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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 Oral Statement
European Union

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I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel.

2. In this Second Oral Statement, for those issues where we believe there is something more to say, we will briefly recall the current state of the exchange of views between the Parties, and then respond to China's most recent submissions, notably as set out in China's Second Written Submission.

II. THRESHOLD ISSUE: REQUESTS THAT THE PANEL AMEND TWO ASPECTS OF THE BCI 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

3. The European Union has submitted that the BCI Procedures are WTO inconsistent insofar as they provide for the automatic classification as BCI of information that was submitted as confidential in the municipal anti-dumping proceeding.[1] In its First Written Submission, China disagreed, relying, in particular on the terms of Article 6.5 of the Anti-Dumping Agreement.[2] We addressed all of China's points in our First Opening Oral Statement, explaining, in particular, that Article 6.5 does not govern the question.[3] In its Responses to the Panel Questions,[4] China sought to rely instead on Article 17.7 of the Anti-Dumping Agreement,[5] invoking Article 6.5 as context. In response, in our Second Written Submission, we again set out an harmonious interpretation of all the relevant *applicable* provisions, and summarised the correct systemic

[1] 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; EU SWS, paras. 6-24.
[2] China FWS, paras. 769-776.
[3] EU First Opening Oral Statement, paras. 3-13.
[4] China's Response to Panel Questions 1-4, paras. 1-32.
[5] China's Response to Panel Question 4, para. 26.

interpretation.[6] Throughout our submissions we have drawn particular attention to the reasoning of the Appellate Body in the Airbus appeal, and we have pointed out, and continue to point out, that China does not engage with this jurisprudence.[7]

4. In its Second Written Submission, China maintains its view that the BCI procedures are WTO consistent, and that the EU concern would be addressed if designation in the WTO proceedings would be dependent on designation by the investigating authority. China appears to argue that investigating authorities have no authority to designate information as non-confidential, only the authority to *disregard* information if no good cause is shown and no non-confidential summary provided. China appears to be arguing that, with this in mind, when the BCI procedures refer to designation by the firm, they are in fact referring to designation by the investigating authority.[8]

5. We do not agree with China's most recent submissions on this point. In the first place, we do not agree with China that, if the firm is unwilling to designate the information as non-confidential or provide a non-confidential summary, the only option for the investigating authority is to disregard such information. This would place in the hands of interested firms far too much power over what investigating authorities could or could not rely on. Article 6.5.2[9] does not *require* the authority to disregard such information; it merely provides for that *discretion*. Furthermore, Article 6.5.2 expressly provides that it can be demonstrated to the satisfaction of the investigating authority, from appropriate sources, that the information is correct, and is therefore to be relied upon in any event. Moreover, and more importantly, as we have already explained, for the European Union, it makes no difference whether the ultimate authority would be delegated by a panel to a firm or to an investigating authority. Our point is

[6] EU SWS, paras. 6-24.
[7] EU FWS, paras. 46-76.
[8] China SWS, paras.304-305.
[9] " If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in

that this responsibility rests with the panel and cannot be absolutely delegated to any other person or entity.

6. China next submits that it is up to the WTO Member to designate (in fact, this is a point that the EU has been consistently making); that there is no requirement to show good cause; that Members can rely on the good faith of other Members; and that it would not be "appropriate" for the panel to decide in case of disagreement.[10]

7. Once again, we disagree with China's most recent submissions on these points, and again respectfully direct the Panel to the jurisprudence set out extensively in our submissions. The DSU does provide for designation by Members (not firms or investigating authorities) and thus far we agree with China. However, the concept of confidentiality is an objective one, not a subjective one entirely in the hands of the submitting Member. It is in this sense that, if challenged, a submitting and designating Member will have to justify the proposed designation, that is, show good cause. In case of disagreement, the adjudicator will have to decide. This is not only something that is appropriate, it is also required, and cannot be delegated. We may naturally assume that Members act in good faith, as we assume that they adopt all their measures in good faith. In neither case do we agree that this is a sufficient basis for ensuring compliance with the covered agreements. This is precisely why we have independent third party adjudication.

8. Next, China notes that "the European Union agrees with China" that the question is governed by Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement, rather than Article 6.5 of the Anti-Dumping Agreement – although it was of course China that first invoked Article 6.5 and has now changed its position to agree with the European Union that the matter is rather governed by Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement. "Therefore", China continues, it does not understand where the

generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct."

obligation on the adjudicator originates.[11] This is a *non sequitur*. It is not because the European Union has identified the governing provisions that the basis for the obligation on the Panel has been obscured. We have already explained that the Panel has an obligation to make an objective assessment of the matters before it, pursuant to Article 11 of the DSU, and this includes any disagreements regarding designation. In addition, the Panel has the inherent power and obligation to deal with such matters as they arise during the course of the proceedings.

9. Next, China argues that the complainants' claims regarding over-designation are irrelevant to the question of whether or not the BCI procedures are WTO consistent.[12] In one sense, the European Union welcomes these statements from China. In this respect, the European Union recalls that not only is it complaining about over-designation, but it is also trying to get at the information that China has so far withheld. What China is saying here is that confidentiality designation in the municipal proceedings is a different issue from BCI designation in the WTO proceedings, because in the latter case the circle of informed persons is narrower, and clearly excludes the interested firms themselves. This means that China accepts that confidential designation in the municipal proceedings is *no excuse* for China not adducing the information in the present proceedings, and that is something that the European Union welcomes. The only problem is, China hasn't adduced any of the relevant information to the Panel.

