In the World Trade Organisation
Panel Proceedings

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

(DS460)

Opening Statement
Of the European Union
At the First Meeting of the Panel

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TABLE OF CONTENTS

TABLE OF EXHIBITS

No	Short Title	Date	Status	DS454
32	Translation Exhibit on Comments 1-22	25/02/2014		JPN-29
33	Translation Exhibit on Comments 23-35	25/02/2014		

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel. On behalf of the European Union, we would like to thank you for the opportunity to appear before you today.

2. In this Oral Statement we will first address the various threshold issues that are before the Panel. We will then address the dumping issues, although we will not repeat what we have said in our Response to China's Request for Preliminary Rulings, which we filed on Friday 21 February 2014. We will then address some of the main injury issues. In order not to burden the Panel with an excessively long Oral Statement, we leave the remaining issues, and particularly the procedural issues, for our rebuttal, although we will be happy to respond to any questions that the Panel might have.

II. THRESHOLD ISSUES: REQUESTS THAT THE PANEL AMENDS TWO ASPECTS OF THE BCI PROCEDURES AND ONE ASPECT OF THE WORKING PROCEDURES

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

3. The European Union has submitted that the BCI Procedures are WTO inconsistent insofar as they provide for the automatic classification as BCI in these WTO panel proceedings of information that was submitted as BCI in the municipal anti-dumping proceeding. The European Union considers that the question of designation should be subject to objective criteria established and eventually applied by the WTO adjudicator. The BCI Procedures are WTO inconsistent because they take this matter out of the hands of the adjudicator. This means that there is no guarantee that a balanced and proportionate approach to designation will be adopted, taking into account the various interests at stake. It contradicts the fact that it is for the Member to seek designation (or not). And it is unnecessary and

disproportionate because it would be sufficient to merely encourage Members to take into consideration the views of the firm submitting the information to an investigating authority in an anti-dumping proceeding, without seeking to bind Members in that respect. We have requested that the BCI Procedures be amended accordingly.[1]

4. China deals with both of the EU requests (this request and the following request) together, in a little over one page of its First Written Submission. China submits that the EU request is "flawed". It considers that this is demonstrated by the case-law referred to by the European Union. The Panel in this case has decided that additional protection for BCI is justified and have specified the form that it should take. In doing so, they balanced the interests of all WTO Members by requiring non-confidential versions. It is therefore "evident" that there is nothing WTO inconsistent in the BCI Procedures. Article 12.1 of the DSU permits panels to adopt such procedures. The protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. The ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. The approach adopted by the Panel is in line with the confidentiality requirements of Article 6.5 of the Anti-Dumping Agreement.[2]

5. Evidently, China does not engage with the specific issue raised by the European Union, which 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. This lack of engagement is significant. It is not for lack of resources. In other parts of its First Written Submission China engages at great length with the EU claims. This lack of engagement rather reflects the simple fact that China has no substantive response. China has no substantive response because there isn't one. The BCI Procedures are

1 EU FWS, paras. 65-68.
2 China FWS, paras. 769-776.

evidently WTO inconsistent on this point, and require immediate amendment.

6. Turning to the specific points made by China, China submits that the EU request is "flawed". However, China provides no explanation or no valid explanation of why that is supposed to be the case. The same is true of China's assertion that this is demonstrated by the case-law cited by the European Union. The European Union has carefully based its submissions on that case-law. We have cited to it in support of each step of our reasoning, and provided the relevant quotation. China does neither.

7. China observes that the Panel in this case has decided that additional protection for BCI is justified. That is correct, and the European Union does not take issue with that observation. Nor do we take issue with the Panel's decision that additional protection for BCI is justified in this case. On the contrary, as stated in our First Written Submission, we support the adoption of such BCI Procedures and consider them necessary in these proceedings. However, this is not the matter that has been placed before the Panel by the European Union. Rather, the matter that has been placed before the Panel by the European Union is whether or not the Panel have 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. China does not respond with respect to this issue.

8. China submits that the Panel has ensured the necessary balance because it has required the submission of non-confidential summaries. The European Union has no objection to the Panel requiring the submission of non-confidential summaries. However, the issue raised by the European Union relates to the authority and obligation to settle issues of designation. It is in deciding whether or not particular items of information are to be designated or not that a balance is struck between the various competing interests at stake. China does not explain how the provision concerning the filing of non-confidential summaries is supposed to bear on this issue.

Evidently it does not. Once again, therefore, China does not engage with or respond to the point raised by the European Union.

9. China submits that panels have the authority to adopt BCI procedures pursuant to Article 12.1 of the DSU. The European Union does not disagree. However, our point is that they must do so in a manner that is consistent with the DSU. Once again, therefore, China's observation does not engage with or respond to the point raised by the European Union.

10. China submits that the protection afforded by the BCI Procedures does not *diminish* the protection afforded by the DSU. However, the European Union is not arguing that the protection afforded by the BCI Procedures diminishes the protection afforded by the DSU. Rather, we are arguing that the DSU places the authority and obligation to make ultimate determinations about designation with the adjudicator; that in making any such determinations the adjudicator must balance the various competing interests at stake; and that it is not compatible with this system that a panel should delegate, in absolute terms, the question of whether information is confidential, to the firm submitting such information in the municipal anti-dumping proceedings.

11. China submits that the ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. However, the European Union is not arguing that the ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU is impaired. Rather, we are arguing that the DSU places the authority and obligation to make ultimate determinations about designation with the adjudicator; that in making any such determinations the adjudicator must balance the various competing interests at stake; and that it is not compatible with this system that a panel should delegate, in absolute terms, the question of whether information is confidential, to the firm submitting such information in the municipal anti-dumping proceedings.

12. Finally, China asserts that the Panel's approach is consistent with Article 6.5 of the Anti-Dumping Agreement, but offers no explanation as to why

that might be the case. The European Union has already dealt with this point.[3] The Anti-Dumping Agreement recognises that the interest in confidentiality must be taken into account.[4] Nevertheless, designation of information as confidential is not something absolutely in the hands of the submitting firm, but rather depends on the investigating authority being satisfied that good cause has been shown and that such designation is warranted, and even then designation remains discretionary.[5] Even if designated as confidential, the rule is against disclosure to competitors, not adjudicators,[6] and at the same time it is recognised that disclosure may be required pursuant to additional protective rules,[7] which is precisely what DSU BCI procedures are.

13. Where one party files a claim that meets the requirement of the working procedures and due process, establishing a *prima facie* case, and the other party does not respond, a panel must find in favour of the complaining party. A complete failure to engage with and be responsive to a point raised by the other party is conceptually equivalent to a failure to appear.[8] In these circumstances, the European Union respectfully re-iterates its request that the BCI Procedures be amended, as specified in the EU First Written Submission.

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

3 EU FWS, para. 75.

4 Anti-Dumping Agreement, Articles 6.1.2, 6.1.3, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.7, 12.2.1, 12.2.2, 12.2.3.

