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Panel Proceedings

China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") From the European Union

(DS460)

Second Written Submission
European Union

Non-Confidential Version
Business Confidential Information (BCI) Redacted as Marked [[BCI]]

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TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Abbreviation	Abbreviated Term
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
Applicants	Wujin and Walsin
BCI	Business Confidential Information
China	People's Republic of China
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GAAP	Generally Accepted Accounting Principles
GATT 1994	*General Agreement on Tariffs and Trade 1994*
HP-SSST	High-Performance Stainless Steel Seamless Tubes
JFE	JFE Steel Corporation
Kobe	Kobe Special Tube Co., Ltd.
MOFCOM	Ministry of Commerce of the People's Republic of China
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SMI	Sumitomo Metal Industries, Ltd.
SMST	Salzgitter Mannesmann Stainless Tubes GmbH
Tubacex	Tubacex Tubos Inoxidables, S.A
Walsin	Changshu Walsin Speciality Steel Co., Ltd.
WTO	World Trade Organization
Wujin	Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd.

I. INTRODUCTION

1. In its second written submission, the European Union further explains why it respectfully requests the Panel to find that China's measures imposing ant-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). The European Union also requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

2. For the convenience of the Panel, the European Union follows the same structure as that used in its First Written Submission.

II. STANDARD OF REVIEW

3. The European Union refers to its First Written Submission.[1] The Parties do not disagree with respect to the standard of review:[2] the Panel must make an objective assessment of the matters before it.

4. China conflates the issue of standard of review with the different issue of the making of a *prima facie* case.[3] The European Union rejects China's assertion that the European Union has not made a *prima facie* case with respect to its claims, for the reasons set out in our submissions relating to each specific claim.

5. Should the Panel have any questions on these matters, the European Union would be happy to respond to them.

[1] EU FWS, paras. 43-45.
[2] China FWS, paras. 40-49.
[3] China FWS, paras. 41-43.

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

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

6. The European Union has submitted that the BCI Procedures are WTO inconsistent insofar as they provide for the automatic classification as BCI in these WTO panel proceedings of information that was submitted as BCI in the municipal anti-dumping proceeding. The European Union considers that the question of designation should be subject to objective criteria established and eventually applied by the WTO adjudicator. The BCI Procedures are WTO inconsistent because they take this matter out of the hands of the adjudicator. This means that there is no guarantee that a balanced and proportionate approach to designation will be adopted, taking into account the various interests at stake. It contradicts the fact that it is for the Member to seek designation (or not). And it is unnecessary and disproportionate because it would be sufficient to merely encourage Members to take into consideration the views of the firm submitting the information to an investigating authority in an anti-dumping proceeding, without seeking to bind Members in that respect. We have requested that the BCI Procedures be amended accordingly.[4]

7. China dealt with both of the EU requests (this request and the following request) together, in a little over one page of its First Written Submission. China submitted that the EU request is "flawed". It considered that this is demonstrated by the case-law referred to by the European Union. The Panel in this case has decided that additional protection for BCI is justified and has specified the form that it should take. In doing so, it balanced the interests of all WTO Members by requiring non-confidential versions. It is therefore "evident" that there is nothing WTO inconsistent in the BCI Procedures. Article 12.1 of the DSU permits panels to adopt such procedures. The protection afforded by

[4] EU FWS, paras. 65-68; EU First Opening Oral Statement, paras. 3-13; EU Responses to Questions 1-4 from the Panel, paras. 2-20.

the BCI Procedures does not diminish the protection afforded by the DSU. The ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. The approach adopted by the Panel is in line with the confidentiality requirements of Article 6.5 of the Anti-Dumping Agreement.[5]

8. The European Union already dealt with each of these points in its First Opening Oral Statement.[6]

9. In its Responses to the Panel Questions,[7] China develops its view that (1) an authorizing letter is required and (2) information designated as confidential by the investigating authority must be BCI in WTO dispute settlement proceedings.[8] China reaches this conclusion based on its analysis of the relationship between Articles 6.5 and 17.7 of the Anti-Dumping Agreement.[9] Conspicuously absent from China's analysis *is any engagement at all* with the extensive reasoning of the Appellate Body in the Airbus appeal, set out in detail in the EU First Written Submission.[10]

10. The European Union considers that China's analysis is obviously wrong. The key error that China makes is to invoke Article 6.5 of the Anti-Dumping Agreement as context *before* it has completed an analysis of the provisions that actually apply to the issue at hand. China then misunderstands how the context of the Anti-Dumping Agreement informs the proper interpretation of the DSU.

11. Thus, the first step is a proper analysis of the provisions that actually apply to the issue at hand. China now agrees that Article 6.5 of the Anti-Dumping Agreement does not apply to the issue at hand – China merely invokes it as context.[11] Rather, the provisions that actually apply to the issue at hand are the relevant provisions of the DSU and the special or additional rules in the Anti-

[5] China FWS, paras. 769-776.
[6] EU First Opening Oral Statement, paras. 3-13.
[7] China's Response to Panel Questions 1-4, paras. 1-32.
[8] China's Response to Panel Question 4, para. 31.
[9] China's Response to Panel Question 4, para. 26.
[10] EU FWS, paras. 46-76.
[11] China's Response to Panel Question 4, para. 20.

Dumping Agreement (Articles 17.4 to 17.7). Thus, the first step is to search for and prefer an interpretation of the provisions that actually apply that is harmonious, rather than conflicting, and that gives meaning to all the relevant provisions. This is what the EU did in its First Written Submission.

12. China fails to do this, notably because China interprets Article 17.7 of the Anti-Dumping Agreement as meaning that confidential information can be "provided" to a panel but not "disclosed" to the other party.[12] This proposition contradicts the fundamental rule of due process in Article 18.1 of the DSU that there shall be no *ex parte* communication with a panel; and the rule in Article 18.2 of the DSU that written submissions to a panel are confidential *but shall be made available to the parties to the dispute.*

13. The EU has set out an harmonious interpretation of all the relevant applicable provisions. The position is straightforward. It is for the Member providing information to a panel to designate it as confidential or not.[13] All such information, whether confidential or not, must be made available to the parties to the dispute (there can be no *ex parte* communication).[14] Confidential information must not be disclosed by the panel or the parties to any other persons without formal authorisation from the Member submitting it.[15] Non-confidential summaries are to be provided on request.[16] A panel must settle any dispute about designation, that is, the objective concept of confidentiality, as part of its objective assessment of the matter before it and in the exercise of its inherent powers and responsibilities.[17] It cannot delegate this task absolutely to any other person or entity. The same rules apply if a panel seeks information from any other person, body, authority or other source.[18]

14. Having properly understood the correct and harmonious interpretation and application of the rules that actually apply, the only conclusion that it is

[12] China's Response to Panel Question 4, para. 21.
[13] DSU, Article 18.2; Anti-Dumping Agreement, Article 17.7.
[14] DSU, Articles 18.1 and 18.2; Anti-Dumping Agreement, Article 17.7.
[15] DSU, Article 18.2; Anti-Dumping Agreement, Article 17.7.
[16] DSU, Article 18.2; Anti-Dumping Agreement, Article 17.7.
[17] DSU, Article 18.2; Anti-Dumping Agreement, Article 17.7; DSU, Article 11.
[18] DSU, Article 13; Anti-Dumping Agreement, Article 17.7.

possible to reach is that a panel may not delegate the settlement of any disputes regarding designation absolutely to any other person or entity – this is precisely the point raised by the European Union.

15. The next step is to consider the context of the Anti-Dumping Agreement. In doing so, it is important to remember that Article 6.5 does not purport to regulate DSU proceedings. With this in mind, the US observation, supported by China,[19] that Article 6.5 contains no exception for DSU proceeding is a *non sequitur* and constitutes legal error in the process of interpretation. In fact, it would be exceedingly odd if Article 6.5 would contain an exception for DSU proceedings, since it does not even purport to regulate such matters.

16. Rather, what is contextually significant is Article 6.5 and footnote 17 together, because footnote 17 confirms that even information designated as confidential by the investigating authority may be disclosed (specifically to a domestic adjudicator and to the other litigant) provided that it is appropriately protected. Contextually, *this precisely confirms the reading of the DSU set out above*: confidential information may be provided to an adjudicator and the other party in DSU litigation provided that it is appropriately protected. Such protection is provided by the general DSU confidentiality regime and supplemented by BCI procedures as necessary.

17. This is further confirmed by the context of Article 13 of the DSU. Clearly, in order for such tribunals to conduct an "independent" review of such measures they must be able to have access to the basis on which such measures have been adopted. If they would be dependent for this on the confidentiality designations made either by an interested party or by the investigating authority, they would clearly not be independent. Furthermore, information submitted to such tribunals must clearly be available to the other litigant, otherwise there would be a breach of the fundamental principle of due process.

[19] China's Response to Panel Question 3, paras. 15-16.

18. Approaching the issue from the perspective of "legitimate expectations", as China does,[20] it is important to bear in mind that an interested party in a municipal anti-dumping proceeding has notice not just of the final sentence of Article 6.5 of the Anti-Dumping Agreement, but also of the other provisions of the Anti-Dumping Agreement, and indeed the single undertaking that is the WTO Agreement as a whole, including the DSU.

19. From this perspective, China's suggestion that an interested party submitting information as confidential has a legitimate expectation that it will be automatically so designated[21] is clearly incorrect. Even under the terms of Article 6.5, designation is not something absolutely in the hands of the submitting party, but rather something in the hands of the investigating authority, which must be satisfied that good cause is shown. Thus, even if the submitting party requests confidential designation, the investigating authority may decide that good cause has not been shown, and may designate the information as non-confidential. In short, the interested party has the legitimate expectation that the issue of designation will be subject to review by the investigating authority.

20. Similarly, as outlined above, given the terms of footnote 17 and Article 13 of the Anti-Dumping Agreement, the interested party is on notice that disclosure to an adjudicator (and thus to a litigant in domestic court proceedings) may be required provided that appropriate protection is in place.

21. Similarly, the interested party is on notice that a determination of good cause being shown is in turn subject to review by a WTO panel. Thus, if an investigating authority would consider that good cause would be shown and designate certain information as confidential, but such determination would be ruled WTO inconsistent by the DSB, then in the context of a re-determination and compliance proceedings it would not be the case that the interested party could lawfully seek to withhold authorization to disclose, pursuant to the final sentence of Article 6.5 of the DSU.

[20] China's Response to Panel Question 3, para. 17.

22. In conclusion, there is no absolute right to, or legitimate expectation with respect to, the issue of confidentiality designation. This is not a matter that rests or can rest, in absolute terms, in the hands of the firm. Rather, it will always be necessary to strike a reasonable balance between competing interests: the legitimate objective of confidentiality; the legitimate interest of being in a position to make administrative and judicial determinations; and the legitimate interest of due process, which requires that other interested parties have notice and are able to make their views known accordingly. As the European Union sees it, *this balance can only be struck by the authority responsible for conducting the specific procedure in question*. Accordingly, interested parties are on notice that this is an issue that ultimately rests: with the investigating authority *in municipal anti-dumping proceedings*; with the judicial authority *in municipal court proceedings*; and with a panel (and eventually the Appellate Body) *in WTO proceedings*. With this is mind, it is clearly a mistake to find, in the final sentence of Article 6.5 of the Anti-Dumping Agreement, a rule transferring responsibility for such matters, in absolute terms, from a WTO panel to an investigating authority or a firm.

23. As set out in our claims and submissions regarding the alleged confidentiality of certain information so designated by MOFCOM, the European Union contests such designation, and expects and anticipates that the Panel will rule on these claims.