10. That being said, the European Union remains of the view that, if something would be designated by the Panel as BCI for the purposes of the present proceedings then it would be difficult for the Panel to reach the conclusion that it was not confidential for the purposes of the municipal proceedings. Thus, if the former determination is made dependent on the latter, as in the BCI

[10] China SWS, paras. 306-307.
[11] China SWS, para. 308.
[12] China SWS, para. 309.

procedures, then a circularity is created, making it effectively impossible for the co-complainants to succeed with their claims of over-designation.

11. Finally, having carefully reviewed China's most recent submissions, also in light of its prior submissions, and considering China's submissions as a whole, the European Union formally, expressly and specifically objects to the BCI designations contained in the following: China FWS, paragraph 670, first indent, second bullet point; China FWS, paragraph 672, first indent, first bullet point; and China SWS, para. 12 (as we further explain below, this material must not be designated BCI but must be completed expunged from the Panel record).

12. For all of these reasons, the European Union respectfully reiterates its request that the Panel modify the BCI Procedures, as requested by the European Union.

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

13. For similar reasons, the European Union has also submitted that the BCI Procedures are WTO inconsistent insofar as they provide that a party must provide prior written authorisation from the entity that submitted such information in the anti-dumping proceedings.[13] China initially disagreed with the European Union for reasons similar to those given with respect to the preceding point.[14] We dealt with these arguments in our First Opening Oral Statement.[15] Also as in the case of the preceding point, China then switched its focus to Article 17.7 of the Anti-Dumping Agreement,[16] and we have also rebutted these arguments.[17]

[13] 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; EU SWS, paras. 25-28.
[14] China FWS, paras. 769-776.
[15] EU First Opening Oral Statement, paras. 14-24.
[16] China's Response to Panel Questions 1-4, paras. 1-32.
[17] EU SWS, paras. 25-28.

14. In its Second Written Submission China argues that such a letter is "necessary" to "allow" an investigating authority to comply with its obligations under Article 6.5 of the Anti-Dumping Agreement.[18] We disagree. Seeking to include such a rule in the BCI procedures does not "allow" anything. Rather, it seeks to ***impose*** an obligation on the European Union. Whatever obligations may or may not bear on an investigating authority pursuant to Article 6.5 – and we take note of the fact that there may be a disagreement about what they might be – it is not the purpose of these proceedings to hand down a ruling on the interpretation of Article 6.5 ***and its application by the European Union***. No such matter is within the Panel's terms of reference. Rather, it is the purpose of these proceedings to examine *the measure at issue* for consistency with the provisions of the covered agreements referenced in the Panel Request.

15. We could imagine a situation in which a dispute of such a type might come before a panel. We could imagine, for example that a Member's investigating authority might systematically disclose to a Member's court (as referenced in Article 13 of the Anti-Dumping Agreement) information designated as confidential pursuant to Article 6.5, without written authorisation from the interested parties, particularly those of another Member. There might be a dispute about that, which could turn on the meaning of various provisions of Article 6.5. The EU view would be that the firm cannot frustrate the adjudication by withholding information or authorisation, provided that adequate protection is in place, pursuant to footnote 17. At this stage the information cannot be withdrawn, because the measure is based on it. We take this view because we think that, properly understood contextually, "disclosure" in Article 6.5 refers to other interested parties and the public, not an adjudicator, when appropriate protections are in place. However, our key point is that such a dispute is not before you and you do not have the authority to rule on matters that are not within your terms of reference.

[18] China SWS, para. 310.

16. In exactly the same way, you do not have the authority in these proceedings to rule on the way in which the ***European Union*** interprets and ***applies*** Article 6.5 of the Anti-Dumping Agreement. WTO law does not have direct effect in the European Union, and nothing in the covered agreements requires that. It is a mistake to seize upon the occasion of these panel proceedings in order to attempt to impose upon the European Union a particular interpretation of Article 6.5 with respect to its ***application*** by the ***European Union***. Our measures are not before you. What governs the relevant matter arising in these proceedings is Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement.

17. The correctness of the EU position in fact emerges very clearly from a careful consideration of the US responses to Panel Questions 1 and 2, with which China aligns itself.[19] The United States specifically acknowledges that Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement – which everyone now agrees are the governing provisions – do not preclude the Member from disclosing the material to a panel, parties and third parties, but merely speak to further onward disclosure. It is in this sense that the United States describes these provisions as providing "additional protection".[20] It is also in this sense that the United States twice refers to disclosure "beyond the panel process".[21] The most that the United States can say is that Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement do not "displace or diminish" the obligations in Article 6.5 of the Anti-Dumping Agreement. This is very telling. The European Union is not arguing that Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement "displace or diminish" the obligations in Article 6.5. We are arguing that Article 6.5 does not apply to and does not govern the issue before you – a point to which China and now the United States have actually agreed.

[19] China SWS, para. 312, referring to the US Response to Panel Questions 1 and 2, paras. 1-10.
[20] US Response to Panel Question 2, para. 8, line 2.
[21] US Response to Panel Question 2, para. 8, footnote 2.

18. Turning to the US response to Question 1 from the Panel we may also detect the same flawed line of reasoning. Thus, at paragraph 4 the United States argues that "if the protections of Article 6.5 … were treated as non-applicable in the context of a WTO dispute settlement proceeding, parties would be deterred from disclosing confidential information to investigating authorities …". Thus, once again, the European Union is not arguing that the obligations of Article 6.5 are not applicable to it and its investigating authorities. Naturally, we fully accept that they are, although it seems that we disagree with both the United States and China about how to interpret and apply those obligations. Our point is that they do not apply to the issue of confidentiality and authorisation that we have raised in these proceedings – a point to which everyone has in fact by now agreed. *That* issue is governed by Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement. The purpose of the working procedures and BCI procedures is to regulate the conduct of *these proceedings*; not to serve as a proxy for directly enforcing a particular view about how Article 6.5 should be interpreted and applied *by other Members*.

