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In the World Trade Organisation
Panel Proceedings

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

(DS454/DS460)

Responses to First Set of Questions from the Panel
European Union

Non-confidential version

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TABLE OF CONTENTS

TABLE OF EXHIBITS

No	Short Title	Date	Status	DS454
34	**Table 6-6 Worksheets**		**BCI**	
35	**Table 6-7 Worksheets**		**BCI**	
36	**Table 6-8 Worksheets**		**BCI**	
37	**SMST Verification Exhibit 7**		**BCI**	
38	**EU Comments on Translation Issues Raised by China at the First Meeting**			

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.

1. The EU comments on the translation issues raised by China at the First Meeting are attached as Exhibit EU-38.

I. BCI PROCEDURES

Question 1

At several paragraphs of its oral statement at the first meeting of the Panel, the European Union explains that the issue raised by the European Union "is whether or not the Panel has the authority to delegate, in absolute terms, the question of whether information is confidential, to the firm submitting such information in the municipal anti-dumping proceedings."

a. Would the European Union's concerns be addressed if the designation of BCI were dependent on the investigating authority's determination to treat information as BCI in the underlying anti-dumping proceedings (and not on the firm's mere submission of that information as confidential)?

b. **According to the European Union's understanding, if a panel cannot delegate the question of whether information is confidential, would it mean that a panel must receive all confidential information and then itself determine whether good cause (as provided for in Article 6.5 of the Anti-Dumping Agreement) was shown for requesting confidentiality?**

2. The EU has raised two related but distinct concerns: the absolute delegation of designation; and the requirement to obtain written authorisation.

3. The EU's concerns would not be addressed if the absolute delegation would be to the authority rather than the firm. We do not think that the Panel is entitled to delegate absolutely designation to anyone.

4. The EU is not saying that the Panel must itself designate all information as either confidential or non-confidential. The EU is saying that, according to the terms of Article 18.2 of the DSU, it is for the submitting Member, in the first place, to designate information as confidential or not. Furthermore, we are saying that, in case of disagreement about designation, it is for the Panel to decide whether information is to be designated confidential or not within the meaning of the DSU and any BCI procedures. The Panel should, in this respect, pay close attention to the views of the parties and third parties and even the

views of the authority and firm if they are known. But the Panel cannot delegate absolutely the final decision to anyone else.

5. The EU considers that Article 6.5 of the Anti-Dumping Agreement does not govern the question of designation in DSU proceedings. It governs the question of designation in municipal anti-dumping proceedings. Article 1 of the DSU provides that DSU proceedings are governed by the rules and procedures set out in the DSU, including any special or additional rules. Appendix 2 of the DSU lists Articles 17.4 through 17.7 as special or additional rules. It does not refer to Article 6.5.

Question 2

With regard to paragraph 1 of the BCI Procedures:

a. Given that the relevant language at issue was initially proposed by the European Union and Japan, and that China has not objected to this language, would it be correct for the Panel to understand that the European Union, Japan and China have effectively designated the confidential information in the underlying anti-dumping proceedings as BCI for purposes of these disputes?

b. **Has China designated all confidential information in the underlying anti-dumping proceedings as BCI for purposes of these disputes?**

6. The European Union and Japan did not propose that the Panel should delegate absolutely designation to any other person: the proposal expressly provided that any disagreements regarding designation should be settled by the Panel. It is this provision that was not included in the BCI procedures actually adopted by the Panel, which is why the European Union has raised the matter.

7. The European Union is being *guided* in these DSU proceedings by the designations requested and afforded in the municipal anti-dumping proceedings. However, we do not consider ourselves absolutely bound by such prior designations. Should we choose to un-designate information from our own firms (for example because, with the passage of time, it is no longer sensitive or has come into the public domain) we fail to see what interest any other party or third party might have in objecting to such course of action. Furthermore, should we choose to challenge the designation previously attached by Chinese

firms, we consider ourselves free to do so, and we further consider that the Panel must settle any such dispute.

8. In this respect, we specifically recall that the complainants have challenged the over-designation of certain information by Chinese firms and the authority as confidential. We consider that the Panel must rule on these claims. We believe it self-evident that the Panel cannot delegate a determination on the substance of these claims to the very firms that made the designations in the first place.

Question 3

At paragraph 67 of its third-party written submission, the United States submits that "[t]he last sentence of Article 6.5 [of the Anti-Dumping Agreement] makes clear that, once an investigating authority accepts information as confidential, the investigating authority must not disclose such information without the specific permission of the party submitting it. The United States notes this text does not contain an exception for WTO proceedings." Please comment on this statement in light of the European Union's request to remove the obligation to submit the relevant "authorizing letter" from the first sentence of paragraph 2 of the BCI Procedures.

9. As explained above, Article 6.5 of the Anti-Dumping Agreement does not govern these DSU proceedings.

10. Even if one were to refer to it by way of context, one would have to exercise caution, because the context of municipal proceedings is very different from the context of WTO proceedings.

11. Furthermore, one would have to include footnote 17, which is an integral part of Article 6.5, and which refers to the possibility of disclosure being required pursuant to a narrowly drawn protective order.

12. Although the EU does not have precise information about the rules in all WTO Members, it appears to the EU extremely unlikely that investigating authorities could refuse to provide information to a municipal judge on the grounds that it would be confidential and the firm has not given its permission. Rather, it seems to the European Union that, in the municipal courts of the WTO Members, it is very likely that provision of information to a judge does not necessarily mean that it is placed in the public domain, but rather that it may remain confidential to the court proceedings. This would be consistent with and

probably even required by Article 13 of the Anti-Dumping Agreement relating to the need for effective judicial review.

13. In the WTO, such information is already protected by Article 18.2 of the DSU. Furthermore, where, as in this case, BCI procedures are adopted, there is also an additional protection.

14. Therefore, contextually, Article 6.5 and footnote 17 support the position of the European Union in these proceedings.

15. Finally, we recall that we have explained in our First Written Submission why the requirement to obtain prior written authorisation from the firm is inconsistent with the system established by the DSU.

Question 4

At the first meeting of the Panel with the parties, the European Union stated that DSU proceedings concerning claims under the Anti-Dumping Agreement are subject to Article 17.7 of the Anti-Dumping Agreement, as this provision is listed in Appendix 2 of the DSU.

a. What is the interpretation of the term "provided" in the first sentence of Article 17.7 of the DSU? In your response, please address whether this interpretation should differ or not from the term "disclosed" in the same sentence.

b. **What is the interpretation of the terms "person, body or authority" in the first sentence of Article 17.7 of the DSU.**

16. The first sentence of Article 17.7 refers expressly to confidential information provided to a panel, that is, in the context of the present discussion, confidential information provided to a panel by the WTO Member submitting such information to a panel.

17. Such information is also necessarily provided to the Secretariat and to the other party. There can be no *ex parte* communication with a panel, pursuant to Article 18.1 of the DSU.

18. The rule is against disclosure without formal authorization, meaning that the information should not be disclosed to any person not entitled to receive it (beyond the panel, Secretariat, parties and third parties). This means that it may

not be in the final public report, unless the Member providing the information has given formal authorization to that effect. However, the information must be confidential, which is an objective concept ultimately to be ruled on by the panel, not a subjective concept in the hands of the submitting Member.

19. The provision refers to the person, body or authority providing such information because, pursuant to its information seeking powers, particularly in Article 13 of the DSU, a panel is entitled to seek information from any individual or body which it deems appropriate. Thus, it is possible that, in an anti-dumping proceeding, a panel seeks information from a person, body or authority other than a party or third party. In such a situation, in responding to a panel's question, it would be such person, body or authority that would be "providing" the information to the panel and that could request that it be treated as confidential.

20. Thus, it does not result from Article 17.7 of the Anti-Dumping Agreement that a panel is entitled to delegate absolutely confidentiality designation, with respect to information submitted by a party in DSU proceedings, to a firm or authority in municipal anti-dumping proceedings. Nor does it result from Article 17.7 that a panel may require a Member providing information to a panel to obtain prior written authorisation from a particular firm.

II. PANEL'S TERMS OF REFERENCE

Question 6

Does each of the following provisions contain multiple obligations: Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement? Please explain.

21. We begin our response to this question with Article 2.2.2 of the Anti-Dumping Agreement.

22. China finds no fewer than four separate obligations in this provision.[1] What appears to be driving China's methodological approach is the idea that whenever one can identify a term with respect to which one might have a

[1] China's First Opening Oral Statement, para. 20.

dispute, there is a separate obligation. Given that there are forty-five terms in Article 2.2.2, taken to its logical if absurd conclusion, that would mean that there are forty-five separate obligations in Article 2.2.2. The way in which China elects to slice up the provision into four elements of China's choosing is essentially arbitrary.

23. The European Union has a different approach. We look to the provision as a whole in order to answer the question of whether or not, in all the circumstances, China had adequate notice of the issue being raised by the European Union, which we believe to be the case.

24. Specifically, when we look at Article 2.2.2, we identify one single operative provision that is in the nature of mandatory language establishing an obligation: the term "shall" that appears as the eighteenth term in Article 2.2.2. This is already a good indication that Article 2.2.2 contains a single obligation.

25. Furthermore, unlike China, the European Union does not generally consider that it makes much sense to attempt to deconstruct complex, interlinked, compound rules into different parts and characterise some part of them as an obligation and some other part of them as a condition or separate qualifier. This would risk to have the consequence that complaining Members could focus on the part of the complex rule of interest to them and seek to shift the burden with respect to some other part of the rule onto the defending Member.

26. Looking at Article 2.2.2, Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii), what the European Union sees is four options for the determination of the amounts for administrative, selling and general costs and for profits. The first option is set out in Article 2.2.2 because it is the preferred option. The remaining three options are set out in Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii) because they are only available when such amounts cannot be determined on the basis of the first option.