24. Finally, to tie-up a few loose ends: the European Union and Japan agree that, pursuant to Article 18.2 of the DSU, it is for the Member to designate in the first place, *but for a panel to rule in case of dispute*.[22] The European Union does not argue that a panel must itself designate all information.[23] The concept of confidentiality is an objective one, not something to be subjectively determined by a particular Member or party or other person.[24] Whether or not this has occurred in other disputes, particularly involving the US and China,

[21] China's Response to Panel Question 3, para. 17.
[22] China's Response to Panel Question 1, para. 5.
[23] China's Response to Panel Question 1, paras. 6-7.
[24] China's Response to Panel Question 1, paras. 8-10.

who appear to agree on the point, even though it would render this aspect of DSU proceedings dysfunctional, is irrelevant.[25]

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

25. The European Union has also submitted that the BCI Procedures are WTO inconsistent insofar as they provide that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to the Panel. For the reasons indicated in our First Written Submission, the European Union considers that this statement in the BCI Procedures is WTO inconsistent. It effectively takes out of the hands of the submitting Member and eventually the adjudicator the question of what may be submitted in WTO DSU proceedings. It provides a proxy for unlawfully delegated designation, because whatever the correct designation, a firm could simply withhold authorisation. It means that there is no guarantee that a balanced and proportionate approach to designation (and designation through the proxy of withholding authorisation) will be adopted, taking into account the various interests outlined above. It contradicts the fact that it is for the Member to seek designation (or not) and for the Member to decide whether or not to place particular evidence before a panel. And it is unnecessary because it would be sufficient to merely recall that submitting Members remain solely responsible for their own compliance with any applicable confidentiality rules.[26]

26. As indicated above, China deals with both of the EU requests (this request and the preceding request) together, in a little over one page of its First Written Submission. China submits that the EU request is "flawed". It considers that this is demonstrated by the case-law referred to by the European Union. The Panel in this case has decided that additional protection for BCI is justified and have specified the form that it should take. In doing so, they balanced the

[25] China's Response to Panel Question 3, para. 14.

interests of all WTO Members by requiring non-confidential versions. It is therefore "evident" that there is nothing WTO inconsistent in the BCI Procedures. Article 12.1 of the DSU permits panels to adopt such procedures. The protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. The ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. The approach adopted by the Panel is in line with the confidentiality requirements of Article 6.5 of the Anti-Dumping Agreement.[27]

27. The European Union already dealt with each of these points in its First Opening Oral Statement.[28]

28. In its Responses to the Panel Questions,[29] China develops its view that (1) an authorizing letter is required and (2) information designated as confidential by the investigating authority must be BCI in WTO dispute settlement proceedings.[30] China reaches this conclusion based on its analysis of the relationship between Articles 6.5 and 17.7 of the Anti-Dumping Agreement.[31] We have explained above why China's analysis is legally erroneous. It is clearly a mistake to find, either in the final sentence of Article 6.5 of the Anti-Dumping Agreement, or in Article 17.7, a rule requiring or permitting the imposition of such a requirement. This aspect of the BCI procedures has already been prejudicial to the European Union. The European Union would have wished to make and develop certain other claims and arguments, but has been hindered in pursuing that objective by the existence of this requirement for prior authorization.

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

[26] EU FWS, paras. 69-74; EU First Opening Oral Statement, paras. 14-24; EU Responses to Questions 1-4 from the Panel, paras. 2-20.
[27] China FWS, paras. 769-776.
[28] EU First Opening Oral Statement, paras. 14-24.
[29] China's Response to Panel Questions 1-4, paras. 1-32.
[30] China's Response to Panel Question 4, para. 31.
[31] China's Response to Panel Question, para. 26.

29. China originally requested the Panel to amend paragraph 10 of the Working Procedures so that it provides that objections to translations should be raised promptly in writing no later than the next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing.[32]

30. The European Union has understood that paragraph 10 of the Working Procedures does not, and indeed should not, contain an absolute rule, because it uses the term "should". However, if the Panel considers otherwise, then the European Union respectfully requests that paragraph 10 be amended to make it clear that the rule is not absolute. This could be done for example, by inserting the words "to the extent that its significance is reasonably apparent" before the term "should".[33]

31. China agrees.[34] The European Union highlights the contrast between China's express recognition of the need for "balance" on this question, as opposed to an "absolute" rule, with its insistence on an absolute rule (and rejection of the need for balance) with respect to the two aspects of the BCI procedures raised by the European Union.

IV. PROCEDURAL CLAIMS

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

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

32. As set out in our First Written Submission,[35] the European Union claims that China's treatment of confidential information submitted by the Applicants was

[32] China FWS, paras. 802-807.
[33] EU First Opening Oral Statement, paras. 25-32.
[34] China's Response to Panel Question 5, para. 32.

inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application;[36] Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission;[37] and the Appendix to the Applicants' Additional Submission.[38] Specifically, the European Union claims that China acted inconsistently with Article 6.5 because it permitted the full text of the four reports at Appendix V to the Application, Appendix VIII to the Application, Appendix 59 to the Applicants' Supplemental Submission, and the Appendix to the Applicants' Additional Submission to remain confidential, without a showing of good cause.[39] The European Union considers that the petitioners' concerns could have been addressed by simply withholding the names of the third parties or entities providing these reports.[40]

33. China initially responds that the European Union has not made a *prima facie* case because, allegedly, it has not specified the documents (the four reports) to which its claim relates,[41] with the consequence that China (allegedly) cannot engage with the question of whether or not the petitioners demonstrated "good cause" regarding their requests for confidential information.[42]

34. The Panel should reject China's argument. The documents are specified at paragraph 90 of the EU First Written Submission; and all of them were previously referred to at paragraph 77 of the EU First Written Submission. China itself demonstrates that it has understood to what the claim relates by listing the documents in paragraph 703 of China's First Written Submission.

[35] EU FWS, paras. 77-97.
[36] Application, Exhibit EU-1.
[37] Applicants' Supplemental Submission, Exhibit EU-15.
[38] Applicants' Additional Submission, Exhibit EU-16.
[39] EU FWS, paras. 86-88 and 77.
[40] EU FWS, para. 87.
[41] China FWS, paras. 702-704.
[42] China FWS, paras. 705-706.

Evidently, as China itself acknowledges,[43] the European Union and Japan are developing the same claim with respect to these reports.[44]

35. Having recalled the requests made by the petitioners,[45] China then argues that the confidential treatment did not concern the entirety of the four reports at issue on a blanket basis, but that the non-confidential versions included "a large part of the original text".[46] According to China, MOFCOM declined to disclose not only the name of the third party (because this would affect its business) but also the full report.[47] China submits that Article 6.5 is mandatory; that an authority has a broad discretion in determining whether or not good cause is present; and that it is under no obligation to explain its determination in the measure at issue.[48] China then submits that the information was by nature confidential and that there were, in fact "several other reasons" each justifying the confidential treatment, which it lists, concluding that, solely withholding the names would not meet these several concerns.[49]

36. In its Response to Panel Question 67 China again sets out the petitioners' requests and argues that MOFCOM "devoted a large amount of text to the issue" but was "under no obligation to explain" its assessment. According to China, there was good cause because of: a risk to the daily business; a risk of a negative impact on sales; a risk of hurdles to the collection of information in the future; and a risk of business retaliation. China concludes that disclosure would also have had a harmful effect on the petitioners.[50]

37. As set out in our First Written Submission and in our Response to the Panel Questions, the European Union considers that China is not permitted to engage in *ex-post* rationalisation at this stage of the process. The measure at issue must

[43] China FWS, para. 698.
[44] EU FWS, paras. 86-97; Japan FWS, paras. 272-280.
[45] China FWS, paras. 709-713.
[46] China FWS, para. 714.
[47] China FWS, paras. 715-716 and paras. 734-737.
[48] China FWS, paras. 717-725 and paras. 734-737.
[49] China FWS, paras. 726-733.
[50] China's Response to Panel Question 67, paras. 173-183.

be judged on its own terms, and in this respect what matters is the assessment actually contained in the measure at issue.

38. With respect to China's assertion that it disclosed "a large part of the original text", the European Union has already pointed out that, other than disclosing the final data summarised in paragraph 90 of the EU First Written Submission, the Applicants provided no summary of any other contents of these reports, including the methodologies utilized by the third party institutes to obtain these data or the underlying evidence they relied upon. To recall, the panel in *China – X-Ray Equipment* stated: "In cases where multiple types of information are designated as confidential, the substance of each type of confidential information must be summarized".[51]

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

40. For these reasons, we respectfully request the Panel to reject China's arguments and affirm the claims made by the European Union and Japan.

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

41. As set out in our First Written Submission,[52] with respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible. First, with respect to Appendices V and VIII to the Application, Appendix 59 to the Applicants' Supplemental Submission, and the Appendix to the Applicants' Additional Submission, the Applicants disclosed only the final data provided by each report, but no further summary or explanation. Second, with respect to Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38,

[51] Panel Report, *China – X-Ray Equipment*, para. 7.341.
[52] EU FWS, paras. 89-97.

39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, and 58 to the Applicants' Supplemental Submission, for each of these items, the column entitled "Note and non-confidential summary" in the Applicants' "List of supplementary evidence and non-confidential summary" simply states: "No disclosure is made due to confidentiality consideration for business secret".[53] As the panel found in *China – X-Ray Equipment*, such a statement is not an adequate non-confidential summary under Article 6.5.1.[54]

42. In response, China first provides its own summary of the relevant documents.[55] It then summarises Article 6.5.1 and the case-law, submitting that the key point is that the non-confidential summary must permit a reasonable understanding. According to China, the Oxford English Dictionary defines "reasonable" as "not irrational or absurd". China acknowledges that, where there are multiple types of information, it is not enough to merely summarise the data: the evidence and source must also be summarised. China argues that there are no requirements regarding the form of non-confidential summaries; that investigating authorities have in this respect a significant margin of discretion; and that the alternative is to provide a statement of reasons about why summarisation is not possible.[56]

43. With respect to the four reports, China then goes on to argue that it did summarise the source by stating that it was a "third party" and "a respected Chinese organisation"; and that it did summarise the evidence by stating that it was "proprietary" and based on "market data".[57] China then submits that two of the reports are themselves already summaries.[58] According to China, they contain no information regarding methodologies and no underlying evidence: China describes them as being based on "non-existent information".[59] According to China, the European Union has provided no further evidence to

[53] Applicants' Supplemental Submission, Exhibit EU-15, Section III (List of supplementary evidence and non-confidential summary).
[54] Panel Report, *China – X-Ray Equipment*, paras. 7.352-7.353, 7.355, 7.360.
[55] China FWS, paras. 741-747.
[56] China FWS, paras. 748-756.
[57] China FWS, para. 758.
[58] China FWS, para. 759.
[59] China FWS, para. 759.

demonstrate that this is insufficient.[60] Finally, China submits that the four reports disclose more than merely final data; and that the present case is distinguishable from *China – X-Ray equipment* because the summaries meet what China refers to as a "minimum standard" because they are "not irrational or absurd".[61] Finally, with respect to the other documents, China submits that MOFCOM provided a statement of reasons as to why further summarisation is not possible.[62]

44. The European Union respectfully requests the Panel to reject China's arguments and affirm the claims made by the European Union and Japan. We do not consider that the statements provided by China are sufficient to permit a reasonable understanding of the documents. In particular, we do not understand why China believes that affirming that the documents are based on "non-existent information" might be helpful to China's case. The whole purpose of these transparency provisions is to provide the interested parties with the opportunity to assess and challenge the factual assertions, evidence and arguments on which petitioners and the investigating authority base themselves. If it transpires that these documents are in fact based on "non-existent information" then that does nothing to support the proposition that the measure at issue is consistent with the covered agreements. On the contrary, it provides a strong indication that there may well be serious substantive inconsistencies linked to these procedural irregularities.