5 Anti-Dumping Agreement, Article 6.5 ("… upon good cause shown …") and Article 6.5.2 ("… not warranted … may …").

6 Anti-Dumping Agreement, Article 6.5 (" … because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information …").

7 Anti-Dumping Agreement, footnote 17: " Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required."

8 See: Working Procedures for Appellate Review, Rule 29 (Failure to Appear) ("Where a participant fails to file a submission within the required time-periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate.").

14. The European Union has also submitted that the BCI Procedures are WTO inconsistent insofar as they provide that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings when submitting such information to the Panel. For the reasons indicated in our First Written Submission, the European Union considers that this statement in the BCI Procedures is WTO inconsistent. It effectively takes out of the hands of the submitting Member and eventually the adjudicator the question of what may be submitted in WTO DSU proceedings. It provides a proxy for unlawfully delegated designation, because whatever the correct designation, a firm could simply withhold authorisation. It means that there is no guarantee that a balanced and proportionate approach to designation (and designation through the proxy of withholding authorisation) will be adopted, taking into account the various interests outlined above. It contradicts the fact that it is for the Member to seek designation (or not) and for the Member to decide whether or not to place particular evidence before a panel. And it is unnecessary because it would be sufficient to merely recall that submitting Members remain solely responsible for their own compliance with any applicable confidentiality rules.[9]

15. As indicated above, China deals with both of the EU requests (this request and the preceding request) together, in a little over one page of its First Written Submission. China submits that the EU request is "flawed". It considers that this is demonstrated by the case-law referred to by the European Union. The Panel in this case has decided that additional protection for BCI is justified and has specified the form that it should take. In doing so, they balanced the interests of all WTO Members by requiring non-confidential versions. It is therefore "evident" that there is nothing WTO inconsistent in the BCI Procedures. Article 12.1 of the DSU permits panels to adopt such procedures. The protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. The ability of Members to designate information as confidential pursuant to

[9] EU FWS, paras. 69-74.

Article 18.2 of the DSU remains fully in force. The approach adopted by the Panel is in line with the confidentiality requirements of Article 6.5 of the Anti-Dumping Agreement.[10]

16. Evidently, China does not engage with the specific issue raised by the European Union, which is whether or not the Panel has the authority to require that a party must seek and provide evidence of prior written authorisation from the entity that submitted the relevant information in the anti-dumping proceedings when submitting such information to the Panel. As already stated with respect to the preceding point, this lack of engagement is significant. It confirms that the BCI Procedures are evidently WTO inconsistent on this point, and require immediate amendment.

17. Turning to the specific points made by China, China submits that the EU request is "flawed". However, China provides no explanation or no valid explanation of why that is supposed to be the case. The same is true of China's assertion that this is demonstrated by the case-law cited by the European Union. The European Union has carefully based its submissions on that case-law. We have cited to it in support of each step of our reasoning, and provided the relevant quotation. China does neither.

18. China observes that the Panel in this case has decided that additional protection for BCI is justified. That is correct, and the European Union does not take issue with that observation. Nor do we take issue with the Panel's decision that additional protection for BCI is justified in this case. On the contrary, as stated in our First Written Submission, we support the adoption of such BCI Procedures and consider them necessary in these proceedings. However, this is not the matter that has been placed before the Panel by the European Union. Rather, the matter that has been placed before the Panel by the European Union is whether or not the Panel have the authority to require that a party must seek and provide evidence of prior written authorisation from the entity that submitted the relevant

[10] China FWS, paras. 769-776.

information in the anti-dumping proceedings when submitting such information to the Panel. China does not respond with respect to this issue.

19. China submits that the Panel has ensured the necessary balance because they have required the submission of non-confidential summaries. The European Union has no objection to the Panel requiring the submission of non-confidential summaries. However, the issue raised by the European Union is whether or not the Panel has the authority to require that a party must seek and provide evidence of prior written authorisation from the entity that submitted the relevant information in the anti-dumping proceedings when submitting such information to the Panel. China does not explain how the provision concerning the filing of non-confidential summaries is supposed to bear on this issue. Evidently it does not. Once again, therefore, China does not engage with or respond to the point raised by the European Union.

20. China submits that panels have the authority to adopt BCI procedures pursuant to Article 12.1 of the DSU. The European Union does not disagree. However, our point is that they must do so in a manner that is consistent with the DSU. Once again, therefore, China's observation does not engage with or respond to the point raised by the European Union.

21. China submits that the protection afforded by the BCI Procedures does not diminish the protection afforded by the DSU. However, the European Union is not arguing that the protection afforded by the BCI Procedures diminishes the protection afforded by the DSU. Rather, we are arguing that the Panel does not have the authority to require that a party must seek and provide evidence of prior written authorisation from the entity that submitted the relevant information in the anti-dumping proceedings when submitting such information to the Panel.

22. China submits that the ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU remains fully in force. However, the European Union is not arguing that the ability of Members to designate information as confidential pursuant to Article 18.2 of the DSU

is impaired. Rather, we are arguing that the Panel does not have the authority to require that a party must seek and provide evidence of prior written authorisation from the entity that submitted the relevant information in the anti-dumping proceedings when submitting such information to the Panel.

23. Finally, China asserts that the Panel's approach is consistent with Article 6.5 of the Anti-Dumping Agreement, but offers no explanation as to why that might be the case. The European Union has already dealt with this point. The Anti-Dumping Agreement recognises that the interest in confidentiality must be taken into account. Nevertheless, designation of information as confidential is not something absolutely in the hands of the submitting firm, but rather depends on the investigating authority being satisfied that good cause has been shown and that such designation is warranted, and even then designation remains discretionary. Even if designated as confidential, the rule is against disclosure to competitors, not adjudicators, and at the same time it is recognised that disclosure may be required pursuant to additional protective rules, which is precisely what DSU BCI procedures are.

24. The comments that we have already made regarding China's lack of engagement with the EU requests apply with equal force. Where one party files a claim that meets the requirement of the working procedures and due process, establishing a *prima facie* case, and the other party does not respond, a panel must find in favour of the complaining party. A complete failure to engage with and be responsive to a point raised by the other party is conceptually equivalent to a failure to appear.[11] In these circumstances, the European Union respectfully re-iterates its request that the BCI Procedures be amended, as specified in the EU First Written Submission.

[11] See: Working Procedures for Appellate Review, Rule 29 (Failure to Appear) ("Where a participant fails to file a submission within the required time-periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate.").