27. We think that Article 2.2.2(i) contains a single rule that refers to "the same general category of products". We do not know how many obligations China sees here: the European Union sees one. If this is the option selected by the

investigating authority, it must comply with the terms of this provision. This is a more than sufficient approach for the purposes of Article 6.2 of the DSU.

28. Similarly, we think that Article 2.2.2(ii) also contains a single rule that refers to "other exporters or producers subject to the investigation in respect of production and sales of the like product". Similar comments apply. We do not know how many obligations China sees here: the European Union sees one. If this is the option selected by the investigating authority, it must comply with the terms of this provision. This is a more than sufficient approach for the purposes of Article 6.2 of the DSU.

29. Similarly, we think that Article 2.2.2(iii) also contains a single rule that refers to "any other reasonable method, provided that the amount for profit … shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market". Similar comments apply. We do not know how many obligations China sees here: the European Union sees one. If this is the option selected by the investigating authority, it must comply with the terms of this provision. This is a more than sufficient approach for the purposes of Article 6.2 of the DSU.

30. We do not see Article 2.2.2 as any different. Like the other three options, we see, in the first option, a single rule that requires the use of "actual data pertaining to production and sales in the ordinary course of trade". If this is the option selected by the investigating authority, it must comply with the terms of this provision. This is also a more than sufficient approach for the purposes of Article 6.2 of the DSU.

31. In this respect, we refer particularly to the term "this basis" that appears in the second sentence of Article 2.2.2. This is expressed in the singular. It is not in the plural. Thus, it refers back to the content of Article 2.2.2 and confirms that what one finds there is a single basis for the determination of the amounts in question.

32. Specifically, immediately after the operative term establishing the obligation in Article 2.2.2, which is the term "shall", we find the term "be based on". In our

view, the term "be based on" refers to everything that follows. That is, the amounts to be determined shall "be based on" "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". We know from the second sentence that there is a single basis. From this, it necessary follows that the term "actual data pertaining to production and sales in the ordinary course of trade on the like product by the exporter or producer under investigation" may properly be understood as the single basis to which the provision expressly refers. We do not think that, as China would have it, just because there are twenty-four words in this phrase that we are looking at twenty-four different bases (in the plural) or twenty-four different obligations.

33. We find further support for this approach in Article 2.2.2, second sentence, which also contains the term "on the basis of", that is, also in the singular, confirming that each of the options in Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii) each refer to a single rule. If this is the right analysis for Article 2.2.2(i), Article 2.2.2(ii) and Article 2.2.2(iii) then it is surely also the right analysis for Article 2.2.2.

34. Furthermore, the EU would like to point out that China's approach involves dividing up the interlinked language of Article 2.2.2 in an entirely artificial manner. The particular difficulty that China has in this respect is that the term "pertaining to" is a modifier that links the term "actual data" and what follows, such that it is only the phrase as a whole that makes sense. The modifier cannot be appended uniquely to what precedes it in a meaningful way. Neither can the modifier be appended uniquely to what follows it in a meaningful way. The modifier *only has meaning* when it is appended both to what precedes it *and* to what follows it. In other words, there is a single phrase, that is, a single base, that is, a single obligation. Any other approach would reduce the relevant interlinked terms to redundancy and render them meaningless. The Appellate Body has frequently observed that a treaty interpreter is not entitled to adopt an interpretation of a treaty that reduces entire provisions or terms to redundancy or ineffectiveness.

35. China attempts to deal with this fact by simply changing the actual treaty language, paraphrasing the text so as to eliminate the term "pertaining to" and replacing it with a different structure built around different terms.[2] Clearly, China wishes that Article 2.2.2 did not contain the modifying term "pertaining to". China is free to make submissions and arguments to the Panel based on what China wishes the treaty would say. The Panel, however, which is tasked with making an objective assessment of the matter before it, is not permitted to make its assessment on such basis. The Appellate Body has often repeated that a WTO Member's rights and obligations must be determined by reference to the terms actually used in the treaty, without omission or addition.

36. Finally, the European Union would like to point out that the term "actual data" is, *uniquely*, used only once in the whole of Article 2 of the Anti-Dumping Agreement. It is not used in Article 2.2.2(i), Article 2.2.2(ii) or Article 2.2.2(iii). As such, it is a term of art that can legitimately be used to direct a Member to the first option set out in Article 2.2.2, as opposed to any of the options set out in Article 2.2.2(i), Article 2.2.2(ii) or Article 2.2.2(iii). In fact, the single reference to "actual data" in Article 2.2.2 is the only time this term is used in the whole of the Anti-Dumping Agreement. Thus, any suggestion by China that it was in this respect confused or misdirected is highly implausible and should be rejected by the Panel.

37. Turning to Article 2.2, the European Union first observes that Article 2.2.2 begins with an express cross-reference: the phrase "For the purpose of paragraph 2". It then goes on to explain how the amounts for administrative, selling and general costs and for profits is to be determined. The provision of Article 2 that introduces this issue is Article 2.2. Article 2.2 expressly provides that the margin of dumping shall be determined by a comparison that uses "a reasonable amount for administrative, selling and general costs and for profits". Furthermore, Article 2.2.2(iii) similarly begins with the phrase "any other reasonable method", clearly confirming that any option selected for the determination of administrative, selling and general costs and for profits must

[2] China's First Opening Oral Statement, para. 20.

be "reasonable", and this is therefore also evidently true with respect to the first option set out in Article 2.2.2.

38. China confirmed this during the oral hearing. Pressed repeatedly on the matter before the Panel, China attempted to argue that it was "reasonable" for China to disregard SMST's repeated express directions to Tables 6-5 to 6-8 and "reasonable" for China to verify Tables 6-5 to 6-8 whilst ignoring the SG&A information in Table 6-3, only to then seek to rely on the Table 6-3 SG&A in the measure at issue. In doing so, China was certainly referring to a legal rule that is pertinent to the Panel's assessment. China's difficulty is that, as we explained during the hearing, its conduct on this point during the investigation was certainly not "reasonable".

39. With the preceding observations in mind, the European Union would again point out that Article 2.2 contains a single operative phrase with mandatory language ("shall be determined"). It is not because there is a complex interlinked rule that includes some qualifiers or conditions that one needs to discover multiple obligations, based on a methodology that, taken to its absurd extreme, would discern one obligation per treaty term (there are 109 treaty terms in Article 2.2). We do not yet know how many obligations China will discover in this provision, given China's arbitrary approach of carving provisions up according to its own particular interests in this particular case. In any event, there is no dispute between the parties that the disagreement in this case relates to the determination of administrative, selling and general costs, a matter with respect to which one can only discern one rule in Article 2.2: the amount must be "reasonable". Consequently, in all the circumstances of this case, the EU submits that its Panel Request identified the issue, also with respect to Article 2.2, with sufficient particularity.

40. Similar comments apply with respect to Article 2.2.1, which also contains a single operative phrase ("may be disregarded … only if").

41. Similar comments apply with respect to Article 2.2.1.1. In particular, China accepts that the Panel Request refers to the first sentence of Article 2.2.1.1, and the EU rejects China's attempts to deconstruct the single interlinked complex

rule in that provision by isolating one of the relevant conditions. This is particularly so given that, as explained above, the test of reasonableness is in any event expressly referenced in Article 2.2 and in Article 2.2.2(iii), which are both linked by express cross-references to Article 2.2.2.

Question 7

At paragraphs 19-21 of its oral statement at the first meeting of the Panel, China states that Article 2.2.2 of the Anti-Dumping Agreement contains multiple obligations with regard to "actual data" and "data pertaining to production and sales in the ordinary course of trade"? Please comment. In your response, please explain whether "actual data" would necessarily pertain to the "production and sales in the ordinary course of trade"?

42. The EU refers to its response to question 6. The EU considers that the treaty must be interpreted and applied using *the terms actually appearing in the treaty*, without omission or addition. In this respect, the EU notes that the first sentence of the question, referring to China's submissions, deconstructs the interlinked terms actually used in the treaty and re-states them (with duplication) as two separate rules. This is therefore an approach in which the outcome is pre-determined by the assumptions embedded in the premises, which is not an acceptable approach. The second sentence of the question, also drawing on China's submissions, replaces the actual terms used in the treaty with a different term ("pertain to").

43. As explained above, the EU considers that the term "pertaining to" is a modifier that links the term "actual data" and what follows, such that it is only the phrase as a whole that makes sense. The modifier cannot be appended uniquely to what precedes it in a meaningful way. Neither can the modifier be appended uniquely to what follows it in a meaningful way. The modifier only has meaning when it is appended both to what precedes it and to what follows it. In other words, there is a single phrase, that is, a single base, that is, a single obligation. This is confirmed by the other terms of Article 2.2.2 which expressly confirm that each of the four options has a single basis.

44. This means that an investigating authority has either used "actual data pertaining to production and sales in the ordinary course of trade" (or "actual

data" for short) or it has not. If it has, it will have complied with the requirements governing the first option. If it has not, it will not have complied with those requirements. Thus, the concept of "actual data" *not* "pertaining to production and sales in the ordinary course of trade" simply has no special or significant legal meaning, at least for the purposes of applying Article 6.2 of the DSU, any more than the concept of "the comparable price" *not* "in the ordinary course of trade" would have for the purposes of Article 2.1. What governs are the terms actually used in the treaty: not a re-statement of those terms to suit the interests of a particular party.

Question 8

Has the European Union presented arguments in its first written submission in support of its claims under Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement? If so, please explain why the European Union states, in paragraphs 172-174 of its first written submission, that it "finds further support for its claim in the immediate context of Article [2.2.1.1][2.2.1][2.2]". Under which provision is the "claim" referred to by the European Union in these passages?

45. The EU claims are of inconsistency with Article 2.2.2, Article 2.2, Article 2.2.1 and Article 2.2.1.1. Each of these claims is supported by the context of each of the other three provisions. In addition, a determination of breach of Article 2.2.2 would have as a consequence that the Panel should also find a breach of each of the other provisions. The European Union has presented arguments in support of each of these claims in its First Written Submission.