45. Finally, we do not believe that China may be considered to have provided a statement of reasons as to why further summarisation is not possible that is consistent with Article 6.5.1 of the Anti-Dumping Agreement.

[60] China FWS, para. 759.
[61] China FWS, paras. 757-763.
[62] China FWS, paras. 764-767.

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

46. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement because China refused to take into account information relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable, which was appropriately submitted so that it could have been used in the investigation without undue difficulties, and which was supplied in a timely fashion. Specifically, at the verification, SMST submitted to the investigating authorities that certain financial expenses had been inadvertently double-counted in the SMST Dumping Questionnaire Response, and adduced corrected information that was duly verified. The *only* reason provided by China in the SMST Final Disclosure and in the Final Determination for refusing to take the corrected information into account was that SMST did not raise this point before the verification started.[63]

[63] SMST Final Dumping Disclosure: "… During the verification, your company presented that certain financial expenses were double reported in the response and requested to revise. Because your company did not present this claim before the verification, the investigating authority decides not to accept. …" (Exhibit EU-25).
SMST Comments on Final Dumping Disclosure, p. 1: " … it was shown at verification that the [[**BCI**]]% rate was actually too high because certain financial expenses had been double-counted. As shown at verification, the financial expenses incurred at headquarters were already allocated in the administrative expenses in Table 6-6 and therefore should not have again been allocated in Table 6-8. *See* SMST-Germany Verification Exhibits 7 & 9. While BOFT claims that this information was not presented "before the verification," this issue was one of the first ones reviewed by BOFT at the beginning of verification and BOFT had ample time to collect and review all relevant documents. Thus, BOFT should not double-count financial expenses in the SG&A rate used to calculate constructed value for DMV 304HCu …" (Exhibit EU-28).
Final Determination, p. 42, explaining that, in the course of verifications, SMST Italia indicated that some financial costs were mistakenly mentioned several times in the responses to the questionnaire and asking for rectification, and recording China's response that, since the company did not raise this point before on-the-spot verifications started, China decided to reject SMST's request. (Exhibit EU-30).

47. China responded to this *procedural* claim by focussing on the substance.[64] The substance of the matter has now been clarified in the Parties' Responses to the Panel Questions: there is double-counting in Tables 6-6 to 6-8 but not in Table 6-5.[65]

48. On the substance of the matter, China argues that it did not rely on the SG&A data in Tables 6-5 to 6-8, but rather used the planned information in Table 6-3. However, the European Union has claimed that, in doing so, China acted inconsistently with various provisions of the Anti-Dumping Agreement. What the European Union wishes to ensure is that, assuming that it is successful with this latter claim, in the re-determination, China will have to re-consider the relevant data *without double counting*. The difficulty that we have is that, in this respect, MOFCOM rejected SMST's request regarding the double counting *solely* because it was made at verification. Therefore, if we do not challenge MOFCOM's *procedural* error, there is a certain risk that we find ourselves in the re-determination procedure faced with an argument from MOFCOM that it is not obliged to re-consider the data without double counting because SMST's request was already rejected on *procedural* grounds in the original administrative proceedings. This is a risk that we seek to eliminate with our procedural claim.

49. Turning to the *procedural* claim that we have actually made, as we have explained in our submissions, we do not argue that an investigating authority has no discretion on this matter. Rather, our claim is based on the terms of the measure at issue itself, which simply records rejection of the information *solely* on the grounds that it was submitted at verification. We do not claim or argue that an investigating authority must always accept all such information at verification. Merely that it must be open to doing so if this does not impede the verification.

50. We believe that China's submissions in these very proceedings demonstrate that to be the case, because it is simply a matter of reconciling Tables 6-6 to 6-8

[64] China FWS, paras. 192-232.

with Table 6-5, by ensuring that, in compiling Table 6-5, no double counting takes place. If this is something that China could do in its submissions in these proceedings, it is certainly something that MOFCOM could have done during the investigation. Consequently, it seems to us that, through its actions, China has, in effect, conceded the point. We seek only that the Panel take such steps as may be necessary in order to ensure that China understands that it should ensure that no such double counting occurs in the re-determination. This requires only that China formally acknowledges the point and this is memorialised in the report; failing which the EU simply requests that MOFCOM's procedural error be duly noted, for the reasons set out above.

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

1. With respect to the dumping determinations

51. As set out in our First Written Submission,[66] the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations. In particular, China failed to disclose information on dumping calculations essential to its ultimate findings. Consequently, interested parties were unable properly to defend their interests.

52. In response, China submits that facts are distinct from reasons and that reasons are not subject to the disclosure requirement; and further that a non-reason is not necessarily a fact.[67] China also submits that evidence is not covered, and that no "particular degree of precision" is required.[68] China recalls that only essential facts need to be disclosed, not all facts, and appears to suggest that if such facts are already in possession of the firm, they may not need to be

[65] China's Response to Panel Questions 26-27; EU Response to Panel Questions 26-30.
[66] EU FWS, paras. 110-125.
[67] China FWS, para. 646.
[68] China FWS, para. 647.

disclosed.[69] China acknowledges that the purpose of disclosure is to permit interested parties to defend their interests, but considers that disclosure can be effected in several ways.[70] China acknowledges that disclosure should relate to normal value, export price and fair comparison, but submits that the case law does not yet provide "conclusive guidance" on what exactly must be disclosed. According to China, "mathematical determination" and the actual calculation of the dumping margin need not be disclosed.[71]

53. Next, China submits that the European Union has not made a *prima facie* case of breach of Article 6.4 of the Anti-Dumping Agreement because no request for information was made.[72] Similarly, China submits that neither complainant has made a *prima facie* case of breach of Article 6.9 of the Anti-Dumping Agreement because their claims "are not substantiated in any way" but merely amount to "general allegations"; and it is not for the Panel to "divine" WTO inconsistency on such basis.[73] With respect to Tubacex, China submits that no document has been provided by the European Union.[74] Subsequently, with respect to SMST, China submits that MOFCOM provided WTO consistent disclosure with respect to normal value,[75] export price,[76] and adjustments,[77] but was not required to do so with respect to "methodology."[78] Finally, China submits that SMST did or should have understood the disclosure based on "the plain words" of the disclosure, which prove that it was "unreasonable not to understand" how the calculation had been made.[79]

54. The European Union has already dealt with the error in China's reasoning to the effect that an inferred fact can only be classified as "reasoning" and therefore as a non-fact. The concept of a "fact" is an objective one, not a subjective one. It

[69] China FWS, para. 648.
[70] China FWS, paras. 649-650.
[71] China FWS, paras. 651-654.
[72] China FWS, paras. 657-664.
[73] China FWS, paras. 665-666.
[74] China FWS, para. 666.
[75] China FWS, para. 670, at page 217.
[76] China FWS, para. 670, at page 670.
[77] China FWS, para. 672, at page 220.
[78] China FWS, para. 673.
[79] China FWS, paras. 674-676.

does not depend upon the situation of the observer. In the example given in the EU Response to Panel Question 71, that the train passed through station B is a fact, which would have been experienced by an appropriately placed observer. That some other person infers the fact from the information in the example does not make it any less of a fact. Thus, contrary to what China appears to believe, something can be, at the same time, an observed fact (for one observer) and an inferred fact (for another observer). Concurrent categorisation in this second group does not, however, deprive it of its character as a fact. As such, if essential, it must be disclosed.

55. China also appears to engage in similar error when it argues that something that does not belong in the realm of reasoning is not necessarily something that belongs in the realm of fact. The European Union is not certain what China has in mind. If it is fantasy, that has no role to play or at least should have no role to play in WTO anti-dumping law. We may therefore safely conclude that, for the purposes of the present discussion, there are only two relevant categories: fact and non-fact.

56. With respect to the burden of proof issue, the European Union does not agree with China that the complainants can be expected to prove a negative or complete the silence in the disclosure documents with their own speculation. It is sufficient for them to adduce the relevant documents, and point to the fact that they do not disclose the essential facts.

57. With regard to the rule that the essential facts must be disclosed, in our view this refers to the facts that are necessary in order understand the determination that is being made. This concept of necessity is a very familiar one in WTO law and can provide useful guidance to the Panel on this matter. Thus, for example, the Panel can think about whether or not a particular disclosure was essential or necessary by thinking at the same time about what the alternative may have been. It can think about the extent to which the disclosure actually given and the disclosure that might have been given contribute or would contribute to the objective, which is to inform the interested party and allow it to defend its interests. It can think about the relative impact of the two disclosures on the

interested party. And it can also think about the relative impact on the investigating authority, and specifically whether or not the alternative would impose an undue burden.

58. The issue of SMST normal value for Product B, and particularly how the SG&A has been calculated, selected by China as illustrative,[80] is, in this respect, highly instructive.

59. Even today, at this late stage of the process, China has still not provided to SMST, the European Union or the Panel an explanation, with specific numbers, of how the calculation was actually made. Thus, even today, neither SMST nor the European Union understand how the calculation was actually made. If the Panel believes that it understands, precisely, how the calculation was actually made, then the European Union would be most grateful if the Panel could set out its understanding, so that the parties might comment on it. China characterises this lack of understanding as "unreasonable".[81] To the European Union, this assertion really does simply make the complainants' case on non-disclosure. If, acting in good faith, it is simply not possible for multiple parties to understand what has happened, then the problem does not lie with their capacity to understand; it lies with the disclosure, or rather lack of it.

60. This observation becomes even more compelling when one considers the alternative. Why would MOFCOM not simply explain to SMST what the actual numbers it used actually were? China seems to take the position that it need not do so because the numbers are already in SMST's possession. That may or may not be the case, but it misses the point, of course, because SMST simply does not know which numbers, whether or not in its possession, MOFCOM has used.

61. To answer the questions set out above. Would this alternative make a greater contribution to the objective? Certainly it would. It would permit SMST to understand how the calculation has actually been made, and allow it to defend its interests accordingly; compared to the current situation in which SMST and

[80] China FWS, para. 674-676.
[81] China FWS, para. 676.

the European Union are unable to do that. Would this alternative impose an undue burden, or indeed any additional burden, on the investigating authority? Certainly not. MOFCOM and China certainly already have in their possession a precise statement of the calculation. It is simply a question of showing it to us. Why then would such disclosure not be made?

62. In arguing otherwise, China continues to insist that the "plain words"[82] of the disclosure should settle the matter in China's favour. As we have outlined in our submissions, the European Union has a different approach. We see that, with both parties acting in good faith, there has been a mutual misunderstanding, resulting in the use of aberrational data that has inflated the dumping margin. However, unlike China, we draw the reasonable consequence that the measure should be adjusted, not that the parties should entrench themselves in polemic procedural argument. In any event, we would like to respectfully draw China's attention to the fact that, following China's statements at the first meeting, it now appears to be agreed between the parties that the "plain words" of the Chinese version of the disclosure do not include the term "this". So if, as China proposes, the plain words should govern here, that only confirms that the Panel should find in favour of the European Union.

2. With respect to the injury determination

63. As set out in our First Written Submission,[83] with respect to the injury determinations, the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its injury and causation determinations. In particular, China failed to disclose information on import and domestic prices essential to its price effects finding. Consequently, interested parties were unable properly to defend their interests. The European Union elaborated on its position in its Responses to Panel Questions 71-72 and 73-74.

[82] China FWS, para. 676.
[83] EU FWS, paras. 126-141.

64. In response, China argues that it complied with Article 6.9 of the Anti-Dumping Agreement because: the confidentiality of certain data is not disputed; the non-confidential summaries were sufficient to meet its obligations; the provision of a range is sufficient to comply; and certain other data referenced by the European Union and Japan was not "essential".[84] China elaborated on its position in its Responses to Panel Questions 71-72 and 75-77.

