 3.1 and 3.5 ADA, since the Chinese authorities: (i) failed to properly examine the causal relationship between dumped imports and injury; and (ii) failed to examine the relevance of other known factors in its non-attribution analysis.

41. The European Union respectfully requests the Panel to recommend that the Dispute Settlement Body request China to bring the contested measures into conformity with its obligations under the ADA.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST
WRITTEN SUBMISSION OF CHINA

1. INTRODUCTION

1. In this proceeding, the European Union challenges several aspects of the anti-dumping measures imposed by the People's Republic of China ("China") on imports of x-ray security inspection equipment from the European Union. Specifically, the European Union has raised three claims relating to alleged violations of procedural obligations and three other claims relating to the injury and causality analysis. China will examine the European Union's claims in the order they were presented in the European Union's First Written Submission.

2. As a preliminary remark, China notes that throughout its First Written Submission, the European Union refers to MOFCOM's analysis of "price depression". MOFCOM's analysis refers, however, to "price suppression" and not "price depression". The misunderstanding seems to flow from an erroneous translation from the original Chinese versions of MOFCOM's determinations and findings.

2. CLAIM 1: CLAIM UNDER ARTICLES 6.5.1, 6.4 AND 6.2 OF THE AD AGREEMENT

3. The European Union claims that China failed to ensure that interested parties provided non-confidential summaries of confidential information and that where summaries were provided, China failed to ensure that they were in sufficient detail to enable a reasonable understanding of the substance of the information submitted, contrary to China's obligations under Article 6.5.1, and consequently also Articles 6.4 and 6.2.

4. More precisely, in the first place, the European Union claims that MOFCOM failed to ensure that summaries provided with respect to product models in the Petition, Exhibits 8, 9, 10 and 11 attached to the Petition and certain responses and attachments of Nuctech's Questionnaire Response, were in sufficient detail to enable a reasonable understanding of the substance of the information submitted. China submits that all of these claims should be rejected.

5. As regards the product models in the Petition, the identification of the models as the "main models of the Subject Product" is sufficient to permit a reasonable understanding that the data provided with respect to the normal value and export price were those of the subject product. As to Exhibits 8, 9, 10 and 11 to the Petition, they clearly indicate on which issues evidence is provided. Furthermore, their content is adequately summarised in the body of the Petition itself.

6. The quarterly indices provided in the non-confidential version of Exhibits 14, 16, 17, 18 and 19 of Nuctech's Injury Questionnaire Response are also adequate, and in any event, annual trends regarding various injury factors are provided in other Attachments to Nuctech's Questionnaire Response. Finally, with regard to certain responses and Attachments to Nuctech's non-confidential injury Questionnaire Response, the European Union merely identifies the information for which there would not be an adequate summary without however substantiating its claim. China therefore submits that the European Union has failed to make a *prima facie* case. In any case, the confidential information was adequately summarized and this is supported by the fact that Smiths commented extensively on the injury determination and did not complain about an alleged lack of adequate non-confidential summary of this information.

7. In the second place, the European Union claims that MOFCOM failed to require a statement of reasons explaining the exceptional circumstances why summarisation was not possible with respect to the statement made by the Chinese Public Security Bureau of the Civil Aviation Administration. China submits that the Bureau explained to MOFCOM the inherently sensitive character of the information contained in the document submitted in confidence and that any summary of such information risks disclosing elements of this information and could compromise the safety of air transport. MOFCOM rightly held that the safety of public air transport overrules any concerns regarding the need for non-confidential summaries of commercial information and therefore treated these concerns as an exceptional circumstance. MOFCOM was therefore satisfied that these public security concerns constituted exceptional circumstances and amounted also to a meaningful justification why a summary was not possible.

8. Thus, the European Union has failed to demonstrate that China violated Article 6.5.1. The claimed violations of Articles 6.4 and 6.2 are purely consequential to the claim concerning Article 6.5.1 and should therefore be rejected as well. In any case, the European Union's claims under Articles 6.4 and 6.2 have to be rejected since the European Union fails to demonstrate a separate violation of Articles 6.4 and 6.2 of the AD Agreement.

3. CLAIM 2: CLAIM UNDER ARTICLES 6.9, 6.4 AND 6.2 OF THE AD AGREEMENT

9. The European Union claims that China violated Article 6.9 since China did not fully disclose the essential facts which form the basis for the determination of the dumping margin of the European Union's cooperating producer and the essential facts which form the basis for the determination of the residual duty as well as the essential facts that form the basis for the determination of injury, including the analysis of the effects of dumped imports on prices, and that China, consequently also violated Articles 6.4 and 6.2.

10. The European Union first argues that China violated article 6.9 because MOFCOM did not disclose the underlying data and the methodology followed by MOFCOM in its price analysis. China submits that this claim must be rejected for the following reasons. Regarding the methodology, China submits that the methodology followed by MOFCOM to consider the existence of price undercutting and/or price suppression does not constitute an essential fact which forms the basis for the decision whether to apply definitive measures within the meaning of Article 6.9 and therefore that MOFCOM was not required to disclose it pursuant to that provision. As to the underlying data, there is no duty to precisely identify in the disclosure document the source or evidence on which the essential facts are based. MOFCOM fully complied with its obligation under Article 6.9 with respect to its price analysis. Indeed, as for price suppression, MOFCOM adequately disclosed the trends in the domestic prices over the POI. As for its price undercutting analysis, MOFCOM disclosed the trends in the prices of the Subject Product and in the domestic prices and explained on that basis how undercutting is found. Article 6.9 does not require an investigating authority to disclose the actual figures concerning domestic prices. The non-disclosure of the actual price data was furthermore justified by the fact that such domestic prices constitute "confidential" information.

11. The European Union's second claim under Article 6.9 is that MOFCOM did not disclose the underlying facts and criteria on the basis of which the adjustments to the export price were made. Such a claim is, however, directly contradicted by the documents in the file. Indeed, MOFCOM provided explanations in its Disclosure Documents (Preliminary and Final) as to which adjustments were made, the reasons for making such adjustments as well as the level of such adjustments. In addition, MOFCOM explained the allocation method. It is also clear from these Disclosure Documents that the data used were taken from the company's own Questionnaire Responses. The Disclosure Documents even precisely identify which data were used at which stage.

12. The third claim made by the European Union under Article 6.9 concerns MOFCOM's alleged failure to provide to Smiths the actual dumping calculation of its dumping margin. That claim should equally be rejected. Indeed, MOFCOM fully complied with the requirements of Article 6.9 since in its Preliminary and Final Dumping Disclosures, MOFCOM provided to Smiths the explanations as to how the comparison between normal value and export price has been carried out, it identified the data which were used to calculate the normal value and export price and provided in a table the figures of normal value and export price for each model of the Subject Product.

13. The fourth claim under Article 6.9 relates to MOFCOM's alleged failure to disclose the essential facts regarding its calculation of the "all others" dumping rate. That claim must also be rejected. Indeed, in its Disclosure Documents, MOFCOM explained that it used "facts available" for the EU companies which did not respond to the petition or questionnaire, in accordance with China's Anti-Dumping Regulation. Furthermore, MOFCOM explained that the residual duty was calculated on the basis of "the sales data of products of relevant models reported by the respondent Company", thus disclosing the essential facts concerning the calculation of the "all others" dumping rate.

14. Thus, the European Union has failed to demonstrate a violation of Article 6.9. The European Union's claims under Articles 6.4 and 6.2 are purely consequential to its claims under Article 6.9, and should therefore be rejected as well. In any case, the European Union's claims under Articles 6.4 and 6.2 have to be rejected since the European Union fails to demonstrate a separate violation of Articles 6.4 and 6.2 of the AD Agreement.

4. CLAIM 3: CLAIM UNDER ARTICLE 12.2.2 OF THE AD AGREEMENT

15. The European Union claims that China violated Article 12.2.2 because neither in its public notice of the imposition of definitive measures, nor in a separate report, MOFCOM set forth sufficiently detailed explanations for the definitive determinations on dumping and injury, together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected. More precisely, the European Union makes four different claims which should all be rejected.

16. First, the European Union claims that MOFCOM failed to provide reasons for the rejection of relevant arguments or claims made by Smiths which could show that the sales to the affiliated companies were not affected by the affiliation relationship, represented a fair market price and were made in the normal course of trade. This claim must be rejected since the Final Determination contains the reasons for MOFCOM's rejection of the arguments raised by Smiths, namely the fact that MOFCOM's verification established that the pricing and sales processes as well as the actual sales prices of Smiths Heimann to affiliated distributors in the EU during the POI were clearly affected by the affiliation relationship and that Smiths did not have sufficient evidence to prove that the price differences were merely the result of sales expenses which it saved. The European Union's argument is in fact based on its substantive disagreement with MOFCOM's determination, and not a lack of understanding as to information or lack of clarity of MOFCOM's reasons for rejecting Smiths' arguments.

17. Second, the European Union claims that MOFCOM failed to include all relevant information on facts and law concerning its price analysis in the injury determination, and that MOFCOM failed to provide reasons for the rejection of relevant arguments or claims made by Smiths on the injury determination during the investigation. As to MOFCOM's alleged failure to include all relevant information on facts and law, China submits that the methodology used by MOFCOM for its price undercutting or price suppression analysis is neither a "matter of fact" nor is it "relevant" and MOFCOM therefore had no duty of disclosure with regard to it. The information provided by MOFCOM concerning price undercutting and price suppression in its Final Determination provides sufficient background and reasons for its injury determination and as such, it is therefore consistent

with Article 12.2.2 of the AD Agreement. As to the European Union's claim that MOFCOM's Final Determination did not contain the reasons for the rejection of the relevant arguments made by Smiths concerning the credibility of data submitted by Nuctech, China submits in the first place that such arguments cannot be regarded as "relevant" within the meaning of Article 12.2.2 of the AD Agreement. In any case, those arguments were fully addressed by MOFCOM in its Final Determination. As to the other arguments that would have been made by Smiths concerning MOFCOM's injury analysis, since the European Union does not even identify them, China is not in a position to rebut it. The European Union has thus failed to make a *prima facie* case.

18. Third, the European Union claims that MOFCOM failed to provide reasons for the rejection of Smiths' arguments concerning the causal link. China notes that once again this claim is not properly substantiated since the European Union does not precisely identify the arguments regarding the existence of the causal link that would have been raised by Smiths during the investigation and for which MOFCOM would not have provided reasons for their rejection in the Final Determination. *A fortiori*, the European Union fails to demonstrate why these arguments would be "relevant". The European Union's claim should therefore be rejected.

19. Fourth, the European Union claims that China acted inconsistently with Article 12.2.2 since its Final Determination did not make available the calculations it performed and the underlying data concerning Smiths' dumping margin and the residual duty. This claim is to be rejected. First, the calculations and underlying data of the dumping margin determination undoubtedly contain confidential information which falls out of the scope of Article 12.2.2. Second, it is clear that neither the calculation nor the underlying data of Smiths' dumping margin and the residual duty constitute relevant information on matters of fact and law or reasons which have led to the imposition of final measures within the meaning of Article 12.2.2.

20. For all the reasons set out above, China submits that the European Union's claim under Article 12.2.2 should be rejected.

5. CLAIM 4: CLAIM UNDER ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

21. The European Union claims that China violated Articles 3.1 and 3.2 of the AD Agreement since MOFCOM used in its price undercutting and price suppression analysis a methodology which involved the comparison of weighted average unit values for the entire range of products covered by the investigation. According to the European Union, this methodology was manifestly inaccurate and biased against the EU exporter and is not therefore based on an "objective examination" of "positive evidence". The European Union claims that MOFCOM should have taken into account in its price analysis the differences between so-called "low-energy" and "high-energy" scanners and even also among various types of low-energy scanners.

22. As a preliminary remark, China notes that the alleged differences between "low-energy" and "high-energy" scanners were only raised by Smiths in the context of the product scope determination and that Smiths never claimed during the investigation that the price analysis should be carried out separately for "low-energy" and "high-energy" scanners.

23. As to the requirements pursuant to Articles 3.1 and 3.2, China notes that Articles 3.1 and 3.2 do not set out any specific methodology that the investigating authorities must follow in order to examine the effects of the dumped imports on prices in the domestic market and also that previous panels rejected the view that the methodological obligations included in Article 2 for the dumping margin determination apply to the price undercutting analysis of Article 3.2.

24. China submits that the European Union fails to demonstrate that the price analysis made by MOFCOM was not objective in the sense that MOFCOM would not have ensured an even-handed treatment of the information and data on the record of the investigation.

25. First, by claiming that there were differences affecting the price comparability between "low-energy" and "high-energy" scanners and between the various models within each category, the European Union seeks to transpose the obligations arising in the context of the dumping margin determination into the price analysis. The methodological obligations of Article 2.4 cannot, however, simply be transposed in the context of the price analysis.

26. Second, it is not sufficient to allege that the investigating authority could have used a different methodology that would have produced a different result that the methodology effectively used is biased. In the present case, MOFCOM compared the prices of products which had been found as being "like". It was therefore reasonable for MOFCOM to assess the effects of the prices of the dumped imports by using the weighted average methodology. Although MOFCOM was aware that prices may differ from model to model or even from transaction to transaction – this is indeed a common feature of all anti-dumping investigations - it concluded that these price differences were not of a nature to overturn the conclusion that the price undercutting was "significant". Furthermore, Smiths did not even claim during the investigation that MOFCOM should have made adjustments when making the price comparison. There was thus no reason for MOFCOM to consider that the use of averages was unreasonable.

27. The European Union claims that the methodology was biased against the EU exporter because of the considerable differences between "low-energy" and "high-energy" scanners as reflected in their price differences. However, the European Union does not provide detailed evidence as to the allegedly substantial differences in prices. Furthermore, the fact that there are price differences between products included in the average is not an indication of bias. In addition, even the fact that a specific methodology would increase, in certain circumstances, the likelihood of a price undercutting finding does not render the methodology inconsistent with Articles 3.1 and 3.2 of the AD Agreement.

28. In light of the foregoing, China submits that it did not violate Articles 3.1 and 3.2 in its price analysis by using an average-to-average comparison method.

29. Regarding price undercutting, China notes that, contrary to what the European Union alleges, Nuctech claimed that there was price undercutting. China also notes that the example provided by the European Union is purely hypothetical and, in any case, irrelevant. Indeed, MOFCOM did not need to quantify precisely the price difference. It was sufficient for it to be able to consider that the available price evidence showed the existence of significant price undercutting. Regarding price suppression, China again notes that the example provided by the European Union is purely hypothetical. Actually, the average unit value for the product under consideration in the example may go down or up depending on the transactions or the models included. In order to prove its point, the European Union would need to demonstrate that MOFCOM had intentionally selected certain models or transactions in order to achieve a certain result.

30. For all these reasons, the European Union's claim under Articles 3.1 and 3.2 should be rejected.

6. CLAIM 5: CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

31. The European Union claims that contrary to its obligations under Articles 3.1 and 3.4, China failed to make an objective examination, on the basis of positive evidence, of the effect of the dumped imports on prices in the domestic market for like products and the consequent impact of these imports

on domestic producers of such products, including the factors listed in Article 3.4. In particular, the European Union presents four sets of claims. All of these claims are to be rejected.

32. First, the European Union claims that MOFCOM failed to base its evaluation of certain factors, namely cash flow, investment and return on investment, on positive evidence. That claim should be rejected. Indeed, the alleged existence of discrepancies between MOFCOM's findings as reflected in its Final Determination and the figures reported by Nuctech in its Petition and its Questionnaire Response cannot by itself demonstrate that the "evidence" on which MOFCOM based itself is not positive. Actually, MOFCOM carried out on-site verifications and adjusted the figures provided by Nuctech in its Questionnaire Response for the three factors referred to by the European Union after the on-site verification.

33. Second, the European Union claims that MOFCOM failed to examine all factors listed in Article 3.4. China submits that, contrary to what the European Union argues, MOFCOM examined all relevant factors as listed in Article 3.4 of the AD Agreement, including the magnitude of the dumping margin which MOFCOM found to exceed the "*de minimis*" threshold of Article 5.8 of the AD Agreement as set out clearly in the Final Determination.

34. The European Union's third claim that MOFCOM failed to make an objective examination of the state of the domestic industry because it failed to take into account the differences between high-energy and low-energy scanners when examining various injury factors is to be rejected as well. Such a claim must fail on a factual basis since MOFCOM investigated the issue of alleged differences between "low-energy" and "high-energy" scanners and concluded that they were almost the same. Such a claim must also fail on a legal basis since the analysis of the impact of the dumped imports on the domestic industry pursuant to Article 3.4 must focus on the totality of the domestic industry. An investigating authority cannot focus on only one segment or sector of the industry. Thus, while investigating authorities may examine certain parts or segments of the market, they are not required to do so. The European Union's claim should therefore be rejected.

35. Fourth, the European Union claims that MOFCOM failed to make a proper evaluation of all injury factors in context for three reasons which should all be rejected.

36. First, the European Union's argument that most injury factors examined by MOFCOM were positive is factually incorrect as MOFCOM's analysis reveals a negative assessment of a significant number of factors. Furthermore, MOFCOM provided a detailed and reasonable explanation of how the negative factors supported an affirmative injury determination and why the presence of several factors that showed positive trends could not overturn this conclusion.

37. Second, the European Union's argument that MOFCOM made contradictory observations in a not-even-handed manner is misplaced and not supported by the elements as reflected in MOFCOM's Final Determination. Furthermore, contrary to the European Union's allegation, MOFCOM considered how the factors relate to each other and to the wider economic context and thus properly examined all relevant injury factors in their context.

38. Third, the European Union's argument that MOFCOM failed to take into account all facts and arguments on the record relating to the state of the domestic industry, in particular the start-up situation of Nuctech and Nuctech's aggressive pricing policy, should equally be rejected. These elements are not factors that may have a bearing on the state of the domestic industry within the meaning of Article 3.4. In any case, the European Union has failed to demonstrate that those factors were relevant in assessing the impact of the dumped imports on the state of the domestic industry. Regarding the alleged start-up situation of Nuctech, the element provided by Smiths during the investigation appear to contradict each other, are not in line with the arguments put forward by the European Union and is unsubstantiated by any evidence. Regarding Nuctech's alleged aggressive

pricing policy, not only are the arguments unconvincing but also the allegations made by Smiths during the investigation on that issue and to which the European Union refers are unsubstantiated. Obviously, investigation authorities are not under an obligation to discuss every argument put forward by the interested parties, in particular not if an argument is unsubstantiated or contradicted by data collected and verified by the investigation authority.

39. For all these reasons, the European Union's claim under Articles 3.1 and 3.4 should be rejected.

7. CLAIM 6: CLAIM UNDER ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

40. The European Union claims that MOFCOM's determination of the causal link between the dumped imports and the material injury found is inconsistent with Articles 3.1 and 3.5 of the AD Agreement for three reasons. They should all be dismissed.

41. First, the European Union claims that MOFCOM failed to properly examine the causal relationship between dumped imports and the injury in three aspects which should all be rejected. Regarding the volume of the dumped imports, MOFCOM correctly analysed the trends in the volume of dumped imports over the POI and appropriately concluded that the volume of dumped imports was "large" or "great". Furthermore, Article 3 of the AD Agreement does not require investigating authorities to necessarily consider the increase of the dumped imports in relation to domestic consumption and/or domestic sales volume. As to the import prices, there is no requirement to distinguish between segments or sectors and thus MOFCOM correctly carried out its injury and causation analysis with respect to the "like product" as identified by it. Finally, the European Union erroneously claims that there was no temporal correlation between the movement in the prices of the dumped imports and the domestic prices. MOFCOM clearly indicated the temporal correlation between, on the one hand, the rapidly growing imports of the Subject product at very low prices over the POI and on the other hand the domestic prices which sharply declined over the POI. Furthermore, what is relevant is the overall trends in imports and the overall trends in serious injury factors. MOFCOM determined the existence of a temporal correlation between the rapid and significant increase in the volume of the dumped imports as well as the low level of their prices and the injured stated of the domestic industry as reflected in numerous factors.

42. Second, the European Union claims that MOFCOM's evaluation of factors other than the dumped imports as possible causes of injury was inconsistent with Articles 3.1 and 3.5 since, in particular, MOFCOM ignored other known factors raised by Smiths and since MOFCOM failed to consider several arguments made by Smiths in this context. Both arguments should be rejected. As to the other known factors raised by Smiths to which the European Union refers, namely the global economic crisis, Nuctech's aggressive business expansion, fair competition, Nuctech's start-up situation and Nuctech's aggressive pricing policy, China submits that either they were examined by MOFCOM during the investigation or there was no need to examine them because they rested on a factual assumption that had already been rejected by MOFCOM. As to the arguments that would have been made by Smiths during the investigation, China notes that they have been properly examined by MOFCOM.

43. Third, the European Union claims that China violated Article 3.5 as a consequence of the inconsistencies with Articles 3.1, 3.2 and 3.4. Since there are no inconsistencies with Articles 3.1, 3.2 and 3.4, this purely consequential claim under Article 3.5 should therefore be dismissed as well.

8. CONCLUSION

44. China requests the Panel to reject all of the European Union's claims and arguments, finding instead that, with respect to each of them, China acted consistently with all its obligations under the AD Agreement and the GATT 1994.

ANNEX B

EXECUTIVE SUMMARIES OF THE THIRD PARTIES
WRITTEN SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF JAPAN

A. Disclosure of Essential Facts before the Final Determination under Article 6.9 of the *AD Agreement*

1. An Investigating Authority's Obligation to Disclose the Essential Facts before the Final Determination

1. The EU alleges that China did not fully disclose all of the essential facts which would form the basis of the final determination, contrary to its obligation under Article 6.9 of the *AD Agreement*. The EU argues that China's disclosure of the essential facts was insufficient with respect to dumping margins, the residual duty (in the EU's term, or the "all-others" rate in China's term), and the effects of dumped imports on the prices of the domestic like products.[1]

2. The first sentence of Article 6.9 of the *AD Agreement* provides that "the authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measure". In the context of Article 12.8 of the *SCM Agreement*, the panel in *Mexico – Olive Oil* described the essential facts that must be disclosed to be "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation".[2] The same rationale applies to the essential facts for the decision of whether to apply definitive antidumping measures because the provision of Article 6.9 of the *AD Agreement* is substantively identical to the provision of Article 12.8 of the *SCM Agreement*. In the case of an antidumping investigation, the authorities are required to disclose specific facts that underlie the investigating authority's final findings and conclusions in respect to the existence of dumping, injury, and causation.

3. The second sentence of Article 6.9 of the *AD Agreement* clarifies *the depth o*f the essential facts that the authorities must positively inform interested parties. As the panel in *EC - Salmon (Norway)* correctly analyzed, the disclosure must "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".[3]

2. Disclosure of Information on Price Effects in Connection with the Injury Determination

4. In its EU FWS, the EU alleges that MOFOCM did not disclose facts that would support the analysis of "the existence and extent of price undercutting and price depression".[4] According to the EU, MOFCOM stated in the final determination its analysis that the price undercutting was "large" and "serious" in 2006 and 2007, and "slightly higher" than the prices of the domestic like products in 2008. MOFCOM also found that "the prices of domestic like products declined by a large margin with a 72.68% decrease in 2008 compared to 2006".[5] According to the EU, however,

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[1] The First Written Submission by the European Union, submitt ed on 13 April 2012 (the "EU FWS"), para. 83.

[2] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)

[3] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

[4] EU FWS, para. 107.

[5] EU FWS, para. 106, quoting Final Determination, p. 23 (Exhibit EU-2).

MOFCOM failed to disclose "the methodology used in determining the existence of the alleged price undercutting and price depression", even though such methodology constitutes an essential fact within the meaning of Article 6.9 ADA and must be disclosed.[6]

5. Article 3.5 of the *AD Agreement* provides that causation must be demonstrated through the effects of dumping as set forth in paragraphs 2 and 4. Article 3.2 obliges authorities to consider whether the price effect of the dumped imports is to undercut, depress or suppress the price of the domestic like product to a significant degree. Accordingly, the findings upon analysis of the raw data on prices of dumped imports and the domestic like product by the investigating authorities on the price effects are "specific facts that underlie the investigating authority's final findings and conclusions in respect of … causation".[7]

6. Indeed, the disclosure of these facts would be indispensable for exporters/producers and the exporting Member to defend their interests effectively with respect to the completeness and correctness of the authorities' analysis of the price effect of imports on the price of the domestic like product. Accordingly, such information is "necessary information to enable [interested parties] to comment on the completeness and correctness of the facts being considered by the investigating authority".[8] Such information, therefore, is a type of fact that Article 6.9 of the *AD Agreement* envisages as requiring disclosure by the authorities to the interested parties.

7. Japan notes that the confidential nature of certain facts would not allow the authorities to disclose the same to all interested parties. The confidentiality requirement, however, would not release the authority completely from its obligation to disclose the essential facts under Article 6.9.

3. Findings on Normal Value, Export Price, and Dumping Margins

8. The EU alleges that the price adjustments that were made and the normal value and export price calculations are facts that were essential to the determination of the normal value, export price, and the dumping margin on which China relied in order to impose anti-dumping measures".[9] In particular, the EU argues that "MOFCOM did not explain how the figures were calculated on the basis of the information provided by Smiths and the reasons for the discrepancy between the figures."[10]

9. The Appellate Body has clarified that the existence of dumping must be determined on an exporter/producer-specific basis in accordance with the margin of dumping calculated on that basis.[11] The calculated individual margin is, therefore, one of the "final findings" found by the authority to reach the conclusion on the existence of dumping. Accordingly, specific facts underlying the final findings must be disclosed to all interested parties in accordance with Article 6.9 of the *AD Agreement*.

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[6] EU FWS, para. 107.
[7] Panel Report, *Mexico – Olive Oil*, para. 7.110.
[8] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[9] EU FWS, para. 109.
[10] EU FWS, para. 114.
[11] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 111 ("the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. … Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices.").

