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)

First Written Submission
European Union

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

Geneva
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[1] As provided for in the Joint Working Procedures, paragraph 11, in order to avoid unnecessary duplication, the European Union does not physically provide a second paper or electronic copy of documents already exhibited to Japan's First Written Submission in DS454, but rather exhibits them to, and incorporates them into, this First Written Submission, making them its own, by means of the cross-references set out in this Table of Exhibits. Thus, for example, Exhibit EU-1 is Exhibit JPN-3 in DS454, and so forth. As stated at the organisational meeting, two exhibits (Exhibit EU-11 and Exhibit EU-12) are provided in electronic form only because they are illegible when printed in the appropriate format, and a printed version would not disclose the underlying formulas that the EU wishes to evidence and which are only visible in the electronic versions. In the unlikely event that the Panels or a Party or Third Party requests paper copies of these two exhibits, the European Union will provide them.

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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.

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, adopted 24 April 2013
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637

Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299

I. INTRODUCTION

1. In this dispute, the European Union once again brings before the WTO dispute settlement system yet another Chinese anti-dumping measure riddled with multiple WTO inconsistencies.

2. The product this time is high performance stainless steel seamless tubes (HP-SSST) used particularly in the construction of high temperature and high pressure industrial boilers. There are three main types of HP-SSST (Products A, B and C). Product A is essentially what was being produced by the Chinese domestic industry (although it was also attempting to increase production of Products B and C), whilst Products B and C are essentially what was being imported to China from the European Union and Japan. During the reference period, as a result of the economic downturn, Chinese demand for HP-SSST products collapsed, whilst at the same time the domestic industry increased its production capacity. It is these other factors, and not (allegedly dumped) imports from the European Union and Japan (whose export volumes to China also sharply declined), that appear to have had some impact on some Chinese producers.

3. As in other recent cases concerning Chinese anti-dumping measures, multiple procedural defects concerning excessive secrecy, the heavy-handed conduct of verifications, inadequate disclosure and a lack of due explanation have actual or potential cascading consequences that also demand re-consideration of the substantive dumping and injury determinations.

4. The dumping determinations are themselves seriously flawed, being based on data relating to samples actually rejected by the investigating authority as not fit for determining costs of production, but nevertheless used as the basis for calculating SG&A (as China disclosed for the first time during consultations); an obviously unfair comparison between products with drastically different physical characteristics; and the use of facts available without notice.

5. These defects cascade in turn into the injury determination, which is itself, in any event, also seriously flawed, being based on a defective price-undercutting finding, which itself vitiates the impact assessment, and both of which vitiate the causation finding. There was *no increase* in the volume or market share of HP-SSST imports as a whole or by type; and *no price-undercutting* for types A or C. China has refused to disclose the essential facts with respect to its price-undercutting finding for type B, but there is every reason to consider that it is equally flawed. Numerous indicators support the conclusion that the Chinese domestic industry was not materially injured. And in any event, it was the slump in demand, coupled with an increase in domestic capacity, that explain the situation of the Chinese industry, not imports from the European Union and Japan.

6. For how long is China to be permitted to keep repeating the same pattern of irregularities, whilst some sector of Chinese industry again enjoys years of unlawful protection, and other WTO Members and their exporters are deprived of the opportunity to trade afforded to them by the WTO Agreement, suffering injury without reparation? For the sake of the good name of the WTO system, something should be done about it. That is why, in these proceedings, the European Union seeks a robust approach by the Panel, and above all a swift adjudication, so that the European Union and Japan and their exporters may regain, at the earliest possible time, the entry into the Chinese market that China promised them when China joined the WTO, and received all the advantages for the Chinese economy that go with WTO Membership.

II. SUMMARY OF THE PROCEDURE

7. On 13 June 2013, the European Union requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the GATT 1994, and Articles 17.2 and 17.3 of the Anti-Dumping Agreement with respect to China's measures imposing anti-dumping duties on HP-SSST from the

European Union and Japan.[2] The European Union and China held consultations on 17 and 18 July 2013. The consultations failed to resolve the dispute.

8. On 16 August 2013, the European Union requested that a panel be established by the Dispute Settlement Body ("DSB") pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement.[3] At the DSB meeting of 30 August 2013 no Member present at the meeting formally objected and the Panel was established with the following standard terms of reference:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS460/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

9. In light of: the establishment and composition of the panel in DS454 *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*; Article 9.3 of the DSU, which provides that, if more than one panel is established to examine complaints related to the same matter, to the greatest extent possible the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized; and the agreement of the Parties, the Director General on 11 September 2013 composed the panel as follows:

Chairman:	Mr. Miguel Rodríguez Mendoza
Members:	Ms. Stephanie Sin Far Lee
	Mr. Gustav Francois Brink[5]

10. Pursuant to Article 10 of the DSU, India, Japan, Korea, the Kingdom of Saudi Arabia, Turkey, and the United States reserved their rights to participate in the Panel proceedings as third parties.[6] By letter dated 16 September 2013 the

[2] WT/DS460/1, 18 June 2013.

[3] WT/DS460/4, 20 August 2013.

[4] WT/DS460/5, 11 September 2013.

[5] WT/DS460/5, 11 September 2013.

[6] WT/DS454/5, 11 September 2013.

Russian Federation requested third party status. No party objected and the Panel has agreed.

11. The Panels in DS454 and DS460 adopted Joint Working Procedures, including BCI Procedures, and a Joint Timetable on 27 September 2013, pursuant to which the time limit for the filing of the EU First Written Submission was fixed as 11 October 2013.

III. SUMMARY OF THE FACTS

A. Investigation

12. The product under investigation is high-performance stainless steel seamless tubes of particular specification and having such features as high endurance strength, good structure stability, anti-steam oxidation and excellent corrosion resistance at high temperature (HP-SSST). The main applications of HP-SSST are in superheaters and reheaters of supercritical and ultra-supercritical boilers. The terms supercritical and ultra-supercritical describe the pressure of the water inside the boiler. A boiler creating pressure lower than the critical point pressure is called a subcritical boiler. A supercritical boiler creates pressure above the critical point pressure. If the pressure or temperature increases beyond a certain point, the boiler is called an ultra-supercritical boiler. There are three types of HP-SSST, with various names according to different national standards regimes and producers' designations:

Table 1: HP-SSST Product Identification

Product	***ASTM grade/ ASTMUNS steel number***	***China National Standard GB5310-2008***	***Mannesmann serial number***	***Sumitomo serial number***
A	**TP347HFG (S34710)**	08Cr18Ni11NbFG	DMV347HFG	347HFG
B	**S30432**	10Cr18Ni9NbCu3BN	DMV304HCu	Super304 H

C	**TP310HNbN (S31042)**	07Cr25Ni21NbN	DMV310N	HR3C

13. In this submission, the European Union refers to Products "A", "B", and "C". The three types of HP-SSST are noticeably different.

14. On 8 November 2012, China issued its Final Determination,[7] confirming its Preliminary Determination[8] with respect to dumping and injury. The investigation period was 1 July 2010 to 30 June 2011. With respect to injury, China examined data from the period 1 January 2008 to 30 June 2011 (the reference period). China determined that, during the investigation period, HP-SSST from the European Union and Japan was dumped, the Chinese HP-SSST industry was materially injured, and EU and Japanese HP-SSST imports caused material injury to the Chinese industry. China levied anti-dumping duties on HP-SSST from the European Union and Japan with effect from 9 November 2012.

15. On 15 July 2011, Chinese Steel producers Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd. ("Wujin") and Changshu Walsin Specialty Steel Co., Ltd. ("Walsin") (collectively, "Applicants") filed the Application, seeking relief for China's HP-SSST industry under China's anti-dumping law from HP-SSST imports from the European Union and Japan. The Application named as EU producers of HP-SSST Salzgitter Mannesmann Stainless Tubes GmbH ("SMST") and Tubacex Tubos Inoxidables, S.A ("Tubacex") and as Japanese producers Sumitomo Metal Industries, Ltd. ("SMI") and JFE Steel Corporation ("JFE").

16. Much of the data relied on in the Application came from third party studies commissioned by the Applicants at their cost. Specifically, volume and market share data were based on a third party study provided at Appendix V to the

[7] Final Determination Notice, Exhibit EU-29; Final Determination, Exhibit EU-30.

[8] Preliminary Determination Notice, Exhibit EU-17; Preliminary Determination, Exhibit EU-18.

Application and pricing information on another third party study provided at Appendix VIII to the Application. While the Applicants disclosed certain data provided by the Appendix V and VIII studies in the non-confidential version of the Application, they did not disclose any source information, methodologies, or underlying data or evidence utilized in conducting those studies. Instead, the Applicants sought, and China permitted, confidential treatment for the full texts of these studies.

17. During the course of the investigation, the Applicants also made a Supplemental Submission on 1 March 2012 and an Additional Submission on 29 March 2012.[9] The Applicants' Supplemental Submission contained certain information regarding output, sales, sales revenue, average unit price, and insurance and freight costs, disclosed in indexed form in the non-confidential version. This submission also contained 59 appendices, several of which the Applicants did not disclose. The Applicants' Additional Submission contained a brief summary and an Appendix. The Applicants disclosed figures on combined domestic production for the three HP-SSST types at issue, but did not disclose any other data, source information, or methodology information for the Appendix.

18. China issued the Notice of Initiation for the investigation on 8 September 2011.[10] On the same day, China provided the notice to the EU Delegation and the Japanese Embassy in China, and notified the foreign exporters listed in the Application. China issued its initial anti-dumping questionnaires to the registered respondents and by publication on MOFCOM's website on 9 October 2011, and subsequently issued supplemental anti-dumping questionnaires.

19. China issued its injury questionnaires for domestic producers, foreign producers/exporters, and domestic importers on 8 October 2011. China received responses from two domestic producers (Wujin and Walsin), four

[9] Applicants' Supplemental Submission, Exhibit EU-15; Applicants' Additional Submission, Exhibit EU-16.