65. With respect to China's argument that the complainants have acknowledged that the Product A import price in 2008 was confidential, we refer to our Response to Panel Question 73. The European Union does not agree with this unqualified assertion. We do not consider that MOFCOM was entitled to simply treat the data in its entirety as confidential. We believe that a meaningful price range could have been provided. We have not found anything in China's First Written Submission nor in its Reponses to the Panel Questions that would support a different conclusion.

66. With respect to China's argument that there were only two domestic producers and this made disclosure of a range impossible, the European Union does not agree. China's argument is expressly premised on the assumption that the range would consist of the minimum and maximum prices actually charged. On this basis, China observes that the domestic producer *not furnishing* either the lowest or highest price would become privy to the data of the other. And that the other would know that the producer *not furnishing* the data had always priced within that range.[85] However, elsewhere in its submissions China expressly recognises the possibility of providing a range that does not consist of the minimum and maximum prices actually charged.[86] This method would therefore have permitted China to provide a range.

67. Similarly, China's argument to the effect that each producer would have known the average domestic price of the other[87] is not convincing, because it would

[84] China FWS, paras. 683-687.
[85] China's Response to Panel Question 72, para. 188.
[86] China's Response to Panel Question 72, para. 186 ("two numbers in between which the domestic prices were situated, but which would not necessarily constitute the extrema of the domestic prices").
[87] China's Response to Panel Question 77, paras. 196-197.

not be possible for one producer to extract the average *weighted* domestic price of the other producer from the data. Absent such weighting, the "average" result would be meaningless and of no commercial value.

68. Furthermore, China's argument is premised on the assumption that the range of data would have to be disclosed to the exporters and the domestic producers in identical format. However, that would not be necessary. An investigating authority is not required to disclose all data, in identical format, to all interested parties. For example, dumping disclosures are specific to the exporter concerned: they are not required to be made in identical format to other interested parties. In exactly the same way, it would have been perfectly possible for MOFCOM to have disclosed the relevant data in one format to the exporters, thus allowing them to understand the essential facts and defend their interests accordingly; and in a slightly different format to the two domestic producers, if MOFCOM believed that would be necessary in order to protect the confidentiality of their information *vis a vis each other*.

69. With respect to China's argument regarding the underselling of Product B, the European Union remains of the view that MOFCOM should have disclosed a number for each year.[88] China's Response to Panel Question 76 still does not achieve that, that is, it does not provide a range specific to the year in question. It could matter, for example, whether the alleged undercutting at 3% concerned 2008 or 2010.

70. Furthermore, we do not agree with China's assertion that the disclosure that it did provide was "*de facto*" "akin" to providing domestic price ranges.[89] In this respect, the European Union remains unable to discern the essential facts, and China does not provide them.

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

[88] EU Response to Panel Question 74.
[89] China's Response to Panel Question 72, paras. 186-187.

confidentiality is irrelevant.[90] As we have indicated above, the question of what is essential or necessary has embedded within it a consideration of what alternatives were reasonably available, which better contributed to the objective of permitting the interested parties to understand the determination and defend their interests, at no additional cost to the investigating authority.

72. For all of these reasons, we respectfully request the Panel to reject China's arguments and affirm the claims made by the European Union and Japan.

D. Failure to set forth or otherwise make available in sufficient detail the findings and conclusions: Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

1. With respect to the dumping determinations

73. As set out in our First Written Submission,[91] the European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the all others rate and the use of facts available. As in *China – GOES*, China in the present case has no valid justification for its failure to reveal: (i) why it resorted to facts available; and (ii) how it determined the highest dumping margin found for the relevant exporters that received an individual margin to be the appropriate all others rates.

74. In response, China first reiterates the terms of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. It then submits that it did provide the necessary information. Specifically, China argues that because it stated that facts available were used with respect to firms that did not submit a questionnaire response, this is sufficient for the purposes of Articles 12.2 and 12.2.2. Furthermore, China argues that the facts used to establish the all others rate are the same as

[90] China's Response to Panel Question 75, para. 190.

those used to establish the highest dumping margin for a co-operating firm from each country, and that this is also sufficient for the purposes of Articles 12.2 and 12.2.2. According to China, this is what one EU firm requested. Finally, China submits that the Panel should not follow the same approach as was followed in *China – GOES* because the circumstances are not similar.[92]

75. The European Union does not agree with China that it is sufficient, for the purposes of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, to state that facts available were used with respect to firms that did not submit a questionnaire response. This is little more than a simple affirmation of what was done, but provides no indication of the underlying reasoning justifying such an approach.

76. Similarly, the European Union does not agree with China that it is sufficient, for the purposes of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, to simply refer to the highest margin found for a co-operating exporter. This is also little more than a simple affirmation of what was done, but once again provides no indication of the underlying reasoning justifying such an approach. In any event, other interested parties are not privy to all the information provided to a particular firm, so such a statement is inadequate for the purposes of ensuring that the relevant findings and conclusions have been set forth or otherwise made available, as required by Articles 12.2 and 12.2.2.

77. Finally, the European Union does not agree that the facts of this case are materially different from the facts in *China – GOES*, and we respectfully invite the Panel to reach the same conclusions in this particular case.

78. For all of these reasons, we respectfully request the Panel to reject China's arguments and affirm the claims made by the European Union and Japan.

2. With respect to the injury determination

[91] EU FWS, paras. 142-151.
[92] China FWS, paras. 629-639.

79. As set out in our First Written Submission,[93] the European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination, particularly with respect to the injury and causation determinations. A pillar of China's affirmative determination as to injury and causation was its price effects analysis – specifically, China determined that the domestic industry was injured by the investigated imports due to price undercutting. However, China did not provide all of the relevant information and reasoning supporting its price undercutting conclusions. Specifically, its finding of price undercutting: (i) omitted key factual information; and (ii) did not provide the reasoning behind one critical aspect of its price comparisons by type.

80. In response, China argues that Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement do not require the inclusion of *all* information; that methodologies (as opposed to reasoning and conclusions) are not covered; that discretionary matters are not covered; and that confidential information is also not covered.[94] In this particular case, referring to its arguments regarding Article 6.9 of the Anti-Dumping Agreement, China argues that it did in fact include all relevant information on matters of fact, in the form of a non-confidential summary. Furthermore, China argues that it was not required to disclose details on how MOFCOM accommodated important quantitative differences between the products in its price undercutting analysis regarding Product C because this is a methodological question, and because it made no adjustment, so could not be expected to explain such non-existent adjustment.[95]

81. The European Union does not agree that China has complied with the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. While China did disclose certain "trend" information that information is not

[93] EU FWS, paras. 152-159.
[94] China FWS, paras. 688-692.
[95] China FWS, paras. 693-694.

pertinent to a finding of price undercutting, and was not sufficient to support such finding.

82. In this respect, the European Union recalls that China's refusal to provide the pricing information underlying its price undercutting analysis and its resulting obstruction of the view into this analysis has been addressed and rejected before by the Appellate Body. China similarly failed to disclose information related to an injury analysis in *China – GOES*, and the Appellate Body in that case found that China consequently had not complied with Article 12.2.2. As in the present case, in the determination underlying *China – GOES*, China had provided only information on price variations "without including the *prices* of domestic products", while at the same time basing its injury determination on a finding that import prices were, in some independently evident sense, "low".[96]

83. The panel and Appellate Body in *China – GOES* rejected this approach. The Appellate Body said that "MOFCOM's disclosure that 'average domestic prices dropped' … is insufficient to convey all the relevant information on the matters of fact relating to MOFCOM's finding that subject imports were at a 'low price'".[97] As the Appellate Body did in *China – GOES*, the Panel in the present case should not accept China's use of price change data in place of the data that actually are relevant to its determination that import prices "noticeabl[y]" undercut domestic prices.[98]

84. As a matter of emphasis, it is worth noting that in *China – GOES*, China had made separate findings of price suppression and price depression, and furthermore that China had denied before the panel that its determination relied on price undercutting findings. In that case, the Appellate Body nonetheless rejected these objections, finding that China's conclusions that imports were sold at "low prices" required that it disclose the material facts and reasoning

[96] Appellate Body Report, *China – GOES*, para. 263 (original emphasis).
[97] Appellate Body Report, *China – GOES*, para. 264; Panel Report, *China – X-Ray Equipment*, para. 7.461 ("In our view, MOFCOM's description of its price effects findings does not meet the requirements of Article 12.2.2, since it provides no insight into how those findings were reached. In particular, there is no explanation of how MOFCOM assessed the relationship between domestic and subject import prices …".).
[98] Final Determination, Exhibit EU-30, p. 54.

behind these conclusions.[99] Unlike in *China – GOES*, in the present case, China made no price suppression or price depression findings, so its injury determination is based exclusively on its price undercutting findings. Therefore, China's failure to comply with Articles 12.2 and 12.2.2 in the present case is even more egregious than it was in *China – GOES*. China should therefore in the present case be found to be in violation of these provisions.

85. Second, China also failed to satisfy its obligations under Articles 12.2 and 12.2.2 because with regard to its price comparison of imported and domestically produced Product C, China failed to provide any detail on how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis.[100] China found that domestic sales of Product C were "small" relative to subject imports of Product C in 2009 and 2010, and China therefore purportedly took these quantitative differences "into consideration".[101] China, however, failed to explain how this was done, thus making it impossible for respondents to understand this critical step in China's injury analysis. China's price undercutting analysis was essential to its injury determination, and the price comparison by type between imported and domestically produced Product C was an essential part of the price undercutting analysis. China's purported treatment of "quantitative differences" was, therefore, very much relevant to that analysis.

86. The European Union recognizes that Article 12.2.2 requires an authority to pay due regard to confidentiality. However, with regard to China's claims that it rightfully withheld certain import price data and all domestic price data to protect interested parties' confidentiality,[102] this claim lacks foundation. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data that would permit a comparison of import prices and domestic prices by type and total product basis, while

[99] Appellate Body Report, *China – GOES*, para. 265.
[100] Final Determination, Exhibit EU-30, pp. 53-54.
[101] Final Determination, Exhibit EU-30, pp. 53-54.
[102] Final Determination, Exhibit EU-30, p. 52 (with regard to import prices of Products A and C) and p. 56 (with regard to domestic prices).

maintaining the confidentiality requests of interested parties. As the Appellate Body stated in *China – GOES*:

> We note that Article[] 12.2.2 … also provide[s] that the notice or report shall pay "due regard … to the requirement for the protection of confidential information". When confidential information is part of the relevant information on the matters of fact within the meaning of Article[] 12.2.2 …, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of that information.[103]

87. Confidentiality concerns therefore cannot excuse China from its obligation to provide a report containing all relevant information material to its injury determination. For these reasons, with respect to both the European Union and Japan and their exporters, China has failed to satisfy its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

V. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

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

88. The European Union claims that, in the measure at issue, China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) in a manner that reasonably reflects the costs associated with the production and sale in the ordinary course of trade of Product B (DMV 304HCu). We have explained that the records and actual data kept by SMST, as reported in the questionnaire responses and duly verified, demonstrate SG&A of [[**BCI**]] as opposed to the approximately [[**BCI**]] determined by China. China has erroneously used not the records kept by SMST and actual data, but a planned, hypothetical, projected or anticipated calculation. Its error is egregiously compounded by the fact that China based its determination on two sample transactions, even though it rejected these very same transactions as

unrepresentative and unreliable for the purposes of calculating costs of production.[104]