10. Japan recalls the panel's analysis in *Argentina – Poultry Anti-Dumping Duties*, it stated that "the normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures".[12]

11. Japan notes that the requirements related to confidentiality would not be a sufficient reason for the authorities vis-à-vis the exporter or producer not to disclose its dumping margin calculation. Information which an interested party submitted to the authority is not confidential vis-à-vis the submitter.

B. The Sufficiency of the Description in the Notice Final Determination under Article 12.2.2 of the *AD Agreement*

1. The Investigating Authority's Obligation to Provide a Sufficiently-Detailed Explanation in Its Public Notice of the Final Determination

12. In its FWS, the EU argues that China provided insufficient explanation on dumping and injury in its public notice or separate report of the final determination.[13]

13. Article 12.2 of the *AD Agreement* requires the issuance of a public notice or separate report of the final determination, setting forth "in ***sufficient detail*** the findings and conclusion reached on ***all issues*** of fact and law considered material by the investigating authorities".[14] In this context, the panel in *EC – Tube or Pipe Fittings* explained that "a 'material' issue [is] an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination".[15] Recently, the panel in *EU – Footwear (China)* agreed with the view of the panel in *EC – Tube or Pipe Fittings*.[16] Accordingly, authorities are required to provide a sufficiently-detailed explanation in the public notice of the final determination on both factual and legal issues, without exception, which the authorities had to resolve in order to reach their final determination either affirmative or negative.

14. Article 12.2.2 of the *AD Agreement* requires that the public notice of such final determination must contain "all relevant information on the matters of fact and law and reasons" as well as "the reasons for the acceptance or rejection of relevant arguments" made by exporters or by interested Members. These rules, however, must be understood in the context of the general rules in Article 12.2 that the authorities are required to set forth explanations on "all issues of fact and law considered material by the investigating authorities". The panel in *EU – Footwear (China)* clarified this requirement, stating:

> **In our view, the notions of "material" and "relevant" in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process.** Other provisions of the AD Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, **Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination,**

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[12] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.223 (emphasis in original).
[13] EU FWS, para. 128.
[14] Emphasis added.
[15] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[16] Panel Report, *EU – Footwear (China)*, para. 7.844.

providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.[17]

15. As clarified by the panel in *EU – Footwear (China)*, the question of whether an issue is "relevant" and "material" must be reviewed from the perspective of the authorities' actual final determination. If the issue is relevant to, and material in the authorities' final determination, the authorities must provide sufficient background and reasons for their conclusion of the issue in the public notice or a separate report of the final determination for readers of the notice to discern and understand the reasons.

16. The requirement of the authorities' explanation "in sufficient detail" in the public notice of the final determination must also be understood in the light of the restrictions imposed by the requirements for the protection of confidential information. Accordingly, the authorities' explanation would not be found inconsistent with Article 12.2.2 due to an insufficiency of the explanation to the extent that such insufficiency is justified by the observance of the confidentiality requirement for the underlying information.

2. The Alleged Failure to Explain the Reasons for the Rejection of Sales to Affiliated Distributors from the Normal Value Calculation

17. In its FWS, the EU argues that MOFCOM did not explain the reasons for the rejection of relevant arguments presented by Smith Heimann, an EU producer, related to MOFCOM's exclusion of Smith's sales to its affiliated distributors in the EU from the normal value calculation. According to the EU, MOFCOM stated merely that "the sales prices of Smiths Heimann through affiliated distributors in the EU during the POI were clearly affected by the affiliation relationship, and that Smiths Heimann did not have sufficient evidence to prove that the price differences were merely sales expenses which it saved".[18] The EU alleges that such an explanation is insufficient and thus inconsistent with Article 12.2.2.

18. With respect to the determination of dumping, Article 12.2.2 requires that the public notice contain information for "the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2".[19] The authorities have the obligation to ensure that the basis of the normal value is those transactions "in the ordinary course of trade", as set forth in Article 2.1. Whether certain sales are in the ordinary course of trade or not is, therefore, a "relevant" question of fact for the authorities to establish the normal value to reach to the final determination of dumping.

19. The issue of the exclusion of sales to an affiliated distributor from the normal value calculation would be particularly relevant to the actual final determination of dumping in question. MOFCOM found that the prices of sales to affiliated distributors were lower than the prices of other sales to non-affiliated companies.[20] Accordingly, the decision to exclude these sales would increase the normal value, resulting in a higher dumping margin and the higher AD duty. Such a decision would be material for MOFCOM's actual final determination of dumping. Therefore, MOFCOM was obliged to provide the reasons for the acceptance or rejection of the interested party's argument on the inclusion of affiliated party transactions in the final determination.

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[17] Panel Report, *EU – Footwear (China)*, para. 7.844 (emphasis added).

[18] EU FWS, para. 145, quoting the Final Determination, p. 17.

[19] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).

[20] EU FWS, para. 145, quoting MOFCOM's final determination, p. 17. The EU did not raise any objection to this fact-finding.

3. The Alleged Insufficient Explanation on the Injury Determination

20. The EU alleges that MOFCOM failed to "explain the methodology used in order to calculate the alleged price undercutting or price depression".[21] The EU also alleges that MOFCOM failed to provide reasons for the rejection of Smith's question on the credibility of the data submitted by the petitioner.[22] The EU further argues that MOFCOM did not provide any reasons for the rejection of Smith's arguments related to several other factors which would also have caused injury to the domestic industry.[23]

21. The overarching provision of Article 3.1 requires authorities to make an objective examination of positive evidence. Article 3.2 of the *AD Agreement* sets forth that "the authorities shall consider whether there has been a significant price undercutting". Article 3.5 sets forth that "the authorities shall also examine all known factors other than the dumped imports …, and the injuries caused by these other factors must not be attributed to the dumped imports". Article 12.2.2 then provides that "the notice or report shall contain the information described in subparagraph 2.1", which includes "consideration relevant to the injury determination as set out in Article 3". As such, issues raised by the EU would all be relevant to the final determination.

22. Furthermore, the factual issue of the price undercutting would be material to the final determination. As discussed above, the factual findings of the price undercutting are essential facts for the final determination. The factual issue essential to the final determination would also be material to the actual final determination. Analysis on causation between other factors and the injury to the domestic industry would also be material to the final determination. Article 3.5 explicitly requires the authorities "to separate and distinguish the injurious effects of different causal factors".[24] Without such analysis, "the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties".[25] Accordingly, these issues would be material to the final determination, and thus should be explained in the public notice or a separate report of the final determination.

[21] EU FWS, para. 148.
[22] EU FWS, para. 150.
[23] EU FWS, paras. 154, 155, and 312-314.
[24] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[25] *Ibid*.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF NORWAY

Table of Contents

Table of cases cited in this submission

Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
EC – Fasteners	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS431/R, adopted 21 October 2008, DSR 2008:IX, 3179
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR2007:IV, 1207
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609

I. INTRODUCTION

1. As a third party to this dispute, Norway would in the following like to address certain interpretative issues, discussed in the First Written Submissions of the EU and China.

II. ARTICLE 6.5.1

A. What constitutes an adequate summary in accordance with Article 6.5.1

2. The EU claims that several of the non-confidential versions of documents submitted contained inadequate summaries, thereby violating Article 6.5.1 of the *Anti-Dumping Agreement*, specifying that, in at least three cases, the replies to question 32, 33 and 38 of Nuctech's non-confidential Questionnaire Response, the confidential passages were simply marked "confidential".[1]

3. Article 6.5.1 feeds into the important minimum standard of due process rights of an anti-dumping investigation, and is aimed at making it possible for interested parties to defend their interest and to make "rebuttal" arguments, even towards information in confidential submissions. As the wording indicates ("thereof"), it is the confidential information that is to be summarised. In Norway's view, the disclosure of a document with the confidential parts simply deleted, whether this deletion is marked "confidential" or not, would thus not fulfil the requirement of summarising the confidential information. There may of course be some exceptions to this, inter alia if the original document itself summarises the deleted confidential sections in question. The panel in *Mexico – Olive Oil* supports this interpretation, and indicates that the circumstances where such a document would be sufficient are not likely to be abundant.

4. If the content of the information is of such a nature that summarisation is not possible, Article 6.5.1 requires that a statement of the reasons explaining the exceptional circumstances why this is so needs to be provided.

B. Whether Article 6.5.1 requires that the statement of reasons why summarisation is not possible be made public

5. The EU claims that China failed to require a statement of reasons explaining why summarisation was not possible in its injury analysis, in particular with respect to the statement by the Chinese Public Security Bureau of the Civil Aviation Administration.[2] China, on the other hand, argues that, as long as the interested party provides a statement explaining why summarisation is not possible and the investigating authority assesses this statement, Article 6.5.1 does not confer an obligation to make such a statement public in the non-confidential file.[3]

6. Norway disagrees with Chinas argument. In *EC – Fasteners*, the Appellate Body confirmed the Panel's finding that the investigating authority must scrutinise the statement provided, as otherwise, "the potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel".[4] For the same reasons, Norway holds that it is not sufficient that the investigating authority scrutinises the statement; this must also be made public. In Norway's view, the mere structure of Article 6.5.1 indicates that the statement needs to be public. Norway reiterates the serious effects anti-dumping investigations may have, and the corresponding need to ensure that the investigation follows certain rules of procedural justice and fairness. When information is kept

[1] EU's First Written Submission, para. 75.
[2] EU's First Written Submission, para. 78.
[3] China's First Written Submission, para. 104.
[4] Appellate Body Report, *EC – Fasteners*, para. 544.

confidential, it is thus of great importance to ensure that this is done for the right reasons. If the investigating authority is not required to make public statements containing the reasons why summarisation of confidential information is not possible, the potential for abuse would be significant.

III. ARTICLE 6.9

7. The EU claims that China is in breach of Article 6.9, as the investigating authority did not disclose the essential facts which formed the basis for the determination of i) the dumping margin of the EU's cooperating producer, ii) the residual duty and iii) injury.[5]

8. Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.[6] Rather, the investigating authority must actively *identify* the facts on which it will rely in making its determination, for instance by "disclosing a *specially prepared document* summarizing the essential facts under consideration".[7]

9. The core of the duty of disclosure under Article 6.9 relates to "essential facts". The panel in *Argentina – Poultry* distinguished "facts" from "reasons". The duty of disclosure thus relates to *evidence*. As to what evidence the investigating authority has an obligation to disclose, the panel in *EC -Salmon* specified that "they are the facts necessary to the process of analysis and decision making by the investigating authority, not only those that support decision ultimately reached".[8]

10. Article 6.9 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures. Absent disclosure of the essential facts, interested parties are left guessing at the factual basis in the record for the authority's factual and legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision.

IV. ARTICLE 6.4

11. The EU claims that China failed to provide a timely opportunity for all interested parties to see all information that was relevant to defend their interests, and that was used by the authority in the anti-dumping investigation, thereby violating Article 6.4 of the *Anti-Dumping Agreement*.[9]

12. Article 6.4 of the *Anti-Dumping Agreement* confers on interested parties a right of access to evidence in the non-confidential record of the investigation. The Appellate Body has ruled that the relevance of information must be assessed from the perspective of the interested parties.[10] The essence of due process is that interested parties must be in a position to defend their interests in light of the views of other parties and the information before the authority. If one interested party has taken the time to put a document on the record, that party clearly considers it to be relevant and the authority should not deny another interested party the opportunity to comment upon it.

13. The Appellate Body has also held that the phrase "used by the authorities" in Article 6.4 refers to information that the authority must *evaluate* in making its determinations.[11] An authority

[5] EU's First Written Submission, para. 83.
[6] Panel report, *Guatemala – Cement II*, para. 8.230.
[7] Panel report, *Argentina – Ceramic Tiles*, para. 6.125.
[8] Panel report, *EC – Salmon*, para. 7.807.
[9] EU's First Written Submission, paras. 43 and 84.
[10] Appellate Body Report, *EC – Tube or Pipe Fitting* , para. 145.
[11] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145. Information submitted regarding injury factors listed in Article 3.4 was information that must "be used by the authorities" in making its determination.

must evaluate all of the information submitted to it that relates to its determinations, and cannot ignore any of it.

14. The duty to allow interested parties to "see" relevant information is subject to limitations in the case of confidential information, which the authorities cannot disclose. Article 6.5.1 provides certain mechanisms to ensure due process rights are taken care of in these cases. China argues that, as the scope of Articles 6.4 and 6.5.1 are different, there may exist confidential information for which a non-confidential summary must be provided which is not used by the authorities and therefore does not fall within the scope of Article 6.4.[12]

15. As the non-confidential summary of the confidential information must be included in the record, and the investigating authority therefore must evaluate it, as with all information submitted to it, Norway holds that all such summaries must be disclosed according to Article 6.4. The investigating authorities have an obligation to scrutinise the non-confidential summaries provided, in order to ensure that they fulfil the requirement of Article 6.5.1. The Appellate Body has confirmed such an obligation.[13] Hence, non-confidential summaries must always be evaluated by the investigating authorities, and therefore are always "used by the authorities", as set out in Article 6.4. The duty of disclosure as prescribed by Article 6.4 therefore clearly applies to non-confidential summaries of confidential information.

V. ARTICLE 6.2

16. The EU claims that, by violating Articles 6.5.1 and 6.9 of the *Anti-Dumping Agreement*, China also deprived the interested parties of their full opportunity to defend their interests, contrary to Article 6.2 of the *Anti-Dumping Agreement*.[14] Furthermore, the EU argues that the obligation set out in Article 6.2 is so broad that a finding of violation of Article 6.4 necessarily entails a violation of Article. 6.2 in the present case.[15]

17. The effective exercise of the rights under Article 6.2 requires that interested parties have access to information submitted by the other interested parties, as well as to information obtained by the authority during the investigation. Absent access to this information, an interested party cannot formulate an "opposing view", make "rebuttal arguments", or generally make effective comments on the evidence in the record and on the authority's determinations.

18. On these grounds, there is a mutually dependent relationship between Article 6.2 and several of the other procedural rules contained in the *Anti-Dumping Agreement*. Articles 6.4, 6.5.1 and 6.9 serve, among others, the purpose of enabling interested parties to defend their interests as set forth in Article 6.2.

19. For its part, Article 6.2 requires that interested parties be given full opportunity for the defence of their interests *throughout the anti-dumping investigation*. In other words, whenever an interested party is not given full opportunity to defend its interests, during an anti-dumping investigation, the obligation in Article 6.2 is infringed. As a result, it is Norway's view that any violation of the obligation under Articles 6.5.1, 6.4 and 6.9 entails a violation of Article 6.2.

[12] China's First Written Submission, para.113.
[13] Appellate Body Report, *EC – Fasteners*, para. 544.
[14] EU's First Written Submission, paras. 43 and 84.
[15] EU's First Written Submission, para. 66.

VI. CONCLUSION

20. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the *Anti-Dumping Agreement*.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

I. Procedural and Transparency Requirements of Article 6 of the AD Agreement

1. The EU alleges that China failed to ensure that confidential information provided by interested parties was summarized according to Article 6.5.1 of the AD Agreement. The EU further argues that, in so doing, China also failed to provide a timely opportunity for interested parties to see information relevant to their defense and a full opportunity to defend their interests in contravention of Articles 6.4 and 6.2 of the AD Agreement. A basic tenet of the AD Agreement, as reflected in Article 6, is that the parties to an investigation must be given a full and fair opportunity to see relevant information and to defend their interests. Thus, Article 6.2 sets forth requirements inherent in a "full opportunity for the defense" of all interested parties' interests. This includes the opportunity to meet adverse parties, present opposing views, offer rebuttal arguments, and the right to present information orally.

2. Article 6.4 complements Article 6.2, by creating the obligation for authorities to provide "timely opportunities" for interested parties to see relevant information and to prepare presentations on the basis of this information. Both Articles 6.2 and 6.4 recognize that, in fulfilling the obligations of these Articles, authorities may need to protect confidential information. Those Articles therefore allow for a limited exception to the disclosure requirements for confidential information.

3. Indeed, in anti-dumping investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities ensure the confidential treatment of such information. At the same time, Article 6.5.1 balances the need to protect such information against the disclosure requirements of other Article 6 provisions. Thus, Article 6.5.1 provides that an investigating authority, if it accepts confidential information, must provide or otherwise assure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

4. As the Appellate Body explained in *EC – Fasteners (China)* (para 542), "Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon "good cause" shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests". Where the investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries, significant prejudice to the ability of companies and Members to defend their interests could occur.

II. Article 6.9 of the AD Agreement

5. The EU alleges that China violated Article 6.9 of the AD Agreement by failing to disclose certain of the essential facts forming the basis for the determination of the dumping margin, including data and calculations which form the basis for the determination of normal value and export prices and the determination of the dumping margin. Article 6.9 requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties. The obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of "facts", as opposed to the disclosure of the "reasoning" of the

investigating authority. A "fact" is "[a] thing known for certain to have occurred or to be true; a datum of experience" and "[e]vents or circumstances as distinct from their legal interpretation." The use of the adjective "essential", which modifies "facts", indicates that this obligation does not encompass "any and all" facts, but only the "essential facts". The ordinary meaning of "essential" includes "of or pertaining to a thing's essence" and "absolutely indispensable or necessary".

6. Moreover, the obligation to disclose "essential facts" encompasses those essential facts "under consideration which form the basis for the decision whether to apply definitive measures". The term "consideration" has been defined, *inter alia*, as "the action of taking into account". Thus, for purposes of the dumping determination, the essential facts under Article 6.9 are the "indispensable and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *i.e.*, whether dumping has occurred and, if so, the magnitude of such dumping.

7. In order to determine whether definitive measures are warranted, an investigating authority must compare a respondent's normal value to its export price. An affirmative dumping determination is made only if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. This comparison, however, represents merely the final stages of a dumping determination. The investigating authority must first calculate the normal value and the export price.

8. The calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are facts that are "absolutely indispensable" to the determination of the existence and magnitude of dumping. Without such information, no affirmative determination could be made and no definitive duties could be imposed.

9. Article 6.9 requires that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination of dumping. As Article 6.9 expressly provides, the aim of the requirement is to permit "parties to defend their interests". The Panel in *EC – Salmon* (para 7.805) stated that "the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."

10. If interested parties are not provided access to facts used by the investigating authority on a timely basis, they cannot defend their interests. If, for example, an interested party is not provided the calculations used by the investigating authority to address dumping, or the data underlying those calculations, the interested party cannot review the investigating authority's calculations to determine whether they contain errors, or whether the investigating authority actually did what it purported to do. Unless an interested party is provided with these essential facts, it cannot adequately defend its interests.

11. Thus, to the extent that the underlying record reveals that China's investigating authority failed to make available the underlying data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents, it would have failed to meet its obligations under Article 6.9 of the AD Agreement.

III. Article 12.2.2 of the AD Agreement

12. The EU alleges that China violated Article 12.2.2 of the AD Agreement because it failed to set forth sufficiently detailed explanations for definitive determinations on dumping and injury, including references to matters of fact and law which led to the acceptance or rejection of arguments.

Article 12.2.2 requires that investigating authorities provide reasons for the acceptance or rejection of claims by exporters or importers, either through public notice or a separate report.

13. Authorities are required to provide more than cursory assertions to justify decisions to impose definitive antidumping duty measures. The calculations employed by an investigating authority to determine dumping margins, and the data underlying the calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. Calculations are the mathematical basis for arriving at the dumping margins, and therefore, they are highly "relevant" to the decision to apply definitive measures. They are "matters of fact" because they consist of sales and cost data and mathematical uses of these data. Further, they lead to the imposition of definitive measures, because if they result in an affirmative dumping margin, then an investigating authority may apply definitive measures.

14. The requirements of Article 12.2.2 avoid opacity in decision making. Consequently, where the record reveals that an investigating authority provided only cursory assertions to justify a decision to impose definitive antidumping duty measures, that investigating authority will have acted inconsistently with its obligations under this provision.

IV. Article 3.2 of the AD Agreement

15. The EU contends that China's findings on price effects, specifically price undercutting and price depression, are inconsistent with Articles 3.1 and 3.2 of the AD Agreement. Article 3.2 provides that, with respect to the effects of dumped imports on prices, authorities must examine whether there has been significant price undercutting or whether the effect of the imports has been significantly to depress subject import prices or prevent price increases, while Article 3.1 requires an investigating authority to base its determination of injury on positive evidence and to objectively examine the effect of dumped imports on prices.

16. Article 3.1 imposes two requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence". The Appellate Body has referenced with approval a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy". The second requirement is that the injury determination involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be "objective", an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation". Furthermore, the requirement that the examination be "objective" mandates that "the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness".

17. Article 3.2 of the AD Agreement describes further the examination that authorities must conduct to determine the price effects of dumped imports. As the Panel in *EC – Pipe Fittings* emphasized, Article 3.2 does not require an authority to use any particular type of price undercutting analysis. There is no single correct methodology for examining price comparisons in conducting such an analysis. Nor is a finding of price undercutting a prerequisite to finding price depression. Rather, Article 3.2 states that authorities are to examine whether there has been significant price undercutting by the dumped imports *or* whether the effect of the imports has been significantly to depress subject import prices or prevent price increases that would have otherwise occurred. The use of the disjunctive indicates that authorities can find significant undercutting without finding significant price depression or suppression, or that they can find significant price depression or suppression without finding significant undercutting.

18. Accordingly, authorities are required to consider whether there is price undercutting, as well as whether there is price depression or price suppression, but are not required to make any particular findings about any of these inquiries. To the extent an authority relies on findings of any type of price effects, however, Article 3.1 requires that those findings be supported by positive evidence.

19. Furthermore, the analytical methodology an authority uses in its price effects analysis must conform with the "objective examination" standard specified in Article 3.1 of the AD Agreement. This requirement pertains both to comparisons of prices between domestically produced and imported products to examine price undercutting, and comparisons of prices of domestically produced products over time to examine price depression. To satisfy the objective examination standard, the authority must compare equivalent products sold at the same level of trade.

20. In this respect, the United States shares the EU's concern that use of average unit values (AUVs) in making pricing comparisons may fail to yield objective price comparisons in certain circumstances. Generally, AUVs provide a poor basis for pricing comparisons when the domestic like product and/or imports under investigation are not homogenous products but instead reflect a range of products with different characteristics and end-use applications. In such circumstances, differences in AUVs between domestically produced and imported products, or changes over time in AUVs of domestically produced products, may reflect differences in product mix rather than differences in pricing and thus would not provide an objective measure of price differences.

V. Article 3.4 of the AD Agreement

21. The EU claims that China's analysis of the imports under investigation violates Articles 3.1 and 3.4 of the AD Agreement. Article 3.4 requires investigating authorities to evaluate the factors enumerated in that provision, although it does not instruct in what manner an investigation authority must undertake that evaluation.

22. Article 3.4 specifies an authority's obligation to ascertain the impact of dumped imports on the domestic industry. In addition to requiring an analysis of "all relevant economic factors and indices having a bearing on the state of the industry", the article enumerates certain specific factors which an authority must include in its analysis.

23. The Appellate Body in *EC – Pipe Fittings* (para. 156) found that it is mandatory for an authority to evaluate each of the factors set out in Article 3.4. The Appellate Body has also indicated, however, that Article 3.4 does not address the manner in which an authority's analysis of each individual factor must be set out in the documents providing the explanation for its determination. Instead, whether an authority has satisfied its obligation to perform the requisite examination is to be ascertained under the particular facts and circumstances of each case.

VI. Causal Link Claims under Articles 3.1 and 3.5 of the AD Agreement

24. The EU makes several claims that China's causation analysis violates Articles 3.1 and 3.5 of the AD Agreement. Articles 3.1 and 3.5 require an investigating authority to examine the causal relationship between dumped imports and injury, and to examine any known factors, other than the dumped imports, which are causing injury to the domestic industry.

25. Article 3.5 specifies an authority's obligation to ascertain that dumped imports are causing injury. Additionally, an authority's factual findings under Article 3.5 must comply with the "positive evidence" and "objective examination" requirements articulated in Article 3.1.

26. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and – importantly – contains an explicit

link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2 and/or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would also fail. That is, if an authority relies on a price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate significant price effects or significant impact constitutes a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5.

27. The second and third sentences of Article 3.5 require an authority to examine "all relevant evidence" before it, both to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped imports were also causing injury.

28. The third sentence provides that, before reaching the conclusion that the dumped imports were a cause of any difficulties experienced by the domestic industry, an authority must examine other known factors which are injuring the domestic industry. As the Appellate Body found in *US – Hot-Rolled Steel* (paras. 223-24), if a factor other than dumped imports is a cause of injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports. The Appellate Body has further stated that the AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis.

29. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is injuring the domestic industry. If there are no other known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 would neither require nor contemplate that an authority will conduct a non-attribution analysis. Indeed, in such a circumstance, the authority can appropriately attribute all injury to the dumped imports.

ANNEX C

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF
THE EUROPEAN UNION AT THE FIRST
MEETING OF THE PANEL

I. INTRODUCTION

1. The antidumping duties at issue before this Panel were imposed following an investigation in which the Chinese authorities disregarded some of the most fundamental procedural guarantees provided in the Anti-dumping Agreement (ADA) and this despite the fact that the EU exporter fully cooperated with the Chinese authorities. The duties are based on manifestly flawed determinations relating to injury and causality which could not have been reached by an objective and unbiased authority. A particularly striking example of this is MOFCOM's complete failure to take into account the existence of large and manifest differences between product types when considering the price effects of imports.

2. This dispute is concerned with what appears to be recurrent features in MOFCOM's investigations and raise important systemic issues. If the way in which MOFCOM conducted this investigation and reached its findings were to be condoned, safeguards and disciplines set out in the Anti-Dumping Agreement would be substantially weakened.

II. CLAIMS UNDER ARTICLES 6.5.1, 6.4 AND 6.2 ADA

3. The European Union submits that the investigation conducted by China has failed to comply with the requirements laid out in Articles 6.5.1, 6.4 and 6.2 ADA. Under Article 6.5.1 ADA, when an interested party claims that certain information must be treated as confidential, the *investigating authority* must require the party to provide *adequate non-confidential summaries* of the confidential information. In exceptional circumstances only, where an interested party cannot adequately summarise the confidential information, an *explanation of why the information was not susceptible to summarisation* must be provided.