19. The United States continues with the observation that some Members may have domestic legal provisions that impose penalties, including criminal penalties, on government officials that disclose such information without authorization.[22] Even if a Member might have such rules with respect to the WTO, that is simply a policy choice. If requested information is not disclosed, inferences may be drawn. It is not for such Members to attempt to marshal Article 6.5 in an attempt to justify such a policy choice, still less to seek to impose it on other Members through inappropriate provisions in working procedures that clash with other provisions of the DSU.

20. The point becomes even clearer as the United States argues that the sentence at issue in the BCI procedures "supports and promotes … Article 6.5".[23] What is true is that the sentence at issue "supports and promotes" the way in which the United States interprets and applies Article 6.5. However, what is equally clear

[22] US Response to Panel Question 1, para. 4.

is that the sentence at issue does not support and promote the way in which the European Union understands Article 6.5, but directly conflicts with it. Nevertheless, we are content for the Panel to leave open the question of who is right about the interpretation and application of Article 6.5. Our key point is that the Panel has no business trying to impose a particular view on the European Union in the working procedures or BCI procedures, because it is not the purpose of these proceedings to somehow seek to directly enforce a particular view regarding the interpretation and application of Article 6.5 to matters that are not within the Panel's terms of reference.

21. In short, despite the US protestations to the contrary, it is precisely the United States (and China) that are seeking to conflate these different obligations. They are trying to use these proceedings to enforce their view of Article 6.5. But what must govern the particular issue raised in *these proceedings* is Article 18.2 of the DSU and Article 17.7 of the Anti-Dumping Agreement.

22. Finally, China suggests that Japan agrees with China.[24] However, a careful review of Japan's complete statement (as opposed to the selective quotation provided by China) reveals that Japan is agreeing with the European Union. Both the European Union and Japan recognise the obligations in Article 6.5. But at the same time both recognise that they do not govern the matter before you; and that it is not appropriate that the sentence at issue be included in the BCI procedures.

23. As we have already explained in our prior submissions, the European Union would have liked to present and develop other arguments, also implicating data relating to other firms, and would still like to do so, but has to-date been constrained and prevented from doing so by the existence of this rule.

24. For all of these reasons, the European Union respectfully reiterates its request that the Panel modify the BCI Procedures, as requested by the European Union.

[23] US Response to Panel Question 1, para. 7.
[24] China SWS, para. 311.

III. 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

25. As set out in our First Written Submission,[25] the European Union, like Japan, claims that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, with respect to certain specific documents.[26] [27]

26. 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,[28] 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.[29] 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. Evidently, as China itself acknowledges,[30] the European Union and Japan are developing the same claim with respect to these reports.[31]

[25] EU FWS, paras. 77-97.
[26] Appendices V and VIII to the Application; Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission; and the Appendix to the Applicants' Additional Submission.
[27] EU FWS, paras. 86-88 and 77.
[28] China FWS, paras. 702-704.
[29] China FWS, paras. 705-706.
[30] China FWS, para. 698.
[31] EU FWS, paras. 86-97; Japan FWS, paras. 272-280.

27. Having recalled the requests made by the petitioners,[32] 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".[33] According to China, MOFCOM declined to disclose not only the name of the third party but also the full report.[34] 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.[35] China then submits that the information was by nature confidential and that there were, in fact "several other reasons" each justifying the confidential treatment.[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.[37]

28. As set out in our First Written Submission, in our Response to the Panel Questions and in our Second Written Submission, 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 be judged on its own terms, and in this respect what matters is the assessment actually contained in the measure at issue.

29. 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,

[32] China FWS, paras. 709-713.
[33] China FWS, para. 714.
[34] China FWS, paras. 715-716 and paras. 734-737.
[35] China FWS, paras. 717-725 and paras. 734-737.
[36] China FWS, paras. 726-733.
[37] China's Response to Panel Question 67, paras. 173-183.

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".[38]

30. 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.

31. 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

32. As set out in our First Written Submission,[39] with respect to Article 6.5.1 of the Anti-Dumping Agreement, the European Union, like Japan, claims that China acted inconsistently with this provision because it did not require sufficient non-confidential summaries or explanations as to why such summaries were not possible, with respect to the documents specified therein.[40]

33. In response, China first provides its own summary of the relevant documents.[41] 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.[42] 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

[38] Panel Report, *China – X-Ray Equipment*, para. 7.341.
[39] EU FWS, paras. 89-97.
[40] Panel Report, *China – X-Ray Equipment*, paras. 7.352-7.353, 7.355, 7.360.
[41] China FWS, paras. 741-747.
[42] China FWS, paras. 748-756.

was "proprietary" and based on "market data".[43] China then submits that two of the reports are themselves already summaries.[44] According to China, they contain no information regarding methodologies and no underlying evidence: China describes them as being based on "non-existent information".[45] According to China, the European Union and Japan have provided no further evidence to demonstrate that this is insufficient.[46] 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".[47] Finally, with respect to the other documents, China submits that MOFCOM provided a statement of reasons as to why further summarisation is not possible.[48]

34. 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.

[43] China FWS, para. 758.
[44] China FWS, para. 759.
[45] China FWS, para. 759.
[46] China FWS, para. 759.
[47] China FWS, paras. 757-763.
[48] China FWS, paras. 764-767.

35. 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.