89. China acknowledges that the measure at issue expressly asserts that it is based on actual data.[105] Nevertheless, initially, China does *not* assert, in its defence, that the calculation is based *only* on actual data pertaining to production and sales in the ordinary course of trade. Rather, China (evasively) asserts the double negative that there is *no evidence* that the calculation is *not based* on actual data pertaining to production and sales in the ordinary course of trade.[106] China makes SMST responsible for proving this negative,[107] whilst ignoring the duly verified evidence provided in Tables 6-5 to 6-8, which it dismisses as "irrelevant".[108] China then asserts that "all information on the record" supports the conclusion that the relevant data was "actual" but provides no citation or evidence in this respect.[109] China's argument is that the Dumping Questionnaire requested actual data;[110] that SMST explicitly confirmed that this is what it was providing;[111] and that China was therefore reasonable in "*assuming*" that the relevant parts of SMST's Dumping Questionnaire Response were based only on actual data.[112]

90. China asserts that SMST's explanations in its Dumping Questionnaire Response and Supplemental Dumping Questionnaire Response to the effect that the data were not actual data pertaining to production and sales in the ordinary course of

[103] Appellate Body Report, *China – GOES*, para. 259.
[104] EU FWS, paras. 160-175; EU Response to China's Request for Preliminary Rulings, paras. 1-52; EU Response to Panel Questions 6-10 and 18-21.
[105] China FWS, paras. 80, 84 and 85.
[106] China FWS, para. 114, first sentence ("There was (and still is) no evidence that the SG&A data reported in Table 6-3 are not actual or based on SMST's records.").
[107] China FWS, para. 98, final indent and para. 118, final sentence.
[108] China FWS, para. 114, final sentence.
[109] China FWS, para. 114 ("… all the information on the record …").
[110] China FWS, paras. 98 ("… SMST was required to provide actual …"), 102 ("SMST was required to report the *actual* …") and 104 ("… the information requested …").
[111] China FWS, para. 98 ("… confirmed that it did …"), para. 102 ("SMST explicitly confirmed …"), the title preceding para. 104 ("SMST provided the data in question as actual …"), para. 104 ("… specifically stated … actual …") and para. 123 ("… provided by SMST as actual data …").
[112] China FWS, para. 109 ("On the basis of the facts before it, MOFCOM was reasonable in assuming that Table 6-3 for sales of Grade B to the European Union provided the actual SG&A amount on the basis of SMST's records.").

trade are "immaterial to this dispute".[113] According to China, SMST requested that the relevant data be disregarded as unrepresentative and unreliable *only* for the purposes of calculating costs of production (a request that was accepted) but *not* for the purposes of calculating SG&A costs.[114] China also faults SMST for allegedly not raising this matter in the context of verification.[115] China's position is that silence on this matter means that it is established that MOFCOM satisfied itself of the accuracy of the information submitted in SMST's Dumping Questionnaire Response and Supplemental Dumping Questionnaire Response.[116] China goes so far as to assert that it was *prohibited* from proceeding in any other manner.[117] According to China, it was only in these DSU proceedings that China first learnt of the problem, and such request is too late to be taken into account.[118] Finally, China argues that certain aspects of the EU claims are outside the Panel's terms of reference.[119]

91. The European Union has already dealt with all of these points in its Response to China's Request for Preliminary Rulings and in its Response to Panel Questions 6-10 and 18-21. We will therefore focus, in this rebuttal, on commenting on China's Responses to the Panel's Questions.

92. **Question 7**. China is incorrect to assert that the *EC – Bed Linen* case supports its position in these proceedings. On the contrary, that case supports the position of the European Union in these proceedings. In *EC – Bed Linen* the Appellate Body precisely *declined* to construe the term "ordinary course of trade" in Article 2.2.2 as a separate and detached rule, *disconnected* from "the method" set out in Article 2.2.2, and establishing an overarching obligation informing Article 2.2.2(ii). Instead, the Appellate Body saw the term "ordinary

[113] China FWS, para. 115 ("It is immaterial to this dispute …").
[114] China, FWS, paras. 98, second indent ("… SMST never claimed …"), 98, fourth indent ("… SMST never stated …"), 98, fifth indent ("… it never requested …"), 107 ("… SMST did not put forward any such request …") and 115 ("… the absence of a request by SMST …").
[115] China, FWS para. 83, second sentence ("… SMST did not address …"), para. 113, first sentence ("… SMST did not raise any issue …") and para. 118, final sentence.
[116] China, FWS, para. 96 ("… it is established that MOFCOM sufficiently satisfied itself of the accuracy of the information submitted.").
[117] China, FWS, para. 117 ("… MOFCOM was not allowed to disregard it …").
[118] China, FWS, para. 112 ("It was only in the framework of this dispute …. too late … to take it into account").

course of trade" as an integral part of the single "method" set out in Article 2.2.2.[120] That precisely confirms the position of the European Union in these proceedings.

93. In commenting on the *EC – Bed Linen* case, China erroneously equates the term "actual data (pertaining to production and sales in the ordinary course of trade)" in Article 2.2.2 with the term "actual amounts" in Article 2.2.2(ii). This is incorrect, because Article 2.2.2, first sentence, refers to the "amounts for administrative, selling and general costs and for profits"; and this language is picked-up in the second sentence, which refers to "such amounts" and "the amounts". The terms "amount" and "amounts" are then re-iterated in Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii). However, the term "actual data (pertaining to production and sales in the ordinary course of trade)" occurs only in Article 2.2.2. It thus directs the defending Member specifically to the method (in the singular) set out in Article 2.2.2, and not to any of the three options contained in Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii).

94. In any event, the *EC – Bed Linen* case was not examining an issue under Article 6.2 of the DSU. China's claim in the present proceedings is that the Panel Request is inconsistent with Article 6.2 of the DSU because, allegedly, it did not provide "a brief summary of the legal basis of the complaint". In this respect, the European Union would again draw the Panel's close attention to the fact that Article 2.2.2 twice uses the term "basis" in the singular to refer to each of the four options set out in Article 2.2.2, Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii); and the term "based on" to refer to the term "actual data pertaining to production and sales in the ordinary course of trade". This means that if a complaining Member directs the defending Member to the relevant option (that is, the basis for the determination) then it has clearly done enough to comply with the requirement in Article 6.2 of the DSU that it refer to the basis of the complaint.

[119] China FWS, paras. 64-72.
[120] Appellate Body Report, *EC – Bed Linen*, paras. 79-83.

95. As China would have it, the European Union could only have achieved this by, in addition to actually referring China to the specific provision at issue (Article 2.2.2), actually writing out in full in the Panel Request the entirety of Article 2.2.2. In this respect, China is ignoring the term "summary" that appears in Article 6.2 of the DSU. A summary is necessarily something more succinct than what is being summarised. This means that, contrary to what China asserts, the European Union was not required to write out the provision in full, but was rather entitled to provide a summary. That was done by expressly referencing the term "actual data" (pertaining to production and sales in the ordinary course of trade) *that appears in no other provision of the Anti-Dumping Agreement*. In these circumstances, China cannot plausibly or reasonably maintain the suggestion that it was in any doubt about which of the four options the European Union was referring to. In particular, China cannot achieve that objective by seeking to elide the distinction between the term "actual amount(s)" and the term "actual data" (pertaining to production and sales in the ordinary course of trade).

96. Compelling support for this conclusion is provided by the use of the term "brief" in Article 6.2 of the DSU. Thus, Article 6.2 of the DSU does not just authorise the use of a "summary", but specifically and expressly authorises the use of a "brief" summary. In doing so, it surely makes it clear that it was not the intention of the drafters of the DSU that panel requests should be converted, in effect, into first written submissions, as China is effectively arguing in this case.

97. **Question 8.** China is also incorrect to assert that the panel report in *US – Corrosion-Resistant Steel Sunset Review* supports its position in these proceedings. On the contrary, that case supports the position of the European Union. In that case, Japan argued that the obligation in Article 5.6 of the Anti-Dumping Agreement requiring self-initiating authorities to have evidence of dumping, injury and causation also applies in the context of sunset reviews conducted pursuant to Article 11.3. This claim was set out in Japan's panel request with express reference to Article 5 and the evidentiary requirements contained therein. In other words, Japan's claim was that the US law breached

Article 11.3 *because* it breached Article 5.6, and was necessarily premised on the proposition that Article 5.6 applies to sunset reviews.[121]

98. In its reply to question 84 from the panel following the second meeting, Japan sought to claim, for the first time, that the US law was inconsistent with Article 11.3 because it did not give the investigating authorities the discretion not to automatically self-initiate. The panel correctly observed that this second claim was not built around the obligation in Article 5.6 (which was referenced in the panel request) but was rather built around the obligation in Article 11.3.

99. Thus, this case cannot be compared to the present proceedings for at least two reasons. First, in *US – Corrosion-Resistant Steel Sunset Review* Japan was clearly moving from the obligation in Article 5.6 to the obligation in Article 11.3. There could be no doubt that this represented a change of the legal basis of the complaint within the meaning of Article 6.2 of the DSU. In the present proceedings, for all the reasons that we have already given, there is no change in the relevant basis: it is set out in Article 2.2.2, which requires that the determination be based on actual data pertaining to production and sales in the ordinary course of trade. Second, Japan raised the point in response to question 84 from the panel following the second meeting. In the present proceedings, the European Union has been pursuing the same point from the start and throughout.

100. In fact, the *US – Corrosion-Resistant Steel Sunset Review* case further supports the position of the European Union in these proceedings because it confirms that the Panel must take into account whether the ability of the respondent to defend itself has been prejudiced, given the actual course of the panel proceedings.[122] That is clearly not the case here, because the European Union has been pursuing the same point from the start and throughout. Thus, China has had ample opportunity to respond, but has chosen, in large measure, to remain silent on the substance of the matter, because it cannot but recognise

[121] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.50.
[122] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.49.

that it made an obvious error in the measure at issue, for which it has no defence.

101. With respect to the continuing absence of disclosure by China, it remains the case that the European Union and the Panel are still left to guess the detail of China's calculation because China is still withholding it. We still do not have the numbers, reconciled to the public documents and disclosures. There is simply no justification for this. There is no reason why an investigating authority would not disclose to a firm its own data. And there is no justification for China's failure to come forth with this information in its First Written Submission, Oral Statement, or even, remarkably, its responses to the Panel Questions.

102. Finally, we have already dealt with the position regarding consultations. There is no agreed written or other record of the consultations and the EU certainly does not agree with the picture painted by China: vague and unsubstantiated oral references of uncertain meaning are no substitute for specific written disclosure. The case law confirms that such matters are not to be determined on such basis.[123] Even today China has still provided no adequate or sufficient understanding of what it has done, based on a reconciliation between the relevant numbers. In any event, according to the provisions of Article 4.6 of the DSU, consultations are confidential, which means that they are not to be disclosed to a panel. Article 4.6 also expressly provides that consultations are without prejudice to the rights of any Member in any further proceedings. Therefore, whatever China might or might not think occurred, this is irrelevant as a matter of law to the rights of the EU in the present proceedings.

103. **Question 22.** We have already substantially dealt with the point raised in China's response. We do not agree with China that anything that is "used" by a firm automatically becomes "actual data pertaining to production and sales in the ordinary course of trade". The significance of this extraordinary assertion will certainly not be lost on the Panel. The first option in Article 2.2.2 is

[123] Panel Report, *EC – Fasteners (China)*, paras. 7.25-7.26.

mandatory. Thus, according to China's reading of this provision, the determination of the amounts for administrative, selling and general costs and for profits would depend only upon whether or not particular information or data would be "used" by the firm being investigated. This would, in effect, place into the hands of the firm the possibility of determining its own SG&A, and thus its own normal value, and thus its own dumping margin (or lack of dumping margin), even if the information or data in question would be *purely hypothetical*, provided only that such purely hypothetical data would be, at some point, "used" by the firm.