4. China alleges in its first written submission that summaries were in fact adequate. However, China attempts to distort the EU's arguments in an effort to divert attention from the real issue.

5. Article 6.5 and 6.5.1 ADA aim to strike a balance between the often conflicting interests of ensuring due process and transparency on the one hand and ensuring confidentiality of sensitive information on the other. The obligation on the party submitting the information in confidence to provide a non-confidential summary or a statement explaining why summarisation is not possible, coupled with an obligation on the investigating authority to scrutinise such statements, are only part of guarantees against the abusive use of the right to confidential treatment. The other important safeguard lies in the role of the other interested parties, who in their turn scrutinise the adequacy of non-confidential summaries or reasons why summaries could not be provided. Keeping statements about summarisation confidential would do away with those guarantees and create a significant potential for abuse, thus affecting the delicate balance established by Article 6.5 between the protection of confidential information and transparency.

III. CLAIMS UNDER ARTICLES 6.9, 6.4 AND 6.2 ADA

6. MOFCOM's Injury Disclosure and Dumping Disclosure did not include all the essential facts under consideration forming the basis for the final determination, violating *inter alia* Article 6.9

ADA. Article 6.9 ADA imposes an obligation on investigating authorities to inform interested parties of the essential facts with the aim of informing them which information the investigating authority will rely upon in deciding whether to apply a definitive measure and thereby allowing interested parties an opportunity to verify the completeness and accurateness of those facts and submit any comments to the investigating authorities.

7. The obligation under Article 6.9 applies to *facts* as opposed to the reasoning of the investigating authorities, and more specifically to "essential facts". Furthermore, Article 6.9 makes it clear that the disclosure obligation relates to the essential facts "that form the basis of the authorities' decisions whether to apply definitive measures". Pursuant to Article 6.9, investigating authorities are under an obligation to disclose to interested parties the *body of facts that are important to the analysis and decision making* of the investigating authority for deciding whether to apply definitive measures and at what level.

8. The EU submits that MOFCOM failed to disclose the *methodology* it employed to consider price undercutting and price suppression. If one were to follow China's reasoning, the essential facts within the meaning of Article 6.9 in the context of an Article 3.2 assessment of price effects of dumped imports, would – *in the interest of administrative efficiency* – be reduced to *unverifiable assertions*. Contrary to China's position, a *methodology is not reasoning*, but rather a *tool*. To have an analysis, the methodology must first be applied to the raw data. The EU further submits that MOFCOM failed to disclose the *underlying data* for the price analysis. While we recognize that the confidential nature of certain facts would not allow the authorities to disclose all the underlying data, confidentiality does not appear on the record, as the reason for lack of disclosure. In any event, China could have provided a meaningful summary describing the approach chosen.

9. The *calculations* relied upon by an investigating authority to determine the normal value and export prices, as well as the *data underlying those calculations*, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and underlying data are facts that are "essential" to the determination of the existence and level of dumping. *Without this information, no affirmative determination could be made and no definitive duties could be imposed*.

IV. CLAIMS UNDER ARTICLES 12.2.2 ADA

10. Regarding Article 12.2.2 ADA, the EU makes claims with respect to two "categories" of information that China failed to include in the final public notice or separate report: (i) the reasons for the acceptance or rejection of relevant arguments or claims by Smiths; and (ii) certain relevant information on the matters of fact and law which have led to the imposition of final measures.

11. First, Article 12.2.2 requires that the public notice contain "all relevant information on matters of fact and law" as well as the "reasons which have led to the imposition of final measures". The EU recognises that there is a degree of subjectivity and discretion on the part of the investigating authorities implied in the language of Article 12.2.2, when it comes to determining what is "relevant". But it notes that the ADA also imposes certain objective requirements that would require reflection in the published report of the investigation. The second sentence of Article 12.2.2 reduces the "discretion" of the investigating authority on what constitutes "relevant information", when it comes to dealing with the information described in Article 12.2.1 and the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions.

12. Secondly, the EU is bringing claims against China with respect to the lack of disclosure of calculations of the individual dumping margin and its underlying data for the cooperating producer and the calculation of the residual duty rate under both Article 6.9 and Article 12.2.2. The ADA requires the investigating authority to disclose to the interested parties the essential facts under

consideration before the final determination is made. "Essential facts" within the meaning of Article 6.9 ADA include calculations and the data underlying those calculations.

13. Furthermore, as our first written submission explains, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. This is so because the calculations themselves are the mathematical basis for arriving at the dumping margins imposed by an investigating authority. Therefore, they are "relevant" to the decision to apply definitive measures. Lastly, they lead to the imposition of definitive measures, because only when they result in an affirmative dumping margin could an investigating authority apply definitive measures.

V. CLAIMS UNDER ARTICLES 3.1 AND 3.2 ADA

14. MOFCOM's determination of injury is based upon two findings with regard to the price effects of the dumped imports: first, that there was "large" and "serious" price undercutting; and second, that Nuctech's prices fell by as much as 72.68% during the POI. China has acknowledged that MOFCOM reached these two findings by applying a methodology involving a comparison of weighted average unit values for the entire range of scanners covered by the investigation. This methodology was inadequate because it failed to take into account the considerable differences among the various types of scanners covered by the investigation, and in particular between high-energy and low-energy scanners. For this reason, the EU claims that MOFCOM's assessment of the price effects of the imports and, consequently, its determination of injury is not based on an "objective examination" of "positive evidence", contrary to the requirements imposed by Articles 3.1 and 3.2 ADA.

15. Articles 3.1 and 3.2 ADA do not set out any specific methodology in order to examine the effects of the dumped imports. But, as emphasised by the Appellate Body, this does not mean that the investigating authorities enjoy unfettered discretion. The EU does not seek to impose any specific methodology. Nor does the EU challenge *as such* the methodology applied by MOFCOM. The comparison of average unit values can be an appropriate methodology where the product under investigation is sufficiently homogeneous. On the other hand, it is inadequate where the subject product includes very different product types with widely diverging prices. In those circumstances, the observed differences between average unit values may reflect differences between the mix of product types, rather than genuine price undercutting or price depression.

16. In the present case, the Chinese authorities chose to make a very broad definition of the subject product covering two distinct categories of scanners: low-energy scanners and high-energy scanners. Whereas low-energy scanners are used for screening relatively small objects, such as parcels or baggage, high-energy scanners serve to scan much larger objects, such as containers, trucks and rail carriages. The differences in physical characteristics and uses between these two categories of scanners are manifest and considerable and translate into very large price differentials. In addition, there are also important differences among the scanners falling within each of those two categories. All those differences were obvious from the record of the investigation and could not have been ignored by MOFCOM. Given these differences, the averaging methodology used by MOFCOM was plainly inadequate to make a meaningful, let alone accurate, assessment of the price effects of dumped imports. The EU does not have access to the sales data of Nuctech which would be necessary in order to quantify precisely the distortions introduced by MOFCOM's methodology. Nevertheless, the EU has illustrated by means of two numerical examples how even small differences, or variations over time, in the mix of product types can have a very large impact on the outcome of MOFCOM's methodology. China does have access to this data but it has not even attempted to rebut the EU arguments on that point.

17. China appears to contend that MOFCOM's methodology is consistent with Articles 3.1 and 3.2 ADA because it is "reasonable", and this essentially for two reasons. *In the first place*, because MOFCOM had determined previously that the imported subject product and the inspection equipment produced in China were "like", within the meaning of Article 2.6 ADA. This argument, however, is misguided because it confuses two separate and distinct issues under the ADA. Previous panels have clarified that there is no requirement under the ADA that each product type covered by an investigation must be "like" any other covered product type. Therefore, MOFCOM's finding that the subject product was "like" the equipment made in China does not imply that the various product types covered by the investigation are "like" each other. Certainly, the EU would not agree that all types of scanners are "like".

18. *In the second place*, China argues that the averaging methodology used by MOFCOM was "unbiased" because, in different circumstances, the same methodology might work to the exporter's advantage. However, the mere fact that a methodology is "unbiased", in the limited sense given by China to that term, is not sufficient to make it compliant with Articles 3.1 and 3.2 ADA. A methodology may be "unbiased", in the sense postulated by China, and still wholly inapt to yield meaningful results. Furthermore, MOFCOM's choice of methodology was "biased" even by China's own standard. High-energy scanners do not compete with low-energy scanners. Since there were no imports of high-energy scanners, there was no reasonable ground for including Nuctech's sales of high-energy scanners in the calculation of Nuctech's average unit values. At the same time, MOFCOM was well aware that doing so would make more likely a finding of price undercutting and magnify the reduction of the domestic industry's prices.

19. Finally, China makes much of the fact that Smiths did not make a similar claim during the investigation. But this argument is irrelevant because it is well-established that the complaining party is not confined to the arguments made by the exporter during the anti-dumping investigation. It is also disingenuous because MOFCOM never disclosed during the investigation the methodologies that it used for assessing the price effects of imports. Moreover, Smiths did request repeatedly that MOFCOM exclude high-energy products from the investigation on the grounds that they were not comparable to low-energy scanners. Had MOFCOM granted Smiths' request, it would have been unnecessary to take into account the differences between the two categories of products at the stage of considering the price effects of imports.

VI. CLAIMS UNDER ARTICLES 3.1 AND 3.4 ADA

20. The EU maintains that MOFCOM's determination that the domestic industry, i.e., the single company Nuctech, was in a state of material injury is blatantly wrong. In violation of Articles 3.1 and 3.4 of the ADA, it is unfounded on the actual facts and lacking the most basic requirements of providing a compelling explanation of all factors in context and a reasoned and adequate explanation of positive evidence. The evidence on the record showed a state of an industry that was visibly growing, with production capacity, capacity utilisation and output increasing, even well above the increasing levels of domestic consumption. MOFCOM ignored all the positive factors in this case and decided to focus primarily on the downward trend of domestic sales prices to support its finding of material injury. Moreover, MOFCOM ignored key facts provided by Smiths showing the actual state of the domestic industry.

21. First, *MOFCOM ignored the actual facts and twisted the reality to make a finding of material injury*. It did so by relying on questionable figures, making contradictory statements, evaluating economic factors in a not-even-handed manner, ignoring the overall context of all the relevant economic factors having a bearing on the state of the domestic industry, and failing to provide a compelling, reasoned and adequate explanations on its material injury finding.

22. Second, *MOFCOM failed to base its evaluation on positive evidence*. The reality still is that we do not know how MOFCOM came up with its figures. The explanation provided by China in these panel proceedings, in particular that some export data generating substantial profits were taken out of the information provided by Nuctech, is inapposite. Indeed, China makes such a statement without any evidence and in blatant contradiction with the information that was on the record showing that one of the reasons for Nuctech's losses was precisely its *losses* in the export market. Similarly, China appears to avoid engaging in factual issues such as what was the percentage of Nuctech's scanner business within the totality of its products. Based on Smiths' estimate, the EU alleges that scanners amounted to around 90% of Nuctech's products during the POI. China does not provide any evidence in this respect. The EU considers that China is in a better position to provide the necessary data for the Panel to make an objective assessment of this matter. Thus, the Panel, in accordance with its duties under Article 11 of the DSU, should make use of its authority pursuant to Article 13 of the DSU and put the relevant question to China.

23. Third, *MOFCOM failed to provide a compelling, reasoned and adequate explanation* of its material injury determination even on the basis of MOFCOM's own factual determination. In its first written submission China attempts to rewrite MOFCOM's Final Determination by selectively quoting certain sentences in an effort to make *ex-post* sense of its reasoning. The structure chosen by MOFCOM already denotes the lack of a compelling explanation in this case. Positive factors were not put in context but merely disregarded. Moreover, China does not contest the fact that MOFCOM did not even refer to some important positive factors, such as productivity. Likewise, MOFCOM ignored the fact that Nuctech's capacity, output, and domestic sales were increasing well in excess of the growth in demand. Again, these show a failure by MOFCOM to provide a very compelling explanation in this case.

24. Similarly, China fails to provide adequate support to its findings that Nuctech was in a state of material injury. In a situation where the market was expanding, the fact that domestic sales prices constantly decreased indicated that Nuctech sacrificed potential profits in order to increase its sales and gain more market share. Indeed, otherwise, Nuctech could have increased its prices (and profits) at least up to the (higher) level of the import prices. Even on the basis of the facts as found by MOFCOM, Nuctech's state was indicating an industry that was taking advantage of its high productivity and economies of scale to reduce its sales prices, even below the prices of imports. In the EU's view, this cannot support a finding of material injury that is reasoned and adequate.

25. Fourth, *MOFCOM's disregard of all facts and arguments on the record relating to the state of the domestic industry*. Indeed, Smiths brought to MOFCOM's attention some factors which were relevant to understand the state of Nuctech during the POI. In particular, Smiths referred to the start-up situation of Nuctech with respect to the low-energy scanner market and its aggressive pricing policy. Smiths also referred to Nuctech's business expansion to foreign markets. In its first written submission, China attempts to explain why those facts were not addressed by MOFCOM. However, those *ex-post* explanations are irrelevant. The truth of the matter is that none of those factors were referred to, summarised or addressed in MOFCOM's determination. In the EU's view, they were relevant factors that MOFCOM should have considered for its finding of material injury to be reasoned and adequate.

VII. CLAIMS UNDER ARTICLES 3.1 AND 3.5 ADA

26. Finally, contrary to what is required by Articles 3.1 and 3.5 ADA, MOFCOM failed to conduct a proper causation analysis. MOFCOM attributed *all* the negative effects observed under Articles 3.2 (price undercutting/price depression) and 3.4 (material injury) to the dumped imports, concluding that none of the other known factors were the source of injury. MOFCOM explicitly found that none of the other known factors examined could be *a* cause of the effects found. Further,

MOFCOM did not examine any of the other known factors alleged by the interested parties that were causing the effects found.

27. With respect to the *attribution analysis*, MOFCOM considered that the "large" or "great" volume of dumped imports together with their low prices were the cause of all negative effects found. Article 3.5 states that the demonstration of causation shall be based on "an examination of all relevant evidence before the authorities". In this respect, the evidence on the record indicated that the volume of EU imports was not so "large" or "great" when seen in the context of domestic consumption and domestic sales volume. Domestic sales volume was booming in comparison to the volume of EU imports. This is a relevant fact that MOFCOM ignored when making its conclusion as to the "large" or "great" volume of EU imports. Moreover, and more importantly, MOFCOM did not examine the nature of those imports in its attribution analysis. By attributing all the effects found with respect to both high-energy and low-energy scanners to imports exclusively relating to low-energy scanners, MOFCOM failed to carry out an appropriate attribution analysis in this case.

28. Second, with respect to the prices of EU imports, MOFCOM also ignored the fact that import prices were constantly increasing throughout the POI and were even above domestic sales prices in 2008. In that context, the fact that EU imports were dumped (allegedly), as China asserts, is beside the point. Indeed, the dumped level of imports is irrelevant in this context. What matters is the undercutting, which did not exist in this case, and certainly did not take place in 2008. In particular, MOFCOM failed to explain how import prices consistently going up and reaching a level even above domestic sales prices could be the *only* cause of domestic sale prices consistently declining by an amount significantly more substantial.

29. In sum, the EU considers that MOFCOM's attribution analysis runs short of the requirements under Articles 3.1 and 3.5 ADA.

30. The same should be concluded with respect to the *non-attribution analysis*. MOFCOM disregarded the actual causes for any negative condition of the domestic industry, as stood out from the record. In particular, there is no consideration of factors such as the impact of the global crisis in 2008, the start-up situation of Nuctech, Nuctech's aggressive pricing policy, Nuctech's aggressive business expansion, and the fair competition between Nuctech and other producers. There is not even a reference to these arguments in MOFCOM's Final Determination. To say now in these panel proceedings for the very first time that MOFCOM decided to reject and not even address explicitly any of the causation arguments raised by Smiths amounts to *ex-post* rationalisation which should be rejected.

31. Therefore, the EU requests the Panel to find that MOFCOM's non-attribution determination, as well as MOFCOM's causation determination in general, are inconsistent with Articles 3.1 and 3.5 ADA.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE FIRST MEETING OF THE PANEL

1. Introduction

1. As a preliminary remark, China would like to express its concerns with respect to the various claims that the European Union has failed to properly substantiate in its First Written Submission, making it impossible for China to effectively rebut them. It is, however, for the European Union to present claims that are understandable and supported by the necessary arguments and evidence. Only then can China be in a position to properly defend itself and the Panel in a position to rule on these claims. China considers that to the extent the European Union has failed to properly substantiate its claims, it has failed to make a *prima facie* case with respect to these claims and such claims should accordingly be rejected by the Panel.

2. In this Oral Statement, China will briefly summarise the main points and highlight certain essential issues on which, in China's view, the discussions should focus.

2. The European Union's claim under Articles 6.5.1, 6.4 and 6.2 of the AD Agreement

3. The European Union's first claim concerns Article 6.5.1 and Articles 6.4 and 6.2 of the AD Agreement.

4. The European Union alleges that China violated Article 6.5.1 since it would have failed to ensure adequate non-confidential summaries or to require a statement of reasons explaining exceptional circumstances why summarization was not possible.

5. As a preliminary remark, China notes that no claim has been made by the European Union pursuant to Article 6.5. It is thus not disputed that the information concerned has been properly treated as "confidential" and that the only issue for the Panel is to determine whether there has been a violation of Article 6.5.1.

6. The European Union's claim that no adequate non-confidential summary was provided by Nuctech for various items contained in the Petition and in its Questionnaire Response is without merit. Indeed, for the different items identified by the European Union, an adequate non-confidential summary, that is a non-confidential summary which is in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, has been provided. Furthermore, China notes that Smiths and the European Union extensively commented on the injury determination, thereby invalidating the European Union's allegation that the lack of an adequate non-confidential summary hampered Smiths' rights of defence.

7. The European Union's claim that MOFCOM allegedly failed to request that the Chinese Public Security Bureau of the Civil Aviation Administration provide a statement of reasons explaining the exceptional circumstances why summarization was not possible should equally be rejected. The non-confidential version of the statement explains the exceptional circumstance why summarization was not possible, namely "the nature of the information" submitted in confidence, which concerned the "use of X-ray security inspection equipment in the civil aviation system". The Chinese Public Security Bureau of the Civil Aviation Administration further explained to MOFCOM the inherently highly sensitive character of the information contained in the document submitted in confidence which relates to the number and types of security systems used in Chinese airports and in the aviation

sector which, for obvious public security reasons, cannot be summarised without risking disclosing the highly sensitive information. Thus, MOFCOM scrutinised this explanation to determine whether it established exceptional circumstances and appropriately explained why in these circumstances, no summary was possible.

8. The European Union claims that, consequently, China also violated Articles 6.4 and 6.2. For China, the due process and transparency obligations laid down in those provisions are of fundamental importance and must strictly be complied with during anti-dumping investigations. In the investigation at issue, contrary to the European Union's allegations, China fully complied with these obligations.

9. Finally, the European Union fails to substantiate its claims under Articles 6.4 and 6.2 which it presents as purely consequential claims to the Article 6.5.1 claim. Since the European Union fails to do so, these claims should be rejected.

3. The European Union's claim under Articles 6.9, 6.4 and 6.2 of the AD Agreement

10. The European Union argues that China violated Article 6.9 and consequently Articles 6.4 and 6.2 since it failed to disclose the essential facts which form the basis for the determination of the dumping margins and the determination of injury, including the analysis of price effects.

11. Regarding the first claim under Article 6.9, China submits that neither the methodology used for the price undercutting/price suppression analysis nor the underlying evidence from which MOFCOM derived the factual basis on which it made its price analysis come within the scope of Article 6.9. The European Union apparently ignores that Article 6.9 is limited in scope and only applies to the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

12. The European Union's second claim regarding the failure to disclose the underlying facts and criteria on the basis of which the adjustments to the export price were made, should also be rejected. Indeed, the Final Dumping Disclosure adequately and fully disclosed all the essential facts concerning the export price adjustments. This is even clearer when the Final Dumping Disclosure is read together with the Preliminary Dumping Disclosure which the European Union intentionally ignores in its First Written Submission.

13. The European Union's further argument on the failure to disclose the essential facts relating to Smiths' dumping margin and to the residual duty must equally be rejected. Again, the European Union deliberately fails to mention the Preliminary Dumping Disclosures that were sent to Smiths and to the European Union and that contain essential facts concerning the determination of Smiths' dumping margin and of the residual duty. Since MOFCOM identified the data which were used, explained how the calculations had been made on the basis of such data and disclosed the final figures of normal value, export price and the dumping margin, the requirement of Article 6.9 has been complied with.

14. With respect to the alleged violations of Articles 6.4 and 6.2, China emphasises again that a violation of Article 6.9 – *quod non* – would not necessarily entail a violation of Article 6.4 and/or 6.2. The European Union has failed to substantiate its claims.

4. The European Union's claim under Article 12.2.2 of the AD Agreement

15. The European Union claims that China violated Article 12.2.2 of the AD Agreement primarily because it did not provide the reasons which led to arguments being accepted or rejected in connection with the determination of normal value, injury and causation. Regarding the argument

raised by Smiths on its relationship with its affiliated companies in the context of the normal value determination, this issue has been fully addressed by MOFCOM and the reasons for rejecting Smiths' argument are set out in its Final Determination. Similarly, Smiths' arguments on the credibility of the data submitted by Nuctech were also examined in MOFCOM's Final Determination. The European Union fails to precisely identify in its First Written Submission the other arguments that Smiths would allegedly have raised in connection with MOFCOM's injury and causation analysis. Moreover, the European Union fails to establish that those arguments were "relevant" within the meaning of Article 12.2.2.

16. Second, the European Union also claims that the Final Determination does not contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures in connection with the injury determination and the calculations of Smiths' dumping margin and the residual duty.

17. As to MOFCOM's alleged failure to explain in its Final Determination the methodology used in the price undercutting and price suppression analysis, that claim should be rejected since it does not come within the scope of Article 12.2.2 as it is neither a "matter of fact" nor is it "relevant" within the meaning of Article 12.2.2. Furthermore, the calculations of Smiths' dumping margin and of the residual duty and the data underlying those calculations do not come within the scope of Article 12.2.2. As acknowledged by the European Union, these calculations and - *a fortiori* - their underlying data contain confidential information, the disclosure of which is necessarily inconsistent with Article 6.5 of the AD Agreement. The European Union nevertheless claims that China should have made available to Smiths the calculations it used to determine its individual dumping margin. Article 12 does not contain obligations concerning the content of a disclosure to specific interested parties but concerns instead the content of the public notice to be published at the end of the investigation. Such notice is by definition public and cannot contain confidential information. For that sole reason, the European Union's claim must be rejected. In any case, the calculations of the dumping margin and their underlying data do not constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2 of the AD Agreement.

5. The European Union's claim under Articles 3.2 and 3.1 of the AD Agreement

18. The European Union claims that MOFCOM's analysis of the price effects is inconsistent with Articles 3.2 and 3.1 of the AD Agreement since it failed to make a price undercutting and/or price suppression analysis distinguishing between so-called "low-energy" and "high-energy" scanners and even among the different models of "low-energy" scanners. It claims that MOFCOM should have made its price analysis on a model-by-model basis. Article 3.2, however, does not require the investigating authority to use any particular methodology for its price analysis. The investigating authority enjoys discretion with respect to the methodology it will follow. Furthermore, Article 3 does not contain any requirement to make adjustments similar to those normally made for the dumping margin pursuant to Article 2.4. This makes sense since, pursuant to Article 3.2, the investigating authority is not even required to make any quantitative findings or determinations on the price effects but merely needs to "consider" the price effects.

19. The European Union fails to demonstrate that MOFCOM's price analysis was not objective because MOFCOM would not have ensured an even-handed treatment of the information and data on the record of the investigation. MOFCOM defined the product under consideration. After examination of the domestic product, it concluded that they were "like". It was thus reasonable for MOFCOM to assess the effects of the dumped imports on prices by using the weighted average unit methodology. During the investigation, Smiths never claimed that the price analysis should be made separately for "high-energy" and "low-energy" scanners nor requested certain adjustments to be made. In any case, there is no clear-cut criterion to differentiate "high-energy" from "low-energy" apparatus.

20. The fact that there are price differences between products which all constitute the like product does not render the use of the weighted average methodology unreasonable. In fact, in most anti-dumping cases, there are price differences due to differences in, e.g. model types, the date of sale or the type of customers. Following the European Union's logic would lead to a prohibition of the use of the weighted average methodology in nearly all anti-dumping cases. Actually, the use of averages may in certain cases be favourable to the exporter while negative on other occasions. The European Union fails to demonstrate that MOFCOM did not ensure an even-handed treatment of the information and data in that MOFCOM would have intentionally selected certain models or transactions to achieve a certain result in its analysis. MOFCOM applied the weighted average methodology in an even-handed and objective manner. Therefore, the European Union's claim that China acted in violation of Articles 3.1 and 3.2 should be rejected.

6. The European Union's claim under Articles 3.4 and 3.1 of the AD Agreement

21. China submits that the four European Union's claims under Articles 3.4 and 3.1 concerning MOFCOM's injury analysis should be rejected.

22. First, regarding the claim that MOFCOM failed to base its evaluation on positive evidence because of alleged discrepancies between the data in MOFCOM's Final Determination and the information submitted by Nuctech or available from other sources, China submits that the mere fact that there may be discrepancies between those data does not demonstrate that the "evidence" on which MOFCOM based itself is not "positive". Actually, the figures and data in a Questionnaire Response are checked by the investigating authority, in particular through on-site verifications. Following such verifications, MOFCOM adjusted Nuctech's data and, for instance, excluded the data relating to the exports of the like product as well as to other products. As to the discrepancies with certain figures from other sources, MOFCOM explained that those data included information on other products as well.

23. Second, the claim regarding China's failure to examine all factors listed in Article 3.4 and, in particular, the magnitude of the margin of dumping should equally be rejected. As set out clearly in the Final Determination, MOFCOM evaluated the magnitude of the margin of dumping in the Final Determination and found that it exceeded the "*de minimis*" threshold of Article 5.8 of the AD Agreement.