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

25. China requests the Panel to amend paragraph 10 of the Working Procedures so that it provides that objections to translations should be raised promptly in writing no later than the next meeting following such filing, or in the absence of any such meeting within two weeks, as opposed to at the next filing.[12]

26. The WTO Agreement is authentic in English, French and Spanish and these are the languages in which litigation is conducted and adjudications delivered. Nevertheless, evidence placed on the record in some other language is still evidence placed on the record, that is, evidence of fact. Furthermore, as the European Union sees it, translation is not a pure question of fact. Even with respect to the comparison of two *individual* terms, there is always going to be a penumbra, even if they are both in the *same language*. This is all the more so if they are in *different languages*. And all the more so given that the meaning of each term can only be properly understood within the relevant *context*, taken as a whole. In other words, translation is about *meaning*, and the meaning of municipal law is a mixed question of law and fact (that is, a legal characterisation of the facts) that can be raised on appeal. In any event, even factual matters can be raised on appeal, pursuant to Article 11 of the DSU. Therefore, in the opinion of the European Union, translation issues could also be raised, for example, on appeal. A panel's working procedures must be consistent with the DSU. Article 17.6 of the DSU indicates that issues of law and legal interpretations, that is, including translation issues, can be raised on appeal. Therefore, a panel's working procedures may not provide that a party is absolutely precluded from raising a translation issue on appeal, any more than they could provide, for example, that a party is absolutely precluded from raising a DSU issue on appeal.

27. The European Union understands that translation is a particular type of issue, of a preliminary nature, and that it may be reasonable to expect

[12] China FWS, paras. 802-807.

parties to raise any obvious translation issues that they may have at a reasonably early stage of the process. This is similar to the position with respect to so-called preliminary issues. Parties are expected to raise them at a sufficiently early stage, in the interests of an orderly conduct of the proceedings. Nevertheless, there is no absolute bar to them being raised later, including in appeal proceedings. Where they relate to so-called jurisdictional issues, such as Article 6.2 of the DSU, the Appellate Body may and even must consider such issues of its own motion, even if they are not raised by either party.

28. The particular difficulty with translation issues is that their significance may not always be apparent until such time as particular terms are set in the context of a particular adjudication. It is quite possible that it is only when one reads an interim report that the significance of a particular translation issue becomes apparent.

29. The European Union would also observe that there are no circumstances in which it would make sense to win a case based on an incorrect translation. The defending Member could implement by simply informing the complaining Member of the correct translation. This would not be a fruitful use of the DSU, as required by Article 3.7 of the DSU.

30. Accordingly, the European Union considers that translation issues can be raised even on appeal. That said, we also consider that parties are under an obligation to raise translation issues in a timely manner. Thus, if a particular translation issue was apparent early in the proceedings, but not raised before the panel, that could be significant for the Appellate Body in determining how to deal with it on appeal.

31. Against this background, the European Union has understood that paragraph 10 of the Working Procedures does not contain an absolute rule, because it uses the term "should". However, if the Panel considers otherwise, then the European Union respectfully requests that paragraph 10 be amended to make it clear that the rule is not absolute. This could be

done for example, by inserting the words "to the extent that its significance is reasonably apparent" before the term "should".

32. With this in mind, China's requested amendment is not necessary, because the provision as drafted is not absolute. If the Panel does consider China's requested amendment, then the European Union would observe that (1) there should be no absolute rule and in any event two weeks is too short and (2) a balanced approach should be adopted as between the two parties. The period of time within which a party may reasonably be expected to raise a translation issue is a function of the volume of a particular submission, including its exhibits, and particularly the amount of translated material that it involves. This is something that can better be assessed on a case-by-case basis. The amendment proposed by China does not ensure such balance.

III. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

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

33. The European Union claims that, in the measure at issue, China did not establish the existence of a margin of dumping for SMST on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C (DMV 310N). In this respect, the European Union has explained that, in calculating normal value for Product C (DMV 310N), China included [[**BCI**]] EU sales of goods that were different from the goods sold for export to China. As explained in SMST's Comments on the Preliminary Dumping Disclosure,[13] normal boiler tubes (i.e., those used in a primary boiler system) have an outer diameter of well over 30mm. This is evidenced by the sales of Product C (DMV 310N) exported to

[13] Exhibit EU-19 (BCI), para. 5.

China, which all had an outer diameter of [[**BCI**]]mm. Large differences in tube outer diameter markedly affect price comparability. Thin diameter tube requires more extensive rolling/drawing, resulting in higher costs of production and prices. Thin diameter tubes also cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves. Thus, in determining the dumping margin for Product C, China compared two baskets with a very different product mix, without making the necessary adjustments in order to ensure a fair comparison.[14]

34. China argues that SMST did not raise this issue in its Dumping Questionnaire Response, but on the contrary stated that domestic and exported DMV 310N was comparable, and only raised the issue, contradicting its Dumping Questionnaire Response, in its Comments on the Provisional Disclosure.[15] According to China, SMST's request was "tied-to the original low volume claim", which China appears to consider significant.[16] Also according to China, SMST was obliged to provide "a modicum of an indication"[17] of an impact on price comparability, but failed to do so. China asserts that, in this respect, it does not seek to "impose an unreasonable burden of proof".[18] According to China, SMST merely requested the exclusion of these transactions, but did not request an adjustment, and it was unclear what SMST was asking MOFCOM to do.[19] China argues that SMST did not quantify the alleged impact of the differences on costs and prices.[20] China also argues that, because SMST allegedly did not provide sufficient evidence, the only assessment that could reasonably by undertaken by MOFCOM was whether or not the transactions in question related to goods within the product scope of the investigation.[21] Finally, China argues that the existing case law on the

14 EU FWS, paras. 176-186.
15 China FWS, paras. 178-184.
16 China FWS, para. 183, second indent.
17 China FWS, para. 187 (" … a modicum of an indication …").
18 China FWS, para. 189 (" … did not impose an unreasonable burden of proof …").
19 China FWS, para. 188.
20 China FWS, para. 183, first indent.
21 China FWS, para. 186.

comparison between exports and domestic sales in the context of an injury determination provides no support for the EU claim in this case.[22] We now deal with each of these points in turn.

35. China's focus on what occurred during the investigation is not particularly helpful, since what really matters is whether or not, objectively, China ensured a fair comparison between normal value and export price. If the baskets compared had such different product mixes that a fair comparison was not ensured, as was the case, then the inconsistency is demonstrated, and that should be an end of the matter.

36. In any event, China's insistence on the content of SMST's Dumping Questionnaire Response is odd, because China accepts that SMST raised the point in a timely manner, in SMST's Comments on the Preliminary Disclosure, before the verification. In this respect, China does not allege any procedural deficiency, nor could it, since the measure at issue itself expressly records the fact that SMST raised the point; and does not attempt to deal with it by determining that this was not done in a timely fashion.[23] Thus, any attempt to deal with the issue at this stage by way of procedural argument would necessarily fail as ex-post rationalisation. Thus, the position is very simple. SMST's Dumping Questionnaire Response says what it says. As soon as the true nature of the problem became apparent to SMST, SMST raised the point in its Comments on the Preliminary Dumping Disclosure, thus qualifying its Dumping Questionnaire Response accordingly. This was done in a timely manner, and that should be an end of the matter.