104. This is obviously not what the term "actual data pertaining to production and sales in the ordinary course of trade" means. Rather, it refers to actual data in the sense of data that is real and actually exists and that is derived from costs actually incurred, as opposed to hypotheticals (that is, planned, anticipated or future assumptions). That the latter might be used by a firm obviously does not convert it into the former.

105. We have also dealt with China's assertion that its determination was based *in part* on actual data. This is not enough. Article 2.2.2 requires the determination to be based on actual data pertaining to production and sales in the ordinary course of trade. It does not allow it to be based, in part, on something else. If that would be so, a determination based only 1% on actual data pertaining to production and sales in the ordinary course of trade but 99% on something else would be consistent with Article 2.2.2. That is not what the provision intends. Nor is the European Union arguing that coefficients can never be based on actual data (pertaining to production and sales in the ordinary course of trade);[124] only that, in this instance, that is not the basis of the determination in the measure at issue.

106. The European Union finds it highly significant that China now finally retreats behind what MOFCOM "understood".[125] But if it has now been demonstrated beyond any doubt (as it has) that MOFCOM and SMST, both acting in good

[124] China Response to Panel Question 22, para. 71.

faith, apparently did not understand each other, and that as a consequence of this apparent mutual incomprehension MOFCOM has made an aberrational calculation on the basis of aberrational data, *but that the correct and duly verified data is sitting on the record*, what is the proper and reasonable way forward? The European Union believes that it is for China to re-visit the issue in the re-determination. We think that is what the dispute settlement system is for. China even now goes so far as to state that, knowing what it now knows today "MOFCOM would have taken [a request to use the Tables 6-5 to 6-8 SG&A] into serious consideration and might have accepted such request".[126] The European Union does not understand what is preventing China from pursuing precisely that course of action now.

107. Turning to the verification,[127] by its silence China responds to the Panel's question: the Table 6-3 SG&A was not verified at all and certainly not as actual data (pertaining to production and sales in the ordinary course of trade) - and there is no documentary evidence to support any such assertion. This is how the verification proceeded because the Table 6-5 to 6-8 SG&A was verified, with supporting worksheets (since submitted by the European Union), making the Table 6-3 SG&A irrelevant, redundant and moot. This is confirmed by the verification report. The verification report also records the full co-operation of SMST. Contrary to what China suggests,[128] it does not state that SMST failed to provide the necessary supporting documents with respect to any matter.

[125] China's Response to Panel Question 22, para. 72.
[126] China's Response to Panel Question 22, para. 80. Moreover, any suggestion that SMST did not request that MOFCOM use the SG&A reported in Tables 6-5 to 6-8 instead of the rate used in the preliminary determination is not correct. Directly after issuance of the preliminary dumping disclosure, SMST filed comments stating:

> "[T]he SG&A rate of [[**BCI**]]% used by BOFT in calculating the constructed value for DMV 304HCu is not supported by any information on the record of this proceeding and BOFT has not explained how it calculated this rate. Rather than using this unsupported SG&A rate, BOFT should have used the [[**BCI**]] % SG&A rate reported in Table 6-5 for EU sales. The SG&A amounts reported in Table 6-5 are taken directly from the applicable Tables 6-6, 6-7 and 6-8."

SMST Comments on Preliminary Dumping Disclosure at para. 4 (Exhibit EU-19) (BCI).
[127] China's Response to Panel Question 22, paras. 73-74.
[128] China's Response to Panel Question 22, para. 73.

108. We deal with China's repeated and erroneous assertion that SMST did not request MOFCOM not to use the relevant data in our comment on China's response to Panel Question 23.

109. Finally, but significantly, China makes the following statement:

> The SG&A data affected by the disregarded cost of production data could have been corrected by these coefficients.[129]

110. The European Union is hesitant to comment on this statement because it is essentially impossible to understand. China appears to be arguing that, even if it is true that the cost of production data was rejected as unrepresentative and unreliable (recall that it approximately doubled the rate of SG&A that would otherwise have been calculated), nevertheless it is possible that, in some mysterious way, this aberration "could" have been "corrected" by the planned coefficients. Presumably, this would have meant that the planned coefficients would have to have been approximately one half of what they were. The European Union is at a loss to understand how China might believe that this statement is capable of demonstrating that the measure at issue is WTO consistent. Two wrongs do not make a right. There is no logical connection between the aberrational cost of production data and the rate of the planned coefficients. The observation is entirely speculative. And in any event the hypothetical "correction" imagined by China evidently did not materialise, since the SG&A for this grade was mysteriously double what it would otherwise have been. This is simply no basis on which to adopt or defend anti-dumping measures.

111. **Question 23**. China asserts that SMST did not request the investigating authority not to use the relevant Table 6-3 SG&A because, according to China's translation, SMST did not refer to "cost or constructed *value* calculations" but rather to "cost or constructed *cost* calculations". Thus, according to China, SMST requested MOFCOM (1) not to use the data in the cost calculations and, in addition, (2) not to use the data in the cost calculations. This would simply

[129] China's Response to Panel Question 22, para. 79.

render SMST's request repetitive and, in this degree, redundant and meaningless.

112. The Anti-Dumping Agreement never uses the term "constructed cost". On the contrary, whenever it uses the term "constructed" whether with respect to the normal value or the export price, it is clear that it is referring to the entire calculation,[130] and not merely to only part of it, such as the costs of production. Furthermore, the Anti-Dumping Agreement frequently uses the term "cost". In some instances it refers specifically to the costs of production.[131] However, in other instances, it refers particularly and expressly to administrative, selling and general *costs*.[132] In other instances, it refers to costs generally.[133] Thus, the term "costs" on its own is not limited to the costs of production, to the exclusion of administrative, selling and general costs, as China would apparently have it. Finally, China nowhere explains what possible logic there may have been in SMST requesting MOFCOM not to use certain cost of production data because it was unrepresentative and unreliable, but nevertheless asking MOFCOM to use *the very same data* for calculating SG&A, by applying the planned coefficients *to the very same cost of production data*.

113. **Question 24**. This issue was addressed in the EU Oral Statement and in our Responses to the Panel Questions. The Chinese version of the translation does not contain the term "this". It is added by China in the English version. The only reasonable way to understand MOFCOM's statements is that it was going to use the Table 6-5 to 6-8 SG&A.

114. At paragraph 86 China repeats the statement that we have already commented on above. The problem is that the planned coefficients were applied to the very data rejected as unrepresentative and unreliable, and there is no sense in which the coefficients can be hypothesised as capable of cancelling out the error in the underlying aberrational data.

[130] Anti-Dumping Agreement, Articles 2.3, 2.4, 5.2(ii) and 9.3.3.
[131] For example, Anti-Dumping Agreement, Articles 2.2, 2.2.1.
[132] For example, Anti-Dumping Agreement, Articles 2.2, 2.2.1, 2.2.2.
[133] For example, Anti-Dumping Agreement, Articles 2.2.1, 2.2.1.1, footnote 5, footnote 6, Article 2.4.

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

115. The European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N). In this respect, the European Union has explained that, in calculating normal value for Product C (DMV 310N), China included [[**BCI**]] EU sales of goods that were different from the goods sold for export to China. As explained in SMST's Comments on the Preliminary Dumping Disclosure,[134] normal boiler tubes (i.e., those used in a primary boiler system) have an outer diameter of well over 30mm. This is evidenced by the sales of Product C (DMV 310N) exported to China, which all had an outer diameter of [[**BCI**]]mm. Large differences in tube outer diameter markedly affect price comparability. Thin diameter tube requires more extensive rolling/drawing, resulting in higher costs of production and prices. Thin diameter tubes also cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves. Thus, in determining the dumping margin for Product C, China compared two baskets with a very different product mix, without making the necessary adjustments in order to ensure a fair comparison.[135]

116. China argues that SMST did not raise this issue in its Dumping Questionnaire Response, but on the contrary stated that domestic and exported DMV 310N was comparable, and only raised the issue, contradicting its Dumping Questionnaire Response, in its Comments on the Provisional Disclosure.[136] According to China, SMST's request was "tied-to the original low volume claim", which China appears to consider significant.[137] Also according to

[134] Exhibit EU-19 (BCI), para. 5.
[135] EU FWS, paras. 176-186; EU First Opening Oral Statement, paras. 33-42; EU Response to Panel Questions 11 and 15-17.
[136] China FWS, paras. 178-184.
[137] China FWS, para. 183, second indent.

China, SMST was obliged to provide "a modicum of an indication"[138] of an impact on price comparability, but failed to do so. China asserts that, in this respect, it does not seek to "impose an unreasonable burden of proof".[139] According to China, SMST merely requested the exclusion of these transactions, but did not request an adjustment, and it was unclear what SMST was asking MOFCOM to do.[140] China argues that SMST did not quantify the alleged impact of the differences on costs and prices.[141] China also argues that, because SMST allegedly did not provide sufficient evidence, the only assessment that could reasonably by undertaken by MOFCOM was whether or not the transactions in question related to goods within the product scope of the investigation.[142] Finally, China argues that the existing case law on the comparison between exports and domestic sales in the context of an injury determination provides no support for the EU claim in this case.[143]

117. The European Union has already dealt with all of these points in its First Opening Oral Statement and in its Response to Panel Questions 11 and 15-17. We will therefore focus, in this rebuttal, on commenting on China's responses to the Panel's Questions.

118. **Question 12**. China agrees with the EU summary of its claim and argument. China's only point is that there are two distinct issues: exclusion of transactions under Article 2.2 (for whatever reason) and fair comparison under Article 2.4. That may be the case, but even if it is true, the first issue is not relevant to the claim actually made by the EU, which relates to the second issue. The answer to the question, therefore, is that China agrees with the EU summary.

119. **Question 14**. The question clearly referred China to all of the information referenced at paragraph 178 of the EU First Written Submission and corresponding footnotes (192-197). China replies with respect to SMST-Germany Verification Exhibit 10, but declines to answer with respect to the

[138] China FWS, para. 187 (" … a modicum of an indication …").
[139] China FWS, para. 189 (" … did not impose an unreasonable burden of proof …").
[140] China FWS, para. 188.
[141] China FWS, para. 183, first indent.
[142] China FWS, para. 186.

remainder of the evidence referenced in footnote 195 of the EU First Written Submission.[144] Accordingly, the Panel can and should proceed on the basis that such information was verified by MOFCOM (which is the case). The information demonstrates the price difference, as explained in footnote 195 of the EU First Written Submission. Therefore, the Panel should reject China's assertions that SMST did not provide any evidence of the alleged price difference[145] and that the verified information only related to physical characteristics, not to price comparability.[146]

120. China plays with the terms exclusion and inclusion in an attempt to justify its response to SMST's request in terms of a determination that the transactions in question were within the product scope of the investigation. That was not, however, the point that SMST was making. Rather, SMST's point was that there were other EU sales of Product C that were physically comparable to the product sold in China and that therefore could be used in the calculation of normal value and the carrying out of a fair comparison. Thus, it was a question of making sure that the basket of transactions used to calculate normal value included only those products that were comparable to the product sold in China.

121. The European Union does not agree with China that this is "not a possibility" with respect to the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.[147] Contrary to China, we consider that the logic set out in the established case law relating to the comparison(s) made under Article 3.2 of the Anti-Dumping Agreement applies with equal force. If the product mix in each of two baskets being compared pursuant to Article 2.4 is very different, the comparison will not be fair. In such a situation, an investigating authority must take steps to ensure a fair comparison. For example, if the product mix is made up of two very different products, then the investigating authority can split the product mix into its two constituent parts and thus ensure a fair

[143] China FWS, para. 190.
[144] China's Response to Panel Question 14, para. 49.
[145] China's Response to Panel Question 14, para. 49.
[146] China's Response to Panel Question 14, para. 51.
[147] China's Response to Panel Question 14, para. 51.

comparison for each.[148] As indicated above, there were sufficient domestic transactions for MOFCOM to do that in this case. In failing to do so, MOFCOM acted inconsistently with Article 2.4, because it did not ensure a fair comparison.