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

36. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account certain information corrected to eliminate double counting.[49] China responded to this *procedural* claim by focussing on the substance.[50] The substance of the matter has now been clarified in the Parties' Responses to the Panel Questions and in China's Second Written Submission:[51] there is double-counting in Tables 6-6 to 6-8 but not in Table 6-5.[52]

37. Focussing on the *procedural* claim that we have actually made, as we have explained in our submissions, we do not argue that an investigating authority

[49] 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 10.20% 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).
[50] China FWS, paras. 192-232.
[51] China's SWS, para. 91.
[52] China's Response to Panel Questions 26-27; EU Response to Panel Questions 26-30.

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.

38. We believe that China's submissions in these very proceedings demonstrate that to be the case, because it is simply a matter of reconciling Tables 6-6 to 6-8 with Table 6-5, by ensuring that, in compiling Table 6-5, no double counting takes place. 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 (which has already happened) 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.

39. China's final and most recent assertion is that, even if there is an infringement of China's procedural obligations, it has rebutted the presumption of adverse impact in Article 3.8 of the DSU.[53] Members have occasionally tried to rebut that presumption: none has ever succeeded.[54] In effect, what China is trying to do is to shield one inconsistency (the procedural breach that the European Union has demonstrated and that China has, in effect, conceded) behind another (China's substantive breach of Article 2.2.2 of the Anti-Dumping

[53] China's SWS, para. 90.
[54] Appellate Body Report, *EC – Bananas III*, paras. 249-254; Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 7.17-37 and 8.5-12; Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 357-360 and 456-477; Panel Report, *Turkey – Textiles*, paras. 9.193-206; Panel Report, *Guatemala – Cement II*, paras. 8.105-112; Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 293-300; Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 357-360 and 456-477.

Agreement). Evidently, we do not agree with China that such reasoning is sufficient to rebut the presumption in Article 3.8 of the DSU.

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

40. As set out in our First Written Submission,[55] the European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping determinations. China's position is "re-iterated"[56] and summarised in China's Second Written Submission with respect to the two central points of its arguments.

41. First, China states that: "It is difficult for China to rebut the arguments of Japan and the European Union, since they fail to mention the formulas that MOFCOM allegedly failed to disclose." This statement nicely illustrates the difficulty. The heart of the problem is that it is impossible for the European Union and Japan to set out the detail of matters that MOFCOM has not disclosed in the first place. All we can do is point to the inadequate disclosure, which is precisely what we have done. China complains that we have not adduced further evidence of non-disclosure. But how can we adduce further evidence of something that did not happen, other than by adducing the disclosure document and pointed to the fact that it is inadequate?

42. Second, the heart of the disagreement between the Parties is now crystal clear. China considers that Article 6.9 only covers the factual basis for inference, not

[55] EU FWS, paras. 110-125.
[56] China SWS, para. 267.

the inferences themselves.[57] We disagree for the reasons we have given in our submissions.[58] A couple of simple examples may serve to illustrate the point.

43. Consider, for example, the people in this room. We know they are here. We have direct evidence of that fact. We can use our eyes to see them and our ears to listen to them. We also know from the delegation lists that some of them are based in capital. Thus, we also have direct evidence of that fact. We have no direct evidence of how they got from capital to this room. However, we may reasonably infer that those coming from far away came by plane. That they came by plane is a fact. That we must infer it does not make it any less of a fact.

44. Consider also, for example, Article 11 of the DSU. It requires panel's to make an objective assessment of the facts, and Article 12.7 of the DSU requires a panel report to set out the findings of fact. Evidently, all panels are going to engage in factual inference at some level. It is unavoidable. Now imagine a panel report that would contain only verbatim text of evidence and argument submitted by the parties, together with the panel's final findings and conclusions, but that would completely omit all record of the factual inferences made and relied on by the panel. Evidently, such a report would be inconsistent with Articles 11 and 12.7 of the DSU. Clearly, what the panel must do is to include such factual inferences in its report and thus disclose them to the parties and the Membership.

45. To put the matter in more concrete terms. Assume that an investigating authority has made the following calculation: 6 + (18 – 12) = 12. It has disclosed the following: 6 + x = 12. The interested party can infer the fact that x is equal to 6. However, in order to understand what has been done, it also needs to know that x has been calculated by deducting 12 from 18, because both 12 and 18 are facts, the accuracy of which the interested party may wish to check. The investigating authority is not entitled to refuse to disclose x on

[57] China SWS, para. 276.
[58] EU SWS, paras. 54-57 and EU Response to Panel Question 71.

the grounds that it is an inference and therefore not a fact. Similarly, it is not entitled to refuse to disclose 12 and 18 on the grounds that they are part of a calculation that involves inference and therefore non-factual information. All of these numbers are facts relied upon, and they must all be disclosed.

46. Our conclusion is that China is simply wrong to assert that something loses its quality as a fact simply because it is inferred.

47. Finally, we recall that China has referred to the issue of SMST normal value for Product B, and particularly how the SG&A has been calculated, as illustrative.[59] We dealt with this in our Second Written Submission.[60] China has now, finally, at this very late stage of the proceedings, provided the detail of what it asserts was the calculation.[61] We think this speaks for itself, and demonstrates our claims. This is what China should have done before, because it was necessary, in the sense that it makes the greatest contribution to the shared objectives of disclosure, at no additional cost to China. However, we think it evident that China cannot cure its breach with such untimely submissions, outside the specific procedural context of the relevant municipal anti-dumping proceeding.