46. Under Article 2.2.2, the EU claim and argument is that the measure as issue is inconsistent with Article 2.2.2, which provides that, for the purposes of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.[3]

47. Under Article 2.2 the EU claim and argument is that the measure at issue is inconsistent with that provision, which supports the view that the data used by an investigating authority must "permit a proper comparison", and that the

[3] EU FWS, paras. 160-171 and 175

amount for administrative, selling and general costs must be "reasonable". The unrepresentative and rejected data used by China did not permit a proper comparison because it did not result in the proper establishment of normal value. Furthermore, it was not reasonable, because it did not reasonably reflect the costs associated with the production and sale of the product under consideration, in the ordinary course of trade.[4]

48. Under Article 2.2.1 the EU claim and argument is that the measure at issue is inconsistent with that provision, which expressly provides for the treatment of sales made below cost as being not made in the ordinary course of trade (within the meaning of Article 2.1), and further indicates that they should be disregarded. By definition, free samples are below cost, and thus not sales in the ordinary course of trade within the meaning of Articles 2.2.1 and 2.1, nor Article 2.2.2.[5]

49. Under Article 2.2.1.1 the EU claim and argument is that the measure at issue is inconsistent with that provision because it is the representative and duly verified data in SMST QR Table 6-5 that corresponds to the records kept by SMST, and that is in accordance with GAAP and reasonably reflects the costs associated with the production and sale of the product under consideration, and that has been historically utilized by SMST. Furthermore, the final sentence of Article 2.2.1.1 of the Anti-Dumping Agreement supports the view that a cost calculation should appropriately and fairly reflect a situation in which there is a non-recurring item of cost which benefits future production (which is essentially what a free sample is). Evidently, China's use of the unrepresentative and rejected data at issue did not comply with that requirement.[6]

Question 9

At paragraph 33 of its response to China's requests for preliminary rulings, the European Union states that "as a matter of law, the sufficiency of a panel request must be assessed in the light of the sufficiency of the measure at issue and the disclosure afforded to the interested Member". At paragraph 41 of its response to

[4] EU FWS, paras. 160-171, 174 and 175
[5] EU FWS, paras. 160-171, 173 and 175
[6] EU FWS, paras. 160-171, 172 and 175

China's requests for preliminary rulings, the European Union states that "the sufficiency of a panel request must be assessed in the light of the discussion between the investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue." Please explain how these statements should be reconciled with (i) the Appellate Body's explanation that "compliance with the requirements of Article 6.2 [of the DSU] must be demonstrated on the face of the request for the establishment of a panel" (Appellate Body Report, *US – Carbon Steel*, para. 127), and (ii) the Appellate Body's statements in *Thailand - H-Beams*, as quoted in paragraph 23 of China's oral statement at the first meeting of the Panel.

50. The Appellate Body Report in *Thailand H-Beams* supports the position of the EU in this case. Rather than taking incomplete and selective statements from the report, as China does in paragraph 23 of its First Opening Oral Statement, the EU respectfully refers the Panel to what actually happened in that case.

51. With respect to injury, the panel request stated as follows:

> Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement.

52. On this basis, the panel made findings regarding: Article 3.1;[7] Article 3.2 (volume effects) (use by Thailand of overlapping time periods),[8] (whether an explicit finding of significant increase is required),[9] (whether there had been a significant increase);[10] Article 3.2 (price effects) (did Thailand consider significance), (did the data support the findings);[11] Article 3.4 (is the list mandatory),[12] (what factors are to be evaluated),[13] (evaluation of all relevant factors),[14] (did Thailand consider all relevant factors, including wages and investments),[15] (did Thailand adequately consider the other factors);[16] and

[7] Panel Report, *Thailand - H-Beams*, paras. 7.136-7.152.
[8] Panel Report, *Thailand - H-Beams*, paras. 7.158-7.159.
[9] Panel Report, *Thailand - H-Beams*, paras. 7.160-7.162.
[10] Panel Report, *Thailand - H-Beams*, paras. 7.163-7.172.
[11] Panel Report, *Thailand - H-Beams*, paras. 7.207-7.215.
[12] Panel Report, *Thailand - H-Beams*, paras. 7.224-7.225.
[13] Panel Report, *Thailand - H-Beams*, paras. 7.226-7.232.
[14] Panel Report, *Thailand - H-Beams*, paras. 7.233-7.237.
[15] Panel Report, *Thailand - H-Beams*, paras. 7.238-7.244.

Article 3.5 (causal relationship),[17] (other possible causal factors).[18] With respect to each and all of these matters the panel did not find the panel request inconsistent with Article 6.2 of the DSU.

53. The panel's findings were upheld on appeal, also with respect to Article 6.2 of the DSU. Specifically, the Appellate Body ruled that, in citing the language of Article 3.1 and in referring to certain key factors, Poland had complied with the requirements of Article 6.2.[19] In this respect, therefore, the case fully supports the position of the EU in the present proceedings.

54. With respect to dumping, the panel request stated as follows:

> Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement.

55. On this basis, the Panel made findings regarding: Article 2.2 (amount for profit in constructed normal value);[20] Article 2.2.2(i);[21] and Article VI:1(b)(ii) of the GATT 1994.[22] With respect to each and all of these matters the panel did not find the panel request inconsistent with Article 6.2 of the DSU.

56. The panel's findings were upheld on appeal, also with respect to Article 6.2 of the DSU. Specifically, the Appellate Body ruled that "the lack of access to … information may have affected the precision with which Poland set out the claims in its panel request."[23] Thus, also in this respect, this case fully supports the position of the EU in the present proceedings, both with respect to the degree of precision required in a panel request, and with respect to the point that lack of disclosure is a relevant factor in the assessment.

57. With respect to procedural issues, the panel request stated as follows:

[16] Panel Report, *Thailand - H-Beams*, paras. 7.245-7.255.
[17] Panel Report, *Thailand - H-Beams*, paras. 7.263-7.266.
[18] Panel Report, *Thailand - H-Beams*, paras. 7.267-7.283.
[19] Appellate Body Report, *Thailand - H-Beams*, para. 90.
[20] Panel Report, *Thailand - H-Beams*, paras. 7.95-7.105.
[21] Panel Report, *Thailand - H-Beams*, paras. 7.106-7.118.
[22] Panel Report, *Thailand - H-Beams*, paras. 7.119-7.128.
[23] Appellate Body Report, *Thailand - H-Beams*, para. 91.

> Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement.

58. On this basis, the Panel made findings regarding: Article 5.2 (content of the application with respect to causation and injury),[24] (content of the application with respect to dumping);[25] and Article 6.3.[26] With respect to each and all of these matters the panel did not find the panel request inconsistent with Article 6.2 of the DSU.

59. The panel's findings were upheld on appeal, also with respect to Article 6.2 of the DSU. Specifically, the Appellate Body made its ruling taking into account the "interlinked nature" of the obligations in Article 5. Thus, also in this respect, this case fully supports the position of the EU in the present proceedings.

60. In making its findings, the Appellate Body observed that it is not necessarily always the case that there is continuity between claims made before municipal authorities and claims made to WTO panels, and that this cannot therefore be *assumed*. The Appellate Body also considered that the underlying investigation cannot normally, in and of itself, be *determinative*, and that the panel erred to the extent that it relied *mainly* on this argument. The Appellate Body went on to find that Thailand had not suffered any prejudice; recalled that nothing prevents a defending party from requesting further clarification and that Article 3.10 of the DSU enjoins Members to act in good faith; and that the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[27]

61. Thus, as outlined above, this report fully supports the EU submissions regarding the lack of disclosure by China in this case.

[24] Panel Report, *Thailand - H-Beams*, paras. 7.68-7.7.73.
[25] Panel Report, *Thailand - H-Beams*, paras. 7.74-7.78.
[26] Panel Report, *Thailand - H-Beams*, para. 7.79.
[27] Appellate Body Report, *Thailand - H-Beams*, paras. 94-97.

62. China refers to the above passage only with respect to the EU submissions regarding the conduct of the municipal anti-dumping proceedings. However, in this respect, the situation in the present case is not at all the same. The EU is not asking China or the panel to *assume* anything. Rather, in assessing China's claim under Article 6.2 of the DSU, we are asking the Panel to take into account that the context and all the attendant circumstances fully permitted China to understand that the EU complaint related to the fact that MOFCOM must have failed to use the SG&A from Tables 6-5 to 6-8, to which the firm had repeatedly directed MOFCOM, and which related to actual data pertaining to production and sales in the ordinary course of trade. The EU is not asking the Panel to make this determinative or even to base itself mainly on this consideration: merely to take it into account.

63. In light of these observations, the EU is content to leave it to the Panel to decide which Party is promoting the development of litigation techniques, and which is simply seeking a fair, prompt and effective resolution of the dispute.

64. Likewise, the Appellate Body Report in *US – Carbon Steel* fully supports the position of the EU in the present proceedings.

65. In that case, the EU panel request was also found to be consistent with Article 6.2 of the DSU. In reaching that conclusion, and upholding the panel's finding in this respect, the Appellate Body expressly took into account the fact that the case concerned a "relatively short provision" (Article 21.3 of the SCM Agreement, which, together with its footnote, contains 163 terms). By contrast, Article 2.2.2 of the Anti-Dumping Agreement (as distinct from Article 2.2.2(i), Article 2.2.2(ii) or Article 2.2.2(iii)) contains only 45 terms.[28] The Appellate Body also took into account that the EU had referred to "one of the central features"[29] of the provision, which is also a test that the EU certainly meets in the present proceedings.

66. Finally, whilst observing that defects in a panel request cannot be cured in the subsequent submissions during the panel proceedings, at the same time the

[28] Appellate Body Report, *US – Carbon Steel*, para. 130.
[29] Appellate Body Report, *US – Carbon Steel*, para. 130.