24. Third, the European Union argues that China failed to make an objective examination of the state of the domestic industry because it disregarded the differences between "low-energy" and "high-energy" scanners. This claim is baseless in both fact and law. There is no requirement in Article 3 that the investigating authority carries out a separate analysis for alleged different categories of the "like product". On the contrary, the obligation to make an objective examination of the state of the domestic industry pursuant to Articles 3.1 and 3.4 means that the domestic industry has to be investigated "as a whole" and that an investigating authority cannot focus only on one segment or sector of the domestic industry. Moreover, no clear cut difference between separate segments exists in this case.

25. Fourth, the European Union assertion that MOFCOM failed to make a proper evaluation of all injury factors in context is groundless. The European Union first argues that MOFCOM failed to provide a compelling explanation of whether and how the overwhelming majority of positive factors were outweighed by any other negative factors. The European Union's presentation of the facts is not correct. It is not so that most injury factors were positive or showed a positive trend. In fact, the Final Determination shows that a significant number of factors were negative. Furthermore, MOFCOM provided a reasoned and reasonable explanation as to how and why the facts and elements on the record support its finding of injury, including an explanation why the allegedly positive factors were insufficient to change this overall conclusion. The European Union is simply requesting the Panel to

re-examine the facts on the record and to determine whether it would have reached the same conclusion on injury as MOFCOM did. This, however, is not the role of the Panel as is clear from Article 17.6 of the AD Agreement and Article 11 of the DSU.

26. The claim that MOFCOM made contradictory observations in a not even-handed manner is entirely misplaced and contradicted by the evidence in MOFCOM's Final Determination. Moreover, it flows from the Final Determination that MOFCOM analysed not only each factor individually but considered also how the factors relate to each other and to the wider economic context.

27. Finally, the European Union's claim that MOFCOM failed to take into account all facts and arguments on the record relating to the state of the domestic industry should equally be rejected. The European Union has not submitted any evidence regarding Nuctech's alleged start-up situation and alleged aggressive pricing policy. In any event, these are not factors having a bearing on the state of the domestic industry within the meaning of Article 3.4. Those factors were rightly considered irrelevant in assessing the impact of the dumped imports on the state of the domestic industry.

7. The European Union's claim under Articles 3.1 and 3.5 of the AD Agreement

28. The European Union argues that China violated Articles 3.5 and 3.1 since it failed to properly examine the causal relationship between the dumped imports and the material injury found and failed to conduct a proper non-attribution analysis.

29. Regarding the causal relationship between the dumped imports and the material injury found, the European Union fails to point to any flaws in MOFCOM's reasonable and reasoned findings. Indeed, MOFCOM carried out an adequate analysis of the volume of the dumped imports and of their effects on domestic prices. Furthermore, as evidenced by the Final Determination, MOFCOM established the existence of a temporal correlation between, on the one hand, the rapid and significant increase in the volume of the dumped imports as well as the low level of their prices and, on the other hand, the injured state of the domestic industry as reflected in numerous factors such as declining prices, losses, negative investment and rate of return, increasing stocks, etc.

30. With respect to the non-attribution requirement, the European Union's allegation that MOFCOM ignored other known factors raised by Smiths and failed to consider several arguments made by Smiths is equally unsubstantiated. It is clear from Article 3.5 that the non-attribution requirement only applies to factors other than dumped imports which are known to the investigating authority and are injuring the domestic industry at the same time as the dumped imports. The European Union simply fails to demonstrate this with respect to the five alleged other known factors. In any case, theses five factors were either examined by MOFCOM or did not need to be because they rested on a factual assumption that had already been rejected by MOFCOM.

ANNEX C-3

CLOSING STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

1. Mr. Chairman, Distinguished Members of the Panel, China would like to thank you for all your efforts.

2. In this Closing Statement, we would like to correct some of the misleading statements made by the European Union. This is important for the proper assessment of the matter before you. We would like to refer you to our First Written Submission, which contains more detailed evidence to rebut the EU's groundless allegations. We want, however, to emphasise the following points.

3. First, China is aggrieved by the very serious allegations made by the European Union that China would have acted in a biased manner and would have disregarded "some of the most fundamental procedural guarantees provided in the Anti-Dumping Agreement."[1] China cannot accept these insinuations. Throughout the proceedings, China respected all due process guarantees. As you know, China is one of the main targets of trade defence investigations. China has therefore a systemic interest in safeguarding the procedural rights of parties involved in such investigations. China would like to reiterate its strong commitment to the principles of transparency and procedural fairness in carrying out anti-dumping investigations. China's investigating authority has always paid the utmost attention to safeguarding the rights of all parties in anti-dumping investigations.

4. Moreover, China would also like to point out that the accusations made by the European Union as to alleged "serious" violations of due process obligations frequently concern practices routinely followed by the EU's own investigating authority and are even directly recommended in the EU's investigative guidelines.

5. Second, the European Union's repeated claims concerning the allegedly blatant violations of due process obligations by China is insufficient to mask the lack of factual evidence supporting these serious allegations. As an example, throughout the investigation, China gave ample opportunity to Smiths to correct and complete its deficient submissions. China also made considerable efforts to inform the parties with all the essential facts which formed the basis of its determinations. Finally throughout the investigation, Smiths has ample opportunities to consult all non-confidential information.

6. Third, the European Union's statement that this case would have been initiated by MOFCOM in retaliation for the anti-dumping measures imposed by the European Union on similar products is pure speculation. In fact, the petition was submitted to MOFCOM several months before the European Union imposed any anti-dumping measures. The European Union also appears to forget that the present anti-dumping investigation has not been initiated *ex officio* by MOFCOM but on the basis of a duly substantiated claim by the petitioner. As in the EU, China's investigating authority is under the obligation to accept petitions that contain sufficient *prima facie* evidence.

7. Fourth, the European Union on several occasions has accused China of making "*ex post facto*" explanations. However, as explained in our First Written Submission, the explanations were either provided or there was no need to provide such explanation since the arguments raised by Smiths were manifestly irrelevant or lacking supporting evidence. Just one example. During the investigation, Smiths argued that Nuctech was in a start-up phase. The notion of a start-up phase is

[1] EU Opening Statement, para. 2.

found in the AD Agreement in the context of the determination of the normal value and is a well defined concept. Smiths, however, has not submitted any evidence whatsoever that Nuctech would have found itself in a start-up phase. The statements made by Smiths were moreover completely contradictory. First, Smiths argued that Nuctech would have recently started a production of so-called low-energy scanners. Then, Smiths explained that Nuctech would have been producing low-energy scanners but would not have been present in the aviation sector. Later on, Smiths also argued that Nuctech was present in the aviation sector but was trying to get additional market share. Again, no evidence of any of the foregoing statements has been given by Smiths. It is clear that one cannot expect that an investigating authority would take this kind of unsubstantiated and conflicting claims more seriously than the evidence obtained from the company's own records.

8. Fifth, the European Union also seems to consider that there is a clear and manifest distinction between the so-called categories of "high-energy" and "low-energy" scanners. There is, however, no clear-cut criterion for differentiating categories of scanners. In fact, it seems that this categorisation is self-serving and has been invented by Smiths for the purposes of this case. Indeed, in a previous case by the European Union, Smiths argued that the cut-off level was an energy level of 250 KeV instead of above 300KeV, as in the present case. Furthermore, no clear-cutting categorisation of scanners can be made on the basis of sizes, prices, uses or technologies. Contrary to what Smiths alleges, there are no distinct categories of scanners and the various types of scanners form a single continuum. Producers, such as Smiths generally offer a full range of products meeting the varied needs of their costumers.

9. Finally, we are surprised that the European Union argues that no injury can occur when import prices are increasing or are even higher than the domestic prices. The European Union conveniently overlooks its many determinations in which it concluded to the existence of material injury in similar circumstances. Indeed, the fact that import prices are increasing and are higher than the domestic prices does not prevent such prices from depressing or suppressing the prices of the domestic industry. This is particularly the case where the prices relate to imports which are rapidly increasing and capturing additional market share.

10. Mr Chairman, Distinguished Members of the Panel, this concludes our closing statement. Thank you.

ANNEX D

ORAL STATEMENTS OF THE THIRD PARTIES AT
THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

THIRD PARTY ORAL STATEMENT OF CHILE AT THE
FIRST MEETING OF THE PANEL*

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as a third party to this dispute, is grateful for the opportunity to present its views on certain systemic aspects of this case.

2. Chile notes that this dispute involves matters that have a considerable bearing on the proper application and interpretation of the *Anti-Dumping Agreement*, particularly as regards the provisions governing transparency and those that guarantee the right of parties to a full opportunity to defend their interests, a prerequisite for any anti-dumping investigation.

3. To begin with, Chile would like to stress the importance of the obligation contained in Article 6.5.1 of the Anti-dumping Agreement for interested parties to furnish non-confidential summaries and for those summaries to be in sufficient detail. As stated by the Panel in *Argentina – Ceramic Tiles*[1], this obligation is important in that the purpose of ensuring access to these summaries is to enable the interested parties to defend their interests in the framework of an investigation, thereby guaranteeing their right to due process.

4. As regards the allegation by the European Union that the reasons why summarization of the confidential information was not possible, Chile, like Norway in its third party submission, takes the view that the Panel must rule on whether the obligation contained in the said provision implies that these reasons must be made public for those involved in the investigation. We agree that the only useful interpretation of the provision would be that the interested parties should have access to these reasons, which they can only obtain if the information is effectively placed at their disposal by being made public.

5. Moreover, in cases where it is not possible to summarize the confidential information, it is the investigating authority's obligation, even if the provision does not expressly say so, to require the interested party to indicate the reasons and grounds why such summarization is not possible.[2] In Chile's view, this obligation cannot be fulfilled merely by describing the nature of the information or assets protected by confidentiality - to accept this would be tantamount to circumventing or failing to apply the provision in question.

6. Secondly, Chile would like to refer to the obligation contained in Article 6.9 of the AD Agreement to inform all interested parties, before a final determination is made, of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

7. The purpose of this obligation is clearly to disclose to the interested parties the information that the investigating authority will be considering as a basis for its final decision, so that the parties can be in a position to comment on or seek to correct that information. It is important to stress that the investigating authority's obligation does not extend to, or cover, all of the information it has had before it during the investigation, but only the relevant information that it will be taking into consideration when reaching its final decision and which relates to the facts, and not to the reasoning used.

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* This Oral Statement was originally made in Spanish.

[1] Report of the Panel in *Argentina – Ceramic Tiles*, paragraph 6.39.

[2] See the Report of the Panel in *Guatemala – Cement II*, paragraph 8.123.

8. Moreover, the panel needs to analyse and take account of the manner in which the investigating authority claims to have disclosed the information and the alleged timing of that disclosure. Compliance has to be analysed in the light of the purpose of the obligation, since it is essential that the timing of the disclosure and the manner in which it is done must be such as to enable the interested parties to defend their interests. To accept any inferior standard would be to deprive the provision in question of all effectiveness.

9. Without wishing to evaluate the substance of the dispute or to question the procedures by which the challenged definitive measures were imposed, Chile considers that for these provisions to be applied correctly, all of the interested parties must be guaranteed access to the information they need to better defend their interests and to be able to influence the final decision. Consequently, we would ask the Panel to conduct its examination in the light of that objective.

10. Finally, leaving aside the question of whether the investigating authority failed to conduct an objective examination on the basis of positive evidence with respect to the determination of injury as required by Article 3.1 of the Anti-Dumping Agreement, Chile would like to suggest that the Panel, in making its assessment of the effect of the dumped imports on prices in the domestic market for like products, consider the conditions of competition between those products. The analysis of those conditions of competition must be based, *inter alia*, on the physical characteristics of the products, including technical and quality specifications, and on the characteristics of their markets, including their end-use, substitutability, price level and forms of distribution.

Once again, many thanks for this opportunity.

ANNEX D-2

THIRD PARTY ORAL STATEMENT OF JAPAN AT THE
FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. Mr. Chair, and distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for your attention to this dispute involving important systemic issues in the *AD Agreement*. Among issues raised by the EU, Japan would like to address with respect to the injury determination the disclosure of essential facts and the public notice of the final determination, taking into account arguments of parties.

II. DISCUSSION

A. The Disclosure of Essential Facts under Article 6.9 of the *AD Agreement*

2. The EU alleges that China did not fully disclose essential facts related to the investigating authority's analysis of the effects of dumped imports on the prices of the domestic like products.[1] China disagrees with this allegation.[2]

3. Article 6.9 of the *AD Agreement* sets forth a specific procedural rule to ensure the transparency of AD investigations and the observance of the due process rights of the interested parties. This Article requires the investigating authority to identify and disclose those facts that would be essential for the authority's final determination. At the same time, this disclosure must be in sufficient detail to enable the interested parties to make an effective defense of their interest.

4. With respect to the scope of the essential facts, a dispute panel explained in the context of the *SCM Agreement* that a specific fact would be essential if it "underlie[s] the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation".[3] In the case of an antidumping investigation, the essential elements are dumping, injury, and causation.

5. Article 3.5 requires the authority to demonstrate the causation between dumped imports and the injury to the domestic industry "through the effects of dumping, as set forth in paragraphs 2 and 4". This provision explicitly necessitates an analysis of the effects of dumped imports in accordance with Article 3.2 in order for the authority to reach the causation determination. Facts, on which the authority based its analysis of the effects under Article 3.2, are therefore essential to the causation determination, and thus must be disclosed to interested parties under Article 6.9.

6. China argues that Article 3.2 does not set forth any methodologies to analyze the effects of dumped imports, and thus the authority has considerable discretion to decide an appropriate methodology.[4] This does not mean, however, that the authority's discretion is unlimited. "The general requirements of objective examination and positive evidence of Article 3.1 limit an investigating authority's discretion in the conduct of a price undercutting analysis".[5] This discretion

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[1] First Written Submission by the European Union (the "EU FWS"), para. 83.
[2] First Written Submission of the People's Republic of China (the "China FWS"), paras. 132-163.
[3] Panel Report, *Mexico – Olive Oil*, para. 7.110.
[4] China FWS, para. 145.
[5] Panel Report, *EC – Fasteners (China)*, para. 7.328.

must be exercised "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[6]

7. These requirements inform the authority's obligation to disclose the essential facts under Article 6.9. The second sentence of Article 6.9 requires the authority to disclose to the interested parties the information that enables them to comment on the completeness and correctness of the facts, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[7] Facts, which the authority found to make its analysis of the effects of dumped import, must also be disclosed in such detail so as to allow the interested parties to make such examination and arguments in light of the authority's obligation of an objective examination in an unbiased manner without favouring the interests of any interested party.

B. The Sufficiency of the Public Notice under Articles 12.2 and 12.2.2

8. The EU alleges that MOFCOM failed to explain the methodology used for analysis of the price undercutting or price depression in the public notice.[8] China disagrees.[9]

9. Article 12.2 sets forth the investigating authority's general obligation for public notices of preliminary and final determinations. The investigating authority must explain in the notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authority". Such explanation must be given irrespective of whether interested parties presented any arguments to the authority.

10. The panel in *EC – Tube or Pipe Fittings* analyzed this general obligation that "a "material" issue [is] an issue … that must necessarily be resolved in order for the investigating authorities to be able to reach their determination".[10] The panel in *EU – Footwear (China)* further stated that the materiality of issues "must be judged primarily from the perspective of the actual final determination of which notice is being given".[11] These panels clarified that an issue must be explained in the public notice when it is judged as material to the actual final determination upon an objective analysis of the final determination, and not based on the subjective consideration by the authority.

11. As discussed earlier, the facts on which the authorities analyzed the effects of dumped imports to determine causation are "essential" facts. As the Appellate Body pointed out, "[t]he 'essential facts' under Article 6.9, which form the basis for a final determination, are those that are material for the authority's decision".[12] The factual issue on the analysis accordingly thus must be explained in the public notice.

12. The EU also alleges that MOFCOM did not state the reasons for the rejection of certain arguments by an exporter in the public notice.[13] China rejected these allegations.[14]

13. Article 12.2.2 sets forth rules applicable only to the public notice of an affirmative final determination imposing a definitive duty. The authority must explain the "reasons for accepting or rejecting **relevant** arguments" by the exporters. The ordinary meaning of "relevant" means "closely

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[6] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[7] *See* Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[8] EU FWS, para. 148.
[9] China FWS, paras. 233-242.
[10] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424, as quoted in China FWS, para. 212.
[11] Panel Report, *EU – Footwear (China)*, para. 7.844.
[12] Appellate Body Report, *EC – Fasteners (China)*, para. 483.
[13] EU FWS, paras. 150, 154, 155, and 312-314.
[14] China FWS, paras. 243-250.

connected or appropriate to the matter in hand".[15] In the context of Article 12.2.2, an argument would be "relevant" if the argument is closely connected to "matters of facts and law and reasons which have led to the imposition of final measures". The scope of these matters of facts and law should also be understood in the context of the authority's general obligation to explain issues of material fact and law, not every single issue, in the public notice. As the panel in *EU – Footwear (China)* stated, "the notions of 'material' and 'relevant' in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given".[16] In the context of Articles 12.2 and 12.2.2, therefore, an argument by an exporter is "relevant" and thus the authorities must explain the reasons for the acceptance or rejection when the argument is closely connected to an issue of material fact or law from the perspective of the actual final determination.

III. CONCLUSION

14. As stated in the third party submission, Japan does not take any particular position on the factual aspects of this dispute. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's comments above and in the third party submission to ensure the fair and objective application of the provisions of the *AD Agreement*. Japan would be pleased to respond any questions that the Panel may have.

[15] Concise Oxford dictionary, tenth edition, revised, p. 1209.
[16] Panel Report, *EU – Footwear (China)*, para. 7.844. (emphasis given)

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF NORWAY AT THE
FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.

2. In its written statement, Norway addressed a number of interpretative issues raised by the EU and China. Norway focused on the non-confidential summarisation of confidential information, the disclosure of essential facts forming the basis of certain determinations, the disclosure of all non-confidential information relevant for interested parties to defend their interests and the provision of full opportunity for the defence of interested parties' rights. With regard to these issues, I shall refer you to the arguments in our written submission.

3. Today, Norway would like to address one additional issue raised by the EU and China in their written submissions; the standard of review. More precisely, the EU's claim that China violated Article 12.2.2 of the *Anti-Dumping Agreement* because the investigating authority failed to provide an adequate explanation for some of its determinations, as well as references to the matters of fact and law and reasons which led to arguments being accepted or rejected.[1] Norway will not address the issue of whether China has fulfilled the obligations set out in Article 12.2.2 in this case, but will highlight certain arguments that may be of importance to the Panel when interpreting the relevant Article.

4. Under the provisions of Article 12.2 and Article 12.2.2 of the *Anti-Dumping Agreement*, the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive anti-dumping duties. Thus, the authority must set forth the relevant facts in the record, and must explain "in sufficient detail", as set out in Article 12.2, the factual and legal determinations made on the basis of the evidence in the record that led to the imposition of duties.

5. Articles 12.2 and 12.2.2 therefore serve the same function as similar provisions in other covered agreements relating to trade remedy measures, namely, Article 3.1 of the *Agreement on Safeguards* and Articles 22.3 and 22.5 of the *Agreement on Subsidies and Countervailing Measures*. The Appellate Body and panels have consistently ruled that these provisions require the investigating authorities to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination.[2] The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.[3] The authority must provide "sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood".[4]

[1] The EU's First Written Submission, para. 128.
[2] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.
[3] Appellate Body Report, *US – Line Pipe*, para 217.
[4] Panel Report, *EU – Footwear*, para.7.844.

6. Furthermore, the Appellate Body has emphasised that "the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report".[5]

7. In sum, the investigating authority must provide an explanation that does not leave the reader guessing why the authority made its determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *Anti-Dumping Agreement* governing those determinations.

8. In conclusion, Norway submits that the Appellate Body – with regard to the standard of review – has stated that a panel must examine whether the authority has provided a "reasoned and adequate explanation" of "how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings".[6]

Mr. Chairman, distinguished Members of the Panel,

9. This concludes Norway's statement today. Thank you for your attention.

[5] Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 97.
[6] Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 99.

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION
OF THE EUROPEAN UNION

1. Claim under Articles 6.5.1, 6.4 and 6.2 ADA

1.1 Introduction

China breached its obligations under Article 6.5.1 ADA by failing to ensure that interested parties provided non-confidential summaries of confidential information or a statement of reasons explaining why summarization is impossible. Where summaries were provided, China failed to ensure that they were in sufficient detail to enable a reasonable understanding of the substance of the information submitted. This also constitutes a violation of Article 6.4 to the extent it amounts to a failure to provide a timely opportunity to interested parties to see and comment upon the information that the authority used in the antidumping investigation and that is relevant for the presentation of their case. Where interested parties are denied an opportunity to see all relevant information in the record, including adequate non-confidential summaries or statements justifying the impossibility of summarisation, they are denied the right to an opportunity to fully defend their interests, as required by Article 6.2 ADA.

1.2. MOFCOM failed to ensure adequate non-confidential summaries

China violated Article 6.5.1, because MOFCOM did not ensure that all information submitted in confidence was accompanied by an *adequate non-confidential summary*. There is no explanation from the domestic interested parties on the record as to why the information would have been impossible to summarise. Information subject to the European Union's claims was relevant, not confidential and used by the authorities in the anti-dumping investigation. While it is correct that the text of Article 6.5.1 does not prescribe a specific format, it is clear that it requires that the summary enables a reasonable understanding with the aim of enabling rebuttal.

1.3. MOFCOM failed to require a non-confidential summary or a statement of reasons why summarisation of the statement by the Aviation Administration was not possible

China violated Article 6.5.1 ADA due to MOFCOM's failure to require a non-confidential summary or a statement of reasons explaining the exceptional circumstances why summarization was not possible with respect to the statement made by the Aviation Administration. China's argument that the statement of exceptional circumstances needs only be made available to MOFCOM is based on a misguided interpretation of Article 6.5.1 and therefore be should be rejected. China's attempt to invoke security concerns for the lack of summarization is ex post rationalization which contradicts the facts on the record.

2. Claim under Articles 6.9, 6.4 and 6.2 ADA

2.1. Introduction

Contrary to its obligations under the ADA China failed to disclose the underlying data and the methodology for price undercutting and price depression/suppression. China also failed to fully disclose all essential facts which form the basis for the determination of the dumping margin for the cooperating producer and the essential facts which form the basis for the determination of the residual duty.

2.2. MOFCOM failed to disclose the underlying data and the methodology for price undercutting and price depression/suppression

MOFCOM failed to disclose the underlying data and methodologies it followed in determining the existence of (i) price undercutting and (ii) price depression/suppression. Because the underlying data and the methodologies for price undercutting and price depression/suppression constitute "essential facts", which form the basis for the decision whether to apply definitive measures within the meaning of Article 6.9 ADA, China acted inconsistently with Article 6.9 ADA by not disclosing them prior to the final determination.

2.3. MOFCOM failed to disclose the calculation of the individual dumping margin

The calculations relied upon by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and underlying data are facts that are "essential" to the determination of the existence and level of dumping. Without this information, no affirmative determination could be made and no definitive duties could be imposed. China's argument that Smiths was provided with sufficient information to replicate the calculations should be rejected. MOFCOM's disclosure at best allowed Smiths's to guess or approximate the calculations, which is not sufficient to meet the requirements of Article 6.9.

2.4. MOFCOM failed to disclose the essential facts under consideration regarding its calculation of the "all others" dumping rate

As confirmed by China's attempt to prove an *ex post* explanation of how the "all others" duty rate was determined, MOFCOM failed to identify in its preliminary and final disclosures to the European Commission the essential facts under consideration regarding its calculation of the "all others" duty rate and in so doing violated Articles 6.9, 6.4 and 6.2. Interested parties can only assess whether the investigating authority acts in a reasonable, objective and impartial manner, and hence take an informed decision *inter alia* about the need for challenging it under Article 6.8 ADA, if they have access to the essential facts under consideration which form the basis for the decision to resort to a determination based on available facts. The European Union submits that this was not the case in this investigation, which constitutes a failure to comply with Article 6.9 ADA.

3. Claim under Article 12.2.2 ADA

3.1. Introduction

Neither in its public notice of the imposition of definitive measures, nor in a separate report, did MOFCOM set forth sufficiently detailed explanations together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected with respect to the determinations of normal value and injury, the establishment of causal link and the establishment of the residual duty rate and the dumping margin for the cooperating producer.

3.2. Normal value determination

MOFCOM did not provide any reasons in its public notice, which would address arguments and evidence presented by Smiths in the course of the investigation concerning the normal value determination. MOFCOM concluded without any explanation that "the sales prices of Smiths Heimann through affiliated distributors in the EU during the POI were clearly affected by the affiliation relationship, and that Smiths Heimann did not have sufficient evidence" to prove otherwise.

3.3. Injury determination

The ADA requires that authorities provide more than cursory assertions to justify their decisions to impose definitive antidumping measures. China acted in violation of Article 12.2.2 ADA because its final determination did not contain sufficient information regarding the price effects analysis, but was instead limited to MOFCOM's conclusions in that regard. MOFCOM furthermore ignored the arguments, duly supported by evidence, raised by Smiths in relation to the factors as to the state of domestic industry. MOFCOM should have provided a reasoned and adequate explanation to address all the arguments and evidence on the record about Nuctech's start-up situation, Nuctech's aggressive pricing strategy and Nuctech's business expansion.

3.4. Establishment of the causal link

Smiths listed several factors which MOFCOM should have considered in assessing the existence of the causal link. The arguments raised by Smiths concerning factors for causation were relevant, but have nonetheless not been addressed adequately by MOFCOM in its Final Determination.

3.5. Determination of the dumping margin for Smiths and the residual duty

MOFCOM did not make available the calculations it performed for Smiths, which themselves are the mathematical basis for arriving at the dumping margins imposed by an investigating authority. The requirement to pay due regard to the protection of confidential information can be respected by including the information in separate reports. MOFCOM also failed to publish the rationale for its decision to resort to facts available in calculating the residual duty, as well as the methodology it applied in establishing the residual duty rate and data it relied upon.