[10] Notice of Initiation, Exhibit EU-2.

foreign producers/exporters (three from the European Union and SMI from Japan), and five domestic importers. The domestic producers' injury questionnaire responses indicated, among other things, that the EU and Japanese suppliers had historically supplied HP-SSST to the Chinese market, because the domestic industry had been incapable of producing these products. Only in the years prior to the filing of the Application did the Chinese industry gain the expertise to begin producing these products.[11] Further, the domestic importers' injury questionnaire responses indicated that the products manufactured in China and HP-SSST imported from the European Union and Japan were not substitutable, that domestic products had no track record for quality, and that end users largely required the use of imported HP-SSST.[12]

B. Preliminary Determination

20. China issued its Preliminary Determination on 8 May 2012, making affirmative preliminary findings with respect to dumping and injury as follows:[13]

Table 2: Preliminary Dumping Margins
EU companies:
1. Tubacex Tubos Inoxidables, S.A.: 9.7%
2. Salzgitter Mannesmann Stainless Tubes Italia S.r.l.: 17.5%
3. All others: 37.5%
Japanese companies:
1. Sumitomo Metal Industries, Ltd.: 15.8%
2. Kobe Special Tube Co., Ltd: 14.5%
3. All others: 39.2%

21. Regarding the "all others" rates, China purportedly based its analysis on the facts available. It appears to have adopted the dumping margins estimated in the Application. With regard to its dumping determinations, China issued

[11] Wujin Injury Questionnaire Response, Exhibit EU-3, question 49; Walsin Injury Questionnaire Response, Exhibit EU-4, question 49.

[12] Minmetals Injury Questionnaire Response, Exhibit EU-5, questions 19, 22, 31; Shanghai Boiler Works Injury Questionnaire Response, Exhibit EU-6, questions 19, 22, 31; Babcock & Wilcox Injury Questionnaire Response, Exhibit EU-7, questions 19, 22, 31; Shanghai Foreign Trade Injury Questionnaire Response, Exhibit EU-8, questions 19, 22, 31; Harbin Boiler Injury Questionnaire Response, Exhibit EU-9, questions 19, 22, 31.

[13] Preliminary Determination Notice, Exhibit EU-17; Preliminary Determination, Exhibit EU-18.

disclosures (including with respect to the all others rate). While disclosing the dumping margins, and providing some basic information regarding the export price and normal value figures used to determine those margins, none of these disclosures provided any of the underlying data and calculation methodologies. With regard to the all others rate, the disclosure explained that China decided to use facts available. However, it did not disclose the facts supporting that decision. With regard to its injury determination, China issued its information disclosure on 7 August 2012, prior to the Final Determination.[14]

C. Final Determination

22. China issued its Final Determination on 8 November 2012.[15] Rejecting requests to exclude imported products that did not compete with domestic products, China confirmed the scope of the investigation. China defined the domestic like product to be identical to the product under investigation, finding the domestic products to be "basically the same in terms of their physiochemical properties, exterior appearance, production process, production equipment, product usage, sales channels, sales territories and clients", with consistent price trends and substitutability.[16] Further, having found that Wujin and Walsin account for a majority of production of the domestic like product, China found these two producers to satisfy the definition of domestic industry, and used data from these two producers as representative of the domestic industry.[17]

23. China determined the following final dumping margins in its Final Determination:[18]

Table 3: Final Dumping Margins
EU companies:

[14] Injury Disclosure, Exhibit EU-24.

[15] Final Determination Notice, Exhibit EU-29; Final Determination, Exhibit EU-30.

[16] Final Determination, Exhibit EU-30, p. 28.

[17] Final Determination, Exhibit EU-30, p. 28.

[18] Final Determination, Exhibit EU-30, pp. 28-41.

1. Tubacex Tubos Inoxidables, S.A.: 9.7%
2. Salzgitter Mannesmann Stainless Tubes Italia S.r.l.: 11.1%
3. All others: 11.1%
Japanese companies:
1. Sumitomo Metal Industries, Ltd.: 9.2%
2. Kobe Special Tube Co., Ltd: 14.4%
3. All others: 14.4%

24. With regard to the all others rate, China explained that it decided to use facts available. However, it did not disclose the facts supporting that decision. With respect to the injury determination, China found there to be a single domestic like product consisting of Products A, B and C taken together. China's injury analysis examined data pertaining to HP-SSST as a whole and individual types of HP-SSST. With respect to injury, China examined data from the period 2008, 2009, 2010, and the first half of 2011. China concluded that the domestic industry was materially injured, and HP-SSST imports were a cause of that material injury. China's analysis of the volume of HP-SSST imports and their domestic market share revealed that volumes declined significantly during the reference period, both in absolute and relative terms. While China did not disclose every data point pertinent to its analysis, it did disclose a sufficient number of data points that have enabled the European Union to derive the pertinent figures. They are summarised in the following table:

Table 4: Volume and Market Share Data

Row	HP-SSST AS A WHOLE		2008	2009	2010	H1 2011	Source of Data
(01)	Volume (tonnes)	Imports	20,100	16,400	4,500	2,600	FD, p. 43
(02)		Domestics*	3,218	2,442	5,030	2,455	(03) - (01)
(03)		Total**	23,318	18,842	9,530	5,055	(01) / (04)
(04)	Share (%)	Imports	86.20%	87.04%	47.22%	51.43%	FD, p. 44
(05)		Domestics	13.80%	12.96%	52.78%	48.57%	(06) - (04)
(06)		Total	100.00%	100.00%	100.00%	100.00%	By definition 100%
Row	**PRODUCT A (TP347HFG)**		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
(07)	Volume (tonnes)	Imports	22	0	0	0	2008: (09) - (08); 2009-2011: FD, p. 44
(08)		Domestics*	1,491	2,001	4,629	2,379	(02) - (14) - (20)
(09)		Total	1,513	2,001	4,629	2,379	(08) / (11)
(10)	Share (%)	Imports	1.45%	0.00%	0.00%	0.00%	FD, p. 44
(11)		Domestics	98.55%	100.00%	100.00%	100.00%	(12) - (10)
(12)		Total	100.00%	100.00%	100.00%	100.00%	By definition 100%
Row	**PRODUCT B (S30432)**		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
(13)	Volume (tonnes)	Imports	14,691	12,648	3,749	2,432	(01) x (26)
(14)		Domestics*	1,727	438	394	59	(15) - (13)
(15)		Total	16,418	13,086	4,142	2,491	(13) / (16)
(16)	Share (%)	Imports	89.48%	96.65%	90.49%	97.63%	FD, p. 44
(17)		Domestics	10.52%	3.35%	9.51%	2.37%	(18) - (16)
(18)		Total	100.00%	100.00%	100.00%	100.00%	By definition 100%
Row	**PRODUCT C (TP310HNbN)**		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
(19)	Volume (tonnes)	Imports	5,387	3,752	752	168	(01) - (07) - (13)
(20)		Domestics*	0	2	7	17	2008: FD, p. 44; 2009-2011: (21) - (19)
(21)		Total	5,387	3,755	758	185	(19) / (22)
(22)	Share (%)	Imports	100.00%	99.94%	99.10%	90.69%	FD, p. 44
(23)		Domestics	0.00%	0.06%	0.90%	9.31%	(24) - (22)
(24)		Total	100.00%	100.00%	100.00%	100.00%	By definition 100%
Row	**PRODUCT SHARES**		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
(25)	Imports	Product A	0.11%	0.00%	0.00%	0.00%	2008: (07) / (01); 2009-2011: FD, p. 44
(26)		Product B	73.09%	77.12%	83.30%	93.54%	FD, p. 51
(27)		Product C	26.80%	22.88%	16.70%	6.46%	(19) / (01)
(28)		Total	100.00%	100.00%	100.00%	100.00%	(25) + (26) + (27)
(29)	Domestics	Product A	46.32%	81.96%	92.03%	96.89%	(08) / (02)
(30)		Product B	53.68%	17.95%	7.83%	2.40%	(14) / (02)
(31)		Product C	0.00%	0.09%	0.14%	0.70%	2008: FD, p. 44; 2009-2011: (20) / (02)
(32)		Total	100.00%	100.00%	100.00%	100.00%	(29) + (30) + (31)
(33)	Total	Product A	6.49%	10.62%	48.57%	47.06%	(09) / (03)
(34)		Product B	70.41%	69.45%	43.47%	49.28%	(14) / (03)
(35)		Product C	23.10%	19.93%	7.96%	3.66%	(21) / (03)
(36)		Total	100.00%	100.00%	100.00%	100.00%	(33) + (34) + (35)

* Applicants' Supplemental Submission, Exhibit EU-15, p. 1.

** Final Determination (FD), Exhibit EU-31, p. 57.

Grey shading indicates actual data

White shading indicates derived data

25. To summarize: for HP-SSST as a whole, the volume of imports decreased sharply while the volume of the domestic like product increased, with imports' share of the domestic market falling from about 86%-87% in 2008 and 2009 to 47%-51% in 2010 and the first half of 2011. Domestic demand also fell sharply from about 23,300 tonnes in 2008 to around 9,500 tonnes in 2010 and a similar annualized level in the first half of 2011.

26. For Product A, a trivial volume of imports entered China in 2008, with no imports in this category in 2009, 2010, or the first half of 2011. The domestic like product therefore maintained a 100% or near-100% share of this market throughout the reference period, with the volume of the domestic like product tripling during the course of the investigation. Domestic demand in fact increased sharply in this market, in which the domestic industry dominated, with this product making up only 6.5% of the domestic market in 2008 but almost 50% of the domestic market in 2010 and the first half of 2011.

27. For Product B, the volume of imports and domestic sales both declined during the reference period. Import market share fluctuated over this period, but overall domestic demand declined, as the market contracted.

28. For Product C, the volume of imports declined sharply during the reference period, mainly because domestic demand collapsed. Nonetheless, while the domestic industry had no sales in 2008, it gradually increased its sales during the reference period, and therefore imports' share of this market fell from 100% in 2008 to about 90% in the first half of 2011.

29. China began its price effects analysis by considering the import and domestic prices of HP-SSST as a whole. Having found no price effects on this basis, it then proceeded to examine the pricing data by type, and ultimately concluded that HP-SSST imports as a whole had a significant price undercutting effect on the price of the domestic like product.[19] The European Union summarises in the table below the pricing data disclosed by China in the non-confidential version of the Final Determination. The import price data summarised below

reflects the adjustments made by China to ensure price comparability.[20] As evident from the table below, China did not disclose all of the pertinent pricing data that it used to reach its price effects conclusion (although in some very specific instances this may have been justified by confidentiality concerns):

Table 5: Pricing Data

IMPORT PRICES		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
yuan/ tonne	**Product A**	?	None	None	None	2009-2011: FD, p. 52
	Product B	112,300	93,800	83,700	76,900	FD, p. 52
	Product C*	159,983	152,819	101,863	109,236	FD, p. 55
	Total (wtd avg)	125,100	107,300	86,700	79,000	FD, pp. 51-52
% chg from prior period	**Product A**	N/A	None	None	None	FD, p. 52
	Product B	N/A	-16.43%	-10.78%	-10.63%	FD, p. 52
	Product C	N/A	-4.27%	-36.32%	5.99%	FD, p. 52
	Total (wtd avg)	N/A	-14.23%	-19.18%	-11.99%	FD, pp. 51-52
DOMESTIC PRICES		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
yuan/ tonne	**Product A**	???	???	???	???	
	Product B	???	???	???	???	
	Product C	None	???	???	???	2008: FD, p. 53
	Total (wtd avg)	???	???	???	???	
% chg from prior period	**Product A**	N/A	-9.08%	-22.17%	9.35%	FD, pp. 52-53
	Product B	N/A	3.95%	-30.94%	2.30%	FD, p. 52
	Product C	N/A	N/A	112.80%	???	FD, pp. 52-53
	Total (wtd avg)	N/A	-29.78%	-32.31%	-8.90%	FD, p. 52
MARGIN OF UNDERCUTTING (- value indicates undercutting by imports)		**2008**	**2009**	**2010**	**H1 2011**	**Source of Data**
Product A		+ ???	N/A	N/A	N/A	FD, p .53
Product B		-3% to -28%	-3% to -28%	-3% to -28%	-15%	FD, p .54
Product C		N/A	+10%	-50%	???	FD, p .54
Total (wtd avg)		+ ???	+ ???	+ ???	+ ???	FD, p .53

* Derived from China's disclosure in the Final Determination, p. 55, that the Product C import price was 142.46%, 162.92%, 121.70%, and 142.05% of the Product B import price in 2008, 2009, 2010, and the first half of 2011, respectively.