Appellate Body also ruled that, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[30] On this basis, the Appellate Body confirmed that there was no prejudice in that case: the disingenuous behaviour of the defending Member was rejected, as it should be rejected in the present proceedings.[31]

Question 10

At paragraph 34 of its response to China's requests for preliminary rulings, the European Union states that "[i]f, as in this case, the measure at issue does not even set out the legal and factual basis for the assessment, sufficient to present the problem clearly, then evidently that has repercussions for what the complaining Member is required to do in its panel request. Precisely the same observation applies with respect to disclosure, and more specifically the lack of it. … A complaining Member, when framing a panel request, cannot be required to guess the detail of what the defending Member has done." At paragraph 22 of its oral statement at the first meeting of the Panel, China states that "[i]t is unreasonable to claim that the European Union did not have sufficient information about the source of the SG&A to prepare its panel request … when it clearly had sufficient information to prepare the first written submission." Please comment.

67. As already observed above, the European Union agrees with China that "reasonableness" is a pertinent consideration. The EU considers that it was not "reasonable" for China to disregard SMST's repeated express directions to Tables 6-5 to 6-8 and not "reasonable" for China to verify Tables 6-5 to 6-8 whilst ignoring the SG&A information in Table 6-3, only to then seek to rely on Table 6-3 SG&A (apparently) in the measure at issue.

68. With respect to the legal relevance of the issue of China's non-disclosure, the EU refers to its comments regarding *Thailand – H-Beams* set out above. The panel's findings in that case were upheld on appeal, also with respect to Article 6.2 of the DSU. Specifically, the Appellate Body ruled that "the lack of access

[30] Appellate Body Report, *US – Carbon Steel*, para. 127.
[31] Appellate Body Report, *US – Carbon Steel*, paras. 132-133.

to … information may have affected the precision with which Poland set out the claims in its panel request."[32]

69. With respect to China's assertion that it has since provided sufficient information, that is simply not the case. Even today China has still provided no disclosure or reconciliation, based on numbers and references to the record evidence, including the measure at issue, that would permit the EU to understand and confirm what China actually did in this case.

70. With respect to China's repeated references in its First Opening Oral Statement to various assertions about what may or may not have happened during consultations,[33] the EU would simply observe that there is no agreed written or other record of the consultations and that the EU certainly does not agree with the picture painted by China. The case law confirms that such matters are not to be determined on such basis.[34] In any event, as indicated above, even today China has still provided no adequate or sufficient understanding of what it has done, based on a reconciliation between the relevant numbers. Furthermore, the EU would respectfully remind China that, 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.

71. Finally, the EU recalls that (1) China has offered no defence on the substance of the matters placed before the Panel and (2) China does not contest that the EU claims are in part before the Panel. In these circumstances, the EU remains of the view that, as a matter of law, the DSU requires China to agree to the EU's modest request that it re-visit this issue in the re-determination, instead of engaging in precisely the sort of litigation techniques so deplored repeatedly by the Appellate Body.

[32] Appellate Body Report, *Thailand - H-Beams*, para. 91.
[33] China's First Opening Oral Statement, paras. 22 and 25.
[34] Panel Report, *EC – Fasteners (China)*, paras. 7.25-7.26.

III. MOFCOM'S DUMPING DETERMINATION

A. Fair comparison under Article 2.4 of the Anti-Dumping Agreement

Question 11

At the first meeting of the Panel with the parties, the European Union stated that it is very clear for an informed person that the more extensive the rolling/drawing is, the higher the cost of production will be. If this is so, why did SMST not request an adjustment in its earlier responses (instead of initially responding to MOFCOM that physical differences will not have any substantial impact on the production costs or sales prices)?

72. The European Union refers to its response to Question 15(a) from the Panel.

Question 15

At paragraph 36 of its oral statement at the first meeting of the Panel, the European Union states that SMST timely raised the issue of physical differences in SMST's comments on the preliminary dumping disclosure.

a. How does this reconcile with SMST's previous statements that physical differences will not have any substantial impact on the production costs or sales prices, as identified by China in its first written submission, at paragraphs 135-143.

73. 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.[35] 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.

74. 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

[35] See SMST Comments on Final Dumping Disclosure explaining differences in normal boiler tube and tubes used in secondary systems (Exhibit EU-28) (BCI).

of these transactions and requested that MOFCOM not use them in calculating normal value.[36] China does not dispute this point.[37]

75. 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.[38] At verification, SMST presented the MOFCOM officials with technical information concerning boiler construction, as well as technical specifications and invoices for each of the transactions involved.[39]

b. Did SMST request an adjustment on the basis of such physical differences affecting price comparability? In your response, please address (i) SMST's comments to the preliminary disclosure, in particular SMST's statement that "because of their very thin dimensions, [thin tubes] require more extensive rolling/drawing resulting in higher costs of production. The price of these thin tubes can therefore not be properly compared to the price of the DMV 310N tubes exported to China" (Exhibit EU-19, para. 5); and (ii) SMST's comments to the final dumping disclosure, in particular SMST's statement that "this also affects price comparability." (Exhibit EU-28, p. 2).

76. Because there were other EU sales of Product C that were physically comparable to the product sold in China and therefore could be used in the calculation of normal value, it was not a question of making a physical differences adjustment. Rather 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. This is this point that SMST was raising in the two statements referred to in the question.

c. At paragraph 39 of its oral statement at the first meeting of the Panel, the European Union states that "SMST also provided to MOFCOM all of the specific documents relating to these transactions; a diagram to that effect that has actually been endorsed by the verifying MOFCOM officials; and all the relevant documentation relating to both the

[36] SMST Dumping Questionnaire Response, Table 7–1 (Exhibit CHN–8) (BCI).
[37] China FWS, para. 183.
[38] SMST Comments on Preliminary Dumping Disclosure (Exhibit EU-19) (BCI).
[39] EU FWS, para. 178.

domestic sales in the European Union and the export sales to China, as well as EU domestic sales of the type of product sold to China." (footnotes omitted)

i. Was this evidence sufficient for MOFCOM to assess price comparability?

77. This evidence was sufficient for MOFCOM to assess price comparability and if MOFCOM believed that it required more information it was incumbent upon MOFCOM to request such information under Article 2.4 of the Anti-Dumping Agreement. As detailed in the European Union First Written Submission, this information included full technical information and invoices for the transactions in question.[40] SMST also presented MOFCOM with all of the invoices and other sales documents related to the Chinese transactions.[41] In addition, Table 4-2 to SMST's questionnaire response, which listed each individual sales transaction made in the EU market during the investigation period, showed that the prices of the [[**BCI**]] transactions of thin secondary system tube were substantially higher than those of any of the other sales of Product C. Similarly, Table 6-3 (DMV 310N (EU)) showed that the unit processing costs (i.e., unit costs of production – unit raw material costs) for the thin secondary system tube were more than [[**BCI**]] times greater than any of the other Product C transactions.[42]

ii. When and how was the information in Exhibit EU-21 submitted to MOFCOM? What is the source of the exhibits included in Exhibit EU-21 (i.e. they are exhibits attached to what document)?

78. Exhibit EU-21 is SMST-Germany Verification Exhibit 10. These documents were provided to MOFCOM during the verification at SMST-Germany. This is not contested by China.

iii. **Was the hand-written comment in Chinese on p. 2 of Exhibit EU-21 (translated to English in footnote 194 of the European Union's first written submission) made by MOFCOM officials?**

[40] EU FWS, para. 178.
[41] SMST Dumping Questionnaire Response (Exhibit EU-10) (BCI), at Exhibit 3-19.
[42] See: EU FWS, paras. 167 and Table 6-3 (Exhibit EU-12) (BCI).

79. Yes.

Question 16

Pursuant to Article 2.4 of the Anti-Dumping Agreement, does an exporter have to demonstrate how physical differences affect price comparability or should an investigating authority proceed to assess the issue of price comparability once physical differences are demonstrated? If an investigating authority has to assess this issue, what information should be requested and supplied by whom and when?

80. 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.

Question 17

At paragraph 183 of its first written submission, China accepts that SMST raised the issue of physical differences before MOFCOM.

a. Did MOFCOM attempt to assess price comparability after SMST raised the issue of physical differences affecting price comparability? Please explain.

81. No, there is no record that MOFCOM attempted to assess price comparability. Rather, as explained in the European Union First Written Submission, the only reason given by China in its final disclosure for continuing to include the secondary system tube in its normal value calculation was that SMST "did not prove that these products do not meet the scope description of the subject merchandise in the initiation notice."[43]

b. **If so, did MOFCOM request SMST to provide the necessary information for such assessment after this issue was raised by SMST? Please explain.**

82. MOFCOM never noted any deficiencies in the information provided by SMST concerning the price comparability of secondary system tube, nor did it request SMST to provide any additional information.

B. The use of SG&A amounts

Question 18

At paragraph 14 of its response to China's requests for preliminary rulings, the European Union states that "[i]t is not contested that China requested [in the dumping questionnaire] actual cost of production and SG&A."

a. Why was *planned data* provided when the relevant question in the dumping questionnaire (referring to Table 6-3) requested *actual data*?

83. In the short time provided for SMST to prepare its questionnaire response, it had different personnel working on different sections. The personnel working on the costs of production in Table 6-3 used planned SG&A data. The personnel working on the sales administrative and financial expenses detailed in tables 6-6 to 6-8 and summarized in table 6-5 used the actual expenses as reported in SMST's financial statements. This fact was clearly explained to MOFCOM in the questionnaire response itself.[44] In other words, SMST *did respond* to the question with actual data by expressly and repeatedly referring MOFCOM to Tables 6-5 to 6-8. The EU knows of no rule that precludes a firm from answering a questionnaire by referring the investigating authority to the response provided elsewhere in the questionnaire response.

b. **At paragraph 83 of its first written submission, China states that "[t]he Verification Disclosure reveals that during the verification SMST did not address either the SG&A as reported in Table 6-3, nor the SG&A used by MOFCOM in the Preliminary Determination, which was allegedly 'not supported by information in the SMST questionnaire response.'" When did SMST realize, for the first time, that SG&A could not have been based on table 6-5? What was SMST's reaction at that moment?**

84. From MOFCOM's preliminary disclosure, SMST and its Chinese counsel understood that MOFCOM was not satisfied with the explanation of the calculation method of SG&A in Table 6-3 and therefore was using the "actual" SG&A, which SMST understood as the actual reported figures in Tables 6-6 through 6-8 (as summarised in Table 6-5). Therefore, in response to MOFCOM's request to present the "working sheets of the allocation of SG&A

[43] EU FWS, para. 178.
[44] EU FWS, footnote 174.

to the subject merchandise, including the allocation method, base and amount" at verification, SMST prepared individual worksheets for Tables 6-6 to 6-8 showing how the reported figures tied to SMST's financial statements. MOFCOM reviewed these worksheets at verification and took various portions of them as verification exhibits. SMST did not prepare any worksheets for the planned SG&A in Table 6-3 nor did MOFCOM ask for any such information.