37. Notwithstanding this, China re-iterates its assertions about SMST's Dumping Questionnaire Response throughout the relevant part of its First Written Submission. In fact, China makes the point no fewer than *twenty* times. China does this despite the fact that the point is irrelevant, given that the measure at issue itself accepts that the point was raised in a timely

22 China FWS, para. 190.
23 China FWS, para. 166, reproducing the relevant part of the SMST Final Dumping Disclosure.

manner.[24] One can only reasonably presume that China does this because, as is also quite apparent, China has no response to the substance of the claim.

38. China's submission that SMST's request was "tied-to the original low volume claim"[25] is inaccurate and irrelevant. The request was a stand-alone request, and was dealt with as such in the measure at issue.[26] Even if it would have been "tied-to" some other request, that would not detract from the fact that, in failing to ensure a fair comparison, the measure at issue is inconsistent with Article 2.4 of the Anti-Dumping Agreement.

39. China's argument that SMST failed to provide "a modicum of an indication"[27] of an impact on price comparability, but failed to do so, should be rejected. The point raised by SMST is expressly dealt with in the measure at issue.[28] This is not done on the basis that SMST had been deficient in providing evidence. On the contrary, it is expressly stated that SMST presented *evidence proving* that the relevant transactions related to a product that was *different* from the company's products exported to China, both in terms of processing technology and in terms of other criteria. This is a clear reference to the fact that SMST demonstrated to MOFCOM that, also because of the very thin dimensions of the products, they require more extensive rolling/drawing resulting in higher costs of production.[29] Evidently, the use of processing technology, including rolling/drawing, involves costs and equally evidently the greater the use of such processing technology, including rolling/drawing, the greater the costs. SMST also provided to MOFCOM all of the specific documents relating to these transactions;[30] a diagram to that effect that has actually been endorsed by the verifying MOFCOM officials;[31] and all the relevant documentation relating to both the domestic sales in the European Union and the export

24 China FWS, para. 166, reproducing the relevant part of the SMST Final Dumping Disclosure.
25 China FWS, para. 183, second indent.
26 China FWS, para. 166, reproducing the relevant part of the SMST Final Dumping Disclosure.
27 China FWS, para. 187 (" … a modicum of an indication …").
28 China FWS, para. 166, reproducing the relevant part of the SMST Final Dumping Disclosure.
29 China FWS, reproducing the relevant part of SMST's Comments on the Preliminary Disclosure.
30 EU FWS, para. 178 and footnote 192.

sales to China, as well as EU domestic sales of the type of product sold to China.[32] In these circumstances, there is no basis for China's assertion that SMST failed to provide "a modicum of an indication" in terms of evidence relating to this matter, which is expressly contradicted by the terms of the measure at issue itself.

40. This is equally confirmed by the further terms of the measure at issue itself. Thus, having expressly recorded the fact that SMST *did* provide the relevant evidence, the measure at issue then turns to describing the evidence that the investigating authority *did* consider to be lacking. However, what is described is *not* a deficiency of evidence with respect to the difference between the relevant products, but instead a lack of evidence that these products were not *within the scope of the investigation*. However, as we have explained in our First Written Submission, this is a different issue that has no relevance to the point raised by SMST. The only reasonable conclusion that it is possible to reach is that, contrary to China's assertions, China is indeed seeking to "impose an unreasonable burden of proof"[33] with respect to this matter. The European Union respectfully requests the Panel to reject China's attempts to do that.

41. With respect to China's assertion that SMST merely requested the exclusion of these transactions, but did not request or quantify an adjustment, and it was unclear what SMST was asking MOFCOM to do,[34] the European Union would simply observe that this has no bearing on the issue before the Panel. The issue before the Panel is whether or not the relative product mix in this case ensured a fair comparison, as required by Article 2.4 of the Anti-Dumping Agreement. The point was brought to the attention of the investigating authority, and should have been dealt with by the investigating authority in a rational and reasonable way. Instead, the investigating authority, whilst acknowledging that the point had been raised and appropriate evidence provided, simply failed to address the

31 EU FWS, para. 178 and footnote 194.
32 EU FWS, para. 178 and footnote 195.
33 China FWS, para. 189 (" … did not impose an unreasonable burden of proof …").
34 China FWS, para. 188.

issue, providing instead a determination with respect to a different and irrelevant issue, that is, the scope of the investigation.

42. Finally, the European Union does not agree with China that the established case law governing the fair comparison required in the context of an injury analysis is irrelevant to the question of what constitutes a fair comparison for the purposes of Article 2.4 of the Anti-Dumping Agreement. We have explained precisely why that is the case.[35] China chooses not to engage with those explanations.[36] In these circumstances, we respectfully submit that the Panel should be guided by the relevant case law, and find in favour of the European Union.

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

43. The European Union claims that, as a consequence of each and both of the preceding substantive dumping claims, and as a consequence of any possible substantive consequences of any and all of the above procedural claims insofar as they relate to dumping, and given that the "facts available" used by China to establish the EU all others rate included the rate applied to SMST, China improperly relied on those "facts available" when establishing the EU all others rate, also acting, in this respect, inconsistently with the above cited provisions of the Anti-Dumping Agreement, and inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement. Furthermore, the European Union claims that China acted inconsistently with Article 6.8 and Paragraph 1 of Annex II of the Anti-Dumping Agreement because it determined the dumping margin for other EU and Japanese exporters based on facts available without notifying them of all the information required and of the consequences of not submitting that information.[37]

35 EU FWS, paras. 179-185.
36 China FWS, para. 190.
37 EU FWS, paras. 187-191.

44. China responds that, even if it is true that the dumping margin for SMST was calculated in a WTO inconsistent manner, and that a re-determination would establish it to be non-existent or at least at a lower level, *no provision* of the Anti-Dumping Agreement would require China to make any consequent adjustment to the all others rate, which, of course, is currently fixed at a level corresponding to the dumping margin originally calculated for SMST.[38] Thus, according to China, it could simply continue to apply the old WTO inconsistent rate to all the other firms involved.

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

46. In similar vein, China asserts that it would be under no obligation to draw any consequences that remedying procedural breaches might have for the substantive dumping determinations, including with respect to the all others rate, because these consequences are, at this stage, "unclear".[39] The same observation applies. For example, if the specific procedural irregularity relating to the calculation of SMST's dumping margin[40] would be corrected, and review of the relevant data would result in a reduction in SMST's dumping margin, then such correction would also have to be effected with respect to the all others rate.

47. It is in the nature of a procedural claim that it relates to a procedural issue, and not to the substance of a particular matter. That is, it is in the nature of

38 China FWS, para. 605.
39 China FWS, para. 606.
40 EU FWS, paras. 98-109.

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

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

IV. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

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

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

50. This would now be the place where the European Union would summarize the applicable legal framework, i.e. Articles 3.1, 3.2, 3.4 and 3.5 of the

Anti-Dumping Agreement. The European Union, however, is in the comfortable position that the Appellate Body, less than two years ago, spelt out precisely this legal summary in three succinct paragraphs of its report in *China - GOES*. These paragraphs 126-128 read like a textbook definition of the interplay between the different paragraphs of Article 3 of the Anti-Dumping Agreement. The Appellate Body states that the different paragraphs of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination"[41]. Most of the inconsistencies described below are in one way or another a breach of this required "logical progression of inquiry".