???	Indicates data should have been available, but was not disclosed.
None	Indicates no product existed for the period in question.
N/A	Indicates data is properly not available for the period in question.

[19] Final Determination, Exhibit EU-30, pp. 49-57.

[20] China found it necessary to make certain adjustments to the CIF import prices in order to compare them with the prices of domestic like products at the same trade level. Final Determination, Exhibit EU-30, pp. 51-52.

30. China began by comparing the weighted average adjusted prices for HP-SSST imports as a whole with the weighted average prices for the domestic like product. China found that import prices declined at an average annual rate of 16.74% from 2008 to 2010, and by 11.99% in the first half of 2011 as compared to the first half of 2010.[21] China further found that the prices of the domestic like product as a whole declined at an average annual rate of 31.05% from 2008 to 2010, and that they declined by 8.90% in the first half of 2011 as compared to the first half of 2010.[22] Significantly, China observed that, during the relevant period, the adjusted import prices were higher than the sales prices of the domestic like product,[23] although China did not disclose the margins by which imports oversold the domestic like product. Based on its analysis of import and domestic price data for the product as a whole, China did not reach any conclusion that imports undercut domestic prices, or had a depressing or suppressing effect on domestic prices.

31. China then proceeded to compare the prices of *each type* of HP-SSST imported with those of the corresponding domestic product. It justified the desirability of such a price comparison by type on the grounds that: (i) "there is a relatively significant difference between the import prices of the three grades of subject products"; and (ii) "these three grades of products take up different percentages in the total sales volume of domestic like products and in the total import volume of the subject products, and … the specific percentages vary over the years, for each grade of products".[24] However, China did not conduct any cross-type price effects analyses.

32. With respect to Product A, China observed that there was only a small volume of imports in 2008, and no imports thereafter.[25] China then found that import

[21] Final Determination, Exhibit EU-30, pp. 51-52.

[22] Final Determination, Exhibit EU-30, p. 52.

[23] Final Determination, Exhibit EU-30, p. 53.

[24] Final Determination, Exhibit EU-30, p. 55.

[25] Final Determination, Exhibit EU-30, p. 53.

prices were higher than domestic prices in 2008,[26] but it did not disclose the overselling margin. Because the import volume was very small compared with the domestic sales volume China concluded that imports had limited impact on the domestic sales price.[27] In short, China did not find any price effects of subject imports of this type on the corresponding domestic products.

33. With respect to Product C, China observed that domestic products had small sales in 2009 and 2010 because imports took up more than 99% of the domestic market, with the import volume far exceeding the domestic sales volume.[28] In light of these facts, China considered that a price comparison should take into consideration the quantitative difference between the import volume and the sales volume of the domestic products.[29] China, however, did not elaborate on how such quantitative difference should be taken into consideration in the price comparison, except to imply that price comparisons for 2009 and 2010 should be permitted because a similar quantitative difference existed in both years.[30] On this basis, China went on to observe that the import price was over 10% higher than the domestic sales price in 2009, but "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products" in 2010.[31] Previously, China had observed that the domestic sales price *increased* by 112.80% from 2009 to 2010,[32] while the import price of this type decreased by 36.32% from 2009 to 2010.[33] Nonetheless, China concluded that in 2010, there was a noticeable price undercutting impact on the domestic sales price.[34]

[26] Final Determination, Exhibit EU-30, p. 53.

[27] Final Determination, Exhibit EU-30, p. 53.

[28] Final Determination, Exhibit EU-30, pp. 53-54.

[29] Final Determination, Exhibit EU-30, pp. 53-54.

[30] Final Determination, Exhibit EU-30, pp. 53-54.

[31] Final Determination, Exhibit EU-30, p. 54.

[32] Final Determination, Exhibit EU-30, p. 53.

[33] Final Determination, Exhibit EU-30, p. 52.

[34] Final Determination, Exhibit EU-30, p. 54.

34. With respect to Product B, China noted that imports accounted for over 70% of total HP-SSST imports, and close to or over 90% of the domestic market for products of this type.[35] China further observed that, from 2008 to 2010, import prices were 3% to 28% lower than the domestic prices, and that in the first half of 2011, import prices were lower than domestic sales prices by over 15%.[36] China concluded that the imports had a relatively noticeable price undercutting impact on domestic sales prices.[37]

35. Based on its findings of price undercutting for Product C and Product B, China determined that there was price undercutting for HP-SSST as a whole.[38]

36. China then proceeded to consider the impact of HP-SSST imports on the domestic industry, by examining the following 16 factors:[39]

[35] Final Determination, Exhibit EU-30, p. 54.

[36] Final Determination, Exhibit EU-30, p. 54.

[37] Final Determination, Exhibit EU-30, p. 54.

[38] Final Determination, Exhibit EU-30, p. 54.

[39] Final Determination, Exhibit EU-30, pp. 57-64.

Table 6: Economic Factors and Performance Indicators of the Domestic Industry			
Positive Indicators (% change from prior period)			
	2009	**2010**	**H1 2011**
Production capacity	+7.89%	+17.07%	+13.89%
Output	-40.17%	+148.18%	+7.16%
Sales volume	-44.72%	+171.16%	+9.16%
Market share	-3.43%	+32.59%	+6.81%
Sales revenue	-61.07%	+83.41%	-0.38%
Capacity utilization	-10.20%	+14.22%	-1.34%
Employment	-23.06%	+92.22%	-4.22%
Labour productivity	-22.24%	+29.11%	+11.89%
Salary per head	+5.17%	+33.46%	+9.96%
Net cash flow from operating activities	Negative	Positive	Positive
Negative Indicators (% change from prior period)			
	2009	**2010**	**H1 2011**
Apparent consumption	-19.27%	-49.85%	-12.08%
Sales price	-29.78%	-32.31%	-8.90%
Pre-tax profits	-87.30%	-16.69%	-72.19%
Return on investment	-27.66%	-2.04%	-2.58%
End-of-period inventories	+175.94%	+37.58%	+23.49%
Capacity for investment and financing	"undermined" and "put on hold and blocked"		

37. China agreed that, at least, production capacity, output, sales volume, market share, employment, labour productivity and salary per head exhibited positive trends.[40] Nonetheless, based on the data it had collected, China concluded that the domestic industry was materially injured.[41]

38. Next, China found a causal link between the material injury suffered by the domestic industry and HP-SSST imports.[42] In doing so, China recalled its volume, price effects, and impact analyses and found the existence of a causal link.

[40] Final Determination, Exhibit EU-30, p. 63.

[41] Final Determination, Exhibit EU-30, pp. 63-64.

[42] Final Determination, Exhibit EU-30, pp. 65-67.

39. China also examined other known factors that could potentially injure the domestic industry, and concluded that other known factors did not sever the causal link. In particular, China examined and dismissed the following other known factors: (i) changes in apparent consumption; (ii) imports from countries other than the European Union and Japan; (iii) the operational management of the domestic industry; (iv) technological advancement in the domestic industry; (v) commercial distribution and trade policy shift; (vi) end-user designated purchasing; (vii) exports of domestic like products; (viii) force majeure; (ix) expansion of domestic production capacity; (x) growing financial outlays in the domestic industry; (xi) increased cost of production in the domestic industry; and (xii) falling nickel price.[43] China agreed that two of these other known factors – namely, reduced apparent consumption and increased domestic production capacity – could have negative effects on the domestic industry. However, it concluded that these factors did not sever the causal link.

40. With respect to apparent consumption, China considered that reduced levels of apparent consumption would likely have an immediate negative effect on the domestic sales volume and price, which would in turn dampen other economic factors and indicators.[44] Beginning with the HP-SSST product as a whole, China observed that apparent consumption declined while domestic sales increased, suggesting domestic sales were not materially injured by the decline in apparent consumption.[45] China then turned to an analysis by type. With respect to Product A, China observed that apparent consumption rose overall and therefore had no adverse effect on domestic sales.[46] With respect to Product B, China explained that the drop in the domestic sales volume outstripped the decline in apparent consumption, as the domestic market share

[43] Final Determination, Exhibit EU-30, pp. 67-77.

[44] Final Determination, Exhibit EU-30, p. 68.

[45] Final Determination, Exhibit EU-30, p. 68.

[46] Final Determination, Exhibit EU-30, p. 68.

generally declined.[47] With respect to Product C, China also concluded that the drop in the domestic sales volume outstripped the decline in apparent consumption.[48] Next, China turned to considering domestic prices. It concluded that the decline in apparent consumption had a negative effect on the domestic sales price but that its earlier analysis suggested that the price undercutting effect of the imports is the reason for the drop in domestic prices.[49] On this basis, China concluded that the impact of the financial crisis and the resultant decline in apparent consumption on the domestic industry did not sever the causal link.[50]

41. With respect to domestic production capacity, China considered that capacity expansion can lead to output increase and supply increase in the domestic market, thus intensifying competition and indirectly affecting such operational metrics as price, sales volume, sales revenue and pre-tax profit.[51] Next, turning to the data, China observed that: (i) the domestic industry's output grew faster than its capacity; (ii) the output of domestic like products was much less than apparent consumption, meaning there was no oversupply; and (iii) the domestic industry's pre-tax profits declined at a faster rate than its investment increased, suggesting to China that reduced pre-tax profits rather than greater investment in capacity expansion was the main reason for the domestic industry's declining return on investment.[52] On this basis, China concluded that capacity expansion is not sufficient to sever the causal link.[53]

[47] Final Determination, Exhibit EU-30, p. 69. In this regard, China stated that the domestic market share for Product B was 9.65%, 2.11%, 7.93%, and 0.01% in 2008, 2009, 2010, and the first half of 2011 respectively. *Id.*, p. 69, note 32. These figures, while exhibiting the same trend, are slightly different from the figures implied by China's earlier disclosure that the import market share for Product B was 89.48%, 96.65%, 90.49%, and 97.63% in 2008, 2009, 2010, and the first half of 2011, respectively. *Id.*, p. 44. As summarized in Table 4 at para. 24 above, those import market share figures imply domestic market share figures of 10.52%, 3.35%, 9.51%, and 2.37% in 2008, 2009, 2010, and the first half of 2011, respectively, for Product B.