2. With respect to the injury determination

48. 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.[62] 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

[59] China FWS, para. 674-676.
[60] EU SWS, paras. 58-62.
[61] China SWS, para. 50.
[62] EU FWS, paras. 126-141; EU Responses to Panel Questions 71-72 and 73-74; EU SWS, paras. 63-72.

comply; and certain other data referenced by the European Union and Japan was not "essential".[63]

49. 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.

50. 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.[64] 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.[65] This method would therefore have permitted China to provide a range.

51. Similarly, China's argument to the effect that each producer would have known the average domestic price of the other[66] is not convincing, because it would not be possible for one producer to extract the average *weighted* domestic price of the other producer from the data.

52. 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

[63] China FWS, paras. 683-687; China's Responses to Panel Questions 71-72 and 75-77; China SWS, paras. 281-285.
[64] China's Response to Panel Question 72, para. 188.
[65] 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").
[66] China's Response to Panel Question 77, paras. 196-197.

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.

53. 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.[67]

54. Finally, the European Union does not agree with China that the question of whether or not there were other ways of providing the data whilst respecting confidentiality is irrelevant.[68] As we have indicated in our submissions, 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.

55. 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

56. 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

[67] EU Response to Panel Question 74.
[68] China's Response to Panel Question 75, para. 190.

Determination, particularly with respect to the all others rate and the use of facts available.[69]

57. 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. 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. 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.

58. 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

59. 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.[70] 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

[69] EU FWS, paras. 142-151; EU SWS, paras. 73-78.

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.

60. 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.[71] 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.[72]

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

62. 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

[70] EU FWS, paras. 152-159; EU SWS, paras. 79-87.
[71] China FWS, paras. 688-692.

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".[73]

63. 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'".[74] 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.[75]

64. 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 behind these conclusions.[76] 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.

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[72] China FWS, paras. 693-694; China SWS, paras. 286-287.
[73] Appellate Body Report, *China – GOES*, para. 263 (original emphasis).
[74] 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 …".).
[75] Final Determination, Exhibit EU-30, p. 54.
[76] Appellate Body Report, *China – GOES*, para. 265.

65. 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.[77] 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".[78] 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.

66. 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,[79] 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 or price ranges that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties. 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[]

[77] Final Determination, Exhibit EU-30, pp. 53-54.
[78] Final Determination, Exhibit EU-30, pp. 53-54.
[79] 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).

> 12.2.2 …, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of that information.[80]

67. 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.

IV. 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

68. To recall, 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).

69. In its latest submission concerning this claim China makes the following assertions:

- the position with respect to the sample transactions is irrelevant;[81]
- whether or not the coefficients used are actual data pertaining to production and sales in the ordinary course of trade is irrelevant;[82]
- what was or was not verified is irrelevant;[83]
- whether or not SMST requested MOFCOM to disregard Table 6-3 is irrelevant;[84]

[80] Appellate Body Report, *China – GOES*, para. 259.
[81] China SWS, section 1.3: "The European Union's arguments are irrelevant."
[82] China SWS, para. 34: "Whether or not the coefficients used are … actual data is irrelevant."
[83] China SWS, para. 52: "What was or was not verified … is irrelevant."
[84] China SWS, sections 1.3.1 and 1.3: " … SMST's statements during the investigation … are irrelevant."

- whatever SMST understood during the municipal proceedings is irrelevant;[85]
- that China only now provides, in its Second Written Submission, the information relating to the calculation, is irrelevant;[86] and
- the reasonableness of the SG&A amounts is irrelevant.[87]

70. In some measure, the stark and unbalanced nature of these statements, particularly when considered together, speaks for itself. The European Union does not share China's views. We think that an anti-dumping proceeding is, of necessity, a dialogue, in which an investigating authority should behave reasonably and in a balanced and even-handed manner. We cannot agree with China that the fact that we have demonstrated that the calculation is based on aberrational sample transactions, without this being contested by China, is irrelevant. We cannot agree with China that the fact that the coefficients are not actual data pertaining to production and sales in the ordinary course of trade is irrelevant. We cannot agree with China that the fact that Table 6-5 was verified whilst Table 6-3 was not with respect to SG&A is irrelevant. We cannot agree with China that the fact that SMST repeatedly requested MOFCOM to disregard the SG&A in Table 6-3 and directed it instead to Table 6-5 is irrelevant. We cannot agree with China that the fact that China has sought to insert the term "this" into the translation of the disclosure document when it is not there is irrelevant. We cannot agree with China that the fact that China only now provides the information relevant to the calculation is irrelevant. We cannot agree with China that the reasonableness of the SG&A amounts used by China is irrelevant. And most of all, we cannot agree with China that the circumstances do not require it to re-visit the measure and correct the error, in good faith.

[85] China SWS, sections 1.2.2 and 1.3: " SMST's … understanding … is irrelevant."
[86] China SWS, para. 50 ("The below provides an overview of the final normal value determination for Grade B for SMST.") and section 1.3 ("The European Union's arguments are irrelevant.").
[87] China SWS, para. 57: "The reasonableness of the SG&A amounts is not a pertinent consideration."

71. The position with respect to the aberrational sample transactions is now clear and uncontested by China, despite China having had multiple opportunities to comment.[88] It requires no further consideration.