85. In its verification report, MOFCOM does not note any problems with the SG&A information provided by SMST at verification but rather states that the "company provided the working sheet of the allocation of SG&A to the subject merchandise, including the allocation method, allocation basis and allocation amount, etc." and that the "company explained the reporting method and process of Table 6-6, 6-7, 6-8."[45] The verification report also states that the "companies actively cooperated with the verification team's investigation, answered the relevant questions as requested and provided the relevant information and materials."[46]

86. With receipt of the final disclosure SMST could only surmise that MOFCOM had not used or had incorrectly used the actual data in Tables 6-5 to 6-8. Even today, MOFCOM has still not provided a disclosure reconciling the specific numbers used in the calculation with what appears in the measure at issue, so even today neither SMST nor the EU can be sure what China has done. Nevertheless, by reverse engineering the calculation based on the limited amount of information available, SMST's best guess was that China either did not use or incorrectly used the actual data in Tables 6-5 to 6-8 when calculating the amounts for SG&A. SMST again immediately brought this matter to MOFCOM's attention in its comments on the final disclosure.

Question 19

At paragraph 77 of its first written submission, China states that "[t]he data in Table 6-5 'Profitability' included information concerning, *inter alia*, SG&A for the product under consideration, but did not contain per grade information." Please comment and explain how data from Table 6-5 could have been used for purposes of calculating SG&A for Grade B specifically (instead of data from Table 6-3).

[45] SMST Verification Disclosure, Exhibit EU-23, items II.4 & 5.
[46] SMST Verification Disclosure, Exhibit EU-23.

87. By their nature, SG&A expenses are general and not tied to a specific product. The planned SG&A information contained in Table 6-3 is in no way grade specific. As is clear from a review of the various Table 6-3 versions for the different markets and grades, the planned SG&A coefficients are the same regardless of product or market.

Question 20

At the first meeting of the Panel with the parties, the European Union stated that the worksheets from Table 6-5 confirm that Table 6-3 was not verified. Please explain and submit the full relevant worksheets.

88. The EU point is that the SMST Verification Disclosure[47] states at point II.5 that SMST explained the reporting method and processes of Tables 6-6, 6-7 and 6-8, thus confirming that this data was verified without any issue arising. Point II.4 also states that SMST provided the working sheet of the allocation of SG&A to the subject merchandise, including the allocation method, allocation basis and allocation amount, etc. At the hearing, China suggested that point II.4 might relate to the SG&A in Table 6-3. That is not, however the case. Point II.4 refers expressly to a working sheet. SMST did not submit any working sheet with respect to SG&A in Table 6-3 and China has no such document on the record of the investigation. SMST did submit working sheets for the SG&A in Tables 6-6 to 6-8.[48] This unequivocally demonstrates that Table 6-5 to 6-8 SG&A was verified whilst Table 6-3 SG&A was not.

[47] Exhibit EU-23, page 3, Point II.

[48] Exhibit EU-34 (Table 6-6 Worksheets) (BCI), Exhibit EU-35 (Table 6-7 Worksheets) (BCI), Exhibit EU-36 (Table 6-8 Worksheets) (BCI) and Exhibit EU-37 (SMST-Germany Verification Exhibit 7) (BCI). In response to item II.6 of the verification outline (Exhibit CHN-11), which requested the "working sheets of the allocation of SG&A to the subject merchandise, including the allocation method, base and amount," SMST provided MOFCOM with separate worksheets on each of the Tables 6-6 to 6-8. These worksheets served as the basis of MOFCOM's verification of SG&A. While MOFCOM did not include the entire worksheets as verification exhibits, parts of them are incorporated in SMST-Germany Verification Exhibit 7. The correlation between SMST-Germany Verification Exhibit 7 and these worksheets is summarised in the following table:

SMST-Germany Verification Exhibit 7 Page	**Worksheet**
1	Table 6-8, page 5
2	Table 6-6, page 4
3	Table 6-6, page 5
4	Printout from computerized accounting records requested by MOFCOM during verification

89. To be clear, our principal claim is simply that China did not reasonably determine the SG&A amounts based on actual data pertaining to production and sales in the ordinary course of trade, and all we seek from the Panel is confirmation of that fact. The EU is not asking the Panel to review and confirm that the SG&A data in Tables 6-5 to 6-8 is correct simply because we do not think that this is a task for a panel: our claim does not rest upon the proposition that the Panel should do that. Rather, what we are seeking is that, in the re-determination, China should return to this matter and examine the SG&A data in Tables 6-5 to 6-8. We are absolutely confident that, in so doing, they will confirm the accuracy of that data. However, this is a matter for the re-determination and eventually compliance proceedings, if necessary. It is not a matter for this Panel.

Question 21

At the first meeting of the Panel with the parties, China stated that the SG&A amount in Table 6-3 is derived from (i) the cost of production, and (ii) a certain coefficient. The Panel understands China to have also submitted that the planned coefficient represents the actual internal rates used by SMST. Thus, according to China, this coefficient should be considered as actual data, despite having been submitted as planned data. Please comment. In your response, please also explain whether the European Union takes issue, in the context of its claims relating to the SG&A amount, with the coefficient, as opposed to the actual amount, in Table 6-3.

90. The term "actual" refers to something that has actually occurred, and it is to be juxtaposed to something that is planned or anticipated, which is something that may or may not occur in the future.[49] Thus, when Article 2.2.2 refers to the actual data pertaining to production and sales in the ordinary course of trade, it is referring to data relating to something that has actually occurred. It is not referring to something that is planned or anticipated.

91. It is not because something *specifically identified as planned as opposed to actual* is included in a questionnaire response that it is thereby converted from

5	Table 6-6, page 6
6	Printout from computerized accounting records requested by MOFCOM during verification
7	Table 6-6, page 2
8	Table 6-6, page 7

[49] Appellate Body Report, *EC-Large Civil Aircraft*, para. 1043.

being planned or anticipated into being actual data. This is particularly so when the questionnaire response specifically directs the investigating authority to the place where the actual data pertaining to production and sales in the ordinary course of trade may be found. China attempts to elide this point by introducing the term "used" and arguing that the planned coefficients were actually used. However, Article 2.2.2 does not refer to something actually used: it refers to actual data. China's argument is therefore unavailing.

92. China did not verify the SG&A data in Table 6-3. China can point to no part of the SMST Verification Disclosure stating specifically that it did. As explained in response to Question 20, Point II.4 of the Verification Disclosure does not relate to Table 6-3 SG&A.

93. Nevertheless, even if China would persist in suggesting that such verification occurred (even though it did not) this would only bring China to the point that Table 6-3 SG&A was verified as "planned", that is, as stated in the questionnaire response. China has provided no evidence and can provide no evidence of any kind that the Table 6-3 SG&A was verified as actual data, because it was not so verified, because it is not actual data.

94. Thus, the EU takes issue both with the coefficient and with the information relating to the samples in Table 6-3. In our submission, neither is actual data pertaining to production and sales in the ordinary course of trade.

C. Alleged double-counting of certain financial expenses

Question 26

At paragraph 11 of its third-party submission, the United States submits that "if a firm always could provide substantial corrections once it realized what specific information an investigating authority was verifying during an on-the-spot investigation, the effectiveness of the on-the-spot investigation would be undermined … [T]he flexibility to accept clerical corrections should not be construed such that the firm could be less motivated to prepare carefully its data submissions". Please comment. In your response, please explain whether Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement mandates an investigating authority to accept all information submitted at verification.

95. It is not a question of mandating an investigating authority to accept all information submitted at verification but rather to permit parties to present information on issues that may arise during verification so long as such information is verifiable and does not impede the verification.

96. In this particular case, the EU claim is procedural, and not on the substance. Furthermore, 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.

Question 27

Please explain your understanding of what is the double-counting referred to in the European Union's claims.

97. The double-counting is explained in paragraphs 207 to 209 of China's First Written Submission. From this explanation, China seems to understand that certain financial expenses reported in Table 6-8 were already contained in Table 6-6 but that in Table 6-5, which summarises the detailed SG&A presented in Tables 6-6 to 6-8, the double-counting has been removed. The EU does not make a substantive claim regarding the double counting. We make a *procedural* claim to the effect that MOFCOM was not entitled to dismiss the point solely on the grounds that it was raised at verification.

98. Thus, what the EU is seeking is that, in the re-determination, China ensures that the actual data it uses does not involve any double counting. The EU believes that its procedural claim achieves this objective. Once the Panel confirms that procedural inconsistency, the EU believes that, in the process of the re-determination, China will no longer be able to reject the correct data only on the basis that it was submitted during verification. China will therefore have to re-examine the data as a matter of substance, and use the correct data. This is consistent with the EU claims regarding the use of actual data pertaining to production and sales in the ordinary course of trade. We believe that, assuming we are also successful with these claims, in the re-determination, China will

necessarily be guided towards a re-consideration of Tables 6-5 to 6-8, also based on ensuring that all double counting has been eliminated.