4. Claim under Articles 3.1 and 3.2 ADA

4.1 The requirements imposed by Articles 3.1 and 3.2 ADA

Nothing in previous panel reports supports the proposition that the investigating authority is under no requirement to take into account the differences between various types or models of the product under investigation when examining the effects of the dumped imports pursuant to Articles 3.1 and 3.2 ADA. While Articles 3.1 and 3.2 ADA do not prescribe any specific methodology, they require that, whatever methodology is chosen, the investigating authority must ensure that a determination of injury is made on the basis of "positive evidence" of the effects of the dumped imports and involves an "objective examination" of such evidence. Second, it is also uncontroversial that, as observed by the panel in *EC – Pipe Fittings*, the requirements imposed by Article 2.4 ADA cannot be "transposed wholesale". But this does not imply that the investigating authority may disregard all differences among product types or models under Articles 3.1 and 3.2 ADA. The panel in *EC – Pipe Fittings* recognised expressly that it may be necessary to take into account such differences when conducting a price undercutting analysis to the extent that they have "a perceived importance to customers". Similarly, while the panel in *EC – Fasteners* noted that the requirements of Article 2.4 ADA with respect to "due allowance" for differences affecting price comparability were not applicable in the context of Articles 3.1 and 3.2 ADA, that panel did not imply that any such differences are irrelevant under Articles 3.1 and 3.2 ADA. Rather, the point made by that panel, was that such differences could be taken into account by means other than making "due allowance" in the sense of Article 2.4 ADA. For example, by defining product categories.

MOFCOM did make a very precise "quantification" of both the level of price undercutting and the extent to which Nuctech's prices declined, which in turn provided the basis for MOFCOM's finding of price depression/suppression. China cannot base its determination of injury on certain

quantitative findings with regard to the price effects of dumped imports and then, when the consistency of those findings with Articles 3.1 and 3.2 ADA is challenged, argue that under the ADA a finding of injury need not have been based on those findings, but might instead had been based on different considerations. MOFCOM's Final Determination did not rely on those other considerations, but on the quantitative findings at issue, which must therefore be fully consistent with the requirements imposed by Article 3.1 ADA.

The report issued by the panel in *China – GOES* has confirmed that, when examining the price effects of dumped imports, the investigating authority is required by Articles 3.1 and 3.2 ADA to ensure that the prices used for the comparison are properly comparable. On that basis, that panel concluded that the Chinese authorities had acted inconsistently with Articles 3.1 and 3.2 ADA by relying on the comparison of average unit values (AUV) in order to establish the existence of price undercutting without taking into account *inter alia* that "the relevant AUVs included products of different grades, without any attempt by MOFCOM to adjust for differences in physical characteristics".

4.2 MOFCOM did not conduct its analysis "in an objective and unbiased manner"

A finding of "likeness" under Article 2.6 ADA does not render the differences between the various types of scanners irrelevant under Articles 3.1 and 3.2

Previous panels have clarified that there is no requirement under the ADA that each type or model covered by an investigation must be "like" any other covered type or model. Therefore, MOFCOM's finding that the subject product was "like" the equipment made in China neither implies nor requires that each of the various product types covered by the investigation is "like" any other type. For that reason, a finding of "likeness" under Article 2.6 ADA does not exempt the investigating authority from taking into account the relevant differences between product types when assessing the price effects of dumped imports under Articles 3.1 and 3.2 ADA.

In any event, it is manifest that the various types of scanners covered by the investigation are not "like" each other within the meaning of Article 2.6 ADA. The differences are particularly striking between high-energy and low-energy scanners. In response to the detailed argumentation and evidence submitted by Smiths, MOFCOM limited itself to provide a rather concise response. In essence, MOFCOM gave three reasons for considering that low-energy scanners are fully comparable to high-energy scanners. None of them stands even the most cursory examination.

China has provided no evidence of the existence of the pretended "single continuum". While one might quibble about whether the dividing line should be drawn at precisely 300 KeV or at a somewhat higher level, there is a wide and easily recognisable "gap" between high-energy and low-energy scanners. The energy level of the scanners used for screening large objects, such as cargo containers, trucks or railway carriages is always much higher than that of the scanners used for screening baggage, parcels or other small objects. And this difference is always reflected in very large price differentials. The distinction between high-energy and low-energy scanners is well-known in the industry. Nuctech itself uses the terms "high-energy". The existence of a distinct and large "gap" becomes evident when comparing the images and technical specifications of the models shown in Attachment 2 to Nuctech's Questionnaire response, which Nuchtech described as its "major products".

In their own investigation, the EU authorities covered high-energy scanners, as well as some low-energy scanners (those above 250 KeV). In doing so, they were exercising the discretion accorded to the investigating authority under the ADA for defining the product under consideration. This does not mean, however, that the EU authorities placed a "dividing line" at the level of 250 KeV for the purposes of examining the price effects of the dumped imports. Unlike MOFCOM, the EU

investigating authorities did use a methodology for examining those effects which was adequate to take fully into account all the relevant differences between the various types of scanners covered by the investigation.

Even assuming that, as alleged by China, the dividing line between high-energy and low-energy scanners was not "hard and clear", this could never be a valid justification for disregarding all the differences among the various types of scanners covered by the investigation. If as China appears to be arguing now, MOFCOM had been of the view that the level of energy was, of itself, an insufficient criterion for segmenting the product under consideration, then MOFCOM would have been required, in order to comply with Articles 3.1 and 3.2 ADA, to take into account any other relevant criteria, rather than taking the shortcut of disregarding completely all differences in physical characteristics and uses affecting price comparability.

The mere fact that a methodology is "unbiased", in the very limited sense given by China to that term, is not sufficient to make it compliant with Articles 3.1 and 3.2 ADA. A methodology may be "unbiased", in the sense postulated by China, and still wholly inapt to yield meaningful results. In any event, MOFCOM's choice of methodology was "biased" even by China's own narrow standard. High-energy scanners do not compete with low-energy scanners. Since there were no imports of high-energy scanners, there was no reasonable ground for including Nuctech's sales of high-energy scanners in the calculation of Nuchtec's average unit values. At the same time, MOFCOM was well aware that doing so would make more likely a finding of price undercutting and price depression/suppression.

China dismisses the numerical examples provided by the European Union for being hypothetical. But the European Union cannot quantify the impact of the methodology applied by MOFCOM because China has not disclosed the necessary information. The purpose of the examples was to demonstrate how even small differences or variations in the product mix can have a considerable impact on the outcome of the methodology applied by MOFCOM. The hypothetical counter-examples offered by China would fail to rebut this. While criticising the EU examples, China has failed to provide any evidence in order to show that, in practice, the use of the methodology at issue had no adverse impact for Smiths.

It is well-established that the complaining party is not confined to the arguments made by the exporter during the anti-dumping investigation. Moreover, MOFCOM never disclosed during the investigation the averaging methodology that it used for assessing the prices effects of imports. To the contrary, in one of the questionnaires addressed to Smiths, MOFCOM had explained that Smiths' export prices would be compared by MOFCOM to the prices for comparable models made in China and requested Smiths to identify which domestic models it considered to be comparable to its own models. Furthermore, Smiths did request repeatedly that MOFCOM exclude high-energy products from the investigation on the grounds that they were not comparable to low-energy scanners. Had MOFCOM granted Smiths' request, it would have been unnecessary to take into account the differences between the two categories of scanners at the stage of considering the price effects of imports.

This is the very first time that China has advanced any suggestion to the effect that the use of the methodology at issue was a response to Smiths' lack of cooperation. Moreover, contrary to China's contention, the relevant issue is not whether the methodology applied by MOFCOM was the "most reasonable" in view of the information supplied by Smiths, but rather whether the use of that methodology was "reasonable" at all. If the deficiencies of the information supplied by Smiths had made it impossible for MOFCOM to use any methodology which was compliant with the requirements of Articles 3.1 and 3.2 ADA, MOFCOM should have given appropriate notice to Smiths and, if necessary, resorted to "facts available" in accordance with Article 6.8 ADA. MOFCOM, however, did none of this.

At any rate, it is incorrect, as a matter of fact, that MOFCOM had no option but to use the averaging methodology at issue. In the first place, MOFCOM's findings of price depression/suppression were based exclusively on price data provided by Nuctech. Second, the export price data for 2008 provided by Smiths as part of its response to MOFCOM's dumping questionnaire would have been sufficient to allow MOFCOM to calculate unit average export prices for all the models exported by Smiths to China. Indeed, MOFCOM, did calculate such unit prices per model as part of the dumping margin calculation. Third, while it is true that Smiths did not supply the annual average unit export prices on a model basis for 2006 and 2007, it did provide to MOFCOM the annual average unit prices for all its export sales to China of the product under consideration made during each of those two years. MOFCOM was well aware that Smiths did not export any high-energy scanners to China and, therefore, that the annual average unit prices for 2006 and 2007 reported by Smiths did not include any such exports. In view of this, MOFCOM could, at a minimum, have excluded high-energy scanners from the calculation of Nuctech's average unit prices for the same years which were used in the price undercutting comparison.

5. Claims under Articles 3.1 and 3.4 ADA

5.1. MOFCOM failed to base its evaluation on positive evidence

The European Union disagrees with China's characterisation of the scope of the EU's claim. The European Union has not only contested the data reflected in MOFCOM's Final Determination with respect to cash flow, investments and return of investment. There is more indicia on the record questioning the reliability of the data employed by MOFCOM with respect to other injury factors, profits and employment. China's explanation of the figures reflected in MOFCOM's Final Determination is that they are the result of the verifications made to the information provided by Nuctech. This cannot be it. Nowhere in its determinations did MOFCOM alert interested parties to those discrepancies or stated that some of the data collected was "modified" pursuant to the on-site verification. Simply, there is no evidence of the fact China asserts in these proceedings.

5.2. MOFCOM failed to examine all factors listed in Article 3.4 ADA

China did not examine the magnitude of the margin of dumping in the present case explicitly or implicitly, contrary to the repeated case-law in this respect and that equally applies in the present case.

5.3. MOFCOM failed to take into account the differences between different types of the product concerned when evaluating various injury factors

There are considerable differences in physical characteristics and uses between high-energy and low-energy scanners which also lead to differences in prices and cost of production. They do not compete with each other and thus belong to distinct markets. Thus, MOFCOM's finding that both categories were "almost the same" is factually incorrect. Moreover, the European Union does not argue that MOFCOM was required to carry out a separate examination of all factors having a bearing on the state of the domestic industry per segment or sector. Rather, the European Union focuses its argument primarily on injury factors relating to prices and costs. Further, the European Union maintains that, in a situation like the present case, where the products made by the domestic industry are so different, the combination of price and cost data relating to all categories (e.g., high-energy and low-energy scanners) would lead to data which is not representative of the state of the domestic industry as a whole. By combining information with respect to different product categories in the context of the present investigation, MOFCOM failed to make an objective examination of the actual state of the domestic industry.

5.4. MOFCOM failed to make a proper evaluation of the overall development and interaction among injury factors taken together

MOFCOM wrongly characterised certain factors as "negative", when seeing as "trends" and in the specific context of the market and other factors. Moreover, MOFCOM failed to provide a compelling explanation of whether and how the overwhelming majority of positive movements were outweighed by any other factors and indices which might be moving in a negative direction. China does not dispute that the majority of factors showed a positive state of the domestic industry. However, China argues that it put the positive factors in context by stating that capacity, output, sales volume and market share should be viewed in light of the context of the market, namely a fast growing market. But this is not the examination that is required in a situation where there is an overwhelming majority of positive movements. The very compelling explanation is required in order to show whether and how those positive factors were outweighed by any other factors and indices which might be moving in a negative direction. MOFCOM's Final Determination does not contain such a balanced consideration. Indeed, a simple opposition of factors (positive and negative) separated by "however" does not amount to "a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP". Moreover, it is quite telling that China does not dispute the fact that MOFCOM did not refer and thus failed to examine some positive factors which were relevant, such as productivity and wages. The failure to examine those positive factors again indicates that MOFCOM failed to put all positive factors in the relevant context of the investigation at issue.

In addition, when evaluating some injury factors, MOFCOM made contradictory observations in a not even-handed manner. Statements such as "severe" depression of sales revenue growth, "serious" losses throughout the period, the rate of return being "negative throughout the period", "consistent" net cash outflow, "diminished" investment and financing capacity, and the observed reduction in employment, were partial or unfounded, in contradiction with the information and data as previously found by MOFCOM.

In the present case, the European Union maintains that MOFCOM failed to evaluate the relevant data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined. More concretely, MOFCOM failed to address how and why domestic sales prices were decreasing, even in 2008 (by 46.7%), when the import prices of the Subject Products consistently increased throughout the period (including 2008, by 14%) and were higher than those of the domestic products in 2008. When import prices were higher than domestic sales prices, the fact that domestic sales prices constantly decreased indicates that domestic producers sacrificed potential profits in order to increase their sales and gain more market share. Indeed, otherwise, domestic producers could have increased their prices (and profits) at least up to the (higher) level of the import prices. Further, MOFCOM ignored the fact that Nuctech was growing well in excess of the growth in demand. In a situation where Nuctech was expanding faster than domestic demand, in order to sell its products domestically Nuctech had to reduce its domestic sales prices. Moreover, and importantly, in the face of positive trends in so many injury factors, MOFCOM should have confirmed the basis for its own statement about the "expectations" of the domestic industry, and more so when such expectations were fundamental to support its conclusion that the industry was depressed. Those "expectations" were key and relevant context to support MOFCOM's injury determination. The European Union notes that China has failed to address this issue in its submissions.

Moreover, China failed to take into account all facts and arguments on the record relating to the state of the industry. The three factors raised by Smiths (i.e., Nuctech's start-up situation, Nuctech's aggressive pricing policy, and Nuctech's business expansion) were factors or indices having a bearing on the state of the domestic industry within the meaning of Article 3.4 ADA. MOFCOM failed to considered the three factors raised by Smiths having a bearing on the state of the domestic

industry. In view of the importance given to effects such as domestic sales prices, losses and inventories, the European Union considers that MOFCOM should have provided a reasoned and adequate explanation to address all the evidence on the record about Nuctech's start-up situation, Nuctech's aggressive pricing strategy and Nuctech's business expansion.

5.5. Conclusion

The European Union requests the Panel to find that MOFCOM's determination of injury is inconsistent with China's obligations under Articles 3.1 and 3.4 ADA.

6. Claims under Articles 3.1 and 3.5 ADA

6.1. MOFCOM failed to properly examine the causal relationship between dumped imports and injury

The European Union maintains that MOFCOM's characterisation of the volume of EU imports as "large" or "great" was improper, partial and non-even handed. Indeed, the import volume of the Subject Products increased in absolute terms and in comparison with domestic consumption. However, the increase of EU imports was much lower than the skyrocket trend showed with respect to the domestic like products. The fact that domestic sales volume was booming in comparison to the volume of EU imports, when put in relation with domestic consumption, was relevant evidence before MOFCOM when making its determination about the "significance" of the volume of EU imports in this case.

MOFCOM's assessment of the prices of EU imports was also improper. The European Union maintains that by attributing all the effects found with respect to domestic industry making both high-energy and low-energy scanners to imports exclusively relating to low-energy scanners, MOFCOM failed to carry out an appropriate attribution analysis in this case. The effects found with respect to an industry that produces two different categories of products with wide price differences, such as cars and buses, cannot be attributed to imports of cars or imports of buses exclusively. Since those products do not compete with each other, the attribution of the effects found with respect to both categories in cases where only one category was imported is inconsistent with Article 3.5 ADA.

MOFCOM also failed to provide a very compelling explanation in a case where there was no correlation between import prices going up by almost 10% and domestic sale prices going down by 73% during the POI. Quite telling as well, there was no correlation between EU import prices going up in 2008 by 14%, even above domestic sales prices, when domestic sales prices went down by more than 50% in the same year. MOFCOM failed to explain how import prices consistently going up and reaching a level even above domestic sales prices could be the only cause of domestic sale prices consistently declining by an amount significantly more substantial. This is the point we are making and not, as China stated in its first written submission, whether there should be a correlation in the sense of overall coincidence between overall trends in imports and overall trends in injury factors.

In its response to Question 49, China explains that Nuctech was "forced" to maintain its prices at low levels in order to be able to compete with Smiths, who was able to capture additional market share during the POI. Otherwise, according to China, Nuctech would have lost even more sales to Smiths. But this story does not match with MOFCOM's findings. MOFCOM found that Nuctech had increased its market share every year, beyond any increase in the market share of EU imports in relative terms. It also found that Nuctech had increased its sales volume and sales revenue every year by more than 50%. In a context where EU import prices were constantly increasing, the European Union still wonders how MOFCOM's finding that such prices "forced" the domestic sales prices to maintain their downward trend during the POI can stand the compelling, reasoned and adequate explanation that is required from investigating authorities under Article 3.5 ADA. In a

market that was expanding (i.e., domestic consumption was growing), the EU imports grew but the domestic sales and output grew even more than the growth of the EU imports. The downward trend of domestic sales prices was not the consequence of the EU imports prices, but of Nuctech's aggressive pricing policy and the fact that Nuctech was expanding well in excess of the growth in domestic demand. In any event, it cannot be said that Nuctech was forced to maintain its prices low in a situation where the EU import prices were above. Simply put, Nuctech decided to maintain its low price policy also in 2008 in order to capture more market share in the years including and preceding the Olympic games and other important events taking place in China.

Consequently, with respect to the import prices, MOFCOM erroneously attributed the effects observed on the domestic industry to EU imports, in particular by failing to distinguish between high-energy and low-energy scanners, by relying on findings of price undercutting and price depression/price suppression that were unreliable, and in any event by failing to provide a reasoned and adequate explanation of how the increasing price of EU imports could force domestic sales prices to go down.

6.2. MOFCOM failed to examine the relevance of other known factors

MOFCOM made a pro-forma examination of other known factors. Interested parties (in particular Smiths) raised other known factors in the course of the investigation, in particular the global crisis in 2008, Nuctech's start-up situation, Nuctech's aggressive pricing policy, Nuctech's aggressive business expansion and the fair competition between Nuctech and other producers. MOFCOM's Final Determination did not mention any of those factors, limiting its analysis to the pro-forma list of other factors (most of them irrelevant to the present case) contained in the Anti-Dumping Questionnaire addressed to Nuctech.

The other factors raised by Smiths were "other known factors" under Article 3.5 ADA and MOFCOM failed to examine the other known factors raised by Smiths. There is no explicit reference as to why MOFCOM rejected the factual basis of the allegations made by Smiths. Even if there are, those references were not supported by the evidence on the record (as found by MOFCOM) or directly contradicted the evidence brought by Smiths without any reference to what evidence MOFCOM relied upon to make its findings. MOFCOM remained silent on these factors and failed to make an objective examination of the other known factors raised by Smiths in the present investigation.

Finally, MOFCOM failed to properly consider the arguments and evidence raised by Smiths in connection with the other known factors that MOFCOM explicitly examined, in particular Nuctech's export performance (i.e., that exports were the cause, not the cure, of Nuctech's financial difficulties) and the product quality and technology factors.

6.3. Conclusion

Based on the above, the European Union reiterates its views that MOFCOM's causation and non-attribution analysis is inconsistent with Articles 3.1 and 3.5 ADA.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

1. CLAIM 1: CLAIM UNDER ARTICLES 6.5.1, 6.4 AND 6.2 OF THE AD AGREEMENT

1. The European Union claims that China violated Article 6.5.1 since MOFCOM failed to ensure adequate non-confidential summaries with respect to product models referred to in the Petition, Exhibits 8, 9, 10, 11 and 14 attached to the Petition and certain responses and attachments of Nuctech's Questionnaire Response, and since MOFCOM failed to require the provision of a statement of reasons explaining the exceptional circumstances why summarization was not possible with respect to a statement of the Chinese Public Security Bureau of the Civil Aviation Administration. China submits that all these claims should be rejected.

2. As regards the product models in the Petition, described as "main models of the Subject Product", China submits that Smiths was perfectly able to identify to which product type the chosen models corresponded. In any case, taking into account the context, the identification of the two models as the "main models of the Subject Product" was sufficient to permit a reasonable understanding that the data provided for normal value and export price were those of the subject product. Finally, no further information could have been given without carrying the risk of disclosing price information to other parties and making it possible for Smiths to identify the entity that had supplied the information. As to Exhibits 8, 9, 10 and 11 to the Petition, China maintains that their content is adequately summarised. Similarly, Exhibit 14 to the Petition clearly indicates its content and is thus adequately summarised.

3. The non-confidential summaries of Attachments 14, 16, 17, 18 and 19 of Nuctech's Injury Questionnaire Response are adequate since they correctly reflect the substance of the information provided in confidence which was itself provided on a quarterly basis and since, in any case, annual trends concerning the factors concerned were provided in other attachments of the Questionnaire Response. Moreover, Smiths was fully able to properly defend its interests during the investigation. Similarly, the non-confidential summaries of the responses and attachments to Nuctech's Injury Questionnaire Response which the European Union claims as being inadequate are sufficient to permit a reasonable understanding of the information submitted in confidence. Furthermore, since Smiths and the European Commission did not complain about the alleged insufficiency but commented extensively on the injury determination, Smiths' rights of defense were not hampered.

4. Regarding the statement by the Chinese Public Security Bureau of the Civil Aviation Administration, MOFCOM duly scrutinised the statement consisting of the written declaration incorporated in the statement placed by MOFCOM in the Public Reading Room as well as further oral explanation as regards the highly sensitive nature of the information concerning airport security to MOFCOM during the hearing of domestic end-users. MOFCOM was under an obligation to do so before the document could have been placed in the Public Reading Room. The fact that MOFCOM itself placed the document in the Public Reading Room demonstrates that MOFCOM scrutinized and accepted the explanation.

5. Thus, China fully complied with its obligations under Article 6.5.1 of the AD Agreement. The claimed violations of Articles 6.4 and 6.2 which are purely consequential to the Article 6.5.1 claims should therefore be rejected as well.

6. Even if a violation of Article 6.5.1 was found by the Panel with respect to Article 6.5.1, the European Union's claims under Articles 6.4 and 6.2 have to be rejected since the European Union fails to demonstrate a violation of Articles 6.4 and 6.2 of the AD Agreement. With respect to Article 6.4, the European Union has not established that its claim meets the requirements under Article 6.4 of the AD Agreement: the European Union has not identified which information interested parties should have been given the opportunity to see; if an adequate non-confidential summary was not in the file, it was impossible and thus not "practicable" for MOFCOM to give to interested parties the opportunity to see it; the European Union has failed to demonstrate that the information was "relevant" and "used" by MOFCOM and not confidential. Moreover, the European Union has failed to demonstrate that interested parties requested to see each of the pieces of information concerned.

7. Regarding the claim under Article 6.2 of the AD Agreement, there is no automatic violation of Article 6.2 in case of a violation of Article 6.5.1. Since the European Union has failed to demonstrate why the fact that no adequate non-confidential summary was provided for each identified item deprived Smiths of the full opportunity to defend its interests, its claim should be rejected.

2. CLAIM 2: CLAIM UNDER ARTICLES 6.9, 6.4 AND 6.2 OF THE AD AGREEMENT

8. The European Union claims that China violated Article 6.9 since China did not fully disclose the essential facts which form the basis of its injury determination and dumping determination and that China, consequently, also violated Articles 6.4 and 6.2 of the AD Agreement. The European Union makes four claims which should all be rejected.

9. The European Union first argues that China violated Article 6.9 because MOFCOM did not disclose the underlying data and methodology regarding the price undercutting and price depression analysis. This claim should be rejected. First, China submits that the methodology is similar to reasoning. The methodology is the way facts are processed and is thus not a "fact". Moreover, the methodology is certainly not an essential fact which forms the basis for the decision whether to apply definitive measures, taking into account the context of the injury determination. Regarding the underlying evidence or underlying data, China submits that MOFCOM was under no obligation to disclose the actual domestic prices underlying its price analysis. In particular, the non-disclosure was required by the fact that there was only one domestic producer and that such domestic prices constituted confidential information. MOFCOM expressly explained that reason in its Final Determination and provided a meaningful summary in the form of trends in the domestic prices in its Preliminary Determination.

10. The second claim is that China did not disclose essential facts regarding the normal value and export price determinations. The European Union has confirmed that it will not make any argument regarding the normal value determination. Regarding the export price determination, China notes that MOFCOM fully disclosed to Smiths which adjustments were made, the reasons for making such adjustments as well as the level of such adjustments in the Preliminary Dumping Disclosure and the Final Dumping Disclosure.

11. The third claim made by the European Union under Article 6.9 concerns MOFCOM's alleged failure to provide to Smiths the dumping margin calculation. China submits that MOFCOM fully explained to Smiths how the comparison between the normal value and the export price was made in the Preliminary and Final Dumping Disclosure to Smiths, which precisely identify the formula and describe the methodology. Regarding the actual calculations made by MOFCOM for the normal value and the export price, China submits that such calculations do not constitute "essential facts". In any case, MOFCOM precisely identified the elements of the calculations in such a way that, even in the absence of the calculation sheets, it was easy for Smiths to make the calculations themselves.

12. The fourth claim under Article 6.9 relates to MOFCOM's alleged failure to disclose the essential facts regarding the calculation of the residual duty. China maintains that in its Disclosure Documents, MOFCOM adequately informed the EU delegation of all the essential facts that formed the basis for the determination of the residual duty. In particular, MOFCOM explained the basis for the use of "facts available" and that it used "the sales data of products of relevant models reported by the respondent Company".