51. Since we will refer back to this "logical progression" time and again in the following part, it is worth remembering in detail how the Appellate Body understands this logical progression to operate. We are quoting from the Appellate Body Report in *China - GOES*:

> This inquiry entails a consideration of the volume of subject imports and their price effects, and requires an examination of the impact of such imports on the domestic industry as revealed by a number of economic factors. These various elements are then linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated. Specifically, pursuant to Article[…] 3.5 […], it must be demonstrated that dumped […] imports are causing injury '*through* the effects of' dumping […] '(a)s set forth in paragraphs 2 and 4'. Thus, the inquiry set forth in Article[…] 3.2 […], and the examination required in Article[…] 3.4 […], are necessary in order to answer the ultimate question in Article[…] 3.5 […] as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Article[…] 3.5 […]. As further explained below, the interpretation of Article[…] 3.2 […] should be consistent with the role th(is) provision[…] play[s] in the overall framework of an injury determination under Article[…] 3 […].[42]

52. The various arguments the EU is raising with respect to the injury determination echo the same *basso continuo*: that MOFCOM's injury determination is not part of a "logical progression", but that it breaks this "logical progression" in a number of instances.

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41 Appellate Body, *China - GOES*, para. 128.
42 Appellate Body, *China - GOES*, para. 128 (emphasis original).

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

53. The European Union claims that China's determination is inconsistent with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement in two respects.

54. (i) China's analysis of the price effects of imported Product C is analytically and factually flawed. The data indicates that the 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 assume that imports of Product C had any price undercutting effects on the corresponding like domestic products.

55. (ii) China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. China found some price undercutting limited to a minority industry sector that does not actually compete with other sectors, which must be read in the context of the general finding that the vast majority of the domestic production of HP-SSST was not subject to any price undercutting effect by the subject imports.

56. We will turn first to the point that China's analysis of price-undercutting with respect to Product C is flawed.

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

57. In its First Written Submission, China contests the EU allegation that MOFCOM's consideration of the price effects of imported Grade C falls short of an objective examination. In particular, China contests the EU allegation that MOFCOM erroneously concluded that imports of Grade C had "price undercutting effects on the corresponding like domestic products".

(a) Lack of price undercutting - Article 3.2 requires "price undercutting", not just a "price differential *per se*"

58. The European Union claims that MOFCOM erroneously concluded that imports of Product C had "price undercutting effects on the corresponding like domestic products". In the view of the European Union, MOFCOM erroneously did not refer to the increase in the prices of domestic products in its price undercutting analysis.

59. According to the data on Product C price levels that may be derived from China's Final Determination, in 2009, imports of Product C were priced at 152,819 yuan/ton while domestic like products were priced at 138,826 yuan/ton.[43] In 2010, import prices *decreased* to 101,863 yuan/ton while the prices of domestic like products increased to 295,635 yuan/ton, that is, **more than 200%** of the 2009 price.[44]

60. In the view of the European Union, these remarkable figures suggest that imports of Product C were not in competition with domestically produced Product C in the Chinese market; rather, the domestic sales of Product C were outlier transactions. This is supported by three observations: (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.

61. 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.

43 EU FSW, para. 233.
44 EU FSW, para. 233.

62. China contests these allegations and argues that "any factual elements other than the price differential between the import price and domestic price are irrelevant".[45]

63. In the view of the European Union, China blurs the difference between a "price differential *per se"* and "price undercutting" in the sense of Article 3.2 of the Anti-Dumping Agreement.

64. A "price differential *per se*" is only a **snapshot** that looks at import prices and domestic prices. Such a "price differential *per se*" may have been caused by "price overcutting", i.e. by domestic prices increasing from one year to the next, possibly combined with a vast difference in import and domestic price levels, and a trivial volume of domestically produced products, so that no undercutting effects were present.

65. Under the circumstances that were present in this investigation, it was not enough for China to conclude that a "price differential *per se*" equalled "price undercutting" in the sense of Article 3.2 Anti-Dumping Agreement.

66. The key question is thus whether any "price differential *per se*" will suffice to meet the standard of Article 3.2 Anti-Dumping Agreement, or whether the investigating authority must consider whether the price differential *per se* has the effect of price undercutting.

67. Recently, the Appellate Body discussed Article 3.2 of the Anti-Dumping Agreement in detail and clarified this provision. The European Union assumes that the Panel will render its report in the light of the extensive clarifications provided by the Appellate Body in *China – GOES.*

68. In the view of the European Union, it is clear from the report that the Appellate Body requires that the determination of injury be based on, i.a., the *effects* of the dumped imports on prices in the domestic market for like products, and that such an *effect* of price undercutting needs to be there in

45 China FWS, para. 285.

order for a "price differential" to qualify under Article 3.2 of the Anti-Dumping Agreement.

69. Indeed, the Appellate Body points 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'"[46]. 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"[47]. 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"[48]. 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."[49] "This inquiry entails a consideration of the volume of subject imports and their price effects"[50].

70. It is clear from these statements that the Appellate Body considers that the focus of Article 3.1 of the Anti-Dumping Agreement on price *effects* colours the whole of Article 3.2 of the Anti-Dumping Agreement, and not just price depression and price suppression.

71. The analysis of "price undercutting" aims at finding price *effects* of subject imports on domestic prices, not just a "price differential" *per se* as China claims.

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46 Appellate Body Report, *China – GOES*, para. 126 (footnote omitted).
47 (Emphasis added).
48 Appellate Body Report, *China – GOES*, para. 127 (emphasis added).
49 Appellate Body Report, *China – GOES*, para. 127 (emphasis added).
50 Appellate Body Report, *China – GOES*, para. 128 (emphasis added).

72. The Appellate Body stresses the importance of the "*effect*" by stating that "With regard to the *effect* of such imports on domestic prices, the authority must 'consider whether there has been a significant price undercutting […]'[51]".

73. It seems to be clearly the view of the Appellate Body that Article 3.2 of the Anti-Dumping Agreement contains *three* price *effects*: (1) price undercutting; (2) price depression; (3) price suppression; and not just a "price differential" and two price effects, as China seems to claim. When the Appellate Body refers to price depression and price suppression, it calls these "the last two price effects" in Article 3.2[52], 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"[53].