[48] Final Determination, Exhibit EU-30, p. 69.

[49] Final Determination, Exhibit EU-30, p. 70.

[50] Final Determination, Exhibit EU-30, p. 70.

[51] Final Determination, Exhibit EU-30, p. 74.

[52] Final Determination, Exhibit EU-30, p. 74.

[53] Final Determination, Exhibit EU-30, p. 74.

42. Having found the existence of dumping, material injury, and a causal link, China determined to levy final anti-dumping duties on HP-SSST imports from the European Union and Japan with effect from 9 November 2012 in accordance with the final dumping margins stated above.[54] China permitted the provisional anti-dumping measures to remain in place for the six month period from 9 May 2012 to 9 November 2012, and applied the final dumping margins retroactively to 9 May 2012.[55]

IV. STANDARD OF REVIEW

43. The applicable standard of review in this dispute is derived from Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. Pursuant to these provisions, the Appellate Body has clarified the role of panels reviewing a determination by an investigating authority as follows, notably explaining that a panel must not simply defer to the conclusions of the investigating authority:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of

[54] Final Determination Notice, Exhibit EU-29, Sections II, III, IV.

[55] Final Determination Notice, Exhibit EU-29, Section IV.

> facts, nor to be passive by "simply accept[ing] the conclusions of the competent authorities".[56]

44. Thus, the objective assessment to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.[57]

45. The standard of review recognizes that investigating authorities in anti-dumping investigations may have to consider conflicting arguments and evidence, and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that the conflicting evidence was considered:

> [I]t is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analysing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation".[58]

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[56] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (footnote and emphasis omitted); Panel Report, *China – GOES*, paras. 7.4, 7.513 and 7.619; Panel Report, *China – X-Ray Equipment*, para. 7.6.

[57] Panel Report, *China – GOES*, para. 7.3, citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186.

[58] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97 (footnote omitted).

V. THRESHOLD ISSUE: REQUEST THAT THE PANELS AMEND TWO ASPECTS OF THE BCI PROCEDURES

46. The Joint Working Procedures of the Panels, Annex 1, Additional Working Procedures of the Panels Concerning Business Confidential Information ("BCI Procedures"), paragraphs 1 and 2, provides as follows:

> 1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panels. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which could seriously prejudice an essential interest of the person or entity that supplied the information to the Party. In this regard, BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.
>
> 2. The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue in these disputes, the party shall also provide, with a copy to the other parties, an authorizing letter from the entity. That letter shall authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue.

47. The European Union submits that two aspects of these provisions (underlined) are WTO inconsistent, and requests that the Panels amend the BCI Procedures so as modify these provisions in light of the observations contained in this section. The European Union requests that the Panel rule on this matter and make the necessary changes to the BCI Procedures in good time so as to permit an orderly conduct of these proceedings, and to the extent necessary by way of a preliminary or interim ruling.

48. Specifically, the European Union objects to the Panels automatically classifying as BCI in these WTO panel proceedings information that was submitted as BCI in the anti-dumping proceeding (unless in the public domain); and objects to the requirement 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 Panels. We deal with each of these matters below, after summarising the DSU legal framework relating to confidentiality.

A. Summary of the DSU legal framework relating to confidentiality

49. An analysis of the question of confidentiality should begin with the relevant provisions of the DSU,[59] which establishes a general confidentiality regime.[60] Written submissions to a panel or to the Appellate Body must be treated as confidential.[61] This means that they may only be communicated by one person to another person who is lawfully entitled to access them.[62] This includes members of the panel or Appellate Body and the staff of the WTO Secretariat and the Appellate Body Secretariat. It also necessarily includes the parties (that is, persons under the responsibility of the parties).[63] Third parties (that is, persons under their responsibility) may also access the submissions of the parties to the first meeting.[64] The final panel report is circulated to all Members (that is, persons under their responsibility),[65] and is eventually public. The publication of reports means that some but not necessarily all information that is confidential during the DSU proceedings enters the public domain with the publication of the report.[66]

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[59] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 7: "The analysis of this question should begin with the DSU."

[60] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10: "The DSU and the Rules of Conduct … establish a general confidentiality regime."

[61] DSU, Article 18(2): "Written Submissions to the panel or the Appellate Body shall be treated as confidential …". The provisions of Article 18(2) of the DSU are substantially re-produced in paragraph 3 of the Appendix 3 Working Procedures.

[62] The Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("Rules of Conduct"), particularly part VII, also impose confidentiality obligations on covered persons.

[63] DSU, Article 18(2): "… but shall be made available to the parties to the dispute."

[64] DSU, Article 10.3: "Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel."

[65] DSU, Article 15.2

[66] Consultations and good offices, conciliation and mediation remain confidential pursuant to Articles 4.6 and 5.2 of the DSU. Panel deliberations and Appellate Body proceedings remain confidential pursuant to Articles 14 and 17.10 of the DSU, subject to the possibility of open hearings.

50. Nothing in the DSU, including the Appendix 3 Working Procedures, precludes a party to a dispute from disclosing statements *of its own position* to the public.[67] Thus, the DSU does not seek to regulate how a Member deals with its own information, including information about its own firms, but rather provides that nothing in the DSU precludes a Member from publishing such information. Of course, a WTO Member may or may not be subject to other rules that regulate the circumstances in which it may place information in the public domain, but this is not a matter for the DSU.

51. Members must treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.[68] As recalled above, the general position is that the proceedings are confidential, which means that WTO Members must treat as confidential the submissions of another WTO Member, except to the extent that they are recorded in a report that is subsequently made public, or placed into the public domain by the other Member, for example, by publication on the internet. Thus, the additional reference to the designation of *information* (as opposed to submissions) as confidential indicates an additional obligation that endures even after the end of the proceedings and publication of the report. It implies that such information will also not appear in the published report. It is this additional obligation, together with the inherent authority that panels have to regulate their own procedures, that provides the basis for the practice of adopting additional confidentiality procedures, commonly referred to as business confidential information procedures, or BCI procedures, discussed in more detail below.

52. Significantly, Article 18.2 of the DSU confirms that what triggers the additional obligation is *designation by the submitting Member*, and not designation by any other person. Equally significantly, this obligation is imposed on WTO Members, *and not on panels or the Appellate Body*. This

[67] DSU, Article 18.2: "Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own position to the public."

[68] DSU, Article 18.2: "Members shall treat as confidential information submitted by another Member …".

reflects the fact that reports will eventually be published. If the final decision as to confidentiality designation would rest entirely and without review with a Member, or for that matter with some other entity or a firm, then the entire content of a dispute could be designated as confidential, making publication of a report impossible.

53. Finally, a party must provide a non-confidential public summary if requested to do so by another party.[69] Although the absence of a time-limit has in practice made the operation of this obligation problematic, panels have the inherent authority to establish such time limits. The obligation to provide a non-confidential summary allows for public disclosure both during and after the DSU proceedings. It also confirms that a Member (or any other entity or firm) would be precluded from designating the proceedings confidential in their entirety. The interim review stage provides an opportunity for parties to comment also on the issue of confidentiality designation, by seeking the replacement of specific confidential information in the interim report with a non-confidential summary. This involves prior notice of substantially all of the final report as a matter of practice. In theory, any additional confidentiality issue could still be addressed between provision of the final report to the parties and circulation to the Members.

54. Finally, in some cases where non-confidential summary of specific information is not practicable, as a matter of practice, some reports have been issued in both confidential (not public) and non-confidential (public) versions.

55. Against this background, as a matter of logic, there are two specific issues that can arise: under-designation and over-designation.

56. Under-designation refers to a situation in which one Member submits information to a panel *and does not designate it as confidential*. This implies that, even if the information remains confidential during the DSU proceedings, it may eventually find its way into the public version of the final report and

[69] DSU, Article 18.2: "A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

thus into the public domain. However, another party to the dispute may consider that it has an interest in such information being designated as confidential so that it does not find its way into the public version of the report. A third party might also have such an interest. It is conceivable that, albeit in unusual circumstances, the adjudicator or the Secretariat might also have an interest. It is possible, or even likely, that agreement can be reached among the different interested parties as to the designation of such information as BCI or not. However, it is also possible that agreement cannot be reached. In such circumstances, the adjudicator has the inherent authority and obligation to decide on the designation of the information in question.[70] In effect, it becomes part of the matter before the adjudicator with respect to which the adjudicator must make an objective assessment pursuant to Article 11 of the DSU. An adjudicator is *prohibited* from delegating that authority and obligation to any other entity or person, or abdicating responsibility by refusing to rule on the question, just as they would be prohibited from doing so with respect to any other issue that forms part of the matter before them.

57. Over-designation refers to a situation in which a Member submits information to a panel and designates it as confidential, implying that it will remain confidential during the panel proceedings and not appear in the final public version of the report. As a matter of practice, it may be relatively unusual for another party or third party or any other entity or person to raise an issue about over-designation, and they may not even be in a position to do so if they do not have all the information in the first place. However, disagreements and issues may still arise. For example, another party may feel improperly constrained in the way it can use such information, for example by consulting beyond the

[70] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 15-16: "It is not for the parties to determine whether additional protection is called for. **It is for the panel, and now the Appellate Body, to do so**. Indeed, it is for the adjudicator to decide whether the information concerned calls for additional protection. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection." "We do not exclude … revisiting whether a particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings." (emphasis added).

circle of persons for which it assumes responsibility, and for that reason may complain about over-designation. If third parties have been excluded, they may complain that their ability to exercise their third party rights has been improperly impaired. Other WTO Members may have a concern if their ability to understand the final public version of the report is improperly reduced, and indeed this may also be an interest of the wider public and of the system more generally. Just as in the case of under-designation, the WTO adjudicator has the authority and the obligation to settle such issues, even of its own motion, because it must take into account the interests of all WTO Members.[71]

58. In sum, two important points emerge from the preceding analysis.

59. First, the question of designation is ultimately a matter that must rest with the WTO adjudicator and cannot be delegated to any other entity or person. Whilst a WTO adjudicator is very likely to give very close attention to the views of a Member, or eventually an investigating authority or firm to the extent that such views may be apparent to the WTO adjudicator, and whilst what may or may not have occurred during the domestic proceedings associated with the measure at issue might provide a reasonable proxy, it cannot form the basis for an *absolute* rule that takes this matter out of the hands of the WTO adjudicator.