13. In conclusion, the European Union has failed to demonstrate a violation of Article 6.9. Since the European Union's claims under Articles 6.4 and 6.2 are purely consequential to its claims under Article 6.9, they should therefore be rejected as well. In any case, the European Union's claims under Articles 6.4 and 6.2 have to be rejected since the European Union fails to demonstrate a violation of Articles 6.4 and 6.2. Regarding Article 6.4, China submits that Articles 6.4 and 6.9 have different scopes and, in particular, while Article 6.9 requires an active disclosure by the investigating authorities, Article 6.4 does not. Therefore, it is clear that a violation of Article 6.9 does not automatically demonstrate that Article 6.4 has also been violated. The European Union fails to establish the elements of its claim under Article 6.4 and, in particular, that Smiths requested to see the information concerned. Regarding the claim under Article 6.2, China maintains that there is no automatic violation of Article 6.2 in case there is a violation of Article 6.9. Since the European Union did not demonstrate why the lack of disclosure of certain essential facts by MOFCOM deprived Smiths of the fully opportunity to defend its interests, it has failed to make a *prima facie* case of violation of Article 6.2 of the AD Agreement.

3. CLAIM 3: CLAIM UNDER ARTICLE 12.2.2 OF THE AD AGREEMENT

14. The European Union claims that China violated Article 12.2.2 because neither in its public notice of the imposition of definitive measures, nor in a separate report, MOFCOM set forth sufficiently detailed explanations for the definitive determinations on dumping and injury, together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected. The European Union makes four different claims which should all be rejected.

15. The European Union first claims that MOFCOM failed to provide reasons for the rejection of relevant arguments or claims concerning the normal value determination. This claim should be rejected since the Final Determination contains the reasons for the rejection of the arguments raised by Smiths during the investigation with respect to the relationship with its affiliated distributors. The explanations of MOFCOM were amply sufficient in view of Smiths own express recognition that its prices and sales process to affiliated distributors were clearly affected by the relationship.

16. Second, the European Union claims that MOFCOM failed to explain the methodology used for the price undercutting and price suppression and to provide reasons for the rejection of arguments or claims made with respect to the injury determination. As to the methodology used for the price analysis, China submits that such methodology is not a "matter of fact" and is not "relevant" within the meaning of Article 12.2.2 of the AD Agreement. Not any information relating to the injury determination constitutes "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". In particular, in light of Article 12.2.1 (iv), since there is no obligation to use a calculation methodology to consider what have been the effects of the import prices on domestic prices in Article 3, there is no basis for an obligation to disclose such a methodology. Furthermore, the explanation of the methodology is not necessary to discern and understand the reasons for concluding that anti-dumping measures must be imposed and is thus not required pursuant to Article 12.2.2. As to MOFCOM's alleged failure to provide the reasons for the rejection of Smiths' arguments concerning the injury analysis, China notes, with respect to the arguments concerning the credibility of Nuctech's data, that they cannot be regarded as "relevant" within the meaning of Article 12.2.2 and that, in any case, they were fully addressed in the Final Determination. As to the other arguments, China considers that despite the European Union's reply to

Panel's Question 14, it is still not in a position to understand which specific arguments of Smiths the European Union refers to and therefore, since the European Union has failed to properly identify the facts of its claim, its claim should be rejected.

17. The third claim concerns MOFCOM's alleged failure to provide reasons for the rejection of Smiths' arguments concerning the causal link. The European Union has failed to identify the precise arguments that Smiths would have raised and which MOFCOM allegedly failed to address. The European Union has thus not substantiated its claim, which should therefore be rejected. In any case, the Final Notice must only contain the reasons for the acceptance or rejection of relevant arguments or claims. It is for the European Union to establish that the arguments raised by Smiths were "relevant". Since it failed to do it, its claim should be rejected.

18. The fourth claim of the European Union is that China acted inconsistently with Article 12.2.2 by failing to make available the calculations it performed for Smiths and its underlying data and the calculations and underlying data for the residual duty. China submits that the dumping calculations and their underlying data do not constitute "relevant information on matters of fact and law and reasons which have led to the imposition of the final measures". Indeed, Article 12.2.1 only requires the final notice to contain the margins of dumping established and a full explanation of the reasons for the methodology used, but not the calculations and the underlying data. Furthermore, such calculations are not necessary to understand the reasons why the investigating authority imposes anti-dumping measures. Finally, the dumping calculations and their underlying data constitute confidential information that can not be included in the Public Notice or in a Separate Report within the meaning of Article 12.2.2 of the AD Agreement.

19. For all the reasons set out above, China submits that the European Union's claims under Article 12.2.2 should be rejected.

4. THE DISTINCTION BETWEEN SO-CALLED "LOW-ENERGY" AND "HIGH-ENERGY" SCANNERS IS ARTIFICIAL AND IRRELEVANT

20. The European Union bases several claims on the argument that MOFCOM failed to take into account the existence of two alleged categories of scanners, i.e. "low-energy" scanners (scanners with an energy of or below 300 KeV) and "high-energy" scanners (scanners with an energy level exceeding 300 KeV). The European Union claims that there are clear-cut differences between these two "categories" of scanners in terms of physical characteristics, uses, technological features, manufacturing processes and prices. As China explains, this is not so. In fact, there are many examples of scanners with an energy level of or below 300 KeV which have the characteristics that Smiths described as belonging to the scanners with an energy level above 300 KeV and *vice-versa*. This demonstrates the artificial nature of this distinction.

21. As to the differences in physical characteristics, China provides examples showing that: there are no striking physical differences between "low-energy" and "high-energy" scanners; scanners of a certain energy level do not have a standard weight; it is not correct that "high-energy" scanners are many times larger and heavier than low-energy scanners, that the products are completely different in construction and that the installation of "high-energy" scanners is a construction project requiring several days or weeks by an experienced crew; it is not correct that "low-energy" scanners necessarily contain a conveyor system supporting a load of only 50 Kg to 2 tonnes and that if a "high-energy" scanner contains a conveyor, it is installed apart from the rest of the system.

22. Regarding the uses of scanners, there is no particular use which would be specific for scanners below 300 Kev and scanners above 300 KeV. Furthermore, the European Union incorrectly alleges that "low-energy" scanners would be used for screening "small parcels" while "high-energy" scanners would be used for screening larger objects.

23. Furthermore, the alleged differences in technological features, mechanical features and manufacturing process again are factually incorrect. Finally, with respect to prices, China shows that the European Union incorrectly states that the price of scanners with an energy level above 300 KeV is necessarily higher than the price of scanners with an energy level of or below 300 KeV. In fact, the price of a scanner depends on several factors, including its physical characteristics, uses, configuration, quality, etc.

24. In sum, China demonstrates that the fact that a scanner has an energy level below or above 300 KeV does not imply that it has certain physical characteristics, specific uses or prices. In fact, each producer offers a range of models of scanners, which vary in terms of their use, their physical characteristics, their prices, etc. It is not possible to identify two clearly different categories of scanners on the basis of their energy level.

5. CLAIM 4: CLAIM UNDER ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

25. The European Union claims that China violated Articles 3.1 and 3.2 of the AD Agreement since MOFCOM used in its price undercutting and price suppression analysis a methodology which involved the comparison of weighted average unit values for the entire range of products covered by the investigation. According to the European Union, this methodology was manifestly inadequate because it failed to take into account the existence of considerable differences among the products covered by the investigation, and in particular between "high-energy" and "low-energy" scanners. China submits that these claims should be rejected.

26. First, to the extent that the European Union's claim is merely based on the argument that since there were physical differences between different types of products which affected price comparability, such differences should have been taken into account, it must fail.

27. Second, the European Union does not demonstrate that MOFCOM's price analysis was not "objective" in that MOFCOM did not ensure an even handed treatment of the information and data on the record of the investigation. In particular, China notes that MOFCOM did not in any way manipulate data or figures. MOFCOM applied the same methodology for the Subject Product and the Like Product including in the weighted average unit all data relating to all models falling in the Subject Product and in the Like Product. Thus MOFCOM ensured an even-handed treatment of the information and data on the record. Moreover, the use of the weighted average unit methodology was reasonable and unbiased. Since Smiths never requested that certain adjustments had to be made with respect to the price analysis carried out by MOFCOM, there was no reason for MOFCOM to consider that the use of averages was unreasonable. Furthermore, the claim is based on a factually erroneous premise, namely that there are considerable differences between "low-energy" and "high-energy" scanners and that there are very large price differences between both types of scanners. Given that there are no clear-cut price differences between scanners of an energy level of or below 300 KeV and scanners of an energy level above 300 KeV, there can be no bias even if the imported scanners consisted only of scanners of an energy level of or below 300 KeV while domestic scanners consisted of scanners of an energy level below and above 300 KeV. Finally, the use of the weighted average unit methodology was the most reasonable methodology available in view of the deficient and limited information and data provided by Smiths.

28. For all the reasons set out above, China submits that the European Union's claims under Articles 3.1 and 3.2 should be rejected.

6. CLAIM 5: CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

29. The European Union claims that China violated Articles 3.1 and 3.4 of the AD Agreement because it failed to make an objective examination, on the basis of positive evidence, of the effect of

the dumped imports on prices in the domestic market for like products and the consequent impact of these imports on domestic producers of such products, including the factors listed in Article 3.4. The European Union makes four sets of claims with respect to the injury determination which should all be rejected.

30. First, the European Union claims that MOFCOM failed to base its evaluation on "positive evidence" since the trends provided by MOFCOM in its findings about certain injury factors do not coincide with the trends provided by Nuctech. China explains that the findings made by MOFCOM regarding the various injury factors were based on the figures and data provided by Nuctech as adjusted where necessary after careful examination and scrutiny and thus were based on "positive evidence". These data were available to all parties since they have been reported and examined by MOFCOM in the Preliminary Determination, Injury Disclosure and the Final Determination.
Furthermore, MOFCOM expressly indicated in its Preliminary Determination that supplementary evidence and material had been provided by Nuctech after verification.

31. The European Union's second claim concerns MOFCOM's alleged failure to examine the magnitude of the margin of dumping. MOFCOM, however, examined that factor and found margins that exceeded the "*de minimis*" threshold of Article 5.8 of the AD Agreement as set out clearly in the Final Determination.

32. The European Union's third claim that MOFCOM failed to make an objective examination of the state of the domestic industry because it failed to take into account the differences between "high-energy" and "low-energy" scanners when evaluating various injury factors is to be rejected as well. The claim lacks any factual basis since there are no clear-cut and/or considerable differences in physical characteristics, uses or prices between "high-energy" and "low-energy" scanners. This claim also lacks any legal basis since the analysis of the impact of the dumped imports on the domestic industry pursuant to Article 3.4 must focus on the domestic industry as a whole. There is no requirement for the investigating authority to carry out a separate analysis for allegedly different categories of the like product.

33. Fourth, the European Union claims that MOFCOM failed to make a proper evaluation of all injury factors in context for three reasons which should all be rejected. China makes the following two observations.

34. First, MOFCOM provided a reasoned and reasonable explanation as to how and why the facts and elements on the record support its finding of injury. MOFCOM's analysis shows that it properly examined all the factors in context. Against the background of a rapidly expanding demand and growing market with logical positively evolving capacity, output, sales and market share, MOFCOM explained how the factors showing a negative trend supported a finding of injury. MOFCOM found that while the price of the EU imports increased by 9%, from 2006 to 2008, the import prices significantly undercut the domestic prices in 2006 and 2007 and that, even if in 2008 the import price was slightly above the domestic price, it remained at a low level and prevented Nuctech from reaching profitability. It also found that the sales imports increased by 88% and captured additional market share in a rapidly expanding market. Thus, Nuctech was forces to keep low prices in order to remain competitive.

35. Second, the European Union's argument that MOFCOM failed to take into account all facts and arguments on the record relating to the state of the domestic industry, in particular the alleged start-up situation and aggressive pricing policy of Nuctech, should equally be rejected. China maintains that these elements do not constitute factors or indices having a bearing on the state of the domestic industry within the meaning of Article 3.4. In any case, they were not relevant in assessing the impact of the dumped imports on the state of the domestic industry.

36. Regarding the alleged start-up situation of Nuctech, the elements provided by Smiths during the investigation appear to contradict each other, are not in line with the arguments put forward by the European Union and are unsubstantiated by any evidence. A detailed analysis of Smiths' allegations concerning the alleged start-up situation of Nuctech shows that these allegations are either not supported by any evidence or the evidence referred to does not in any way demonstrate that Nuctech was in a start-up situation. In fact, China submitted evidence showing that Nuctech was producing scanners of an energy level below 300 KeV well before 2006. Finally, the very fact that Nuctech made investments does not demonstrate that it was in a start-up situation.

37. Regarding Nuctech's alleged aggressive pricing policy, the allegations made by Smiths during the investigation on that issue and to which the European Union refers are unsubstantiated. Moreover the argument is unconvincing.

38. Obviously, not every factor raised by an interested party needs to be examined by the investigating authority but only those that constitute "relevant economic factors and indices having a bearing on the state of the industry". In the absence of any evidence showing that these elements constitute such "relevant economic factors", MOFCOM was not required to examine them in its injury analysis.

39. For all these reasons, the European Union's claim under Articles 3.1 and 3.4 should be rejected.

7. CLAIM 6: CLAIM UNDER ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

40. The European Union claims that MOFCOM's determination of the causal link between the dumped imports and the material injury found is inconsistent with Articles 3.1 and 3.5 of the AD Agreement for two main reasons which should both be rejected.

41. First, the European Union claims that MOFCOM failed to properly examine the causal relationship between dumped imports and the material injury found in three aspects.

42. Regarding the volume of dumped imports, the European Union claims that the evidence on the record indicated that the import volume was not so "large" or "great" when seen in the context of domestic consumption and domestic sales volume. China submits that Article 3.2 only requires the investigating authority to consider whether there has been a significant increase in dumped imports in absolute terms or relative to production or relative to consumption. No additional obligation can be added. Furthermore, MOFCOM took into consideration the volume of imports in the context of domestic consumption and the domestic sales volume. Finally, the European Union fails to explain why the fact that the domestic sales volume is increasing would have a bearing on the causal link between the dumped imports and the material injury found.

43. Regarding the alleged distinction between "low-energy" and "high-energy" scanners, China submits that there is no obligation in Article 3.5 to carry out separate injury/causation analysis for "low-energy" and "high-energy" scanners. Furthermore, in any case, since the factual premise on which the European Union bases its claim is incorrect, it is not even necessary to examine whether Article 3.5 contains such an obligation.

44. With respect to MOFCOM's analysis of the import prices, China notes that the negative effect of the import prices on the domestic prices may take the form of price undercutting or price depression or price suppression. In this case, MOFCOM found price undercutting in 2006 and 2007 and, while there was no undercutting in 2008, price suppression was found. China also notes that the relevant point is not the trend followed by the import prices and the domestic prices separately but the interaction between both, including the level of the prices. Furthermore, China maintains that what is

relevant is the "overall trends in imports" and the "overall trends in serious injury factors". MOFCOM's analysis shows that the downward pressure is the result of Smiths' low prices combined with the rapid increase in the volume of imports and market share.

45. Second, the European Union claims that MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 since, in particular, MOFCOM ignored other known factors raised by Smiths and several arguments made by Smiths in this context. This claim should be rejected. As to the other known factors raised by Smiths to which the European Union refers, namely the global economic crisis, Nuctech's aggressive business expansion, fair competition, Nuctech's start-up situation and Nuctech's aggressive pricing policy, China submits that to the extent these factors were presented by Smiths without appropriate evidence, they cannot be regarded as constituting another known factor within the meaning of Article 3.5. In any case, these factors were either examined by MOFCOM during the investigation or there was no need to examine them because they rested on a factual assumption that had already been rejected by MOFCOM.

46. The European Union's claims under Articles 3.1 and 3.5 should therefore be rejected.

8. CONCLUSION

47. China requests the Panel to reject all of the European Union's claims and arguments, finding instead that, with respect to each of them, China acted consistently with all its obligations under the AD Agreement and the GATT 1994.

ANNEX F

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF
CHINA AT THE SECOND MEETING OF THE PANEL

I. THE EUROPEAN UNION'S CLAIM UNDER ARTICLES 6.5.1, 6.4 AND 6.2 OF THE AD AGREEMENT

1. The European Union claims that China violated Article 6.5.1 since MOFCOM failed to ensure adequate non-confidential summaries of various elements of the Petition and of Nuctech's Questionnaire Response or to require a statement of reasons explaining exceptional circumstances why summarization was not possible.

2. First, with regard to the non-confidential summaries of the product models in the Petition, the European Union distorts China's argument when stating that China has alleged that the summaries were adequate because greater detail would have disclosed confidential information. China did not make such an argument. China submitted that the description as "main models" was adequate since it gave sufficient detail to understand the information submitted in confidence. The fact that the provision of further detail would have led to the disclosure of confidential information is only an additional observation.

3. Second, with respect to Exhibits 8, 9, 10, 11 and 14 to the Petition, contrary to what the European Union argues, the obligation under Article 6.5.1 of the AD Agreement does not require the disclosure of the "type of evidence". Indeed, Article 6.5.1 only requires that the summary be in sufficient detail to permit a reasonable understanding of the "substance" of the information which refers to the content as opposed to the form. Moreover, the European Union's allegation that the result of China's reasoning is that it would be the responsibility of the interested parties to piece together the information into a summary is groundless since China has demonstrated where precisely in the Petition the summaries could be found in the corresponding sections of the body of the Petition.

4. Third, the argument that the quarterly indexes in Attachments 14, 16, 17, 18 and 19 of Nuctech's Questionnaire Response are insufficient summaries since MOFCOM based itself on annual trends in the investigation should be rejected. How data were processed by MOFCOM is not relevant in order to assess whether a non-confidential summary is meaningful. Furthermore, the fact that both Smiths and the European Union commented extensively on MOFCOM's findings of injury and never complained about a lack of appropriate summary of data in Nuctech's Questionnaire Response shows that Smiths was fully able to properly defend its interests during the investigation.

5. Fourth, the European Union's arguments concerning certain responses and attachments of Nuctech's Questionnaire Response should equally be rejected. Where the confidential information is a reply to a yes/no question, it is obvious that a summary cannot be provided without disclosing the confidential information and therefore a statement of reason is not required. As to the reply to the other questions, the non-confidential version constitutes an adequate summary of the information submitted in confidence.

6. Fifth, regarding the Statement of the Chinese Public Security Bureau of Civil Aviation Administration, contrary to what the European Union alleges, China pointed out that the record included a statement of reason which was supplemented orally. Furthermore, the European Union erroneously claims that there would be a contradiction between the argument invoked about the inherently sensitive character of the information and the request included in the public file. Indeed, the second sentence of the request included in the public file which contains the statement of reason why

summarization was not possible invokes the "nature of the information". It refers to the highly sensitive character of the information relating to air transport safety as this flows from the name of the entity itself. There is therefore no contradiction. Finally, the European Union manifestly ignores the fundamental differences regarding safety between railway and air transport sectors when it claims that the fact that the railway administrations did not invoke safety or the risk of material adverse effects demonstrate that these reasons could not objectively justify why it was impossible to summarize the information concerned.

7. The European Union's claims under Articles 6.4 and 6.2 should be rejected as well. China refers to the detailed arguments presented in its earlier submissions.

II. THE EUROPEAN UNION'S CLAIM UNDER ARTICLES 6.9, 6.4 AND 6.2 OF THE AD AGREEMENT

8. The European Union's claims under Article 6.9, 6.4 and 6.2 of the AD Agreement should all be rejected.

9. China will start with the European Union's claim that MOFCOM failed to disclose the methodology and underlying data for price undercutting and price suppression.

10. First, with respect to the methodology used by MOFCOM for the price undercutting and price suppression analysis, the European Union claims that this methodology is a "fact" since it is not "legal reasoning" and that there can be no other category than "facts" and "reasoning". This is manifestly wrong since "reasoning" is not limited to "legal reasoning" and since there is no indication that there can only be two categories. The methodology used by MOFCOM is similar to "reasoning" and reflects the way facts were being processed or organised and thus does not constitute a "fact". The Panel's findings in *EC – Salmon*, contrary to what the European Union argues, do not support the view that the methodology used by MOFCOM should be regarded as an essential fact. The words "essential" or "necessary" refer to issues for which a determination is mandatory under the AD Agreement and Article 3.2 does not refer to any "methodology" or type of comparison that would need to be undertaken.

11. Second, regarding the underlying data, contrary to what the European Union argues, China did not state that the essential facts are limited to conclusions that the investigating authority has reached. Furthermore, China notes that the European Union's claim is rather vague and unclear as it never clarified which underlying data MOFCOM failed to disclose. To the extent that the underlying data which, according to the European Union, should have been disclosed are Nuctech's domestic prices, such disclosure was not possible for reasons of confidentiality. MOFCOM, however, disclosed domestic price information in the form of trends. The entirely new argument that MOFCOM should have disclosed prices ranges to show that domestic and imported prices were comparable is misplaced in the context of an Article 6.9 claim and instead relates to the form in which certain data could have been summarized within the meaning of Article 6.5.1 of the AD Agreement.

12. The claim concerning the alleged lack of disclosure of the calculation of Smiths' dumping margin should equally be dismissed. As a preliminary remark, China notes that the European Union has extended the scope of its claim. Indeed, the European Union has now started to claim a lack of disclosure of data on transactions and adjustments used in the calculation of normal value and export price while, in its Reply to Question 11 from the Panel, the European Union had stated that it will not make arguments with respect to a lack of disclosure regarding the normal value determination. This aspect of the claim should therefore be rejected by the Panel. In any case, since the European Union did not submit any argument concerning this claim, it has failed to make a *prima facie* case.

13. Assuming that the data on transactions and adjustments used to calculate the normal value and export price are "essential facts", MOFCOM met its disclosure obligation since it precisely identified the data used for the determination of the normal value and the export price, the nature and level of the adjustments, it explained the methodology followed to make the comparison between the normal value and export price and provided a table which reported the data of normal value, export price, quantity, CIF price and dumping margin for each model of the Subject product. The disclosure was made in MOFCOM's customary disclosure method, i.e. a narrative disclosure, which is consistent with Article 6.9 that does not prescribe a specific form for the disclosure.

14. The claim regarding the deficient disclosure concerning the calculation of the "all others" dumping rate should also be dismissed. While China already addressed all arguments put forward by the European Union, the latter did not reply to any of China's arguments but merely claimed they were "misguided". China has shown that MOFCOM disclosed all the essential facts in relation to the all others duty rate.

15. As to the consequential claims under Articles 6.4 and 6.2, the European Union has failed to demonstrate precisely how a violation of Article 6.9 also amounts to a violation of Article 6.4 and Article 6.2 for each item specifically. With respect to its Article 6.4 claim, the European Union even fails to precisely identify the "information" for which MOFCOM should have provided to the interested parties timely opportunities to see and *a fortiori* that such information was not confidential.

III. THE EUROPEAN UNION'S CLAIM UNDER ARTICLE 12.2.2 OF THE AD AGREEMENT

16. The European Union's claims under Article 12.2.2 of the AD Agreement should also be rejected in their entirety.

17. China will not comment on the first claim relating to the absence of reasons in the public notice which led to arguments being accepted or rejected concerning the normal value determination since no new argument has been developed by the European Union.

18. As to the second claim which relates to the injury determination, China notes that, with respect to the methodology used, not every question or issue which arises during an investigation must necessarily be regarded as having led to the imposition of the anti-dumping duty within the meaning of Article 12.2.2. The information provided in the Final Determination concerning the price analysis is detailed, precise and complete and provides sufficient background and reasons to understand MOFCOM's injury determination. As to the arguments in relation to the injury determination that would have been made by Smiths during the investigation, China notes that it is still not in a position to understand which specific arguments of Smiths the European Union refers to and cannot therefore comment on this claim. China can only make two general comments. First, not all arguments of an interested party can automatically be regarded as "relevant" merely because they were raised in the context of the injury determination. Second, arguments concerning a factor which is not a factor having a bearing on the state of the industry within the meaning of Article 3.4 can certainly not be regarded as "relevant" within the meaning of Article 12.2.2 of the AD Agreement.

19. The European Union's third claim relates to several comments raised by Smiths with regard to the determination of the causal link. This claim should be rejected since these comments were not properly identified and the claim remains unsubstantiated. On substance, the European Union fails to demonstrate that the arguments were relevant. In any case, since Smiths did not substantiate its comments by relevant evidence, there was no obligation for MOFCOM to examine them in the Final Determination.

20. The last claim concerning the calculation of Smiths' dumping margin and the determination of the residual duty should also be rejected. The European Union makes a new line of arguments with respect to the determination of the residual duty, namely that MOFCOM failed to publish the rationale for its decision to resort to facts available in calculating the residual duty. The Final Determination contains, however, MOFCOM's explanation of its decision to resort to facts available in calculating the residual duty. As to the calculations and the underlying data, MOFCOM was under no obligation to include them in its Final Determination.

IV. THE EUROPEAN UNION'S CLAIM UNDER ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

21. China will address several issues with respect to the European Union's claim under Articles 3.1 and 3.2.

22. First, China notes that the European Union has changed the focus of its claim. The European Union's claim in its First Written Submission mainly focused on the existence of differences between "high-energy" and "low-energy" scanners. The European Union claimed that the use of weighted average unit values was inadequate due to considerable differences between "high-energy" and "low-energy" scanners. China pointed out that the distinction between scanners on the basis of the energy-level is purely artificial. China noted that there are no clear-cut differences between the two product categories in terms of their physical characteristics, uses, technological features, manufacturing processes and prices. Thus, to the extent that the European Union's claim is based on this factually incorrect premise it must necessarily fail.

23. The European Union now seems to acknowledge that there is no clear-cut dividing line between scanners with an energy level of or below 300 KeV and scanners with an energy level above 300 KeV. It has therefore decided to focus its claim on the existence of differences between product types in general. It claims that MOFCOM should have taken these differences into account in its price effects analysis.

24. The European Union fails, however, to precisely identify which differences should have been taken into account in the price effects analysis. A reference to differences in physical characteristics, uses and prices in the abstract is not sufficient to properly substantiate a claim. Without precisely identifying the differences, the European Union did not and cannot establish that MOFCOM failed to make an objective examination in the sense that it favoured the interests of certain interested parties in its injury analysis.

25. Second, the European Union claims that China violated Article 3.1 since the use of the average unit value methodology was "inadequate" due to the "highly heterogeneous" nature of the product. The requirement under Article 3.1 is, however, whether the investigating authority has made an "objective examination" based on "positive evidence" and not whether the use of a methodology is adequate.