122. **Question 15**. The reconciliation is explained in the EU Responses to the Panel Questions. In the short time provided for SMST to prepare its questionnaire response, its staff did the best they could to respond to each of MOFCOM's requests for information. Initially, SMST was under the impression that merchandise meeting the definition of the product concerned would be limited to tubes used in the primary boiler system and would therefore involve tubes having a large outer diameter so that relative differences in tube diameter would not have a substantial effect on product costs or prices.[149] Therefore, for its initial questionnaire response, SMST did not analyse the dimensions of each product sold but focused upon the weight and grade of the product sold.

123. Nevertheless, from the weight and unit price of the [[**BCI**]] transactions in question, it was evident that they were unrepresentative and SMST, in its very first questionnaire response, informed MOFCOM of the unrepresentative nature of these transactions and requested that MOFCOM not use them in calculating normal value.[150] China does not dispute this point.[151]

124. When, despite SMST's request, MOFCOM used these [[**BCI**]] transactions in its preliminary dumping calculation, SMST further researched the details of these transactions and discovered that they involved thin tube not used in primary boiler systems. SMST immediately informed MOFCOM of this issue in its comments on the preliminary antidumping duty calculation.[152] At verification, SMST presented the MOFCOM officials with technical

[148] Appellate Body Report, *EC – Fasteners (China)*, para. 490 ("For example, the authority may choose to make comparisons of transaction prices for a number of groups of goods within the like product that share common characteristics, thus minimizing the need for adjustments …").
[149] See SMST Comments on Final Dumping Disclosure explaining differences in normal boiler tube and tubes used in secondary systems (Exhibit EU-28) (BCI).
[150] SMST Dumping Questionnaire Response, Table 7–1 (Exhibit CHN–8) (BCI).
[151] China FWS, para. 183.
[152] SMST Comments on Preliminary Dumping Disclosure (Exhibit EU-19) (BCI).

information concerning boiler construction, as well as technical specifications and invoices for each of the transactions involved.[153]

125. As has been observed in a number of past cases, there is a dialogue between the investigating authority and the firm, and each must behave in a reasonable way. It is reasonable for a firm to clarify issues such as this as an investigation goes forward and the significance of particular data begins to emerge more clearly. It is not reasonable for China to simply dismiss the subsequent clarification on the grounds that it cannot be reconciled with the initial observation in the questionnaire response.[154] That defeats the whole point of having a dialogue in the first place.

126. China seeks to avoid the question by constantly asserting that SMST did not request an adjustment on the basis of physical characteristics affecting price comparability, but ignores the point that what SMST was seeking was simply that the investigating authority take the steps necessary to ensure a fair comparison, as outlined above. In addition, China reverts to the questionnaire response, but does not engage with SMSTs subsequent observations and comments. Contrary to what China asserts, and as explained above, SMST did provide evidence regarding the price differences; and was merely seeking that the authority take the steps necessary to ensure a fair comparison.

127. **Question 16**. The European Union considers that, when, as in this case, an exporter has presented evidence of differences in physical characteristics and prices, an investigating authority must takes steps to see that a fair comparison between the export price and the normal value is made under Article 2.4 of the Anti-Dumping Agreement. In this case, that simply required MOFCOM to make sure that the basket of transactions used to calculate normal value included only those products that were comparable to the product sold in China.

[153] EU FWS, para. 178.
[154] China's Response to Panel Question 15, para. 54.

128. Contrary to what China asserts,[155] the Appellate Body Report in *EC – Fasteners (China)* does not support a different conclusion. Rather, it supports the position of the EU in these proceedings.

129. In *EC – Fasteners (China)* the Appellate Body emphasised that "the obligation to ensure a "fair comparison" lies on the *investigating authorities*, and not on the exporters".[156] Interested parties must, in this respect, behave "as constructively as possible" when it comes to demonstrating a difference affecting price comparability. That is exactly what SMST did in this case. It demonstrated the existence of the difference between the products in question (a point not contested by China); it also demonstrated the existence of price differences (a point also not contested by China); it explained how the difference affected the price, through the additional rolling and drawing (a point also not contested by China); and it provided data demonstrating the different costs of production (a point also not contested by China). In these circumstances, it was incumbent on MOFCOM to determine an appropriate process for ensuring a fair comparison, which it failed to do. If MOFCOM would have considered that it required more information, it was incumbent on MOFCOM to indicate to SMST what further information it might have considered necessary, without, however, imposing an unreasonable burden of proof on SMST, pursuant to the final sentence of Article 2.4.[157] In these circumstances, proceeding in the manner outlined above, by splitting the product mix into its two constituent parts and thus ensuring a fair comparison for each, would not have imposed an "undue burden" on MOFCOM, as China argues.[158]

130. **Question 17**. The European Union does not agree with China's assertion that SMST did not provide the necessary information.[159] We refer in this respect to our comment on China's Response to Panel Question 14. SMST was not

[155] China's Response to Panel Question 16, paras. 58-63.
[156] Appellate Body Report, *EC – Fasteners (China)*, para. 487.
[157] Appellate Body Report, *EC – Fasteners (China)*, para. 488-489.
[158] China's Response to Panel Question 16, para. 61.
[159] China's Response to Panel Question 17, paras. 64-65.

requesting "exclusion" from the scope: it was requesting a fair comparison.[160] It is not enough for China to assert that SMST's questionnaire response and its subsequent request cannot be "reconciled".[161] There was a dialogue by which the matter was clarified and MOFCOM was under an obligation to be reasonably responsive to the point raised by SMST. It was not enough for MOFCOM to simply re-iterate that the product was within the scope of the investigation, since this was not responsive to the product mix and fair comparison point being raised by SMST. It is not correct that Article 2.4 does not allow a solution to be found, by splitting the product mix into its two constituent parts and thus ensuring a fair comparison for each.[162] This was, of course, the sense of the language used by SMST, that is, not to include one product in the comparison of the other. Finally, the cost of production data referenced by China[163] (showing the differences in costs of production between the two products) was provided by SMST and verified, and thus MOFCOM had all the information it required in order to ensure a fair comparison.

C. Use of facts available to determine the all others rate: Article 6.8 and Annex II, paragraph 1 of the Anti-Dumping Agreement

131. The European Union claims that, as a consequence of each and both of the preceding substantive dumping claims, and as a consequence of any possible substantive consequences of any and all of the above procedural claims insofar as they relate to dumping, and given that the "facts available" used by China to establish the EU all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the EU all others rate, also acting, in this respect, inconsistently with the above cited provisions of the Anti-Dumping Agreement, and inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement. Furthermore, the European Union claims that China acted inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement because it determined

[160] China's Response to Panel Question 17, paras. 65-66.
[161] China's Response to Panel Question 17, paras. 65 and 67.
[162] China's Response to Panel Question 17, para. 66.

the dumping margin for other EU and Japanese exporters based on facts available without notifying them of all the information required and of the consequences of not submitting that information.[164]

132. China responds that, even if it is true that the dumping margin for SMST was calculated in a WTO inconsistent manner, and that a re-determination would establish it to be non-existent or at least at a lower level, *no provision* of the Anti-Dumping Agreement would require China to make any consequent adjustment to the all others rate, which, of course, is currently fixed at a level corresponding to the dumping margin originally calculated for SMST.[165] Thus, according to China, it could simply continue to apply the old WTO inconsistent rate to all the other firms involved.

133. This is an extraordinary assertion that the European Union submits is evidently wrong. If the current dumping margin calculated for SMST of 11.1% would be demonstrated to be WTO inconsistent, and the re-determination would fix it at a lower amount, then evidently it would no longer be a determined "fact" that the dumping margin for SMST would be 11.1%. Consequently, "11.1%" would no longer be a "fact" "available", within the meaning of Article 6.8 of the Anti-Dumping Agreement for the purposes of calculating the all others rate. Therefore, if China would nevertheless maintain or re-assert an all others rate of 11.1% it would obviously act inconsistently with Article 6.8 of the Anti-Dumping Agreement.

134. In similar vein, China asserts that it would be under no obligation to draw any consequences that remedying procedural breaches might have for the substantive dumping determinations, including with respect to the all others rate, because these consequences are, at this stage, "unclear".[166] The same observation applies. For example, if the specific procedural irregularity relating to the calculation of SMST's dumping margin[167] would be corrected, and

[163] China's Response to Panel Question 17, para. 67.
[164] EU FWS, paras. 187-191; EU First Opening Oral Statement, paras. 43-48.
[165] China FWS, para. 605.
[166] China FWS, para. 606.
[167] EU FWS, paras. 98-109.

review of the relevant data would result in a reduction in SMST's dumping margin, then such correction would also have to be effected with respect to the all others rate.

135. It is in the nature of a procedural claim that it relates to a procedural issue, and not to the substance of a particular matter. That is, it is in the nature of a procedural claim that one does not know what the substantive consequences may eventually be of remedying the procedural defect. At the very least, what the substantive consequences may or may not be is not a matter for these panel proceedings, but rather, in the first place, for the implementing Member, subject to review in compliance proceedings. In this sense, therefore, the substantive consequences of a procedural defect are *always* "unclear" before the procedural defect has been corrected. This observation therefore provides no support for the proposition that an investigating authority is freed from its obligation to conduct a re-determination in a way that takes into account all the recommendations and rulings of the DSB, the requisite modifications of the measure at issue, and the necessary consequences thereof, so as to ensure that the modified measure is consistent with all its WTO obligations.

136. Finally, the European Union cannot agree that China has done enough to escape the Appellate Body ruling in *Mexico – Anti-Dumping Measures on Rice*, basing itself as it does on a panel report (*China – Broiler Products*) that did not benefit from appellate review, whilst ignoring another (*China – GOES*) that did benefit from appellate review.

VI. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

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

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

138. As the European Union stated in its First Written Submission[168] and in its First Opening Oral Statement[169], the European Union considers that the Appellate Body Report *China – GOES*, and in particular its paragraphs 126-128, are highly pertinent for the issues under consideration. The Appellate Body states that the different paragraphs of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination"[170]. Most of the inconsistencies addressed by the European Union in this case can be described as a breach of this required "logical progression of inquiry". In order not to burden the Panel with repetitions, the European Union refers back to its First Written Submission[171] and its First Opening Oral Statement[172].

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

139. The European Union claims that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because: (i) China's analysis of the price effects of imported Product C is analytically and factually flawed; and (ii) China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole.

140. In the view of the European Union, the parties possibly do not agree on some key interpretative questions as regards "price undercutting" according to Article 3.2 of the Anti-Dumping Agreement.

[168] EU FWS, paras. 195-218.
[169] EU First Opening Oral Statement, paras. 50-52.
[170] Appellate Body, *China – GOES*, para. 128.
[171] EU FWS, paras. 195-218.
[172] EU First Opening Oral Statement, paras. 50-52.

141. However, in the view of the European Union, two aspects need to be clearly distinguished and addressed separately.[173]

142. (1) The **first aspect** is whether the definition of price undercutting involves not just a price differential but also an element of price effect. The EU considers that price undercutting, by definition, involves not just a price differential but also an element of price effect. This first aspect relates to the definition of the term "price undercutting".

143. (2) Only once this first aspect has been addressed does it make sense to address the **second aspect**: *How* is an investigating authority required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports? This second aspect relates to the obligations of the investigating authority; this second aspect is not necessarily identical with the first aspect.