60. Second, the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm, because the DSU provides expressly that it does not regulate the capacity of a Member to disclose statements of its own position to the public. In other words, the authorization (or not) to reveal such information in a panel report flows from *the Member providing the information*.[72]

[71] DSU, Article 10.1: "The interests of the parties to a dispute and those of other Members under a covered agreement as issue in the dispute shall be fully taken into account during the panel process."

[72] This is confirmed by Article 13.1 of the DSU, which provides that confidential information that is provided to a panel shall not be revealed (in a panel report) without formal authorization from the individual, body, or authorities of *the Member providing the information*. The Member providing the information ultimately acts through its duly authorised delegation and persons appearing as such in a dispute.

61. The European Union considers that there are other important reasons that explain these aspects of the rules. A WTO dispute is between WTO Members. Other entities may file *amicus curiae* briefs, but they have no standing and a WTO adjudicator is not bound to take these into account. Furthermore, WTO Members are not required to show any special interest in a dispute, over and above a WTO inconsistent measure. Since the availability of information is a pre-condition for argument and adjudication, if unlawful fetters are placed on a WTO Member's capacity to use such information, there is a real risk that this would in practice curtail a WTO Member's capacity to use the DSU, with firms effectively holding Members hostage by starving them of information. This may be less of a problem in WTO Members, such as China, where the State still has a very substantial influence over the conduct of firms. But it would create a relative imbalance compared to WTO Members such as the European Union, in which the State has far less influence, and in which, as a general rule, it may be highly problematic to compel firms to produce information against their wishes.

62. Even within one WTO Member there may be a multitude of firms with different interests; and increasingly the interests of particular firms cut across the territories of different Members. Thus, it is also quite likely that there may be conflicts between firms both with respect to the issue of designation and with respect to the use of information in disputes. As drafted, the DSU reflects the proposition that the resolution of such internal conflicts rests, in the first place, *with the submitting Member*, and, in case of disagreement, *with the WTO adjudicator*, and this balance should not be altered in BCI procedures.

63. Panels may modify the model working procedures in Appendix 3 of the DSU,[73] although they must respect the provisions of the DSU.[74] In practice, panels in

[73] DSU, Article 12.1: "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute." Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 7 and 8: "A necessary incident of this authority is the power to determine procedures for the conduct of appeals."; "The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures …".

more recent years have been prepared to adopt additional confidentiality rules, that is, BCI procedures, building on Article 18.2 of the DSU. Such procedures must, amongst other things, guarantee conditions of fairness and impartiality and the conduct of proceedings in an orderly manner.[75] Their main purpose is to allow a *participant* to ventilate its case without undue risk of detrimental disclosure.[76] Determining their content in a given case involves striking a proportionate balance between the risk of disclosure and the rights and obligations of WTO Members regarding due process and transparency, and they should go no further than necessary to achieve that objective.[77] There is a burden to justify and explain that such additional procedures are *necessary*, which burden increases the more such arrangements affect the adjudicator, parties, third parties and other WTO Members.[78] In considering whether or not to adopt such procedures, an adjudicator must consider: the need to ensure proper adjudication; the parties' interests in making their case and due process;

[74] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 7 and 8: "… provided that it is not inconsistent with the DSU, the other covered agreements, and the *Working Procedures* themselves."

[75] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 7 and 8: "…under conditions of fairness and impartiality."; "… conducted with fairness and in an orderly manner."

[76] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8: "… a regime to protect confidential information may be necessary to allow a participant to ventilate its case without undue risk of detrimental disclosure."

[77] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9: "In our view, the determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the *Working Procedures*. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm (actual or potential) that could result from disclosure."

[78] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10: "Participants requesting particularized arrangements have the burden of justifying that such arrangements are *necessary* in a given case adequately to protect certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the *Working Procedures*. The participants agreed, at the oral hearing, that the burden of justifying the need for particularized protective arrangements falls on them. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large."

the rights of third parties; and the rights of other WTO Members.[79] Specifically, the report must set out the reasoning and findings in sufficient detail and must be understandable.[80]

64. Typically, BCI procedures address issues such as the following (as in this case): definition of BCI (paragraph 1); outside advisors' conflicts (paragraph 3); use only for the purposes of the dispute (paragraph 4); modalities of identifying BCI (particularly bracketing) (paragraphs 5 and 7); oral statements (paragraph 6); redaction and reasonable understanding (paragraph 6); use in reports (paragraph 8); and use in appeals (paragraph 9). The European Union generally has no difficulty with the adoption of such BCI procedures, and indeed considers them to be in some circumstances both appropriate and even necessary. However, at the same time, the European Union does not consider that a WTO adjudicator is entirely unfettered when adopting such BCI procedures. Rather, we consider that there are limits to what such rules may

[79] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 11: "In setting out our analytical framework, we identify the rights and duties that are implicated where additional protection is under consideration. First, there is the overarching authority of the Appellate Body pursuant to Article 17 of the DSU to ensure proper adjudication of the dispute. Secondly, there are the rights of the participants to ventilate their case, have their dispute adjudicated, and to enjoy due process throughout the proceedings. Thirdly, there are the rights of the third participants who, in accordance with Article 17.4 of the DSU, "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." As reflected in the *Working Procedures*, in particular, in Rules 18, 24, and 27, the Appellate Body has fostered the active participation of third participants in the appellate process. At the same time, the Appellate Body has observed that the third participants are not the main parties to the dispute. Theirs is a systemic interest in the correct legal interpretation of the provisions of the covered agreements that may be at issue in an appeal. Finally, there are the rights and interests of the WTO membership at large." (footnote omitted).

[80] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 13: "As set out above, Article 3.2 of the DSU also provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements. WTO Members therefore have the right to receive an Appellate Body report that clarifies the existing provisions of the covered agreements in accordance with Article 3.2 of the DSU. The Appellate Body would not assist the membership if its report failed to set out reasoning and findings with sufficient detail to enable Members to appreciate fully its content before they adopt the report and make it legally binding. As the Appellate Body has explained, "WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports". The legal interpretations embodied in adopted panel and Appellate Body reports clarify the existing WTO provisions and become part of the *acquis* of WTO law. A report that provides a full exposition of the Appellate Body's reasoning is also important for the proper implementation of the recommendations and rulings of the WTO Dispute Settlement Body (the "DSB"). As Article 21.1 of the DSU states, "{p}rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." The Appellate Body has said that panels should make efforts to ensure that the public version of their reports, which are circulated to all WTO Members, are "understandable". The same applies to Appellate Body reports." (footnotes omitted). See also para. 24 of the Procedural Ruling.

contain. In particular, we consider that such rules must sit comfortably within the executive space provided by, and must not conflict with the provisions of, Article 18 of the DSU. As already indicated, in this case, we consider that two aspects of the BCI Procedures are not WTO consistent, and it is to these matters that we now turn.

B. 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

65. As indicated above, the European Union considers that the question of designation should be subject to objective criteria established and eventually applied by the WTO adjudicator.[81] Further, we consider that the question of designation is ultimately a matter that must rest with the WTO adjudicator and cannot be delegated to any other entity or person.[82] Whilst a WTO adjudicator is very likely to give very close attention to the views of a Member, or eventually an investigating authority or firm to the extent that such views may be apparent to the WTO adjudicator, and whilst what may or may not have occurred during the domestic proceedings associated with the measure at issue might provide a reasonable proxy, it cannot form the basis for an *absolute* rule that takes this matter out of the hands of the WTO adjudicator.

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[81] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15: " … we are concerned that there did not appear to have been a meaningful effort during the Panel process to set out objective criteria as to the attributes of the information that may require additional protection so as to guide the determination of whether the particular information that was submitted deserved additional protection and the particular degree of such protection. Such objective criteria could include, for example: whether the information is proprietary; whether it is in the public domain or protected; whether it has a high commercial value for the originator of the information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market."

[82] Appellate Body Report, *EC and certain member States-Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 15-16: "It is not for the parties to determine whether additional protection is called for. **It is for the panel, and now the Appellate Body, to do so**. Indeed, it is for the adjudicator to decide whether the information concerned calls for additional protection. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection." "We do not exclude … revisiting whether a particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that

66. Also as indicated above, the BCI Procedures in this case include a statement that BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes. Thus, in this case, the issue of designation for this particular category of information is delegated, in absolute terms, not just to a particular party, or even to a particular investigating authority, but to a particular firm. For the reasons indicated above, the European Union considers that this statement in the BCI Procedures is WTO inconsistent. It takes the matter out of the hands of the adjudicator. It means that there is no guarantee that a balanced and proportionate approach to designation 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 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.

67. The European Union cannot rule out the possibility that, in these DSU proceedings, it does not agree with the confidentiality designations adopted by all the firms that were interested parties in the anti-dumping proceeding and with respect to all the information so designated. Indeed, one of the specific claims of the complaining Parties is that China permitted over-designation and/or itself over-designated information as confidential. If such information is *automatically* to be designated as BCI in the present proceedings, then that would seriously risk to pre-judge one of the very issues that is supposed to be in dispute. In short, our point is that, if a disagreement about BCI designation for the purposes of these proceedings would arise, it would have to be settled by the Panels, and could not be delegated, by way of an absolute rule, to a particular firm.

information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings." (emphasis added).

68. We therefore request that the relevant sentence in paragraph 1 of the BCI Procedures be modified to read: "In this regard, parties and third parties are encouraged to designate as BCI information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes." Furthermore, we request that a final sentence be added to paragraph 1 of the BCI Procedures as follows: "In case of disagreement, the Panels shall decide on BCI designation."

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

69. As indicated above, the European Union considers that the additional confidentiality obligation (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm, because the DSU provides expressly that it does not regulate the capacity of a Member to disclose statements of its own position to the public.

70. Also as indicated above, the BCI Procedures in this case include a statement 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 Panels. For the reasons indicated above, 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.

71. Of particular concern is the fact that the BCI Procedures do not indicate what the envisaged consequence might be of not providing such an authorisation. However, the implication is that the Panels' authority and obligation to rely on the relevant evidence might be in some unspecified manner or measure diminished. For all of the reasons outlined above, the European Union considers that this is a matter of grave concern, and is inconsistent with the cited provisions of the DSU, because it is not for individual firms to determine, indirectly, what may and may not be litigated in the WTO.