72. The position with respect to the coefficients is also clear. According to China, anything "used" by a firm is, by definition, actual data pertaining to production and sales in the ordinary course of trade; and in any event it is sufficient for the purposes of Article 2.2.2 if the amounts are based *in part* on actual data pertaining to production and sales in the ordinary course of trade.[89] We have explained why we disagree with both of these assertions, which we think are obviously wrong.[90] Such an approach would permit investigating authorities to manipulate at will actual data pertaining to production and sales in the ordinary course of trade. We have also explained and demonstrated that the coefficients were not verified, whilst Table 6-5 was.[91] We have further explained that China cannot make the coefficients actual data pertaining to production and sales in the ordinary course of trade by seeking to rely on the fact that they were provided in Table 6-3, whilst seeking at the same time to ignore the express and repeated statements by SMST stating otherwise and directing MOFCOM to Table 6-5.[92]

73. With respect to China's argument that the claim is *partially* outside the Panel's terms of reference, we note that China has not engaged with the question of how many obligations there are in Article 2.2.2, Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii). China conflates the terms "amounts" and "data"; continues to refuse to take into account that the Panel Request expressly referenced Article 2.2.2 as the "basis" of the complaint and provided a brief summary; misstates case law that is actually against China[93]; and refuses to

[88] EU FWS, paras. 160-175.
[89] China SWS, paras. 29-36.
[90] EU SWS, paras. 103-105.
[91] EU SWS, para. 107.
[92] EU SWS, paras. 111-112.
[93] Appellate Body Report, EC – Bed Linen, para. 82: ("In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to "actual data pertaining to production and sales in the ordinary course of trade". (emphasis added) Thus, the drafters of the Anti-Dumping Agreement have made clear that sales

take into account the fact that it mistranslates its own disclosure document, and only now provides the detail of the calculation.

74. Finally, China misunderstands Article 4.6 of the DSU. Consultations are confidential in the sense that only parties and admitted third parties are privy to them: panels are not. That is because their purpose is to search for a satisfactory adjustment of the matter, and Members would be constrained in that objective unless they can have confidence that their discussions will remain confidential, and not subsequently disclosed to the adjudicator. This is a standard provision in court systems all over the world. To emphasise the point, Article 4.7 provides that consultations are without prejudice to the rights of any Member in any further proceedings. With this in mind, China's latest assertions are once again inconsistent with the DSU and contested by the EU, and cannot be relied upon by China.

75. No doubt if the European Union had written the entire provision out in its Panel Request (as well as expressly referring to Article 2.2.2), instead of simply providing a brief summary, in accordance with the terms of Article 6.2 of the DSU, we would now be facing an (equally unmeritorious) claim of failure to consult, pursuant to Article 4 of the DSU. China cannot profit from its totally inadequate disclosure in the municipal anti-dumping proceedings in order to engineer a situation where it can try to pressure Members back to square one (causing substantial additional delay). The claim already contained a brief summary of the legal basis, referring to the unique and interlinked terms: actual "data" pertaining to production and sales in the ordinary course of trade, which was more than sufficient. China cannot make a "disclosure" within the meaning of the Anti-Dumping Agreement in its Second Written Submission (as it now attempts to do), any more than it can seek to rely on vague and decontextualized oral assertions during the consultations, the nature, extent and context of which are contested by the EU.

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not in the ordinary course of trade are to be excluded when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.").

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

76. To recall, the European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N).[94]

77. China's most recent submission on this issue contains little that is new. First, China continues to insist repeatedly only on the initial questionnaire response, declining to engage in the significance of the subsequent dialogue that took place between SMST and MOFCOM. We don't think this is reasonable or correct. Second, China continues to insist that SMST made no request for adjustment. We think we have demonstrated that SMST repeatedly brought the issue to MOFCOM's attention, and we do not think that China can reasonably maintain otherwise. Third, China still refuses to engage with all the evidence referenced by SMST concerning physical characteristics, price differences, production methods and production costs. Fourth, and finally, China continues to insist that there is no direct evidence of a causal link between the differences in physical characteristics and production techniques on the one hand, and the price differences on the other hand.

78. Specifically, as we have already indicated with respect to costs of production, we note that Table 6-3 (DMV 310N (EU)) contains the cost of production of Product C per month. Table 4-2, Domestic (regional) Sales, cells K5 and K6 state that the two sales were made on 15 October 2010 and 17 November 2010 and were the only sales of Product C made in those months. Cells E18 and F18 of Table 6-3 (DMV 310N (EU)) demonstrate that the cost of production for those months is about twice as high as the cost of production in April and May 2011. In April and May 2011 Product C was sold in representative quantities.

[94] EU FWS, paras. 176-186; EU First Opening Oral Statement, paras. 33-42; EU Response to Panel Questions 11 and 15-17; EU SWS, paras. 115-130.

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

79. Finally, we observe that, as is well known, the type of causation we are discussing cannot be directly observed and proved. All that can reasonably be done is to evidence the cause and the effect and provide an explanation, which is precisely what SMST did. In insisting otherwise MOFCOM was obviously acting in a manner inconsistent with the final sentence of Article 2.4 of the Anti-Dumping Agreement, which provides that investigating authorities must not impose an unreasonable burden of proof on interested parties.

V. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

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

81. The more the proceedings advance, the clearer the differences between the parties become. In the view of the EU, the term "price undercutting" poses two interpretative challenges:

82. The first question to be addressed relates to what constitutes "price undercutting". The EU maintains that price undercutting, by definition, involves not just a "price differential" but also an element of "price effect".

83. The second question – as distinct from the first one – 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? This second question is not necessarily identical with the first question.

84. Turning to the first question: China in its Second Written Submission states clearly:

> China considers that Article 3.2 allows an investigating authority to find (or to presume conclusively) price undercutting in case the dumped import prices are below the comparable domestic prices. *No additional "effect" consideration is required since price undercutting is in itself an effect.*[95]

85. The situation which China describes in its first sentence ("in case the dumped imports are below the comparable domestic prices") is the situation which the European Union would call a "price differential" (not identical with the richer notion of "price undercutting").