Question 28

At paragraphs 98-99 of its first written submission, the European Union states that, at the on-the-spot investigation, SMST commented on the double-counting of certain financial expenses in the SG&A rate used to calculate the constructed value for the relevant product at issue.

a. Why did SMST not submit this information when requested by MOFCOM prior to the on-the-spot investigation?

99. This was an issue that only became evident as SMST was going through the SG&A worksheets with MOFCOM at the beginning of verification. It became evident that the financial expenses from headquarters were already contained in the administrative expenses in Table 6-6 but then again contained in the financial expenses in Table 6-8. The nature and amount of the double-counting was confirmed by MOFCOM as is evident from paragraph 209 of China's First Written Submission.

b. What prompted SMST to submit this information?

100. This information was submitted in the normal course of verifying the SG&A expenses.

Question 29

At paragraphs 208-209 of its first written submission, China states that no double-counting of financial expenses occurred. Please comment and explain the factual basis of the European Union's claims. In your response, please also address the explanation given by China at paragraph 209 of its first written submission.

101. In paragraph 209 of its first written submission, China is correct that the double-counting only involves Table 6-8. In the financial expenses reported in Table 6-5, which summarise the detailed SG&A presented in Tables 6-6 to 6-8, the double-counting has been removed.

102. Thus, what the EU is seeking is that, in the re-determination, China ensures that the actual data it uses does not involve any double counting. The EU believes that its procedural claim achieves this objective. Once the Panel confirms that procedural inconsistency, the EU believes that, in the process of the re-

determination, China will no longer be able to reject the correct data only on the basis that it was submitted during verification. China will therefore have to re-examine the data as a matter of substance, and use the correct data. This is consistent with the EU claims regarding the use of actual data pertaining to production and sales in the ordinary course of trade. We believe that, assuming we are also successful with these claims, in the re-determination, China will necessarily be guided towards a re-consideration of Tables 6-5 to 6-8, also based on ensuring that all double counting has been eliminated.

Question 30

At paragraphs 200-201 of its first written submission, China refers to another double-counting issue, and concludes that "China … understands that this is not the double-counting referred to by the European Union." Please comment.

103. China is correct. The double-counting issue referred to at paragraphs 200-201 of China's First Written Submission is not the double-counting issue referred to by the EU.

IV. INJURY DETERMINATION

Question 31

The first part of the second sentence of Article 3.2 of the AD Agreement provides:

> **With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member**

a. Leaving aside issues of comparability, may an investigating authority find price undercutting simply on the basis that dumped import prices are lower than domestic prices, or is an authority required to also establish that such price differential is an effect of dumped imports? Please explain.

b. If an authority must show that the relevant price differential is an effect of dumped imports, how might it do so?

c. **If an authority must show that the relevant price differential is an effect of dumped imports, must that issue be addressed under Article 3.2, or might it rather be addressed in the context of the Article 3.5 causation analysis?**

104. Ad a) In order to fully address this question, two different aspects will be distinguished and addressed one after the other. The first aspect of the question is: does price undercutting involve an element of price effect, or is it sufficient to simply establish a price differential? Only if price undercutting is seen as involving a price effect do we reach the second aspect of the question. This second aspect is whether and under what circumstances an investigating authority is *required to establish* that a price differential is an effect of dumped imports.

105. The first aspect to be addressed is thus whether price undercutting involves an element of price effect.

106. 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.

107. In the view of the European Union, this is so for a number of reasons.

108. Wording: as Japan correctly points out, the most pertinent usage of the word "undercut" is: "To supplant […] by selling at lower prices"[50]. "To supplant" is used to mean "Chiefly of things: to take the place of, succeed to the position of, supersede".[51] In order to establish whether there has been "price undercutting by the dumped imports", it needs to be established whether dumped imports are having the *effect* of taking the place of domestic like products by selling at lower prices. In the view of the European Union, the very term "undercutting" requires an effect to be present.

109. Context: the relevant sentence in Article 3.2 of the Anti-Dumping Agreement refers to *effect*: "With regard to the *effect* of the dumped imports […], the investigating authorities shall consider whether there has been a significant price undercutting […], or whether the *effect* of such imports is *otherwise* to

[50] *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 10 march 2014, http://www.oed.com/view/Entry/211547; Opening Statement of Japan, p. 23.
[51] *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 10 march 2014, http://www.oed.com/view/Entry/194611; Opening Statement of Japan, p. 23.

depress prices […] or prevent price …"[52]. In the view of the European Union, since the sentence starts with the words "With regard to the *effect* of the dumped imports …"[53] the remainder of the sentence indeed must be understood "with regard to the *effect* of the dumped imports"[54]. The sentence goes on by introducing price undercutting, and then distinguishing price undercutting from price depression/suppression by stating "or whether the *effect* of such imports is otherwise to depress prices…"[55]. If price depression is defined as a situation where "the effect of such imports is otherwise to depress prices", then clearly price undercutting must have also referred to an *effect*. Otherwise, the *otherwise* would not make sense. The sentence starting with the words "With regard to the effect of the dumped imports on prices" clearly refers to three price effects, not to two price effects (price depression/suppression) and a non-price effect.

110. Context: the Appellate Body has pointed out "that Article 3.1 of the Anti-Dumping Agreement 'is an overarching provision that sets forth a Member's fundamental substantive obligation' with respect to the injury determination, and 'informs the more detailed obligations in succeeding paragraphs'"[56]. Article 3.1 of the Anti-Dumping Agreement refers explicitly to the "effect" of the imports and requires that a determination of injury "be based on (…) the effect of the dumped imports on prices in the domestic market"[57]. In the words of the Appellate Body, "Article[…] 3.1 […] outline[s] the content of such determination, which consists of the following components: […] (ii) the *effect* of such imports on the prices of like domestic products"[58]. The Appellate Body notes that the other paragraphs under Article 3 merely "elaborate on the three essential components referenced in Article[…] 3.1 […]. Article[…] 3.2 […] concern[s] items (i) and (ii) above, and spell[s] out the precise content of an investigating authority's consideration regarding […] the *effect* of such imports on domestic prices."[59] "This inquiry entails a consideration of the volume of

[52] Emphasis added.
[53] Emphasis added.
[54] Emphasis added.
[55] Emphasis added.
[56] Appellate Body Report, *China – GOES*, para. 126 (footnote omitted).
[57] (Emphasis added).
[58] Appellate Body Report, *China – GOES*, para. 127 (emphasis added).
[59] Appellate Body Report, *China – GOES*, para. 127 (emphasis added).

subject imports and their price *effects*"[60]. When the Appellate Body refers to price depression and price suppression, it calls these "the last two price effects" in Article 3.2[61], presuming that price undercutting as the first one is also a "price effect". Had the Appellate Body considered that price depression and price suppression are the only "price effects" in this Article, it would not have called them "the *last two* price effects"[62].

111. This interpretation finds support in the French version of the text: « s'il y a eu … sous-cotation notable …, ou si ces importations *ont, d'une autre manière, pour effet de déprimer les prix … ou d'empêcher … des hausses de prix…*».

112. The second aspect to be discussed is whether and under what circumstances an investigating authority is *required to establish* that a price differential is an effect of dumped imports.

113. In the view of the European Union, an investigating authority is required to discuss whether a price differential is an effect of dumped imports in cases where the investigating authority has strong reasons to doubt the presence of such effect.

114. Such were the circumstances during this investigation. In the view of the European Union, the inverse price movements and the vast difference in import and domestic price levels suggests that imports of Product C were not in competition with domestically produced Product C in the Chinese market. The record shows that domestic importers unanimously considered subject imports and domestic like products not to be substitutable. Under such circumstances, the European Union is of the view that it will not suffice to merely establish a price differential, but that an investigating authority is required to discuss whether a price differential is an effect of dumped imports. Such a discussion is lacking in the measure at issue, so that China has only established a price differential but not price undercutting in the sense of Article 3.2 of the Anti-Dumping Agreement.

[60] Appellate Body Report, *China – GOES*, para. 128 (emphasis added).
[61] Appellate Body Report, *China – GOES*, para. 133.
[62] Appellate Body Report, *China – GOES*, para. 133 (emphasis added).

115. Ad b) In a case where an investigating authority has strong reasons to doubt the presence of undercutting, in the view of the European Union 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. In the measure at issue, any such discussion of factors that point to a lack of effect is missing. In the view of the European Union, this cannot be sufficient.

116. Ad c) The European Union considers that, like the preceding two questions, this question should also be answered in light of the Appellate Body Report *China – GOES*, para 147: interpreting Article 3.2 as requiring a consideration of the relationship between subject imports and domestic prices does not result in duplicating the causation analysis under Article 3.5. Rather, Article 3.5 on the one hand, and Article 3.2 on the other hand, posit different inquiries. The analysis pursuant to Article 3.5 concerns the causal relationship between subject imports and injury to the domestic industry. In contrast, the analysis under Article 3.2 concerns the relationship between subject imports and a different variable, that is, domestic prices. As discussed, an understanding of the latter relationship serves as a basis for the injury and causation analysis under Article 3.5. In addition, Article 3.5 requires an investigating authority to demonstrate that subject imports are causing injury "through the effects of dumping", as set forth in Article 3.2, as well as in Article 3.4. Article 3.4 requires an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry", and provides a list of such factors and indicia that the authority must evaluate. Thus, the examination under Articles 3.5 encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Article 3.4. The examination under Article 3.5, by definition, covers a broader scope than the scope of the elements considered in relation to price undercutting under Article 3.2.

Question 32

Assume that in Year 1 both the import price and domestic price is 100. Assume that in Year 2 the import price remains 100, but the domestic price increases to 110.

a. Would these facts alone entitle an investigating authority to find the existence of price undercutting in the sense of the second sentence of Article 3.2? Please explain.

b. **If in response to sub-question 31(a) you indicated that an authority must show that the relevant price differential is an effect of dumped imports, please indicate what type of additional information the authority would need in order to do so.**

117. Ad a) In the view of the European Union, an investigating authority is required to discuss whether the subject imports have explanatory force for the prices in the domestic market. This involves a discussion of whether a price differential amounts to price undercutting in cases where the investigating authority has strong reasons to doubt the presence of such effect. Such strong doubts may arise e.g. from evidence that the dumped imports and the domestically produced products are not in competition with each other, or that for other reasons the price differential may not have the effect of price undercutting. The answer to question (a) thus depends on an overall view of the evidence on the record.