74. The Appellate Body then explains how "effect" as a general notion informing all three price effects in Article 3.2 of the Anti-Dumping Agreement is to be understood:

> The definition of the word "effect" is, inter alia, "something accomplished, caused, or produced; a result, a consequence". The definition of this word thus implies that an "effect" is "a result" of something else. Although the word "effect" could be used independently of the factors that produced it, this is not the case in Articles 3.2 and 15.2. Rather, these provisions postulate certain inquiries as to the "effect" of subject imports on domestic prices, and each inquiry links the subject imports with the prices of the like domestic products.[54]

75. The Appellate Body then applies this definition of "price effects" to price depression and suppression. Price undercutting was not at issue in the *China - GOES* case. But since the Appellate Body has stated that the whole of Article 3.2 of the Anti-Dumping Agreement must be read in the light of

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51 Appellate Body Report, *China – GOES*, para. 129 (emphasis added).
52 Appellate Body Report, *China – GOES*, para. 133.
53 Appellate Body Report, *China – GOES*, para. 133 (emphasis added).
54 Appellate Body Report, *China – GOES*, para. 135 (footnote omitted).

"price effects", its definition of "effect" is also important for price undercutting.

76. With regard to price suppression/depression, the Appellate Body notes: "More specifically, an investigating authority is required to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable – that is, domestic prices"[55].

77. Given that "price effects" inform the whole of Article 3.2 of the Anti-Dumping Agreement, it seems equally appropriate that, in conducting an analysis of price undercutting, an investigating authority is required to consider whether a first variable – that is, a price differential *per se* – has explanatory force for the occurrence of a second variable – that is, price undercutting. An investigating authority is then required to examine whether a price differential *per se* has explanatory force for the occurrence of a price undercutting, or whether it lacks explanatory force because of e.g. (1) inverse price movements; (2) vast differences in import and domestic price levels; (3) a trivial volume of the domestically produced product.

78. This interpretation is reinforced by the text of Article 3.2 which refers to "price undercutt*ing"* (emphasis added) and hence to an "-ing" form. An "-ing" form is based on a verb, "to undercut". It is necessary that *something* is "undercutting" in order to have "undercutting". Price undercutting refers to a situation in which prices are being undercut, *by something*. An examination of price undercutting, by definition, calls for more than a simple observation of a "price differential *per se*", and also encompasses an analysis of *what* has explanatory force for this price differential *per se*. Therefore, the language used in Article 3.2 does not simply refer to a "status quo" such as a "price differential *per se*", but rather instructs the investigating authority to consider whether a "price differential *per se"* has explanatory force for undercutting.

55 Appellate Body Report, *China – GOES*, para. 136.

79. Therefore, a consideration of price undercutting under Article 3.2 encompasses by definition an analysis of whether the price differential *per se* has explanatory force for price undercutting (or price overcutting etc.).

80. China argues that it is under no obligation to consider what caused the price undercutting.[56] In the view of the European Union, this misses the point. The European Union argues that China has only shown a price differential *per se*, and has not shown whether it has explanatory force for price undercutting.

81. It is important to note that this does not detract from the causation analysis that is required under Article 3.5 of the Anti-Dumping Agreement.[57] As the Appellate Body has pointed out, the analysis under Article 3.2 serves as a basis for the analysis under Article 3.5 concerning injury caused by subject imports to the domestic industry and the non-attribution of injury caused by other factors. This does not preclude an interpretation whereby an investigating authority, in carrying out the inquiry under Article 3.2, is required to consider the explanatory force of a price differential *per se in relation to* potential price undercutting.[58] On the contrary, without such a consideration, the authority would not be able to ensure that its analysis regarding price undercutting under Article 3.2 provides a meaningful basis on which it could further analyse whether, through such price effects, subject imports are causing injury to the domestic industry within the meaning of Article 3.5.

82. Interpreting Article 3.2 as requiring a consideration of the relationship between a price differential *per se* and a potential price undercutting does not result in duplicating the causation analysis under Article 3.5.[59] 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

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56 China FWS, para. 299.

57 Cf. parallel reasoning with regard to price depression/suppression: Appellate Body Report, *China – GOES*, para. 145.

58 Cf. parallel reasoning with regard to price depression/suppression: Appellate Body Report, *China – GOES*, para. 145.

relationship between subject imports and injury to the domestic industry. In contrast, the analysis under Article 3.2 concerns the relationship between a price differential *per se* and an alleged price undercutting, i.e. subject imports and 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 Articles 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.

83. In sum, this interpretation is reached on the basis of the text and context of Article 3.2 of the Anti-Dumping Agreement, together with the objective of Article 3 discerned from various paragraphs of that provision, in light of the clarification provided by the Appellate Body in *China – GOES*. 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. The outcome of this inquiry will enable the authority to advance its analysis, and to have a meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry.

[59] Cf. parallel reasoning with regard to price depression/suppression: Appellate Body Report, China –

Moreover, the inquiry under Article 3.2 does not duplicate the different and broader examination regarding the causal relationship between subject imports and injury to the domestic industry pursuant to Article 3.5. Neither does Article 3.2 require an authority to conduct an exhaustive and fully fledged non-attribution analysis regarding all possible factors that may be causing injury to the domestic industry. Rather, the investigating authority's inquiry under Articles 3.2 is focused on the relationship between a price differential *per se* and alleged price undercutting, and the authority may not disregard evidence that calls into question the explanatory force of the former for the latter.[60]

84. In the circumstances of this case, the investigating authority had strong reasons to doubt whether a price differential *per se* has explanatory force for any alleged price undercutting. The inverse price movements and the vast difference in import and domestic price levels, combined with the trivial volume of domestically produced Product C as discussed in the European Union First Written Submission[61], all suggest that imports of Product C were not in competition with domestically produced Product C in the Chinese market; rather, the domestic sales of Product C were outlier transaction. Under such circumstances, it was erroneous to forego an analysis of whether a price differential *per se* had any explanatory force for the alleged price undercutting.

(b) Allegations that "similar quantitative difference" justifies price comparison for Product C

85. China considers that it was "meaningful"[62] for its price undercutting conclusion for Product C to compare the prices for Product C in 2009 and 2010 in spite of the tiny amount of domestic sales of this Product. The tiny amount of such domestic sales as compared with a large amount of import

GOES, para. 147.

60 Cf. parallel reasoning with regard to price depression/suppression: Appellate Body Report, *China – GOES*, para. 154.

61 EU FWS, para. 234-242.

62 China FWS, para. 73.

sales of Product C indicates that the domestic sales are outlier transactions that cannot be compared. An objective price undercutting conclusion needs a solid quantity of sales for the product, that is, both import and domestic sales. Absent this quantity, there is no basis to establish an objective price undercutting conclusion. China argues that the quantitative difference between the imported Product C and the domestic Product C that existed in 2009 and 2010 was similar in both years. China considers that in 2009 and 2010 the imports of Product C held a similar market share, and that, on this basis, it was meaningful to compare the prices in 2009 and 2010.[63] The European Union does not understand why showing that the market share of Product C was tiny in both years should show anything but the fact that these domestic sales were outlier transactions not just in one year but in both years, making them an unreliable basis for any price undercutting conclusions.

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

86. The EU claims that China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. China found some price undercutting limited to a minority industry sector that does not actually compete with other sectors, which must be read in the context of the general finding that the vast majority of the domestic production of HP-SSST was not subject to any price undercutting effect by the subject imports.