86. In its second sentence, China explicitly acknowledges that price undercutting as a concept involves (and thus requires) a "price effect".

87. There seems to be agreement with China then that a "price effect" is a necessary part of "price undercutting".

88. The key difference between China and the EU would then not be whether "price undercutting" involves a "price effect". On the contrary, there seems to be agreement that there must be a "price effect".

89. The key difference seems to be that China considers that any mere "price differential" amounts to a "price effect".

90. The EU, on the other hand, considers that there may be situations where a mere "price differential" does not contain a "price effect".

[95] China SWS, para. 120 (emphasis added).

91. Therefore, the key interpretative question on this issue arising from China's Second Written Submission would be: Is it sufficient to simply establish a price differential?

92. As stated in its responses to the First Set of Questions from the Panel, question 31, the European Union considers that not every price differential amounts to price undercutting, but that price undercutting requires a price effect to be present. The existence of a price effect is a necessary condition for price undercutting to be present.

93. The European Union has adduced a number of reasons for its position

94. The most pertinent usage of the word "undercut" is: "To supplant […] by selling at lower prices"[96]. "To supplant" means "Chiefly of things: to take the place of, succeed to the position of, supersede"[97]. Therefore, it needs to be established whether the dumped imports are having the *effect* of taking the place of domestic like products by selling at lower prices. The term "undercutting" thus requires an element of "effect" to be present. Imports that do not have the effect of taking the place of domestic like products by selling at lower prices cannot be said to "undercut" domestic like products.

95. The European Union has already described in detail how the relevant sentence in Article 3.2 of the Anti-Dumping Agreement refers to "effect".[98] Suffice it to say here that the sentence starts with the words "With regard to the effect of the dumped imports on prices" and hence clearly refers to three price effects, and not to two price effects (in the form of price depression/suppression) and a non-price effect.

[96] *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 19 May 2014, http://www.oed.com/view/Entry/211547; Opening Statement of Japan, p. 23.
[97] *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 19 May 2014, http://www.oed.com/view/Entry/194611; Opening Statement of Japan, p. 23.
[98] EU Responses to First Set of Questions, para. 109.

96. As described earlier by the European Union, this interpretation is also in line with the clarifications provided by the Appellate Body in *China – GOES*.[99]

97. It is also supported by the French version of the text.[100]

98. A finding of "price undercutting" thus requires a finding of a price differential plus a finding of a price effect. There can be no price effect if there is no competitive relationship between the dumped imports and the domestic like product. There are other factors that may impact the finding of a price effect. If the degree of competition between the dumped imports and the domestic like products is low, then this speaks against price effect. If the margins of dumping are low, then this speaks against price effect. If the price differential between the dumped imports and the domestic like products is minor, then this speaks against price effects. There may also be exogenous factors which may explain the price differential.

99. The European Union considers that in a case where an investigating authority has strong reasons to doubt the presence of undercutting, the investigating authority needs at least *to discuss* the evidence pointing to the absence of such effect. The investigating authority at least needs to address the factors that point to a lack of effect related to the price differential, and state why it considers that such effect is present in spite of evidence to the contrary. If there is a complete lack of such discussion of factors pointing to a lack of effect, then the presence of "price undercutting" has not been properly established.

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

100. As pointed out in the EU First Written Submission[101] and in the EU Second Written Submission[102], the European Union considers that China's analysis of

[99] EU Responses to First Set of Questions, para. 110.
[100] EU Responses to First Set of Questions, para. 111.
[101] EU FWS, paras. 227-234.
[102] EU SWS, paras. 162-170.

the price effects of imported Product C is erroneous, and falls short of an objective examination, based on positive evidence.

101. As stated before[103], 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. These factors suggest that imported Product C did not place downward pressure on or cause an actual decrease or prevention of increase in domestic prices of Product C.

102. In its Second Written Submission, China claims that

> The fact that the complainants did not challenge MOFCOM's findings relating to the competitive relationship under Article 2.6 of the Anti-Dumping Agreement results in the irrelevance of this aspect under Article 3.2. When making their claims under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, Japan and the European Union must take, as a given, the competitive relationship between the domestically produced Grade C and the imported Grade C.[104]

103. The European Union has rejected this argument already in its Second Written Submission.[105]

104. In the view of the European Union, China confuses two different types of analysis. The consideration that is undertaken pursuant to Article 2.6 of the Anti-Dumping Agreement is not identical with the requirement "under Article 3.2 of the Anti-Dumping Agreement […] to consider whether the prices are actually comparable"[106].

105. The Panel in China – X-Ray Equipment expresses this difference clearly:

> Therefore, China argues that in its price effects analysis MOFCOM compared the prices of "like" products, which was sufficient to ensure price comparability. The Panel is not convinced by this argument. The consequence of defining the product under consideration very broadly, is that the "like" domestic product will also be very broad. However, a

[103] EU SWS, paras. 163.
[104] China SWS, para. 103.
[105] EU SWS, paras. 165.
[106] Panel Report, *China – X-Ray Equipment*, para. 7.51.

> number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration. In the circumstances of this case, the fact that the domestic product was found under Article 2.6 of the Anti-Dumping Agreement to be "like" the product under consideration, does not necessarily mean that a Smiths product used for scanning hand baggage at airports is necessarily "like" a Nuctech product used for scanning rail carriages, trucks or marine cargo containers, for example.
>
> 7.66 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.[107]

106. The considerations for “like” products under Article 2.6 of the Anti-Dumping Agreement and the considerations for finding a competitive relationship under Article 3.2 of the Anti-Dumping Agreement are therefore not identical.