72. These concerns are confirmed by further consideration of how this provision may operate in practice. Specifically, the provision appears to have been drafted from the perspective of a Member that wishes to rely on certain information. This leaves the question of how it will operate in circumstances where one Member is challenging another Member to disclose certain information. This is a real issue in this case. Thus, for example, the European Union is seeking that China should disclose essential facts and information on which it relied in the Final Determination, and that was originally submitted by the Chinese producers and their advisors. Evidently, there is a real risk that China may simply refuse to provide such information on the spurious grounds that it has no written authorization to do so. Even if the Panels would put questions to China pursuant to Article 13.1 of the DSU, as the European Union requests, there is a real risk that China could contest any inferences drawn as a result of its failure to respond, by virtue of the express requirement in paragraph 2 of the BCI Procedures. At best, this could seriously delay the prompt settlement of the dispute, and at worst it could seriously hamper the ability of the complaining Members to prosecute and enforce their WTO rights.

73. For all of these reasons, the European Union respectfully requests that paragraph 2 of the BCI Procedures be deleted or amended to read as follows: "The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue

in these disputes, the party may also provide, with a copy to the other parties, an authorizing letter from the entity. That letter may authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue."

74. To the extent that the Panels, and eventually the Secretariat, are concerned about protecting the WTO from any consequences of disclosure, a provision along the following lines would be sufficient: "Each party and third party shall be solely responsible for ensuring its own compliance with any applicable confidentiality rules and solely responsible for the confidentiality designation it makes when submitting information to the Panel, and any consequences thereof."

D. The confidentiality rules in the Anti-Dumping Agreement

75. The preceding observations are consistent with and indeed confirmed by the provisions of the Anti-Dumping Agreement relating to confidentiality (although the issue here relates to confidentiality in DSU proceedings, not in anti-dumping proceedings, and the two issues should not be conflated). Thus, the Anti-Dumping Agreement recognises that the interest in confidentiality must be taken into account.[83] 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.[84] Even if designated as confidential, the rule is against disclosure to competitors, not adjudicators,[85] and at the same time it

[83] 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.

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

[85] 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 …").

is recognised that disclosure may be required pursuant to additional protective rules,[86] which is precisely what DSU BCI procedures are.

76. Finally, the special or additional rules in the Anti-Dumping Agreement[87] confirm that a Member is not required to obtain authorisation before providing confidential information to a panel. These rules further provide that such information is not to be disclosed (that is, made public) without authorisation from the person providing the information to the panel, which is, of course, *the submitting WTO Member*, firms having no standing in DSU litigation.

VI. PROCEDURAL CLAIMS

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

77. The European Union submits that China's treatment of confidential information submitted by the Applicants was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in particular with respect to: Appendices V and VIII to the Application;[88] Appendices 1, 7, 8, 24, 25, 26, 27, 28, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, and 59 to the Applicants' Supplemental Submission;[89] and the Appendix to the Applicants' Additional Submission.[90]

78. To be clear, the European Union recognises that there may be circumstances in which information contained in third party studies, particularly when provided

[86] 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."

[87] Anti-Dumping Agreement, Article 17.7: "Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided."

[88] Application, Exhibit EU-1.

[89] Applicants' Supplemental Submission, Exhibit EU-15.

[90] Applicants' Additional Submission, Exhibit EU-16.

for remuneration, may be designated as confidential. However, this is a matter that needs to be assessed on a case-by-case basis. The difficulty with China's approach in this case is that China appears to have simply automatically accepted any such request without any proper consideration of whether or not it was justified, and in any event the particular facts of this case do not justify the far-reaching approach adopted by China. Also to be clear, the European Union is not arguing that China should necessarily have disclosed the full text of these studies, if they do indeed contain confidential information that it would be justified not to disclose, but at least a meaningful summary of the content.

79. Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement provide, in relevant part:

> 6.5 Any information which is by nature confidential … or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities ….
>
> 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

80. The Appellate Body addressed the meaning of these provisions in *EC – Fasteners (China)*.[91] These provisions were also addressed by the panels in *China – GOES* and *China – X-Ray Equipment.*[92] In short, there are three obligations in Articles 6.5 and 6.5.1 that are pertinent to the present dispute.

81. First, in order for information to be treated as confidential, Article 6.5 requires that "good cause" must be shown. Such "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", and "might include an advantage being bestowed on a competitor, or the experience of an adverse

[91] Appellate Body Report, *EC – Fasteners (China)*, paras. 535-544.

[92] Panel Report, *China – GOES*, paras. 7.187-7.225; Panel Report, *China – X-Ray Equipment*, paras. 7.328-7.371.

effect on the submitting party or the party from which [the information] was acquired".[93] Significantly:

> [A] party seeking confidential treatment for information must make its "good cause" showing to the investigating authority upon submission of the information …. 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".[94]

82. Second, assuming information is properly treated as confidential upon a showing of good cause pursuant to Article 6.5, due to transparency and due process concerns, Article 6.5.1 requires interested parties to submit sufficient non-confidential summaries of the information. In this regard, the Appellate Body has explained:

> Article 6.5.1 obliges the investigating authority to require that a non-confidential summary of the information be furnished, and to ensure that the summary contains "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". The sufficiency of the summary provided will therefore depend on the confidential information at issue, but it *must permit a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests*.[95]

83. The panel in *China – GOES* further clarified that Article 6.5.1 "explicitly require[s] the interested party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information".[96] Applying these principles, the panel in *China – X-Ray Equipment* found that the Article 6.5.1 requirement to provide sufficient non-confidential summaries is not satisfied: (i) where "multiple types of information are designated as confidential [but] the substance of each type of confidential information [is not] summarized" (for example, titling an exhibit as "Pieces of evidence for normal value" and summarizing only the

[93] Appellate Body Report, *EC – Fasteners (China)*, paras. 537-538.

[94] Appellate Body Report, *EC – Fasteners (China)*, para. 539.

[95] Appellate Body Report, *EC – Fasteners (China)*, para. 542 (footnote omitted, emphasis added).

[96] Panel Report, *China – GOES*, paras. 7.202 and 7.224.

confidential normal value data while failing to summarize the source of the information and the underlying evidence);[97] (ii) by simply titling an exhibit as "Financial audit reports of the applicant" without providing "a reasonable understanding of the substantive content of those reports";[98] and (iii) by simply stating that a document contains business secrets of the Applicant".[99]

84. Third, in "exceptional circumstances", if the information at issue is not "susceptible to summary", the party submitting the information may indicate it is unable to provide a non-confidential summary. However, it must provide "a statement of the reasons why summarization is not possible". The Appellate Body has said: "Summarization of information will not be possible where no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence".[100] Further, "the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible".[101]

85. In the present case, subject to the comments in paragraph 77 above, the European Union submits that the Applicants did not show "good cause" for treating the full texts of the relevant Appendices as confidential, and therefore China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement in permitting the full texts of these Appendices to remain confidential. The European Union further submits that the Applicants did not furnish sufficient non-confidential summaries of the relevant Appendices or any statements as to why such summaries were not possible, and China's failure to require such

[97] Panel Report, *China – X-Ray Equipment*, para. 7.341.

[98] Panel Report, *China – X-Ray Equipment*, para. 7.342.

[99] Panel Report, *China – X-Ray Equipment*, paras. 7.352-7.353, 7.355 and 7.360.

[100] Appellate Body Report, *EC – Fasteners (China)*, para. 543.

[101] Appellate Body Report, *EC – Fasteners (China)*, para. 544 (footnotes omitted).

summaries or statements was inconsistent with Article 6.5.1 of the Anti-Dumping Agreement.

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

86. With respect to Article 6.5 of the Anti-Dumping Agreement, the European Union claims, subject to the comments in paragraph 77 above, that China acted inconsistently with this provision because China permitted the full texts of the relevant documents to remain confidential without a showing of good cause.

87. 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.

88. 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.

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

89. 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.

90. 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.[102]
- 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".[103] 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".[104]
- 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",[105] and indeed the Applicants' Additional Submission contained a table with these figures.

91. However, other than disclosing these final data, the Applicants provided no summary of any other contents of these reports, including the methodologies utilized by the third party institutes to obtain these data or the underlying evidence they relied upon. To recall, the panel in *China – X-Ray Equipment* stated: "In cases where multiple types of information are designated as

[102] Application, Exhibit EU-1, Appendix V.

[103] Application, Exhibit EU-1, Appendix VIII.

[104] Applicants' Supplemental Submission, Exhibit EU-15, Section III (List of supplementary evidence and non-confidential summary, item 59).

[105] Applicants' Additional Submission, Exhibit EU-16, Appendix.

confidential, the substance of each type of confidential information must be summarized".[106]

92. 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.

93. 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".[107] As the panel found in *China – X-Ray Equipment*, such a statement is not an adequate non-confidential summary under Article 6.5.1.[108]

94. 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.[109] 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 contains "Wujin's … *evidence* suggesting contract enforcement being

[106] Panel Report, *China – X-Ray Equipment*, para. 7.341.

[107] Applicants' Supplemental Submission, Exhibit EU-15, Section III (List of supplementary evidence and non-confidential summary).

[108] Panel Report, *China – X-Ray Equipment*, paras. 7.352-7.353, 7.355, 7.360.

[109] Panel Report, *China – X-Ray Equipment*, paras. 7.341-7.342.

affected"; and Appendix 43 contains "Audit *reports* on Walsin (2008-2010)".[110]

95. 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.

96. 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. Notably, interested parties could not intelligently question the accuracy and adequacy of the data and methodologies contained in the reports that were kept fully confidential.

97. 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.

B. SMST dumping determination, failure to take into account relevant information provided during the verification: Article 6.7 and Annex I, paragraph 1 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement

98. The European Union claims that the measure at issue is inconsistent with Article 6.7 and Annex I, paragraph 1 of the Anti-Dumping Agreement because China refused to take into account information relevant for the determination of the margin of dumping of SMST provided during the on-the-spot investigation. The European Union further claims that the measure at issue is inconsistent with Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement because China failed to take into account all information pertaining to the determination of the margin of dumping for SMST which was verifiable, which was appropriately submitted so that it could have been used in

[110] 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.

the investigation without undue difficulties, and which was supplied in a timely fashion.

99. At the verification, SMST submitted to the investigating authorities that certain financial expenses had been inadvertently double-counted in the SMST Dumping Questionnaire Response, and adduced corrected information that was duly verified. The *only* reason provided by China in the SMST Final Disclosure and in the Final Determination for refusing to take the corrected information into account was that SMST did not raise this point before the verification started.[111]

100. Thus, to be clear, the specific matter in dispute and placed before this Panel by the European Union in this claim is not the *substantive* accuracy of the corrected information relating to financial expenses. That is eventually a matter for any re-determination and compliance proceedings. Rather, the specific matter in dispute and placed before this Panel by the European Union is a *procedural* issue. The procedural issue is whether or not China acted inconsistently with the Anti-Dumping Agreement when, in the measure at issue, it refused to take the corrected information into account, *only* on *procedural* grounds. Further, the issue is limited to the question of whether this was permissible *specifically* only on the *narrow* procedural ground that SMST did not raise this point before the verification started. Stated in more general

[111] SMST Final Dumping Disclosure: "… During the verification, your company presented that certain financial expenses were double reported in the response and requested to revise. Because your company did not present this claim before the verification, the investigating authority decides not to accept. …" (Exhibit EU-25).