87. China considers this claim unfounded and raises a number of reasons. In the view of the European Union, none of these reasons is convincing:

88. The European Union argues that China found an alleged price undercutting effect for only Products B and C. However, during the reference period, the aggregate domestic product of Products B and C was limited, as it

63 China FWS, para. 270.

amounted to only 20% of China's overall HP-SSST production during that period. Conversely, the domestic production of Product A, for which China found *no* price undercutting, accounted for almost 80% of the domestic production of HP-SSST. China could have examined "all of the other parts that make up the industry"[64] by conducting a cross-type analysis of price effects. However, China did not do so. Instead, it selected the minority sub-categories of the like domestic products where it determined that there was a price undercutting effect and unduly extended its findings with respect to those sub-categories to the whole group of like domestic products.[65] In the view of the European Union, this breaks the logical progression of inquiry which the Appellate Body requires.

89. China considers that "the starting point and focus of the comparison are the dumped imports of the product under consideration"[66]. In China's view, "the fact that, allegedly, no price undercutting was found for Grade A, which accounted for almost 80% of the total domestic production, thus focuses on the wrong side of the comparison"[67]. China argues that "the relevant consideration thus relates to the fact that 100% of dumped imports in 2010 were found to be made at undercutting prices. […] Even assuming the price undercutting consideration for Grade C was flawed (*quod non*), MOFCOM still found that over 70% of the dumped imports were made at undercutting prices".[68]

90. The question before this Panel then is: Is the focus of the price effects inquiry under Article 3.2 only on the prices of subject imports, or also on the prices of domestic like products?

91. The European Union considers that both the Appellate Body in *China - GOES* as well as the panel in *China - X-Ray Equipment* have clarified this issue.

64 Appellate Body Report, *US - Hot-Rolled-Steel*, para. 204.
65 EU FWS, paras. 243-245.
66 China FWS, para. 337.
67 China FWS, para. 341.
68 China FWS, para. 337.

92. According to the Appellate Body, Article 3.1 outlines the content of the injury determination, which consists i.a. of "the effect of such imports on the prices of like domestic products" [69]. Article 3.2 elaborates on this essential component. It "spell[s] out the precise content of an investigating authority's consideration regarding the volume of subject imports and the effect of such imports on domestic prices"[70]. It is therefore clear that the focus under Article 3.2 must also be on the prices of domestic like products.

93. The panel in *China - X-Ray Equipment* draws on this analysis. The context for the panel was price comparability, but the clarification provided applies also to price undercutting.

> It is precisely because the price undercutting analysis under Article 3.2 ultimately must be used to assess whether dumped imports 'through the effects of dumping, as set forth in paragraphs 2 and 4' are causing injury to the domestic industry, that it is necessary to ensure the prices that are the subject of an undercutting analysis are comparable. If two products being analysed in an undercutting analysis are not comparable, for example in the sense that they do not compete with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question.[71]

94. Indeed, this would break the logical progression of inquiry.

95. The test required under a price undercutting analysis relates "to the effect of such imports on domestic prices"[72]. It does not suffice to examine whether 100% of subject imports are sold at undercutting prices. The analysis needs to include the effect of such imports on domestic prices, and thus the question whether the allegedly dumped imports are in a competitive relationship with the like products.

96. MOFCOM established that Product A represented almost 80% of total domestic production, and that there was no price undercutting for Product A. Given the lack of a competitive relationship with Products B and C,

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69 Appellate Body Report, *China - GOES*, para. 127.
70 Appellate Body Report, *China - GOES*, para. 127.
71 Panel Report, *China - X-Ray-Equipment*, para. 7.51.
72 Appellate Body Report, *China - GOES*, para. 127.

MOFCOM could not conclude that there were price effects for the domestic like product as a whole.

97. China argues that it follows from the use of the indefinite article "a" that for the price undercutting consideration, "the prices of the dumped imports must be compared with the prices of *some* like products"[73], not the like product "as a whole". According to China, "the wording 'a like product' in Article 3.2 of the Anti-Dumping Agreement should be interpreted as referring to 'any like product', or 'some like products' or 'one of the like products'"[74].

98. However, the use of the indefinite article “a” in Article 3.2 needs to be seen in the context of the use of the definite article 'the' in Article 3.1 Anti-Dumping Agreement.

99. Article 3.1 requires the investigating authority to determine 'the effect of the dumped imports on prices in *the* domestic market for like products", i.e. the effect on the like product as a whole.

100. This may involve several comparisons between segments which are comparable, a possibility which the use of the indefinite article "a" in Article 3.2 hints at.

101. China seems to consider that a cross-grade price undercutting consideration (or any other additional assessment) was not required, also in light of MOFCOM’s determination that the three Products "belong to the same category of products" and "that the price changes of the three are to a certain extent correlated with one another".[75]

102. The panel in *China - X Ray Equipment* found:

> The consequence of defining the product under consideration very broadly, is that the ‘like’ domestic product will also be very broad. However, a number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic

73 China FWS, para. 350.
74 China FWS, para. 350.
75 China FWS, para. 366.

> goods have been found by an investigating authority to be 'like', this does not mean that each of the goods included in the basket of domestic goods is 'like' each of the goods included within the scope of the product under consideration.[76]

103. The European Union considers that a similar reasoning also applies here where the basket of "like products" has been defined very broadly.

104. China argues "that none of the interested parties raised the need for any such cross-grade analysis in the course of the investigation", and refers to the panel report in *Egypt - Steel Rebar*.[77]

105. That panel stated that it did not believe there is a basis to find a violation of the Anti-Dumping Agreement in respect of a kind evidence or analysis not explicitly required or even mentioned by that Agreement, "where there is no evidence in the record of the investigation to suggest that such an analysis was necessary, or that any interested party pursued the issue during the investigation"[78].

106. In this case, there was evidence in the record that the products were not in competition with each other. There was thus evidence in the record that an additional analysis was required in order to extend the price undercutting findings for Products B and C to Product A. Even according to the panel report in *Egypt - Steel Rebar* it does not matter whether any interested party explicitly asked for a cross-grade analysis once there is such evidence in the record of the investigation.

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

1. China's impact analysis was improperly based on its flawed price effects analysis

[76] Panel Report, *China - X-Ray-Equipment*, para. 7.65.
[77] China FWS, para 364.
[78] Panel Report, *Egypt - Steel Rebar*, para. 7.105 (emphasis original).

107. The EU claims that China's impact analysis did not logically follow from its volume and price effects analyses and conclusions. When, as in this particular case, an investigating authority has itself elected to conduct an analysis of volume and price effects by type, and where the outcome of that analysis already indicates lack of injury with respect to two out of three product types, including the product type predominantly produced by the domestic industry, that is a matter that must at least be addressed in the impact analysis.