26. MOFCOM ensured an even-handed treatment of the information and data on the record since it did not manipulate or select in any way the data and information used in the price effects analysis. The European Union's claim that since there were no imports of "high-energy" scanners and that MOFCOM was allegedly aware that including such scanners would make a finding of price undercutting and price depression/suppression more likely, MOFCOM intentionally selected to include certain models to achieve a certain result, is incorrect. It is based on the artificial distinction between "low-energy" and "high-energy" scanners and on the erroneous assumption that "high-energy" scanners are always more expensive than "low-energy" scanners. Moreover, the European Union did not provide evidence of the absence of imports of "high-energy scanners" over the entire POI, thereby failing to substantiate its claim concerning price undercutting findings. Finally, contrary

to what the European Union claims, the product mix does not and cannot affect findings on price suppression.

27. Furthermore, the European Union does not show that MOFCOM's use of the average unit value methodology favoured the interests of the domestic industry. Indeed, the use of such a methodology cannot be found non-objective or biased merely because the product under investigation included different types or models.

28. Third, contrary to the European Union's allegation, the differences between the dumping margin determination pursuant to Article 2.4 and the price effects analysis pursuant to Article 3.2 of the AD Agreement are important to properly interpret the obligations of Articles 3.2 and 3.1 of the AD Agreement and to not unduly impose obligations on WTO Members that do not flow from this provision.

29. Fourth, the European Union's argument that MOFCOM price effects examination was not objective is merely based on a hypothetical situation which in any case would not affect MOFCOM's findings regarding "price suppression". In the present case, MOFCOM found price suppression, which is characterized by the relationship between the costs of production and the prices. For a given year, both the costs of production and the prices are based on data relating to the same set of products. Thus, the use of weighted average unit values cannot magnify the effects of price suppression or show price suppression while there is none, as claimed by the European Union. Indeed, the fact that the product mix varies or may vary over the POI cannot impact the assessment of price suppression since it depends on whether the prices of a certain product mix have or have not been able to match increases in the costs or to follow decreases in the costs for the same product mix.

30. Regarding China's argument that Smiths did not claim during the investigation that MOFCOM should have taken the differences in products types into account in its price effects analysis, the European Union unconvincingly attempts to justify this failure by stating that the dumping questionnaire for Smiths suggested that MOFCOM intended to make a model-to-model comparison. This argument is unconvincing. The European Union's additional argument that Smiths' request to exclude high-energy products from the scope of the investigation should have alerted MOFCOM to the importance of the differences between "low-energy" and "high-energy" scanners for the price analysis is equally irrelevant. Knowing that MOFCOM decided not to exclude the latter from the scope of the investigation, Smiths should have made comments on this point in the price effects context. Moreover, Smiths never claimed during the investigation that there were important and serious differences among different types of products and *a fortiori* that such differences should have been taken into account by MOFCOM for the price effects analysis.

31. The European Union disputes China's argument that the use of the weighted average unit methodology was the most reasonable methodology available in view of the deficient and limited information and data provided by Smiths. According to the European Union, the issue is whether the use of the methodology was reasonable at all. China submits that an "objective examination" depends on the specific circumstances of the case, including the information and data that were available to the investigation authority. In this case, the methodology based on weighted average data per year was objective since weighted average figures per year were the only available data.

32. In conclusion, China reiterates that MOFCOM's consideration of the price effects of the dumped imports on the domestic prices was fully consistent with China's obligations pursuant to Articles 3.1 and 3.2 of the AD Agreement.

V. THE EUROPEAN UNION'S CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

33. China will now address the European Union's claims under Articles 3.1 and 3.4.

34. In the first place, the European Union has claimed that MOFCOM failed to base its evaluation on positive evidence because of alleged discrepancies between the data in MOFCOM's Final Determination and the information submitted by Nuctech or available from other sources. The European Union has extended its claim to the injury factors sales revenue and profit. The alleged discrepancies between Nuctech's Questionnaire Response and MOFCOM's findings in the Final Determination regarding these two factors can be explained by the adjustments made after verification, in particular, the exclusion of data relating to exports of the domestic like product and sales of products other than the like product.

35. Further, regarding the alleged discrepancies between figures concerning gross profit and employment in certain publicly available information, China has already explained that the issue has been expressly addressed by MOFCOM in its Final Determination and that the reports concerned cover not only the sales of the Like Products but also the sales of other products. The European Union seeks to challenge this explanation by stating that scanners amounted to around 90% of Nuctech's products during the POI. As the European Union, however, acknowledges, this estimate of 90% is entirely unsubstantiated and, as China demonstrated, is in fact contradicted by the data on the record as verified by MOFCOM.

36. Regarding the alleged discrepancies, China has explained that MOFCOM's findings regarding various injury factors were based on the figures and data provided by Nuctech which, after verification, had been amended and thus are based on "positive evidence". The European Union disputes this by claiming that interested parties have not been informed that some of the data collected were modified pursuant to on-site verification and this claims that there is no evidence of what China asserts in these proceedings. First, contrary to the European Union's allegations, MOFCOM expressly stated that Nuctech provided supplementary evidence and materials after verification. Second, MOFCOM did not disregard the figures on the record since it based its determinations on the amended data and figures provided by Nuctech after on-site verification. Third, the European Union is confusing two different issues, namely, whether interested parties have been informed of which data have been used and whether the decision is based on "positive evidence". Contrary to the European Union's claim, data will not become "positive evidence" after the investigating authorities have informed the interested parties of the fact that the data used were data which have been modified pursuant to verification.

37. The second claim raised by the European Union under Articles 3.1 and 3.4 that MOFCOM did not examine all factors listed in Article 3.4 should be rejected since MOFCOM examined the magnitude of the margin of dumping and found margins that exceeded the "*de minimis*" threshold of Article 5.8 of the AD Agreement.

38. The European Union's third claim that China failed to make an objective examination of the state of the domestic industry because MOFCOM failed to distinguish between "low-energy" and "high-energy" scanners is based on the incorrect factual premise that there are considerable differences in physical characteristics and uses between high-energy and low-energy scanners which also lead to differences in prices and cost of production. Furthermore, the claim that MOFCOM should have made a separate examination for "low-energy" and "high-energy" scanners regarding the injury factors relating to prices or costs must fail since there is no requirement in the AD Agreement to examine the domestic industry per sector or segment of the market, whether for all injury factors or for only some of them. Moreover, the European Union fails to demonstrate on which basis the injury analysis fails to be objective. While claiming that the use of weighted average data for the entire range

of scanners did not lead to data representative of the actual state of such industry, it fails to provide any evidence on what then would have been the actual state of the domestic industry and why the methodology used made it more likely to find injury.

39. The fourth claim raised by the European Union relates to MOFCOM's failure to make a proper evaluation of the overall development and interaction among injury factors taken together.

40. The European Union's first argument was that MOFCOM did not provide a compelling explanation of whether and how the overwhelming majority of positive factors were outweighed by any other negative factor. China submitted that the European Union incorrectly considered that the only negative factors were the domestic sales prices and inventories and referred to the Panel's findings in *EC – Fasteners* which, contrary to what the European Union argues, are applicable in the present case.

41. The European Union's second argument that MOFCOM made contradictory observations in a not even-handed manner should equally be rejected. Indeed, the fact that the European Union disagrees with the qualifications used by MOFCOM in its injury analysis does not cause the evaluation of the factors concerned to be biased.

42. As to the argument that MOFCOM failed to examine all factors in their proper context, the European Union seeks to impose an additional obligation on the investigating authorities which in fact relates to the causality issue. The claim that MOFCOM should have addressed the relationship between the domestic prices and import prices and the fact that Nuctech was growing well in excess of growth in demand relate to the causality determination.

43. Regarding the last argument raised by the European Union that MOFCOM failed to take into account in its injury analysis Nuctech's alleged start-up situation, aggressive pricing strategy and business expansion, China considers that these three factors are not "factors having a bearing on the state of the industry" within the meaning of Article 3.4 of the AD Agreement but rather factors which may have caused certain effects on the state of the industry.

44. The European Union erroneously claims that the explanations provided by China with respect to these three factors are *ex-post* explanations. In fact, these factors are unsubstantiated allegations and MOFCOM was therefore not required to examine them. Not every factor raised by an interested party needs to be examined by the investigating authority, but only those that constitute "relevant economic factors and indices having a bearing on the state of the industry."

45. With respect to the alleged start-up situation of Nuctech, China noted the contradictions between Smiths' submissions and the European Union's arguments, which the European Union has failed to rebut. Moreover, the alleged evidence referred to by the European Union consists in either unsubstantiated allegations made by Smiths or the evidence referred to does not in any way demonstrate that Nuctech was in a start-up situation during the POI. In order to avoid this obvious lack of evidence, the European Union claims that the start-up situation of Nuctech is demonstrated by the high productivity levels, reduction in losses and increasing rates of return. The European Union is, however, confusing causes with consequences. While various indicators may describe the state of a domestic industry, it can not be concluded that an industry is in a start-up situation merely because certain indicators are present. In contrast, there is clear evidence on the record showing that Nuctech was not in a start-up situation but was producing and selling low-energy scanners already years before the POI.

46. As evidence of Nuctech's aggressive pricing policy, the European Union refers to the decrease in prices and the fact that import prices increased during the POI and were above domestic sales prices in 2008. These data do not, however, show in any way that the state of the domestic industry

resulted from an aggressive pricing policy. The European Union confuses the effect, namely the decrease in the domestic prices, with a possible cause, i.e. an alleged aggressive pricing policy. In fact, the only piece of evidence is a Report which was not even attached as an exhibit and not produced in these proceedings.

47. As to Nuctech's aggressive business expansion, the only evidence referred to by the European Union are excerpts of Tsinghua Tongfang Annual Report. As explained by MOFCOM during the investigation, this document does not constitute relevant evidence in regard of the domestic sales of the domestic like product.

48. Therefore, MOFCOM was entitled and even required to ignore all these allegations since they were not properly substantiated by verifiable evidence and therefore did not constitute "positive evidence" within the meaning of Article 3.1 of the AD Agreement.

VI. THE EUROPEAN UNION'S CLAIM UNDER ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

49. In this last part, China will address the European Union's claim under Articles 3.1 and 3.5 of the AD Agreement.

50. The European Union does not develop any real new arguments in its Second Written Submission regarding the causal relationship between the dumped imports and the material injury. China will therefore limit itself to three comments concerning MOFCOM's assessment of the price effects of the dumped imports.

51. First, contrary to the European Union's allegations, China expressly addressed the argument raised by the European Union that MOFCOM attributed to the EU imports effects that could not have been caused by them. Indeed, China's position is that the injury and causation analysis must be carried out with respect to the domestic industry as a whole and that there is no requirement to distinguish between segments or sectors. In any case, since the European Union's claim is based on the erroneous factual premise of a distinction between "low-energy" and "high-energy" scanners, this claim must be rejected.

52. Second, the European Union's argument relating to a lack of correlation between import prices going up and domestic sales prices doing down must fail since it ignores that what matters are not only the trends in the prices but also their level as well as the volume of the dumped imports.

53. Third, when disputing China's explanation that Nuctech was "forced" to maintain its prices at low level, the European Union manifestly ignores the other essential factors referred to by MOFCOM in its findings, i.e. the very low prices and at dumped levels of the imports, the significant price undercutting in 2006 and 2007 and the substantial increase in absolute and relative terms of the imports.

54. As to the non-attribution analysis, MOFCOM was not under an obligation to examine any of the five factors referred to by the European Union since no relevant evidence was provided. In any case, these factors were either examined by MOFCOM during the investigation or there was no need to examine them because they rested on a factual assumption that had already been rejected by MOFCOM.

55. First, concerning the global economic crisis, Smiths provided evidence that was not relevant since it referred to a period of time after the end of the POI. In any case, MOFCOM's finding of the domestic industry's good export performance directly addressed and invalidated Smiths' claim.

56. Second, there was no evidence at all that would somehow show that Nuctech was in a start-up phase. Thus, there was no obligation for MOFCOM to even examine this issue as a possible other known factor that might have caused injury to the domestic industry.

57. Third, Smiths' allegation regarding Nuctech's aggressive pricing policy was not substantiated but based on a Study which was not even provided to MOFCOM and only purportedly concerned an alleged pricing strategy concerning so-called "high-energy" scanners on the export markets, therefore hardly transposable to domestic market sales of the like product. The fact that domestic sales prices decreased by more than 70% during the POI does not constitute evidence showing that Nuctech was pursuing an aggressive pricing policy.

58. Fourth, Smiths' arguments pertaining to fair competition remained unsubstantiated and in the absence of evidence, there was thus no obligation for MOFCOM to examine this issue. In any case, MOFCOM had already dismissed the factual premise of Smiths' claim when noting that there was no evidence showing that the Subject Product is superior to domestic Like Products with respect to quality and service.

59. Fifth, Smiths' argument regarding Nuctech's aggressive business expansion was not supported by evidence since the Reports referred to are documents which are not relevant since they contain data concerning export sales and other products. The European Union's explanation that the aggressive business expansion is demonstrated by the fact that the domestic industry was growing well in excess of the growth in demand is inapposite. The fact that domestic sales volume and market share increased more than the increase in consumption do not demonstrate that this was the result of an aggressive business expansion.

60. Regarding the European Union's claim that MOFCOM failed to address Smiths' argument that exports were the cause, not the cure, of Nuctech's financial difficulties, China notes that the argument was unsubstantiated since the evidence submitted was irrelevant. By contrast, Nuctech provided to MOFCOM data and figures on the basis of which MOFCOM could assess the export performance of Nuctech in relation to the domestic like product.

61. The European Union's claim that MOFCOM ignored Smiths' arguments about the differences in product quality and technology factors should be dismissed since MOFCOM examined Smiths' arguments at length in the Final Determination. MOFCOM thus carried out a proper non-attribution analysis and, in particular, properly addressed Smiths' arguments concerning the export performance and product quality and technology effects, in compliance with the requirements under Articles 3.1 and 3.5 of the AD Agreement.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

[[Business Confidential Information "BCI" redacted**]]**

I. CLAIMS UNDER ARTICLES 6.5.1, 6.4 AND 6.2 ADA

A. SUMMARIES FOR PRODUCT MODELS ARE INADEQUATE AND THE PANEL SHOULD REJECT CHINA'S ATTEMPT AT EX POST RATIONALISATION

1. The EU challenges the adequacy of summarisation of the product models referred to in the dumping section of the Petition. The summaries provided by the Petitioner are neither clear, nor meaningful and China's attempt to provide an *ex post* rationalisation only further exposes how inadequate the summarisation really was. Even in following China's "hardly disputable" explanation of what "main product" stands for, the summary provided in the Petition does not make sense. The normal value and export price for the 4 "main" models sold in significant quantities on the Chinese market do not fall within but are considerably lower than the price range of [60,000-100,000] for the normal value and of [50,000-90,000] for the export price of "[Model 1] and [Model 2]" provided by the Petitioner. Indeed, based on the normal value and export price established by MOFCOM for the purpose of the final disclosure only 2 models fall (roughly) within the price ranges provided by the Petitioner. Yet, those two have been sold in only very small quantities.

B. NON-CONFIDENTIAL SUMMARIES MUST BE SUFFICIENTLY CLEARLY IDENTIFIED

2. The alleged summaries of evidence included in Exhibits 8, 9, 10, 11 and 14 attached to the Petition lack the level of detail necessary to enable interested parties to understand the information summarised therein and comment upon it. Even if we accept *arguendo* China's position that the summary is contained in the body of the Petition, MOFCOM should have ensured that this was clearly cross-referenced. Similarly, what China now submits constituted the "adequate" non-confidential summary of Attachments 14, 16, 17, 18 and 19 to the Petitioner's Questionnaire, has not been identified as such by Nuctech.

3. The EU notes that panel in *China – GOES* recently confirmed that respondents may not be left guessing whether and where the confidential information has been summarised and whether the alleged summary, like in this case, is based on the same data source as the redacted information and thus represents the "non-confidential" summary. The Panel should therefore confirm that while the form of a non-confidential summary is not prescribed by Article 6.5.1, the non-confidential summary of confidential information must be sufficiently clearly identified.

C. THE EFFORTS OF INTERESTED PARTIES TO DEFEND THEIR INTERESTS DO NOT CURE A BREACH OF ARTICLE 6.5.1

4. China appears to have suggested on a number of occasions that in determining the adequacy of non-confidential summaries the Panel should take into account the fact that Smiths and/or the EU commented on aspects of the injury determination and did allegedly not complain about the inadequacy of summarisation. This reasoning is without basis[1] and should be rejected by the Panel.

[1] Panel Report, *China - GOES*, para. 7.191.

Moreover, it is clear from the record that even where complaints had been made they fell on deaf ears, as MOFCOM failed to request adequate summaries as a result. The efforts of Smiths and the EU to defend their interests and submit comments despite the patchy information they were presented with do not cure the breach of Article 6.5.1.

D. CHINA FAILS TO PRODUCE EVIDENCE THAT THE AVIATION AUTHORITY STATED REASONS WHY SUMMARISATION IS NOT POSSIBLE AND THAT THIS STATEMENT WAS DULY SCRUTINISED BY MOFCOM

5. The EU asks the Panel to be wary of China's attempt to water down the Article 6.5.1 disciplines. As explained in our submissions, China misinterprets Article 6.5.1 and in an effort to justify its obvious breach even provides factual statements that contradict the facts on the record. The Appellate Body provided useful guidance in *EC – Fasteners* on the importance of maintaining the delicate balance struck in Article 6.5. and 6.5.1 and made it clear that stated reasons why summarisation is not possible are subject to the investigating authority's as well as the panel's scrutiny[2]. China alleges that a statement was made and scrutinised, but even where prompted to do so by the Panel, appears to be unable to produce actual evidence of the statement or its scrutiny by MOFCOM.

E. CLAIM UNDER ARTICLES 6.4 AND 6.2

6. China raises two new arguments regarding the Article 6.4 claim; namely, that the EU (i) failed to identify the information to which access should have been given; and (ii) failed to provide reasoning with respect to the condition that the authorities are only required to provide information under Article 6.4 "whenever practicable". China's argument that the information was not sufficiently identified should be rejected. As China itself concedes, the EU provided a general description which was then further elaborated in the sections dealing with the specific summaries or statements. In light of the fact that the information was unduly withheld from the EU (and/or Smiths), providing a more specific description would not be possible. Second, China's attempt to argument its failure to make available all the relevant information by submitting that it was "not practicable" to do so, should also be rejected. When the information is not available as a result of a violation of an ADA obligation, this very violation cannot serve as a shield for the authority from a finding of violation under Article 6.4.

II. CLAIMS UNDER ARTICLES 6.9, 6.4 AND 6.2 ADA

A. METHODOLOGIES AND UNDERLYING DATA RELIED UPON FOR MOFCOM'S PRICE ANALYSIS CONSTITUTE ESSENTIAL FACTS

7. In paragraphs 88 and 89 of its second written submission, China tries to deal with one of the inconsistencies in its position that a "methodology" conceptually cannot constitute an essential fact. The inconsistency streaming from the fact that China considers the methodology for the calculation of the dumping margin as an essential fact and has even referred in the course of these proceedings to its disclosure as evidence of its compliance with its obligations under Article 6.9. China relies on the fact that the choice of methodologies is prescribed in the context of Article 2.4, whereas the authority has discretion under Article 3.2, to conclude that a methodology relied upon in the context of price analysis needs not be disclosed. In doing so China entirely ignores the obligation under Article 3.1 ADA. If one were to accept China's position, interested parties would be deprived of the right to comment on the completeness and accurateness of the evidence relied upon, as well as on the objectiveness of the price analysis by the investigating authority.

[2] Appellate Body Report, *EC - Fasteners*, para. 544 (footnotes omitted, emphasis added).

B. SCOPE OF THE CLAIMS CONCERNING NORMAL VALUE AND EXPORT PRICE DETERMINATIONS AND CALCULATIONS OF THE INDIVIDUAL DUMPING MARGIN

8. In view of China's attempt to distort the EU's submission, it is important to clarify that the EU requests this Panel to make findings with respect to China's lacking disclosure of data and criteria on the basis of which MOFCOM made adjustment to the export price, as well as for failing to disclose individual dumping calculations.

C. CALCULATIONS OF THE NORMAL VALUE AND EXPORT PRICE AND DATA UNDERLYING THOSE CALCULATIONS CONSTITUTE "ESSENTIAL FACTS" WITHIN THE MEANING OF ARTICLE 6.9

9. China appears to suggest that the disclosure of the calculations was not necessary for Smiths since sufficient information was disclosed for Smiths to be in a position to reverse-engineer the calculations. The EU disagrees (and so did Smiths). The purpose of disclosure is to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures. If the calculations performed to determine the existence and margin of dumping, and the data underpinning these calculations, are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner. This is not a matter of convenience for the interested parties, as China seems to imply, but is indeed essential for the legitimacy of the process – to ensure that the investigation has been carried out in accordance with the relevant substantive obligations, but also as a safeguard mechanism for the correctness of the actual numbers and data relied upon.

D. MOFCOM FAILED TO DISCLOSE ESSENTIAL FACTS CONCERNING THE RESIDUAL DUTY DETERMINATION

10. When the authorities decide to apply facts available in the calculation of the dumping margin, they are required to disclose such facts available. In addition, as the panel in *China – GOES* concluded upon reviewing a factual situation similar to this case, "in order to allow […] an interested party, to defend its interests, it was vital that MOFCOM disclose the factual basis for its use of best information available."[3] China failed to do so in this case.

E. CLAIM UNDER ARTICLES 6.4 AND 6.2

11. Differences in the nature and scope of the obligations under Article 6.9 on the one hand and Articles 6.4 and 6.2 on the other are not such as to make it conceptually impossible for the obligations to apply to the same factual circumstances and hence - as we submit was the case in this dispute - be infringed at the same time.

III. CLAIMS UNDER ARTICLES 12.2.2 ADA

12. China argues in paragraph 149 of its second written submission that the explanations for the rejection of relevant arguments made by Smiths concerning the normal value determination were adequate in view of what it describes as Smiths "own express recognition". In doing so China is changing the facts and reasoning MOFCOM relied upon in the final determination from "Smiths Heimann did not have sufficient evidence" to what would now seem to be a decision based on an explicit recognition by Smiths. The EU recalls that the investigating authority must provide an explanation in the notice pursuant to Article 12.2.2 that does not leave the reader guessing why the authority made its determinations.

[3] Panel Report, *China – GOES*, para. 7.408.

13. The EU further submits that the China violated Article 12.2.2, because the Final Determination does not include the investigating authority's explanation of the methodology used for price undercutting or price depression nor any information on the underlying facts. In paragraph 156 of its second written submission China argues that the obligation under Article 12.2.2 should be interpreted in conjunction with Article 12.2.1 and concludes that "[t]here is, however, no obligation to use a calculation methodology to consider what have been the effects of the import prices on domestic prices. Accordingly, there is no basis for an obligation to make such disclosure or explanation." The EU clarified in the context of its parallel claim under Article 6.9 that the term methodology is used as shorthand for tool or method used by an authority to process facts and reach a preliminary conclusion with respect to those facts. A methodology would therefore not necessarily be one that relies on calculations. While the investigating authority "enjoys a certain discretion" in adopting a methodology for examining the price effects of the dumped imports[4]; it does not enjoy unfettered discretion[5]. In exercising its discretion the authority must comply with the obligations under Article 3.1 ADA and this should be apparent from the public notice.

14. China submits that calculations and underlying data fall outside the scope of Article 12.2.2 because they contain confidential information. The EU submits that the mere fact that information which is relevant within the meaning of Article 12.2.2 also constitutes confidential information, does not release the investigating authority from its obligation to make this information available. While the obligation to make relevant information available is qualified by the requirement to pay due regard to the protection of confidential information, this requirement can be respected by including the information in separate reports and keep the separate report, or the information on matters of fact contained therein, confidential to the extent necessary. If the only approach for reconciling confidentiality with the obligation to make a public notice, was leaving out anything that is confidential, these notices would soon cease to have any useful purpose. As explained in response to the Panel's question 16, the EU believes that it would be untenable to argue that Article 12.2.2 only has as its objective informing the public in general. The public notice serves an important role also in making possible the exercise of the concerned companies' right of defence. This is why it is generally accepted that confidential information is not simply omitted from a public notice, but is instead presented in a non-confidential format or – in the case of individual margin calculations – disclosed only to the company concerned.

IV. CLAIM UNDER ARTICLES 3.1 AND 3.2 ADA

15. China's second written submission makes a much belated and failed attempt to demonstrate the existence of the alleged single *continuum* of scanners.

16. China relies on a very limited and fragmentary selection of evidence. Furthermore, to a large extent, the selected evidence pertains to producers of scanners other than Nuctech and falls outside the POI. China's reluctance to disclose evidence on the record strongly suggests that such evidence would contradict China's new found argument. China should not be allowed to make up its case *ex-post* by substituting a piecemeal and unrepresentative choice of evidence to the evidence on the record of the investigation.

17. China invokes as evidence of the alleged *continuum* the existence of a few models of scanners of 320 KeV, as well as of one single instance of a scanner of 450 KeV (the model CX-450P DV of the manufacturer L.3com). However, none of these models was manufactured by either Nuctech or Smiths. Furthermore, all of them appear to be relatively recent models, which were not marketed during the POI. Even more tellingly, China has been unable to find even a single example of a scanner between 450 KeV and 1000 KeV. At most, the evidence invoked by China would warrant to draw the

[4] Appellate Body Report, *Mexico – Rice AD measures*, para. 204.
[5] Appellate Body Report, *EC – Bed Linen*, para. 113; Panel Report, *EC – Fasteners*, para. 7.325.

line between low-energy and high-energy scanners at 450 KeV, rather than at 300 KeV. But this would have been ultimately inconsequential, given that neither Smiths nor Nuctech sold any low-energy scanner above 300 KeV in China during the POI. On the other hand, China's failure to establish the existence of any scanners between 450 KeV and 1000 KeV confirms that, contrary to China's allegations, there is a distinct and wide gap between low-energy and high-energy scanners.