SMST Comments on Final Dumping Disclosure, p. 1: " … it was shown at verification that the 10.20% rate was actually too high because certain financial expenses had been double-counted. As shown at verification, the financial expenses incurred at headquarters were already allocated in the administrative expenses in Table 6-6 and therefore should not have again been allocated in Table 6-8. *See* SMST-Germany Verification Exhibits 7 & 9. While BOFT claims that this information was not presented "before the verification," this issue was one of the first ones reviewed by BOFT at the beginning of verification and BOFT had ample time to collect and review all relevant documents. Thus, BOFT should not double-count financial expenses in the SG&A rate used to calculate constructed value for DMV 304HCu …" (Exhibit EU-28).

Final Determination, p. 42, explaining that, in the course of verifications, SMST Italia indicated that some financial costs were mistakenly mentioned several times in the responses to the questionnaire and asking for rectification, and recording China's response that, since the company did not raise this point before on-the-spot verifications started, China decided to reject SMST's request. (Exhibit EU-30).

terms, the question is whether or not, under the terms of the Anti-Dumping Agreement, investigating authorities are *always* entitled to refuse to take into account information provided during a verification *only* on the grounds that the point to which the information relates was not raised before the verification.

101. The European Union submits that this is clearly inconsistent with the Anti-Dumping Agreement. The Anti-Dumping Agreement clearly *permits* points to be raised at verification and supporting information to be provided. Furthermore, it places obligations on investigating authorities that preclude them from *always* rejecting such information. Finally, investigating authorities must, with respect to this matter, conduct themselves in an even-handed way. That is, if an investigating authority accepts the possibility that points can be raised and information provided at verification, even if subject to certain conditions, then it must apply that rule, and the associated conditions, in an even-handed way, without regard to whether the information in question would tend to support the interests of one or other interested party. It cannot suddenly invoke an absolute procedural rule of exclusion with respect to selected interested parties, points, or information, which is essentially what China has done in this case.

102. The provision of the Anti-Dumping Agreement that speaks most specifically to the conduct of verifications is Article 6.7 of the Anti-Dumping Agreement.[112] Article 6.7 provides that the procedures described in Annex I of the Anti-Dumping Agreement shall apply. Annex I is titled "Procedures for on-the-spot investigations pursuant to paragraph 7 of Article 6". Paragraph 7 of Annex I[113]

[112] Article 6.7 of the Anti-Dumping Agreement provides as follows: "In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants."

[113] Annex I, paragraph 7 of the Anti-Dumping Agreement provides as follows: "As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of

provides expressly that the main purpose of the on-the-spot investigation is to verify information provided "or to obtain further details". It also refers expressly to "any further information which needs to be provided", "further details to be provided" and "information obtained", all of which clearly refer to details and information provided during the verification. Thus, this provision not only permits further details and information to be provided during verification, but it also provides that this is one of the *main purposes* of verification, is consistent with *standard practice*, and that the provision of such further details or information *should not be precluded*.

103. As a matter of logic, the question of what information an investigating authority must rely on is closely linked to the related question of the circumstances in which an investigating authority may rely on *other* information, which is essentially what China did in this case when it relied on the erroneous and uncorrected data relating to financial expenses. In this respect, Article 6.8 of the Anti-Dumping Agreement[114] conditions the use of "facts available" on a situation in which an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time or significantly impedes the investigation. In this respect, there is no question that SMST did not behave in such a manner. SMST did not refuse access to the corrected information, but provided it during the verification.

104. China cannot successfully argue that, in this case, SMST provided access and information, but after the expiry of a reasonable period of time. The measure at issue makes no reference to the concept of a reasonable period of time, so this would simply involve impermissible *ex post* rationalisation by China. Furthermore, any such position by China would, given the laconic nature of the

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the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained."

[114] Article 6.8 of the Anti-Dumping Agreement provides as follows: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

measure at issue on this point, necessarily stand for the proposition that the raising of a particular point and related information at verification is *always* too late because it is after the expiry of a reasonable period of time. This cannot be correct, because that would stand for the proposition that further details or information may and indeed (to ensure even-handedness) must always be excluded from being raised in verifications, which, as outlined above, would not be consistent with the relevant provisions of the Anti-Dumping Agreement.

105. Nor can China successfully argue that, in this case, and with respect to this matter, SMST significantly impeded the investigation. The measure at issue makes no reference to such a proposition, so this would simply involve impermissible *ex post* rationalisation by China. Furthermore, there is no rational basis on which to conclude that the raising of further details and information at verification *always* significantly impedes an investigation. The measure offers no explanation for why the routine verification of the corrected information did impede or would have impeded the investigation in any way, let alone significantly.

106. Article 6.8 further provides that, in the application of that provision, the provisions of Annex II of the Anti-Dumping Agreement must be observed. Annex II, paragraph 3 of the Anti-Dumping Agreement[115] provides that all information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, and which is supplied in a timely manner, should be taken into account when determinations are made. In this respect, there is no dispute that the corrected information was verifiable or that it was appropriately submitted and could be used in the investigation. The measure at issue does not refer to any alleged undue difficulties, and China is not at this stage permitted to refer to any such alleged undue difficulties by

[115] Annex II, paragraph 3 of the Anti-Dumping Agreement provides as follows: "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation."

way of *ex post* rationalisation. In any event, it cannot be that taking such information into account *always* results in undue difficulties, since investigating authorities routinely take such information into account, and requirements of even-handedness dictate that they must do so without regard to the consequences for one or other interested party. Accordingly, in this case, this provision confirms that the corrected information should have been taken into account when the final determinations were made.

107. Finally, Annex II, paragraph 6 of the Anti-Dumping Agreement[116] provides that in any event SMST should have been fully informed of the reasons for which any evidence or information would not be accepted, and should have been afforded an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. It further provides that such reasons for rejection must be given in any published determinations. This provision further confirms that, with respect to this matter, there is no scope whatsoever for any attempts at *ex post* rationalisation by China. Rather, the Panel must assess the consistency of the measure at issue with the above stated provisions of the Anti-Dumping Agreement on the basis of what the measure actually says, and *only* on that basis. As outlined above, what the measure actually says, and the proposition upon which by necessary inference it is based, is that details or information submitted at verification must never be accepted. For the reasons set out above, that is obviously inconsistent with the cited provisions of the Anti-Dumping Agreement.

108. Finally, the European Union makes the same claim with respect to the information contained in SMST's Dumping Questionnaire Response and Supplemental Dumping Questionnaire Response and SMST-Germany Verification Exhibits 10 and 18, discussed in more detail in the substantive sections below.

[116] Annex II, paragraph 6 of the Anti-Dumping Agreement provides as follows: " If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."

109. For these reasons the European Union respectfully requests the Panel to find that the measure at issue is, in this respect, inconsistent with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement.

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

110. The European Union submits that China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts that form the basis of its dumping, injury and causation determinations. In particular, China failed to disclose information on dumping calculations and import and domestic prices essential to its price effects finding. Consequently, interested parties were unable properly to defend their interests.

111. Article 6.4 of the Anti-Dumping Agreement requires authorities to provide timely opportunities for interested parties to see all information relevant to the presentation of their cases that is not confidential and that is used by the authorities in the investigation, and to prepare presentations on the basis of such information. It is particularly difficult to understand why, if a firm provides a spread sheet with certain data destined to be used to calculate a dumping margin, it should not receive disclosure of what is in essence the same spread sheet, duly completed with the data actually relied on by the investigating authority, which would not be confidential *vis a vis* that firm. Furthermore, as stated by the Appellate Body in *China – GOES*, Article 6.9 requires disclosure, "before a final determination is made, [of] the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures".[117] An investigating authority must:

> inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

[117] Appellate Body Report, *China – GOES*, para. 240 (original emphasis).

> Such disclosure should take place in sufficient time for the parties to defend their interests.[118]

112. This requirement maintains the basic integrity of an anti-dumping proceeding, helping to ensure that interested parties receive a fair opportunity to respond to anti-dumping allegations. As the panel in *EC – Salmon (Norway)* found:

> the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[119]

113. Article 6.9 has been further clarified in the case law. The *EC – Salmon (Norway)* panel defined the "essential facts" as the "indispensable and necessary" facts considered by the investigating authority in making its determination.[120] The panel in *China – GOES* stated that "essential facts" are "the elements that must exist for the application of definitive anti-dumping duties".[121]

114. These "essential facts" cover "those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties".[122] As the Appellate Body described in *China – GOES*, "[w]hat constitutes an 'essential fact' must therefore be understood in the light of the context of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the *Anti-Dumping Agreement* … as well as the factual circumstances of each case".[123]

1. With respect to the dumping determinations

[118] Anti-Dumping Agreement, Article 6.9.

[119] Panel Report, *EC – Salmon (Norwa*y), para. 7.805.

[120] Panel Report, *EC – Salmon (Norwa*y), para. 7.796.

[121] Panel Report, *China – GOES*, para. 7.407.

[122] Appellate Body Report, *China – GOES*, para. 240.

[123] Appellate Body Report, *China – GOES*, para. 241.

115. Essential facts supporting an anti-dumping margin determination include the data underlying the margin calculations and adjustments to the data. These facts also include information on the calculation methodology, for example, the formulas used in calculations and the data applied in those formulas. China's anti-dumping disclosures contain none of this information.

116. Applied to a finding of dumping, as the panel in *China – GOES* stated, "essential facts" are "the elements that must exist for the application of definitive anti-dumping duties. In an anti-dumping investigation, the essential elements include the existence of dumping ...".[124] In determining the existence of dumping, the Anti-Dumping Agreement requires that the investigating authority determine whether "the export price of the product exported from one country to another is less than the comparable price ... for the like product when destined for consumption in the exporting country".[125] That is, the Anti-Dumping Agreement requires a comparison of normal value and export price. The Anti-Dumping Agreement further details the kind of data an authority must seek and how it must use them in this comparison.[126] For example, the Anti-Dumping Agreement requires that:

> 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.[127]

117. And if such data are not available, it prescribes specific alternative methods of determination.[128]

118. The calculation of normal value and export prices can be made only by applying specific cost and sales data; these data therefore are essential to determining normal value and export price. Assumptions and adjustments applied to these data, for example, to account for taxes and freight, are also

[124] Panel Report, *China – GOES*, para. 7.407.