108. In China's view, the basis for the European Union's position is that it considers the data relating to Product A and Product C are non-attribution factors. China considers that this is an issue that relates to the causation analysis under Article 3.5 of the Anti-Dumping Agreement and not to the impact assessment under Article 3.4 of the Anti-Dumping Agreement.[79]

109. The European Union considers that a proper analysis under Article 3.4 examines "the relationship between subject imports and the state of the domestic industry"[80]. MOFCOM did not find an increase in import volumes. With regard to almost 80% of the domestic industry, MOFCOM did not find any price effects either. MOFCOM had therefore no reasonable basis to undertake an impact analysis with respect to the entire domestic industry.

2. China failed to examine the magnitude of the margins of dumping, properly calculated

110. The European Union submits that China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment. At no point of the investigation did China evaluate the significance of the margins of dumping, properly calculated, for the impact of the imports on the Chinese HP-SSST industry.

79 China FWS, paras. 406-413.
80 Appellate Body Report, *China – GOES*, para. 128.

111. China seems to concede that it did not address the magnitudes of the level of the dumping margin in its overall impact assessment, but only in the cumulation assessment.[81] This is not sufficient.

3. China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured

112. The European Union argues that China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. 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.

113. In China's view, MOFCOM properly examined the weight and relevance of the different factors under Article 3.4.

114. Instead of a thorough and persuasive explanation as to whether and how the negative factors outweighed the at least seven positive factors, China simply enumerates the different factors.

115. The panel in *China - X-Ray Equipment* stated that: "an objective examination would have included and weighed each of the 16 injury indicia as a part of the analysis of the state of the industry"[82].

116. Without any compelling explanation how the at least seven positive factors were outweighed by the negative ones, MOFCOM simply states: "Based on the above, the Investigation Authority concludes the domestic industry is materially injured"[83].

81 China FWS, para. 426.
82 Panel Report, *China - X-Ray Equipment*, para. 7.216.
83 Final Determination, Exhibit EU-30, p. 64.

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

1. China's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of HP-SSST imports

117. The EU claims that China's causation determination lacks any foundation in its volume, price effects, and impact analyses. The European Union submits that China reached its conclusion concerning the existence of a "causal link" between HP-SSST imports and the injury suffered by the domestic industry despite the fact that: (a) the volume and market share of imported HP-SSST products did not significantly increase; (b) China's analysis of the undercutting effect of imported HP-SSST products on prices of like domestic products was flawed; and (c) China's review of the relevant economic factors and indices of the domestic industry was incomplete and skewed by its dismissal of the positive indices and increased emphasis on the negative indices.

118. As regards the volume and market share of imported HP-SSST products, China does not contest that MOFCOM found no increase of volume and market share of imports, but rather a decrease. China argues that instead, MOFCOM could rely on subject imports having "been imported in large quantities and retain(ing) a large market share"[84].

119. This breaks again the logical progression of inquiry. Article 3.5 requires demonstration "that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement".

120. According to the Appellate Body, it is the "outcomes of these inquiries" (i.e. Articles 3.2 and 3.4) which "form the basis for the overall causation analysis contemplated" in Article 3.5.[85]

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84 CHN FWS, para. 517.
85 Appellate Body Report, *China - GOES*, para. 128.

121. This means that causation must relate to the specific effects of dumping that were the subject of the analysis under Articles 3.2 and 3.4.

122. By referring to "large quantities" and a "large market share", China does not base its determination of causation on the outcomes of the inquiries under Article 3.2 and 3.4.

123. Further, China alleges correlation between the prices of the three products based on MOFCOM's finding that the three products constitute a "single product". In China's view, this alleged correlation implies that the finding of price undercutting by dumped imports on domestic prices of Product B and C implies that this alleged price undercutting had an effect on the domestic industry as a whole. The European Union has set out above why the evidence does not support a finding of cross-grade price effects. Without a cross-grade price analysis, the foundation of MOFCOM's causation determination is lacking.

2. China failed to separate and distinguish the injurious effects of other known factors from the alleged effects of HP-SSST imports

124. The EU claims that China failed to separate and distinguish the injurious effects of two other known factors that were causing injury to the domestic industry, namely the decline in domestic demand for HP-SSST and the expansion of the production capacity of the domestic HP-SSST industry.

125. Regarding the decline in domestic demand for HP-SSST, China points out that apparent consumption only dropped for Products B and C, while it increased significantly for Product A.[86] Although the apparent consumption of Product A increased by 74.07% during the POI, prices of Product A dropped by the same pace as those of Products B and C.[87] China considers it reasonable to conclude that apparent consumption cannot be the cause of the drop in price.

[86] China FWS, para. 550.
[87] China FWS, para. 550.

126. However, China has never properly established any cross-grade price effects. Imports were almost completely those of Products B and C. Trends in domestic demand for Product A are therefore irrelevant. Domestic demand of Products B and C decreased significantly, causing significant decreases in prices, import volume and domestic sales volume.

127. Injury suffered by the domestic industry producing Products B and C need therefore be attributed to the significant decrease in domestic demand for these products.

128. As regards Product A, there were no imports of Product A during the POI, apart from a tiny quantity in 2008, so that in lack of a cross-grade analysis it could not be determined that any injury suffered by that segment of the domestic industry was caused by subject imports.

129. The European Union considers that China also failed to separate and distinguish the injurious effects of expansion of the production capacity of the domestic HP-SSST industry. China argues that domestic output grew more than domestic production capacity. Therefore, China considers that the increased domestic capacity had no material effects on prices, since during most of the POI, domestic output's growth was nearly double the increase in production capacity.[88] This growth rate in itself is no argument against the existence of overcapacity. Rather, China combines it with a hypothetical situation. In its Final Determination, "[t]he Investigation Authority noted, for the duration of the investigation period, output of domestic like products was much less than apparent consumption, i.e. supply of like products remained far below demand. There was no case of oversupply".[89] In China's view, the "correct point of reference in this case was thus indeed a marketplace without imports"[90].

130. This is not convincing for at least two reasons. First, there were hardly any imports of Product A. The apparent consumption was thus served by

88 China FWS, para. 557.
89 Final Determination, Exhibit EU-30, p. 74.
90 China FWS, para. 559.

domestic output, and any increase in this output would *prima facie* put a downward pressure on prices and thus lead to injury which China attributed erroneously to subject imports. Second, the correct point of reference for a hypothetical alternative scenario would not be an isolated Chinese market with no imports, but a market where foreign products were imported at non-dumped prices.

V. TRANSLATION ISSUES

131. The European Union has reviewed the alternative translations suggested by China. Some of these alternative translations related to exhibits filed jointly by Japan and the European Union. With regard to these alternative translations, the European Union has expressed its views in one single document which Japan filed as Exhibit JPN-29. We refer to this Exhibit, incorporate it and make it our own, as Exhibit EU-32. The views of the European Union on the other alternative translations which China submitted are summarised in Exhibit EU-33 which we are filing today.

132. This concludes our statement. We welcome the opportunity to answer any questions that you may have.