118. Ad b) In a case where an investigating authority has strong reasons to doubt the presence of undercutting, in the view of the European Union 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. In the measure at issue, a proper discussion of factors that point to a lack of effect is missing. In the view of the European Union, this cannot be sufficient.

Question 55

At paras 143 and 238 of their respective first written submissions, Japan and the EU contend that MOFCOM was selective with respect to the "domestic industry sectors" taken into account for its price comparisons. Please explain the basis for considering that MOFCOM took into account select "domestic industry sectors" in this context.

119. The respective sentence in para 238 of the EU first written submission reads:

> In other words, even assuming that China's price undercutting findings with respect to Products B and C were factually and methodologically accurate, China's conclusions with respect to price effects as a whole are unwarranted, as they are strikingly selective with respect to the categories of products and the domestic industry sectors to be taken into account in order to conduct a proper price comparison.

120. China concluded that imports of Product A did not have a significant price undercutting effect on domestic like products of the same type.

121. In the view of the European Union, China's analysis of the price effects of imports of Product C was analytically and factually flawed. A reasonable investigating authority could not have concluded that imports of Product C had a significant undercutting effect on the prices of the corresponding like domestic products.

122. Notwithstanding all of those considerations, China 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 had a price undercutting effect on like domestic products.

123. By consequence, the results MOFCOM arrived at were selective with respect to the categories of products and with respect to the domestic industry sectors which China took into account in order to conduct a proper price comparison. This selectiveness of the results MOFCOM arrived at is hence a consequence of the selective approach adopted by China, as outlined in the previous paragraphs.

Question 56

Please explain the complainants' assertion (at para. 183 of Japan's first written submission and para. 274 of the EU's first written submission) that MOFCOM was "improperly selective in the ways it treated the relevant factors and indices listed in Article 3.4". In doing so, please explain what is meant by the alleged "contradict[ion]" referred to earlier in that paragraph.

124. Para. 274 of the EU first written submission reads:

> 274. The Final Determination is silent as to why China disregarded the relevance of the majority of the factors and indices having a positive bearing on

> the state of the domestic industry. Indeed, the dismissal of certain positive factors is contradicted by China's own findings made in other parts of its Final Determination. For example, in its attempt to exclude a non-attribution factor under Article 3.5, China referred to the rapid increase in the sales volume of domestic products to show that the decline in domestic demand for HP-SSST products did not "materially injure[]" the domestic industry in terms of volume. In doing so, China was improperly selective in the ways it treated the relevant factors and indices listed in Article 3.4.

125. In paragraph 274 of this first written submission, the EU claims that China disregarded/did not properly discuss the fact that the factors and indices had a positive bearing on the state of the domestic industry. One of these positive factors is the rapid increase in the sales volume of domestic products. In its Article 3.5 analysis, China refers explicitly to this factor and argues that this factor proves a certain element in its non-attribution analysis under Article 3.5. In its analysis under Article 3.4, however, China does not properly discuss the rapid increase in the sales volume of domestic products, although a discussion would have been required. This is what is meant when calling it a contradiction – China considers the rapid increase in the sales volume of domestic products relevant under Article 3.5, but it is surprising to see that this factor is then not properly discussed under Article 3.4 where it is relevant.

Question 57

At para. 234 of its first written submission, the European Union suggests that the fact that the domestic sales volume of Grade C was very small compared to import volume suggests that domestic and imported Grade C were not in competition with one another. The EU asserts that Grade C imports would not, therefore, have had any price undercutting effects on domestic Grade C products.

a. Please comment on China's statement (at para. 477 of its first written submission) that "MOFCOM concluded that the imports of Grade B and Grade C at such undercutting prices made it practically impossible for the Chinese domestic industry to sell domestically".

b. **Why should an objective and impartial investigating authority find that the low volume of domestic Grade C sales indicates a lack of competition with imported Grade C, rather than unfair competition by imports of Grade C?**

126. Para. 234 of the EU first written submission reads:

> 234. Rather, in the view of the European Union, the inverse price movements and the vast difference in import and domestic price levels suggests that imports of Product C were not in competition with

> domestically produced Product C in the Chinese market. Indeed, the record shows that domestic importers unanimously considered subject imports and domestic like products not to be substitutable, with one importer even observing 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". Furthermore, the data indicates that domestic sales volume of Product C during the investigation period was very small compared to import volume. Under such circumstances, and without any reasonable ground for concluding that these products were in fact in competition with one another, it was erroneous for China to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

127. In paragraph 234, the EU argues that the inverse price movements and the vast difference in import and domestic price levels suggests that imports of Product C were not in competition with domestically produced Product C in the Chinese market. This lack of competition, together with the fact that the domestic sales volume of Product C during the investigation period was very small compared to import volume, means that it was erroneous for China to conclude that imports of Product C had any price undercutting effects on the corresponding like domestic products.

128. The EU does not argue that "the fact that the domestic sales volume of Grade C was very small compared to import volume suggests that domestic and imported Grade C were not in competition with one another." The EU rather argues that there is evidence for lack of competition, and this lack of competition together with the low domestic sales volume of Grade C indicates there are no price undercutting effects.

129. As regards the two sub-questions (a) and (b):

130. Ad a): The answer to this question depends on whether one considers that imports of Product C were in competition with domestically produced Product C in the Chinese market. The EU considers that there is evidence in the record that argues against such a competitive relationship.

131. Ad b): As described above, the EU does not argue that "the low volume of domestic Grade C sales indicates a lack of competition with imported Grade C". Rather, the EU argues that there is evidence for lack of competition, and this

lack of competition together with the low domestic sales volume of Grade C indicates there are no price undercutting effects.

Question 58

Does the EU agree with Japan's assertion, at paras 65 and 66 of its oral statement, that "an inquiry into 'price undercutting by the dumped imports' requires an inquiry into whether dumped imports are having the *effect* of taking the place of domestic like products by selling at lower prices" or "rendering domestic prices less firm".

132. Yes, the EU agrees and fully endorses this statement.

Question 59

At para. 78 of its oral statement, the EU asserts that an examination of price undercutting "encompasses an analysis of *what* has explanatory force for this price differential *per se*". The EU also asserts that Article 3.2 "instructs the investigating authority to consider whether a "price differential *per se*" has explanatory force for undercutting". Are these statements consistent? Should an investigating authority determine the explanatory force for the price differential *per se*, or for the price undercutting?

133. These two statements are two different ways of looking at the matter, which are consistent with each other, but the key question in the view of the EU remains whether the subject imports have explanatory force for the prices in the domestic market. In this sense, a necessary condition of price undercutting is a price differential. A price differential, however, may not be enough to show price undercutting under circumstances where there is strong evidence that no price effects exist. In this sense, and in order to clarify the EU statement in para. 78 of its first written submission, Article 3.2 instructs the investigating authority to consider for a price undercutting analysis whether the subject imports (by means of a price differential) have explanatory force for the prices in the domestic market.

Question 60

At para. 78 of its oral statement, the EU asserts that price undercutting refers to a situation in which prices are being undercut "by something". Given the text of Article 3.2, should one not conclude that the "something" is the price of dumped imports, in the sense that price undercutting arises when domestic prices are being undercut by the price of dumped imports?

134. In the view of the European Union, price undercutting requires a price differential. A price differential, however, may not be enough to show price undercutting under circumstances where there is strong evidence that no price effects exist. In this sense, the European Union would not agree that price undercutting arises always when the price of dumped imports is lower than domestic prices. Rather, price undercutting requires the presence of a price effect.

Question 61

At para. 83 of its oral statement, the EU asserts that an investigating authority is required to "understand whether a price differential *per se* provides explanatory force for price undercutting". What else, other than a price differential, might have explanatory force for price undercutting?

135. The whole sentence in para. 83 of the EU oral statement reads:

> The European Union considers that with regard to price undercutting under the second sentence of Article 3.2, an investigating authority is required to consider the relationship between a price differential per se and an alleged price undercutting, so as to understand whether a price differential per se provides explanatory force for price undercutting.

136. In the view of the European Union, the investigating authority must consider whether the subject imports have explanatory force for the prices in the domestic market. In this sense, a price differential is a necessary (but not sufficient) condition for price undercutting to occur. If there is strong evidence that there are no price effects, then a mere price differential will not suffice to show price undercutting. In the current case, there is strong evidence which indicates a lack of price effects: (1) the inverse price movements; (2) the vast difference in import and domestic price levels; and (3) the trivial volume of domestically produced Product C.

Question 62

During the Panels' first meeting with the parties, the European Union asserted that the domestic sales of Grade C during the period of investigation were likely sample or "outlier" transactions. What is the basis for this assertion?

137. In its opening statement, at para. 60, the European Union argues that the figures quoted in para. 59 of its opening statement suggest that imports of Product C were not in competition with domestically produced Product C in the Chinese

market. The European Union considers that the three factors taken together (the inverse price movements; together with the vast difference in import and domestic price levels; together with the trivial volume of domestically produced Product C) indicate that the domestic sales of Product C were likely outlier transactions.

V. TREATMENT OF CONFIDENTIAL INFORMATION

Question 67

Please explain (with specific references to MOFCOM's statements) how MOFCOM objectively assessed and determined the showing of good cause by the petitioners. In your answer please address the Appellate Body's statements regarding the obligations in Article 6.5 of the Anti-Dumping Agreement (Appellate Body Report in *EC - Fasteners (China)*, paras. 537-539), in particular that "'good cause' must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information."

138. As explained in the EU First Written Submission,[63] the European Union considers that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because China permitted the full texts of the relevant documents to remain confidential without a showing of good cause. Thus, the EU considers that MOFCOM simply failed to objectively assess this matter.