144. Ad (1): Turning first to the question whether price undercutting involves an element of price effect, it is not quite clear to the European Union whether there is disagreement with China on this issue.

145. In response to Panel Question 31(c), China argues that "price differential/undercutting is the *effect* on prices that an authority is required to consider under Article 3.2 of the Anti-Dumping Agreement".[174]. This seems to indicate that the parties may be in agreement that the definition of "price undercutting" involves an element of "effect", so that the disagreement may be limited to the second aspect of the inquiry, i.e. *how* an investigating authority is required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports.

146. However, in other replies, China seems to argue that the definition of "price undercutting" does not involve a "price effect": It seems that in reply to Question 47, China argues that "price undercutting" means to "sell at lower

[173] EU Response to Panel question No. 31, para. 104 - 116.

prices", not necessarily requiring a price effect. For the European Union, this seems to contradict at least at first glance China's earlier statement, in response to Panel Question 31(c), that price undercutting involves, by definition, an *effect* on prices (and hence is absent if there is no effect on prices).

147. As described, the European Union considers it paramount to distinguish analytically between these two different questions: (1) Whether the definition of "price undercutting" involves an element of effect on prices – this is a question about definitions; (2) *How* an investigating authority is required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports – this is a question about the obligations of an investigating authority.

148. To blur these two different aspects and to mix them up would make the interpretative exercise unnecessarily cumbersome and confusing.

149. China's position seems clear-cut on the second aspect:

150. In response to Panel Question 31(a), China states that "an investigating authority is *not required to establish* that a price differential is an effect of dumped imports"[175].

151. But the European Union has more difficulty in clearly identifying the position China adopts with regard to aspect (1), i.e. whether the definition of "price undercutting" involves an element of effect on prices.

152. As regards this first aspect, the European Union is of the view that the definition of price undercutting is such that a price effect needs to be present. The existence of a price effect is a necessary condition for price undercutting to be present.

153. In the view of the European Union, and as described in its reply to Question 31, this is so for a number of reasons. These reasons relate, among others, to the

[174] China's Response to Panel Question 31, para. 97 (emphasis added).
[175] China's Response to Panel Question 31, para. 92 (emphasis added).

wording ("to supplant […] by selling at lower prices"), to the context (references to *effect* in Articles 3.1 and 3.2 of the Anti-Dumping Agreement) and to the purpose of Article 3.2 of the Anti-Dumping Agreement.[176]

154. The second aspect which in the view of the European Union needs to be discussed is *how* an investigating authority is required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports.

155. There are cases where the investigating authority has strong reasons to doubt the presence of a price effect, in spite of the existence of a price differential.

156. Certainly in such cases, an investigating authority cannot limit itself to stating the existence of a price differential, but is required to establish through its price undercutting inquiry that the price effect on domestic like products indeed is the result or consequence of, or may be explained by, dumped imports.

157. It seems to be the view of China that an investigating authority is never obligated to investigate questions of effect if only a price differential can be established.[177]

158. If, however, China and the European Union agree that a definition of "price undercutting" encompasses a notion of "price differential" + "price effect", then it seems logical that there may be specific circumstances where a "price differential" may be present but a "price effect" may be lacking. Under such circumstances, it would then seem reasonable to ask the investigating authority to inquire into the presence of any price effect.

159. If, on the other side, China were to argue that the notion of "price undercutting" does not involve an element of "price effect", then the European Union refers back to the intensive discussions all parties had on this issue in their First Written Submissions and during the first substantive meeting of the Panel with

[176] EU Response to Panel question No. 31, para. 104 - 111.
[177] Cf. China's Response to Panel Question 31(b), para. 94-96.

parties,[178] and indeed to China's own response to Panel Question 31(c) where China seems to acknowledge that an "effect on prices" is part of the definition of "price undercutting".

160. In light of China's response to Panel Question 31(c) it would seem possible to reach a consensus that all parties agree that an "effect on prices" is part of the *definition* of price undercutting. This would then resolve the discussions to the extent that they turned around aspect (1).

161. It would leave the parties to argue about aspect (2), that is: *How* is an investigating authority required to establish through its price undercutting inquiry that the price effect on domestic like products is the result or consequence of, or may be explained by, dumped imports?

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

162. In the view of the European Union and as described in its First Written Submission[179], China's analysis of the price effect of imported Product C is erroneous, and falls short of an objective examination, based on positive evidence.

163. In the view of the European Union, the inverse price movements and the vast difference in import and domestic price levels suggest that imports of Product C were not in competition with domestically produced Product C in the Chinese market. The Chinese record indeed shows that domestic importers unanimously considered subject imports and domestic like products not to be substitutable. Lacking a proper analysis of whether these products were in fact in competition with one another, it was erroneous for China to conclude that imports of Product C had any price undercutting effect on the corresponding like domestic products.

[178] The position of the European Union can be found in: EU FWS paras. 192-218; EU First Opening Oral Statement, paras. 50-84; EU Responses to Panel questions No. 31, 32, 57, 58, 59, 60, 61, 62.
[179] EU FWS paras. 227-234.

164. China argues that the European Union "did not challenge" "MOFCOM's findings about the like product" "and, from a legal point of view, this finding is thus incontestable".[180]

165. The European Union is bringing a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and as part of this the European Union is challenging MOFCOM's determination that imports of Product C were in competition with domestically produced Product C in the Chinese market. To the extent that a competitive relationship is a prerequisite for a finding under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement is the right place to challenge such a determination. Clearly, the European Union is not precluded from bringing a claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement in order to challenge a determination of an alleged competitive relationship that is relevant for these very Articles of the Anti-Dumping Agreement.

166. In its Responses to the Panel's Questions, China argues that it "analysed the competitive relationship between domestic and imported products in detail".[181]

167. However, the alleged analysis which China refers to was done as part of the "like product" test, and there was no analysis as part of the price undercutting test.

168. In the view of the European Union, relevant guidance can be found in the Panel Report in *China – X-Ray Equipment* where the Panel concluded:

> Consequently, in the Panel's view, MOFCOM's conclusion *in the context of considering the scope of the investigation*, namely that the domestic product was "like" the product under consideration, does not mean that MOFCOM fulfilled its obligation to ensure price comparability *when conducting its price effects analysis under Article 3.2 of the Anti-Dumping Agreement*.[182]

169. As regards the analysis undertaken as part of the like product determination, it does not amount to an objective examination based on positive evidence either.

[180] China's Response to Panel Question 35(b), para. 114.
[181] China's Response to Panel Question 35(b), para. 119.
[182] Panel Report, *China – X-Ray Equipment*, para. 7.66.

As mentioned in the EU First Written Submission[183], one importer observed e.g. that "[d]omestically produced [Product C] has never been used in domestic power plants and its quality is yet to be tested through actual application".[184] Such evidence contradicting MOFCOM's assumption was seemingly never examined or assessed by MOFCOM.

170. Even assuming that in 2010, imported Product C and domestic Product C were in adjacent or very slightly overlapping markets (*quod non*), the evidence on the record would still not have allowed for a finding of price undercutting in the sense of Articles 3.1 and 3.2 of the Anti-Dumping Agreement: Between 2009 and 2010, the domestic market share increased, and the domestic prices increased significantly. These are strong indications that imported Product C did not drive down domestic Product C prices in 2010, and neither did it cause any tangible decrease or prevention of increase in domestic Product C prices in 2010. The result of the analysis would have been that Product C could not have plausibly had effects on domestic Product C prices.

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

171. In its First Written Submission, the European Union argued that China improperly extended its price undercutting findings with respect to Products B and C to the whole domestic industry to conclude that imports of HP-SSST products hat a price undercutting effect on like domestic products.[185]

172. In its Responses to the Panel's question, China claims that it established correlation among the prices of the three grades of HP-SSST on the basis of positive evidence.[186] According to China, this analysis consisted essentially in

[183] EU FWS para. 234.
[184] Harbin Boiler Questionnaire Response, Exhibit EU-9, question 19. See also: Minmetals Questionnaire Response, Exhibit EU-5, question 31.
[185] EU FWS paras. 235-249.
[186] China's Response to Panel Questions 44, 45, 46, 50.

the following consideration: "As a matter of logic, high-end grades (Grade B and Grade C) can substitute the low-end grade (Grade A)."[187]

173. However, China's price effects analysis does not contain any examination of cross-grade price effects. The conclusions regarding price correlation which China refers to were made in respect to the scope of the investigation, and were not even referred to in the price effects analysis.

174. There were significant price differences between imported Products B and C and domestic Product A. Even if these products were in competition with each other, it seems plausible that these price differentials could have prevented any price effects on domestic Product A. China never examined such price differentials and their impact on potential price effects. At the most, China thus speculated as regards a cross-grade price effect on domestic Product A. This does not constitute an objective examination and positive evidence.

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

175. As regards Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the European Union refers back to its First Written Submission[188] and to its First Opening Oral Statement[189]. In the view of the European Union, China's impact analysis was improperly based on its flawed price effects analysis. China failed to examine the magnitude of the margins of dumping, properly calculated. China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured.

[187] China's Response to Panel Question 45, para. 153.
[188] EU FWS, paras. 250-276.
[189] EU First Opening Oral Statement, paras. 107-116.

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

176. As regards Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the European Union refers back to its First Written Submission[190] and to its First Opening Oral Statement[191]. In the view of the European Union, China's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of HP-SSST imports. China failed to separate and distinguish the injurious effects of other known factors from the alleged effects of HP-SSST imports.

VII. OTHER CLAIMS

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

177. The European Union claims that China acted inconsistently with Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for a period exceeding four months.[192]

178. China acknowledges the claim,[193] but does not respond.

179. In these circumstances, the European Union respectfully requests the Panel to find in favour of the European Union on this issue.[194]

180. China's silence presumably reflects China's view that this is a matter of no consequence, because China will not be required to adopt any compliance measure on this point. This is a matter of serious concern. On the basis of such reasoning, there will never be any remedy for a breach of Article 7.4 of the Anti-Dumping Agreement. That provision would be reduced to redundancy and

[190] EU FWS, paras. 277-325.
[191] EU First Opening Oral Statement, paras. 117-130.
[192] EU FWS, paras. 326-328.
[193] China FWS, footnote 4.
[194] See: Working Procedures for Appellate Review, Rule 29 (Failure to Appear) ("Where a participant fails to file a submission within the required time-periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate.").

ineffectiveness, notwithstanding its use of the mandatory language "shall". This is not what the drafters of the treaty intended and would not be an acceptable interpretation. In the submission of the European Union, these are precisely the type of circumstances in which a suggestion pursuant to Article 19.1 would be warranted and even required. The only suggestion that would give meaning and effectiveness to the provisions of Article 7.4 in this respect is a suggestion that, in the re-determination, China should refund the duties collected with respect to the excess period, prior to the imposition of definitive duties.[195] The European Union respectfully requests that the Panel make such a suggestion.

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

181. The European Union claims that, as a consequence of the breaches of the Anti-Dumping Agreement described above, China's anti-dumping measures on HP-SSST from the European Union are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.[196]

182. China does not respond.

183. In these circumstances, the European Union respectfully requests the Panel to find in favour of the European Union on this issue.[197]

VIII. CONCLUSION

184. For the reasons set forth in the European Union's First Written Submission and in this submission, the European Union respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the referenced provisions of the GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article

[195] EU FWS, paras. 337-338 and footnote 383.
[196] EU FWS, paras. 329-330.
[197] See: Working Procedures for Appellate Review, Rule 29 (Failure to Appear) ("Where a participant fails to file a submission within the required time-periods or fails to appear at the oral hearing, the division shall,

19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate.").