18. The European Union draws once again the Panel's attention to Nuctech's Questionnaire response, where Nuctech identified as its "major products" the ten models shown in Attachment 2 to that response. Those models include five models of the CX series of low-energy scanners (the models CX6550B, CX100100T, CX150180S, CX6040BI, CX100100TI) and five models of high-energy scanners (the models AC6000, MB1215HL, MT1213LH, RF, FS3000 and PB2028TD). The brochures for all those models included in Exhibit CHN – 10 confirm that, whereas none of the CX models was above 300KeV, all the high-energy models were between 2.5 MeV and 9 MeV.

19. China also argues that some of the physical characteristics which Smiths had attributed to low-energy scanners are shared by some high-energy scanners. However, many of the arguments submitted by China in this regard (for example, those concerning appearance and size) rely exclusively on the technical features of just one single model: the 450 KeV model of L.3com. In other instances, the examples cited by China fail to address Smiths' arguments. For example, Smith had noted that high-energy scanners "often occupy a designated building" and that, for this reason, their installation may require several days' or even weeks' work. It is correct that some high-energy scanners are mobile or semi-mobile. But it remains true that, whereas many static high-energy scanners require a designated building, low-energy scanners never do so and can always be installed very easily and quickly. Similarly, Smiths had pointed out that high-energy scanners do not "generally" include a conveyor belt. Therefore, the fact that, exceptionally, a few models of high-energy scanners include a conveyor belt (only 1 of 5 Nuctech's "major products" does so) does not render Smith's observation inaccurate.

20. As regards differences in uses, China alleges that, according to the statements included in their brochures, some models of low-energy scanners can be used to inspect 'large' objects, such as air cargo containers. But, in the first place, Smiths had never contested that some low-energy scanners can be used to inspect some, relatively small, air cargo containers. Moreover, descriptive terms such as 'large' or 'small' lack in themselves sufficient precision. They are relative terms, which can have a very different meaning. Nuctech's smallest high energy model included in Exhibit CHN-10 (the AC6000) can inspect objects of up to 2.44 m x 3.18 m, whereas Nuctech's FS scanners can inspect objects of up to 3.75 m x 5.2 m. None of Nuctech's low-energy "major products" can inspect objects even approaching such dimensions. China further argues that the model ZBV of Nuctech and AS&E (225 KeV) "can be used to inspect articles such as containers and vehicles". But China omits to mention the crucial fact that this model uses a very different and novel technology, with very specific uses: so-called 'backscattering' imaging.

21. China also contends that the price of low-energy scanners may in some cases be higher than the price of high energy scanners. Yet all the evidence which China has been able to gather in support of this contention consists exclusively of just one single sale of each of the two categories. It is obvious that the price for a single transaction may be abnormally low for a variety of reasons. Moreover, those two transactions took place in 2011. In addition, the models concerned are not among the "major products" of Nuctech and do not appear to be sufficiently representative. In particular, it should be noted that the low-energy model (the [[BCI]]) appears to use 'backscattering' technology. In order to establish whether the prices for low-energy scanners may indeed be as high as those for high-energy scanners, as alleged now by China, it would have been both possible and necessary to produce far more robust evidence.

22. China has criticised the EU for not substantiating its claim that the prices for high-energy models are much higher than for low-energy models. However, the EU is merely restating arguments and evidence submitted by Smiths during the underlying investigation. Such arguments and evidence were not contested during the investigation by Nuctech. Furthermore, the Final Determination contains no finding or reasoning suggesting that MOFCOM was of the view that the prices of the two categories were similar. China also argues that "what would count is the difference between prices on the Chinese domestic market". However, that type of evidence was not available to Smiths, and consequently to the EU. On the other hand, the record of the investigation should contain information supplied by Nuctech on the prices charged by that company on the domestic market during the POI for both low-energy and high-energy models. China should explain why it has chosen not to disclose it, instead of the very limited and unrepresentative price evidence made available in its second written submission.

23. The European Union considers that, for the above reasons, China has failed to establish the existence of the alleged *continuum*. In any event, the existence of the alleged *continuum* could never be a valid justification for disregarding all the differences among the various types of scanners covered by the investigation. If MOFCOM had been of the view that the level of energy was, of itself, an insufficient criterion for segmenting the product under consideration because the energy level is not a reliable proxy for other relevant differences, then MOFCOM would have been required, in order to comply with Articles 3.1 and 3.2 ADA, to take into account any other relevant criteria.

24. China complains, again, that the European Union is raising new arguments that Smiths did not make during the underlying investigation and that Smiths failed to provide requested information, which would have been necessary in order to apply a different methodology. China's argument is factually wrong for the reasons explained in our second written submission. In addition, it is legally mistaken. First, nothing in the ADA precludes the European Union from asserting arguments under Articles 3.1 and 3.2 that MOFCOM's findings were not based on positive evidence or reflect an objective examination. Certain provisions in the ADA contain language limiting an investigating authority's responsibilities to those of addressing arguments or information presented to it. For example, Article 3.5 or Article 12.2.2 ADA. In contrast, Article 3.1 ADA contains no similar limitation. The Appellate Body has characterised the obligations of Article 3.1 as "absolute." Moreover, According to the Appellate Body, those obligations "provide for no exceptions, and they include no qualifications. They must be met by every investigating authority in every determination". In view of this, the respondent's failure to raise an argument can never be an excuse for applying a methodology which is not based on an objective examination of positive evidence.[6] Nor can the lack of information justify the application by the investigating authority of a methodology which is not "based on an objective examination of positive evidence".[7]

V. CLAIM UNDER ARTICLES 3.1 AND 3.4 ADA

25. We will now address some of the comments made by China in its Second Written Submission regarding our claims under Articles 3.1 and 3.4 ADA. First, China maintains that "positive evidence" merely requires investigating authorities to "inform" interested parties of the data used for the purpose of making a determination. In other words, according to China, an investigating authority may disregard the data in the public file and use other information, even in blatant contradiction with the information available to interested parties. The EU disagrees. Not because the information on the basis of which a determination is made is disclosed to interested parties, a determination can be said to be based on "positive evidence". Likewise, not simply because such information is confidential, a determination can be said to be based on "positive evidence". "Positive evidence" means that the data has to be verifiable and credible, which is not the case here. It is not even the case that the information

[6] Panel Report, *Mexico – Steel Pipes*, para. 7.259.
[7] Panel Report, *Mexico – Rice*, para. 7.114.

was confidential, as Nuctech provided some information, as contained in the public record, in contradiction with the data used by MOFCOM in its determination. And indeed Smiths alerted MOFCOM of some contradictions during the investigation. The truth of the matter is that China has failed to explain the contradictions between the information in the public record and the data used by MOFCOM in its determination. Therefore, the EU submits that MOFCOM failed to base its examination of various injury factors on the positive evidence, as required by Articles 3.1 and 3.4 ADA.

26. Second, China's ex-post explanation that Nuctech was forced to keep its prices low in order to remain competitive is unattainable. The uncontested reality is that Nuctech was growing well in excess of the growth in demand. MOFCOM itself found that Nuctech had increased its market share every year, and that Nuctech had increased its sales volume and sales revenue every year by more than 50%. In a market situation where EU import prices were constantly increasing, it is hard to see how domestic prices going down, and at a level even below the EU import prices, could be considered relevant to support a finding of a state of a domestic industry as suffering material injury. Rather, it appears that Nuctech decided to maintain its low price policy also in 2008 in order to capture more market share in the years including and preceding the Olympic games and other important events taking place in China.

27. Moreover, a situation where a domestic industry is taking advantage of economies of scale, having high productivity levels and growing well in excess of domestic demand cannot be described as an industry suffering material injury. Rather, this situation fits better with a description of an industry that is expanding in an aggressive manner and growing even above domestic demand. Consequently, the EU claims that MOFCOM's determination in the present case does not meet the standard of a compelling, reasoned and adequate explanation when all relevant factors are examined in their proper context.

28. Third, the EU considers that the evidence on the record as well as MOFCOM's own findings with respect to Nuctech's state indicated that Nuctech was in an economic stage similar to a start-up company. Indeed, high productivity levels, dramatic reduction in losses, increasing rates of return, etc. all fit with a company in a start-up situation, as opposed to an industry suffering material injury. However, MOFCOM failed to examine this factor, as well as other relevant factors (such as Nuctech's aggressive pricing strategy and Nuctech's business expansion) that were relevant for the determination of the state of the domestic industry. By failing to examine this evidence, MOFCOM failed to make an objective assessment of the impact of dumped imports on the Chinese industry as required by Articles 3.1 and 3.4 ADA.

VI. CLAIM UNDER ARTICLES 3.1 AND 3.5 ADA

29. Finally, a few words on our claims under Articles 3.1 and 3.5 ADA. First, China wrongly attempts to escape its obligations under Article 3.5 ADA by arguing that MOFCOM was not obliged under that provision to examine all the relevant evidence indicating that the volume of EU imports was not "large" or "great" when compared to the skyrocket trend showed with respect to the domestic like products. In the EU's view, the characterisation of the volume of EU imports as "large" or "great" squarely falls under the scope of Article 3.5 ADA, as part of the causation analysis, which is different to the examination carried out under Article 3.2 ADA or, for that matter, Article 3.4 ADA. And in fact, in this case, it is worth noting that MOFCOM itself qualified the EU imports as "large" or "great" as part of its causation analysis.

30. Second, China maintains that the low priced EU imports still prevented domestic sales prices from increasing, even in 2008, to a profitable level. However, China fails to explain how can it reasonably be found that the alleged low price of the EU imports was the only cause of the observed trend regarding domestic sales prices. To recall, Nuctech maintained the same strategy in 2008 by

reducing its prices by more than 50% when the EU import prices went up by 14% and were above the domestic sales prices. In the EU's view, this fact should have alerted MOFCOM that there was something else (other than the alleged dumped imports) which was causing the observed sales price decrease. And more so in view of the specific allegation supported by evidence brought by Smiths during the investigation about, inter alia, Nuctech's aggressive pricing policy.

31. Third, the EU has also explained in detail, contrary to what China asserts, that MOFCOM failed to consider other factors raised by interested parties which were causing the same effects observed and thus injuring the domestic industry at the same time as the alleged dumped imports.

32. In sum, the EU reiterates its views that MOFCOM's causation and non-attribution analyses are inconsistent with Articles 3.1 and 3.5 ADA.

ANNEX F-3

CLOSING STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

[[Business Confidential Information "BCI" redacted**]]**

1. The European Union is bringing a number of claims against China in this dispute on account of the lack of transparency in the anti-dumping investigation at issue. Many of those procedural claims have been brought in parallel with claims concerning breaches of substantive obligations. Discussions in that context have been particularly helpful in giving at least an insight at just how difficult it is for an interested party in the course of an investigation to have a full opportunity to defend its interests when crucial information is withheld from it. Indeed many of the questions as to how MOFCOM reached certain conclusions in the context of the injury determination should have already been answered by MOFCOM in its disclosure documents and/or public notice.

2. In one of its earlier interventions. China has declared itself "aggrieved" by the allegations of procedural breaches and "strongly committed to the principles of transparency and procedural fairness".[1] Yet, this principled position did not get reflected in the interpretations advanced by China for the procedural provisions at issue.

3. Can it really be that "essential facts" which form the basis for a decision to apply duties and "information that is relevant" to the presentation of ones case are interpreted so narrowly that the parties would only be given access to the investigating authority's conclusions on a given issue without knowing how and on what basis it was reached? And even if *arguendo* information, such as methods employed in the context of price analysis, were not subject to disclosure to the company, because they constitute reasoning (or something alike it, as China submitted), can they also fall outside the scope of Article 12.2.2, which requires disclosure of "relevant information on facts, law and reasons"? The European Union has explained that this can certainly not be the case. Transparency standards cannot be reduced, as China suggests, to a level where exercising ones right of defence and even checking compliance with substantive obligations becomes difficult or impossible.

4. Similarly, according to China, calculations which constitute the mathematical basis for the dumping margin are neither essential facts under Article 6.9, nor relevant information within the meaning of Article 6.4 and are, again according to China, entirely outside the scope of Article 12.2.2 due to their confidential nature. All this despite the fact that the summary tables that China identifies as facts disclosed in compliance with its obligations under the ADA differ considerably between the stage of preliminary determination and final disclosure and also despite the fact that Smiths explicitly noted that it was unable to reproduce MOFCOM's calculations itself based on the table and on the narratives provided by MOFCOM in the context of final disclosure. If the calculations performed to determine the existence and margin of dumping, and the data underpinning these calculations, are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner. We stress again that disclosure of the calculations is not a matter of convenience, as China seems to imply, but is indeed essential for the legitimacy of the investigation process – to show that it was carried out in accordance with the substantive obligations, but also as a safeguard mechanism against unintended errors. The latter is not a theoretical problem, as the fact that a WTO dispute had already been brought concerning a calculation error by an investigating authority in establishing the dumping margin.

[1] China's closing statement at the first meeting of the Panel with the Parties, para. 3.

5. Transparency is not an administrative formality, but is indeed the cornerstone of the system. We therefore call on the Panel to enforce the ADA transparency disciplines strictly.

6. China has acknowledged that the product under investigation was highly heterogeneous and covered scanners with very different physical characteristics, uses and prices. Yet, when making its injury determination, MOFCOM totally disregarded those differences. In the course of these proceedings, China has advanced different, and somewhat incoherent, grounds for justifying MOFCOM's decision to ignore those differences. None of them is credible, let alone convincing. All of them have the distinct flavour of hastily improvised ex-post rationalizations.

7. At the first hearing, we were told that there was no clear distinction between high and low-energy scanners but instead a single *continuum*. As we have shown, however, China has failed to prove the existence of that alleged *continuum*. Indeed, China's evidence rather confirms the opposite. Moreover, the existence of the alleged *continuum* would not be a reason for disregarding all the differences in physical characteristics. If the energy level is not an adequate proxy for other differences affecting comparability, it was MOFCOM's duty to identify, if necessary on its own initiative, the proper criteria for ensuring price comparability.

8. China also contends that MOFCOM was forced to disregard the differences in physical characteristics affecting price comparability because Smiths failed to cooperate by not providing certain requested information. However, we have shown that the information provided by Smiths, and by Nuctech, would have allowed MOFCOM to apply other methodologies. Moreover, it must be stressed once again that MOFCOM did not resort to facts available. It did not even consider it necessary to send a deficiency letter to Smiths. There is simply no trace on the record of the investigation that MOFCOM's choice of methodology was related in any manner to the quality of Smiths´ response.

9. China's most recent argument is that the injury determination was based on a finding of price suppression and that in order to make such finding it is not necessary to take into account the differences between physical characteristics. However, MOFCOM's final determination does include and relies upon findings of both price undercutting and a sharp decline in the prices of the domestic industry (and it matters little whether China calls this price depression or something else). Without those two findings, MOFCOM's Final Determination would simply collapse. Moreover, China misunderstands the notion of price suppression. China appears to consider that there is price suppression whenever the domestic industry incurs an overall loss. But Article 3.2 requires more than that. It has to be shown that the effect of the dumped imports is to prevent price increases that would otherwise have taken place. Yet, in the present case, the prices of the domestic industry would have declined in any event to reflect a substantial reduction in costs of production. Moreover, imports of low energy scanners cannot have the effect of preventing increases in the prices of high energy scanners because they did not even compete with them.

10. With respect to China's comments on our claims under Articles 3.1, 3.4 and 3.5 ADA, we have the following brief observations.

11. First, in our submissions, the EU has shown how it had arrived at its estimate that scanners amounted to around 90% of Nuctech's products during the POI: i.e., on the basis of various statements contained in documents directly relating to Nuctech's business, in addition to Smiths' best market knowledge. In its oral statement, China has disclosed the figures provided by Nuctech which, quite tellingly, are very close to such estimate with respect to two out of the three years of the POI. In any event, China has proven our point: in a situation where the majority of products made by Nuctech were scanners (i.e., **[[**BCI**]]** when averaging the three years of the POI), the EU fails to understand on what basis MOFCOM could obviate the discrepancies between the public information available to interested parties about Nuctech and the data used in its determinations.

12. Second, the EU maintains its claim that MOFCOM failed to examine the magnitude of the margin of dumping as required under Article 3.4 ADA. China's defense on this issue cannot be considered seriously.

13. Third, and importantly, China has failed to address several big holes in MOFCOM's determination. In particular, China still blames the EU imports for the low domestic sales prices, ignoring that the market share of domestic producers was well above the EU imports and, quite significantly, ignoring also that domestic production increased well above the growth in demand during the POI. When all relevant factors are seen in a proper context, the EU fails to see how MOFCOM's determination of the state of the domestic industry as suffering material injury can be upheld. Moreover, China has still failed to address the basis for MOFCOM's counterfactual about Nuctech. In other words, China has not explained the basis of the alleged "expected" e.g. profits or growth MOFCOM found Nuctech should have reached during the POI.

14. Fourth, China contests the characterisation of several factors raised by Smiths as falling under Articles 3.4 or 3.5 ADA. However, China's arguments are circular.

15. A careful reading of China's opening oral statement shows that China already assumes that those factors are causality factors (e.g., para. 89, when using the term "resulted"). We leave the Panel to be the judge of that. In any event, be it as 3.4 or 3.5 factors, the truth of the matter is that MOFCOM failed to consider them properly in its determinations, as required by those provisions.

16. Fifth, the EU strongly maintains its views that by attributing to the EU imports of low-energy scanners the price effects found (i.e., price undercutting/price depression) on the domestic industry producing *both* high-energy and low-energy scanners, MOFCOM failed to comply with its obligations under Articles 3.1 and 3.5 ADA. China has merely repeated its position about the erroneous factual premise of our claim, thereby conceding the legal question behind our claim.

17. Finally, the EU observes that China has attempted in its oral statement to provide justifications to MOFCOM's lack of examination of several other known factors. Those ex-post explanations are good examples of how MOFCOM *could* have tried to address them during the investigation. However, MOFCOM decided to blatantly ignore them. The explanations now provided by China reinforces the EU's claim that MOFCOM failed to examine those factors as required by Article 3.5 ADA, thereby undermining once more MOFCOM's injury analysis in this case.

18. We thank the Panel once more for the work they have done and will done in the present case and look forward to answer any remaining questions you may have in writing in the course of the following weeks.

ANNEX F-4

CLOSING STATEMENT OF CHINA AT THE
SECOND MEETING OF THE PANEL

1. Mr. Chairman, Distinguished Members of the Panel, China would like to thank the Panel and the Secretariat for the hard work it has done so far and will still need to be doing in order to resolve this dispute, especially for the questions that the Secretariat came up with and the Panel addressed to the parties during the Second Substantive Meeting with the parties. China would like to make the following brief comments.

2. First, as China repeated in its written submissions and oral statements, there is no such distinction between so-called "high-energy" and "low-energy" scanners. There is no scientific basis in this regard. There is no dividing line to be drawn between so-called "high-energy" and "low-energy" scanners. It is clear that China provided sufficient evidences that there are no decisive criteria to make such a distinction. As shown in China's submissions, neither prices, functions, uses, sizes, visualisation techniques nor energy-level could be appropriate criteria to distinguish the scanners under investigation. Even the EU admits that the energy level criterion may be a moving target in order to distinguish the scanners under this dispute. MOFCOM would have liked to but failed to find criteria that could allow for a distinction of a product that is of a single continuum.

3. Second, we think that the question of a competitive relationship is dealt with when the investigating authority defines the product scope. There is no legal basis to examine it under Article 3.2 of the AD Agreement after the product definition was decided. Even Smiths did not raise objections in the framework of the Article 3.2 determination. Even if MOFCOM would have liked to make such a comparison, it was not possible since the data were not available in a detailed manner to undertake a model-by-model or smaller group comparison. Smith did not provide information per models for the years 2006 and 2007. Thus, since the data were not known to MOFCOM during the investigation, it could not, even if it wanted, undertake such a comparison.

4. It is also clear that there is no requirement to follow a specific methodology under Article 3.2 of the AD Agreement. Given the facts and data that are available before MOFCOM, we believe China has made an "objective examination" based on "positive evidence" in accordance with Art. 3.2.

5. Another important fact I would like to address is the EU's attempt to raise the threshold for the procedural requirements under Article 6.5.1 and 6.9 of the AD Agreement. For instance, what is required in a Petition is *prima facie* evidence for the initiation of an investigation. This information is submitted by the petitioner, a private party with only a limited ability to obtain the information. Thus, the obligation for the petitioner under Article 6 is different from the obligation imposed on the investigating authority.

6. Another important comment I would like to make is that China itself is the victim of anti-dumping investigations by many WTO members, including the European Union. In fact, half of the anti-dumping measures by all WTO members were imposed on Chinese products.

7. In many cases, China has consultations with the European Commission regarding issues of transparency, especially with respect to Article 6.5.1, and Chinese exporters face even a worse situation in EU investigations and if this decision will raise the transparency standard, China will be happy if the EU will apply this higher standard with respect to investigations concerning Chinese exporters as well.

8. The Chinese anti-dumping investigation authority understands and complies with the rules. The Bureau investigates importers but at the same time defends Chinese exporters. We therefore understand the rules and the need for transparency and we respect and abide by them in our investigations.

9. We hope the Panel renders a neutral and objective decision, within the boundaries of the provisions. The decision should not impose more obligations on the Members as the provisions foresee. If all Members will respect the decision, China would be benefiting from the decision. We would be happy if other Members do not apply a double standard and will comply with the Panel's findings in an honest manner.

Thank you.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL
BY THE EUROPEAN UNION

WORLD TRADE ORGANIZATION

WT/DS425/2
9 December 2011

(11-6394)

Original: English

CHINA – DEFINITIVE ANTI-DUMPING DUTIES ON X-RAY SECURITY INSPECTION EQUIPMENT FROM THE EUROPEAN UNION

Request for the Establishment of a Panel by the European Union

The following communication, dated 8 December 2011, from the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 25 July 2011 the European Union ("EU") requested consultations with the Government of the Peoples' Republic of China ("China") pursuant to Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the Agreement on Implementation of Article VI of the GATT 1994 ("*Anti-Dumping Agreement*") and Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") with respect to the imposition of definitive anti-dumping duties on x-ray security inspection equipment from the European Union, pursuant to Ministry of Commerce of the People's Republic of China, Notice No. 1(2011), including its annex.

The European Union held consultations with China on 19 September and 18 October 2011. Those consultations unfortunately did not resolve the dispute.

The EU considers the measure at issue to be inconsistent with China's obligations under the following provisions of the *Anti-Dumping Agreement*:

1. Articles 6.2, 6.4 and 6.5.1 of the *Anti-Dumping Agreement* because China failed to ensure that interested parties provided non-confidential summaries of confidential information or, where provided, that the summaries were in sufficient detail to enable a reasonable understanding of the substance of the information submitted with regard to (i) the existence of dumping, including the establishment and comparison of the normal value and the export price; and (ii) the existence of injury, including the effects of dumped imports on prices, the state of the domestic industry and the causal relationship between the dumped imports and the injury allegedly suffered by the domestic

industry. In doing so, China failed to provide a timely and full opportunity for all interested parties to see all information that is not confidential as defined by Article 6.5 of the *Anti-Dumping Agreement* and that was relevant to defend their interests, and that was used by the authority in the anti-dumping investigation, and to prepare presentations on the basis of this information for the defence of their interests.

2. Articles 6.2, 6.4 and 6.9 of the *Anti-Dumping Agreement* because China failed to provide interested parties with information about the essential facts under consideration which would form the basis for the decision to impose definitive anti-dumping measures. In particular, China did not fully disclose the essential facts, which form the basis for the determination of the dumping margin of the EU cooperating producer, including the calculation of the normal value and the adjustments made to the export price, and the determination of the residual duty. China also failed to disclose the essential facts that formed the basis for the determination of injury, including the analysis of the effects of dumped imports on prices, the state of the domestic industry and the causal relationship between the dumped imports and the injury suffered by the domestic industry. In doing so, China failed to provide a timely and full opportunity for all interested parties to see all information that was relevant to defend their interests, and that was used by the authority in the anti-dumping investigation, and to prepare presentations on the basis of this information for the defence of their interests.

3. Article 12.2.2 of the *Anti-Dumping Agreement* because neither in its public notice of the imposition of definitive measures, nor in a separate report, China set forth sufficiently detailed explanations for the definitive determinations on dumping and injury, together with references to the matters of fact and law which led to arguments being accepted or rejected. Specifically, China failed to provide: a) a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and normal value (Article 12.2.1(iii) of the *Anti-Dumping Agreement*); b) all the considerations relevant to the injury determination as set out in Article 3 of the *Antidumping Agreement* (Article 12.2.1(iv) of the *Anti-Dumping Agreement*); and c) the main reasons leading to the determination (Article 12.2.1(v) of the *Anti-Dumping Agreement)*.

4. Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, because China failed to make an objective examination, on the basis of positive evidence, of the effect of the dumped imports on prices in the domestic market for like products. Specifically, it appears from the very limited information disclosed by the Chinese authorities that the finding that EU imports had the effect of undercutting and suppressing and/or depressing the price of domestic products is not based on an objective examination of positive evidence because it failed to take into account the differences between various types of products covered by the investigation.

5. Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* because China failed to make an objective examination, on the basis of positive evidence, of the effect of the dumped imports on prices in the domestic market for like products and the consequent impact of these imports on domestic producers of such products, including the factors listed in Article 3.4, as the overwhelming majority of injury indicators were positive or showed positive trends.

6. Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* because China failed to make an objective determination, on the basis of all relevant evidence before the authorities that the dumped imports were, through the effects of dumping, causing injury. The causality determination is flawed because it is based on findings of price undercutting and price suppression and/or depression by EU imports which are themselves not based on an objective examination of positive evidence. Moreover, China did not consider all known relevant factors other than dumped imports having a bearing on the state of the industry and/or affecting the domestic prices.

Accordingly the European Union respectfully requests that, pursuant to Article 6 of the *DSU* and Article 17.4 of the *Anti-Dumping Agreement*, the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the *DSU*.

The European Union asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 19 December 2011.