139. The European Union submits that the concern regarding the potential disruption of these third parties' businesses could have been addressed by simply withholding the names of the third parties providing these reports, as well as perhaps the names of any entities that provided information to the third parties that prepared these reports, at least to the extent that the information in the reports would be referred to or relied on by the Applicant or the investigating authority. Thus, while the European Union accepts that the Applicants demonstrated good cause for treating the names of the third parties providing these reports as confidential, the European Union submits that the Applicants did not demonstrate good cause for treating the full texts of these reports as confidential.

[63] EU FWS, paras. 86-88.

140. China never required the Applicants to disclose the full texts of any of the four aforementioned reports with the names of the "authoritative third party institute[s]" (which China considered confidential) redacted. Therefore, by allowing the treatment of the full texts of the four aforementioned reports as confidential without a showing of good cause, China violated Article 6.5 of the Anti-Dumping Agreement.

141. The European Union agrees with the findings of the Appellate Body in *EC – Fasteners (China)* at paragraphs 537-539.

142. Specifically, we consider that the requirement to show "good cause" for confidential treatment applies to both information that is "by nature" confidential and that which is provided to the authority "on a confidential basis".[64] The "good cause" alleged must constitute a reason sufficient to justify the withholding of information from the other parties interested in the investigation, who would otherwise have a right to view this information under Article 6 of the Anti-Dumping Agreement. Put another way, "good cause" must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information. "Good cause" must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party.

143. We also consider that the examples provided in Article 6.5 in the context of information that is "by nature" confidential are helpful in interpreting "good cause" generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved. Article 6.5 states that the disclosure of such information "would be of significant competitive advantage to a competitor" or "would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". These examples suggest that a "good cause" which could justify the non-disclosure of

[64] See Panel Report, para. 7.451; Panel Report, *Korea – Certain Paper*, para. 7.335; and Panel Report, *Guatemala – Cement II*, para. 8.219.

confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired. These examples are only illustrative, however, and we consider that a wide range of other reasons could constitute "good cause" justifying the treatment of information as confidential under Article 6.5.

144. In our submission, in practice, a party seeking confidential treatment for information must make its "good cause" showing to the investigating authority upon submission of the information. The authority must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information[65] with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged. The obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a "good cause" showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only "upon good cause shown".

Question 68

With regard to the group of 4 appendices at issue, the complainants suggest that non-confidential summaries contained only the final data provided by each relevant report (European Union's first written submission, paras. 90-91; and Japan's first written submission, paras. 282-283). However, at paragraphs 714, 742-746, and 758-760 of its first written submission, China contends that the non-confidential summaries contained "a large part of the original text". Please comment and explain whether these non-confidential summaries are "in sufficient detail to permit a

[65] Where necessary, the authority must also consider the submitting party's relationship with the source of the confidential information.

reasonable understanding of the substance of the information submitted in confidence."

145. As explained in the EU First Written Submission,[66] 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.

146. 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. In particular:

- For Appendix V to the Application, the Applicants provided the final market data regarding Chinese production, sales, and demand in the non-confidential version of Appendix V itself.[67]
- For Appendix VIII to the Application, the Applicants noted in the non-confidential version of Appendix VIII that "[t]he specific numbers [regarding the prices of HP-SSST exports to China and of HP-SSST sold locally in Japan and the EU] are already disclosed in the non-confidential (public) version of the petition".[68] The European Union understands these specific numbers regarding prices to be provided at pages 26 and 31-32 of the Application.
- For Appendix 59 to the Applicants' Supplemental Submission, the Applicants disclosed the inspection fee, miscellaneous port charges, and handling fee in its "List of supplementary evidence and non-confidential summary".[69]
- And for the Appendix to the Applicants' Additional Submission, the Applicants noted in the non-confidential version of the Appendix that "[t]he pertinent numbers [(i.e., the combined total production figures for the domestic industry)] []are already disclosed in the preceding paragraphs of this document",[70] and indeed the Applicants' Additional Submission contained a table with these figures.

147. However, other than disclosing these final data, <u>the Applicants provided no summary of any other contents of these reports</u>, including the methodologies utilized by the third party institutes to obtain these data or the underlying

[66] EU FWS, paras. 89-97.
[67] Application, Exhibit EU-1, Appendix V.
[68] Application, Exhibit EU-1, Appendix VIII.
[69] Applicants' Supplemental Submission, Exhibit EU-15, Section III (List of supplementary evidence and non-confidential summary, item 59).

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".[71]

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

149. Second, with respect to Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, and 58 to 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".[72] As the panel found in *China – X-Ray Equipment*, such a statement is not an adequate non-confidential summary under Article 6.5.1.[73]

150. Moreover, it is evident from the Applicants' "List of supplementary evidence and non-confidential summary" that a number of these items contain multiple pieces of evidence or reports, which the panel in *China – X-Ray Equipment* found must be further summarized under Article 6.5.1.[74] For example, Appendix 7 contains a "*Report* on the downstream use of shot blasting on the inner wall of high-performance stainless steel seamless pipes supplied by Wujin"; Appendix 8 contains "*Information* regarding the suspension of Wujin's expansion project for high-performance stainless steel seamless pipes"; Appendix 28 contains "Audit *reports* on Wujin (2009-2011)"; Appendix 31

[70] Applicants' Additional Submission, Exhibit EU-16, Appendix.
[71] Panel Report, *China – X-Ray Equipment*, para. 7.341.
[72] Applicants' Supplemental Submission, Exhibit EU-15, Section III (List of supplementary evidence and non-confidential summary).
[73] Panel Report, *China – X-Ray Equipment*, paras. 7.352-7.353, 7.355, 7.360.
[74] Panel Report, *China – X-Ray Equipment*, paras. 7.341-7.342.

contains "Wujin's … *evidence* suggesting contract enforcement being affected"; and Appendix 43 contains "Audit *reports* on Walsin (2008-2010)".[75]

151. With respect to this group of Appendices, the Applicants also provided no explanations as to why additional non-confidential summaries of these Appendices could not be provided.

152. The Applicants' omissions described above with respect to both groups of Appendices prevented interested parties such as EU exporters, and the EU itself, from defending their interests in the investigation.

153. For these reasons, China's failure to require sufficient non-confidential summaries of the Appendices referenced above, or explanations as to why such summaries were not possible, is inconsistent with Article 6.5.1 of the Anti-Dumping Agreement.

Question 69

At paragraph 759 of its first written submission, China states that, with regard to two reports, "[t]he original reports that received confidential treatment do not contain further information regarding the methodologies utilized by the third party institutes to obtain the data, or the underlying evidence they relied upon." Please comment.

154. Neither the complainants nor the Panel have any means of commenting on this assertion as long as neither the document nor a properly constituted non-confidential summary of it has been provided.

VI. DISCLOSURE OF ESSENTIAL FACTS

Question 71

The Shorter Oxford English Dictionary defines "fact" *inter alia* as "Events or circumstances as distinct from their legal interpretation". Would the treatment of MOFCOM's calculation methodology as an essential "fact" for the purpose of Article 6.9 of the AD Agreement be consistent with this definition? Please explain.

[75] Applicants' Supplemental Submission, Exhibit EU-15, Section III (List of supplementary evidence and non-confidential summary) (emphases added). The supplied list of examples is not intended to be exhaustive.

155. Yes. Facts are matters that belong in the realm of the senses and could be apprehended by a well-placed observer. Economic legal analysis, like daily life, involves hundreds or thousands of inferred facts. Inferred facts are things of which there is no direct evidence, but where indirect evidence justifies the relevant conclusion. There may be direct evidence that a train leaves station A at 10:00 am and arrives at station C at 15:00 pm. There may be no direct evidence that it passed through station B. However, if we know that there is one line between stations A and C we may reasonably infer that the train also passed through station B. That the fact is inferred does not make any less of a fact. It is not the fact that changes, only the evidence. Had an observer been standing in station B they would have seen the train go by. That we did not observe the event directly does not make it any less of a fact. That the fact must be inferred does not transform it into something else, such as "reasoning" and therefore "non-fact".

156. Similarly, if we are given the fact that the normal value is 10 and the fact that the export price 8, then it is a fact that the dumping amount is 2. This results from the calculation methodology of deducting 8 from 10. Nevertheless, the dumping amount and the subtraction are not, as a consequence, to be classified as "reasoning" or a "non-fact" and therefore not subject to disclosure. Since any fact can be re-stated as an inference from two or more other facts, this would just provide an excuse to refuse disclose any and all facts, which is not a permissible reading of the provision. Rather, the following are all facts: the normal value is 10; the export price is 8; the mathematical operation of subtraction is applied by deducting 8 from 10; the dumping amount is 2. These are all essential facts and they must all be disclosed.

Question 72

In cases where domestic prices were provided by only two producers, would the use of domestic price ranges have disclosed confidential information? Please explain.

157. The EU does not understand why the use of domestic price ranges would disclose confidential information, provided that an appropriate range is used. We do not understand why this observation is affected by the number of producers. If one producer's prices are 10, then a range can be given that (i)

provides information to the other parties and (ii) protects confidentiality at the same time. Depending on the facts, this could, for example, be a range from 8 to 12. The same could be done if there would be two producers.

Question 73

Do the complainants accept China's assertion (at para. 686 of its first written submission) that the complainants acknowledge that the Grade A import price in 2008 was confidential? If not, why not?

158. We do not believe that MOFCOM was entitled to simply treat the data in its entirety as confidential. We believe that a price range could have been provided.

Question 74

The complainants assert that MOFCOM's disclosure of the range of underselling for grade B was not sufficient for the purpose of Article 6.9 (para. 244 of Japan's first written submission, and para. 130 of the EU's first written submission). Please explain what, in your view, MOFCOM should have disclosed in order to comply with its Article 6.9 obligation.

159. We consider that MOFCOM should have disclosed a number for each year.