107. Even if the considerations were identical (quod non), it seems peculiar to argue, as China does, that a WTO Member would have to bring claims under all provisions which would then be relevant, and could not focus its claim on certain provisions. In China's view, it would then be procedurally precluded by not having challenged the same aspect under all relevant provisions.[108] The EU would not consider itself procedurally precluded from bringing its claim only under Article 3.2 and not at the same time under Article 2.6 of the Anti-Dumping Agreement. The mere fact of not challenging a certain issue under all provisions which would – in China's view – be pertinent cannot amount to procedural preclusion with regard to the claims that the EU did decide to bring.

108. In its Second Written Submission, China claims that MOFCOM analysed at length the competitive relationship between the imported grades and the

[107] Panel Report, *China - X-Ray Equipment*, paras. 7.65-7.66 (footnotes omitted).
[108] China SWS, para. 103.

corresponding domestically produced grades.[109] The European Union has dealt with most of these arguments before.[110] The analysis China refers to was undertaken as part of the "like product" test. There was no analysis as part of the price undercutting test. In addition, evidence contradicting MOFCOM's assumption was seemingly never examined or assessed by MOFCOM. This lack of engagement with contradicting evidence continues into China's Second Written Submission: China refers to an importer stating as a reason for not buying the product under consideration in 2010 that "the price of imports was more competitive"[111]. However, read in context, it becomes clear that the importer claims that imported and domestic products were not commercially substitutable in the domestic market. The importer states explicitly that "[d]uring the period of investigation, domestically produced like products were not universally accepted by the domestic power industry"[112]. The importer claims that "[o]ur company has not purchased any domestic like products, because the domestic like products have not won recognition and acceptance from the domestic power industry"[113]. The importer therefore states a lack of commercial substitutability, and these statements were seemingly never examined or assessed by China.

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

109. In its First Written Submission[114] and in its Second Written Submission[115], the European Union argued that China improperly extended its price undercutting findings with respect to Products B and C to the whole industry to conclude that imports of HP-SSST products had a price undercutting effect on like domestic products.

[109] China SWS, paras. 105-115.
[110] EU SWS, paras. 162-170.
[111] China SWS, para. 114.
[112] Babcock & Wilcox Questionnaire Response, Exhibit EU-7, question 19.
[113] Babcock & Wilcox Questionnaire Response, Exhibit EU-7, question 22.
[114] EU FWS, paras. 235-249.

110. In its Second Written Submission, China attempts to further justify this extension. Its arguments fall into two categories: On the one side, China argues that its alleged finding of "price correlation" justified such an extension. On the other side, China argued that there was evidence of substitutability of Product A by Products B and C.

111. Neither of these arguments is convincing. Turning first to the "price correlation" argument:

112. The EU addressed the essence of these arguments already in its Second Written Submission.[116]

113. There is an even more fundamental concern with China's "price correlation" analysis: Even if it had been properly conducted, it would not have been a proper basis for extending China's conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. Price correlation would only have shown parallel movements. It could have been that exogenous factors were decisive. Correlation shows little; there is for example a correlation between the "per capita consumption of cheese in the United States" and the "number of people who died by becoming tangled in their bedsheets"[117]; and so does the "number of worldwide non-commercial space launches" correlate with "sociology doctorates awarded in the US"[118]. Correlation shows little, and under the given circumstances in this investigation it could not substantiate a finding of price effects with respect to the domestic HP-SSST industry as a whole.

114. Turning to China's "substitutability" argument, given that we are in a trade context, what matters is *commercial substitutability* in the real world, not theoretical substitutability in a world where commercial aspects would not matter. Product B and C were significantly more expensive than Product A, so

[115] EU SWS, paras. 171-174.
[116] EU SWS, paras. 171-174.
[117] http://www.tylervigen.com/view_correlation?id=7, accessed 19 May 2014.
[118] http://www.tylervigen.com/view_correlation?id=805, accessed 19 May 2014.

that in order to establish commercial substitutability, China might have examined the degree of competition between these products and the extent of the price differentials. It decided not to do so and hence it decided not to undertake an analysis of commercial substitutability. In the other direction, i.e. Product A substituting Products B and C, there is not even physical substitutability given that Product A could not physically substitute Products B and C in ultrasupercritical boilers.

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

115. As regards China's impact analysis, the European Union refers back to its First Written Submission[119], its First Opening Oral Statement[120], and its Second Written Submission.[121] 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.

116. In its Second Written Submission, China claims that for Article 3.4, "a distinction must be made, on the one hand, between 'factors affecting domestic prices' and the 'magnitude of the margin of dumping', and all other listed factors, on the other hand"[122], with the consequence, in China's view, that an analysis of these two factors is not required under Article 3.4.

117. However, Article 3.4 explicitly refers to all these factors, and does not contain anything capable of supporting China's "on the one hand […] on the other hand"- distinction.

[119] EU FWS, paras. 250-276.
[120] EU First Opening Oral Statement, paras. 107-116.
[121] EU SWS, para. 175.
[122] China SWS, para. 183.

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

118. As regards Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and for the sake of brevity, the European Union refers back to its First Written Submission[123], to its First Opening Oral Statement[124], and to its Second Written Submission[125]. 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. The European Union considers that it has already rebutted what China argues in this respect in its Second Written Submission.

Mr. Chairman, distinguished Members of the Panel. This concludes our oral statement. We thank you for your attention and look forward to responding to any questions that you may have.

[123] EU FWS, paras. 277-325.
[124] EU First Opening Oral Statement, paras. 117-130.
[125] EU SWS, para. 176.