[125] Anti-Dumping Agreement, Article 2.1.

[126] Anti-Dumping Agreement, Article 2.2.1.

[127] Anti-Dumping Agreement, Article 2.2.2.

[128] Anti-Dumping Agreement, Article 2.2.2.

necessarily essential. Furthermore, information on the method of calculation is essential to understanding the anti-dumping determination. That is, information about how the investigating authority has applied the data it has collected on a firm's costs and sales information, in calculations for normal value, export price, and production costs.

119. In the proceeding at issue, China disclosed none of this information. China's dumping disclosures present only basic figures for export price and normal value and a narrative summary of the actions purportedly taken to derive these numbers. However, the disclosures present no cost data and no application of adjustments to price. They also show no evidence of calculation methodology, whether in the form of worksheets and computer output, or in details of formulas applied and the data applied by them.[129]

120. With regard to the data underlying the margin calculations, the panel in *China – X-Ray Equipment* found that the failure to disclose the price and adjustment data underlying the determination of a foreign exporter's or producer's dumping margin is inconsistent with Article 6.9 of the Anti-Dumping Agreement.[130] Regarding the evidence of calculations, China was required to disclose its calculation methodology, for example, by an explanation of what formulas were applied to what data. As the panel in *China – Broiler Products* stated with reference to calculation of normal value, "a proper disclosure [] would require not only identification of the home market and export sales being used, but also the formula being applied to compare them".[131] The formula used by the authority is thus "an essential element of a comparison of normal value to export price".[132]

[129] SMST Final Dumping Disclosure (Exhibit EU-25). The same WTO inconsistent quality of disclosure was provided to Tubacex and the EU (with respect to the all others rate) (Exhibit EU-27), as well as to Japan and the Japanese exporters (Exhibit EU-31).

[130] Panel Report, *China – X-Ray Equipment*, para. 7.421.

[131] Panel Report, *China – Broiler Products*, para. 7.91 (footnote omitted).

[132] Panel Report, *China – Broiler Products*, para. 7.91.

121. The panel in *China – X-Ray Equipment* did not require the disclosure of actual mathematical calculations. However, it did not find that the investigating authority had no duty to elucidate its calculations. This point was clarified by the panel in *China – Broiler Products*, which stated, in commenting on this case, "if the holding of the panel in *China – X-Ray Equipment* were to stand for the premise that the investigating authority does not have to disclose the formula used to make the calculations … we respectfully disagree".[133] The panel further noted that, while actual calculations may not be required, an investigating authority could discharge its disclosure obligation by explaining "in a narrative fashion what formulas it applied to which data … and the final result of the calculation …".[134] Specifically with regard to the calculation of normal value, the panel stated that this disclosure "could take the form of a spreadsheet or list containing the sales data or a narrative description that would enable the exporter to understand precisely which sales were used".[135] China, therefore, was not at liberty to disclose only summary information on its analysis together with the final dumping margins. It had an obligation to provide substantive information on its calculations permitting each interested party to understand in detail how it went about its calculation of the dumping margin. China's disclosures did not satisfy this obligation.

122. This lack of disclosure critically impaired the interested parties' defence to the dumping determination and dumping margin calculations. Without the missing data and calculation methodology information, they could not present the necessary rebutting arguments or address the errors in China's analyses. China thus frustrated the purpose of the "essential facts" disclosure requirement by denying interested parties an opportunity to "provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".[136] This is well-illustrated by the fact that when China did finally disclose the basis of its SG&A calculation for SMST and

[133] Panel Report, *China – Broiler Products*. para. 7.92.

[134] Panel Report, *China – Broiler Products*. para. 7.92, footnote 175.

[135] Panel Report, *China – Broiler Products*. para. 7.91, footnote 171.

[136] Panel Report, *EC – Salmon (Norwa*y), para. 7.805.

Product B (discussed further below), it was immediately apparent that China had committed an obvious error in the dumping calculation.

123. Thus, China acted inconsistently with its obligations under Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose the most basic facts and analyses related to its anti-dumping determination and margin calculations. The dumping margins are thus backed only by China's representations that it made the required analyses. The Anti-Dumping Agreement requires more than bare assertions. China has thus failed to present the "essential facts" in its dumping determination and margin calculations.

124. The Panel should reach the same conclusion with respect to the all others rates. In this respect, China acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement because China also failed to disclose the "essential facts" related to its determination of the all others dumping rates. In particular, China failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rates; and (ii) the particular facts that were used to determine the all others rates.

125. China's discussion in its Final Dumping Disclosure of how it determined the all others rates consists only of its representations that it decided to use facts available to establish the normal value and export price, and base its determinations on dumping and dumping margins on facts available, and apply the highest dumping margin found for a co-operating exporter. China's Final Dumping Disclosure provides no additional information on how it calculated the all others rates, the data it used to do so, or how it justified using the highest dumping margin found for a co-operating exporter as the all others rate. Because China failed to provide adequate disclosures of "essential facts" related to its all others rates or its determination of dumping duties, China has not met its obligations under Articles 6.4 and 6.9 of the Anti-Dumping Agreement. Indeed, in factual circumstances nearly identical to the present dispute, the panel in *China – GOES* found that China also violated Article 6.9

of the Anti-Dumping Agreement for these same reasons.[137] This Panel should make the same finding.

2. With respect to the injury determination

126. Under the Anti-Dumping Agreement, to make a finding of injury, an authority must examine the various elements as set out, *inter alia*, in Articles 3.1, 3.2, 3.4 and 3.5. Article 3.2 requires consideration of the effect of the investigated imports on domestic prices.[138] With regard to its analysis of possible price effects, an authority must "consider whether there has been a significant price undercutting by the dumped imports … or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree".[139]

127. Accordingly, under the Anti-Dumping Agreement, with respect to possible price effects, an authority must examine the facts necessary to understand and form conclusions related to differences in prices between the investigated imports and domestic products, or to ascertain whether domestic prices have been depressed or suppressed. These facts necessarily include domestic prices, import prices, and changes in prices.

128. Moreover, in making a finding of causation, the Anti-Dumping Agreement requires that an investigating authority determine that the investigated imports are causing injury to the domestic industry, and that it apply relevant evidence in reaching that determination. Under the Anti-Dumping Agreement, "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities".[140] Thus, with regard to causation, under the Anti-Dumping Agreement, China was required to examine the facts that are

[137] Panel Report, *China – GOES*, paras. 7.404-7.412.

[138] Appellate Body Report, *China – GOES*, para. 241.

[139] Anti-Dumping Agreement, Article 3.2.

[140] Anti-Dumping Agreement, Article 3.5.

necessary to understand whether the investigated imports are the cause of alleged injury, which includes facts related to domestic and import prices, and changes in those prices.

129. However, China's Injury Disclosure failed to provide some of these essential facts, and therefore failed to offer interested parties adequate opportunity to defend their interests. The facts disclosed by China in its Injury Disclosure with respect to its price effects analysis are summarized above.[141]

130. As that summary shows, China failed to disclose several pieces of information critical to its price effects determination. Specifically, China failed to disclose: (i) complete information about the import prices it used in its price effects analysis (although an import price for Product C could be derived from other information supplied by China); (ii) any domestic prices; (iii) the percentage change in the domestic price of Product C in the first half of 2011 as compared with the first half of 2010 (this is particularly disconcerting because it would appear that in fact there were no sales of Product C by the Applicants during the first half of 2011); (iv) the margins of overselling for Product A and the HP-SSST product as a whole (to the extent that there were relevant domestic sales); and (v) the margin of overselling or underselling for Product C in the first half of 2011. In addition, for Product B, China disclosed only a range of underselling (i.e., -3% to -28%) for the years 2008-2010, without specifying the particular margin of underselling for any given year.

131. China's failure to disclose with respect to the price-undercutting determination relating to Product B is particularly problematic. To recall, the facts demonstrate that Product A was not or hardly imported and that a comparison between imported Product BC and domestic Product ABC revealed that there was *no price-undercutting*. Furthermore, the domestic Product ABC calculation must have been heavily weighted in favour of Product A, which was what was predominantly produced by the Chinese domestic industry; whilst the imported Product BC calculation must have weighted heavily in

[141] Injury Disclosure, Exhibit EU-24.

favour of Product B. In these circumstances it is very difficult to understand how a comparison between imported Product B and domestic Product B suddenly produced price-undercutting of 28%.

132. In other words, these omissions are material because the foundation of China's price effects determination, and in turn its causation determination, was that, "in general", HP-SSST imports "had a relatively noticeable price undercutting effect on the price of domestic like products" – a finding that China purportedly based on a comparison of domestic and import prices by type.[142]

133. A price undercutting determination necessarily requires an investigating authority to subtract import price levels from comparable domestic price levels and identify a negative difference as underselling. Yet, as noted, China did not disclose all of the relevant domestic and import price levels required for these comparisons, nor did it disclose all of the relevant margins of overselling or underselling, which would be essential to determining whether any instances of underselling are in fact "significant". While China did disclose certain trend information for domestic and import prices, that information is not pertinent to determinations of price undercutting.

134. Regarding an investigating authority's duty to disclose the price information on which it relied in its determination, the panel in *China – X-Ray Equipment* stated:

> We consider that the AUVs [(average unit values)] and underlying price data were essential to … the determination that dumped imports had the effect of price undercutting and price suppression. The AUVs and underlying price data constituted the body of facts on which MOFCOM's determination of price effects was based. Since this body of facts was therefore required to understand the basis for MOFCOM's price effects analysis, we consider that it should have been disclosed by MOFCOM pursuant to Article 6.9.[143]

135. The trend information China supplied is an inadequate substitute for the essential price information underlying a price effects determination. As stated by the panel in *China – X-Ray Equipment*:

[142] Final Determination, Exhibit EU-30, pp. 52-54.

[143] Panel Report, *China – X-Ray Equipment*, para. 7.404.

> by simply informing interested parties of the trends in subject import and domestic prices, MOFCOM provided little basis for interested parties to defend their interests. To properly and fully defend their interests, interested parties required disclosure of the entire body of facts essential to MOFCOM's analysis of the price effects of the dumped imports.[144]

136. In *China – GOES*, the Appellate Body also rejected a proffer of trend information similar to that provided in the present case. It stated:

> we do not consider that MOFCOM discharged its obligations under Article 6.9 of the Anti-Dumping Agreement … by merely disclosing, with respect to price depression, that average domestic prices had fallen …. Indeed, the essential facts that MOFCOM should have disclosed in respect of the "low price" of subject imports include the price comparisons between subject imports and the like domestic products.[145]

137. Moreover, in this case, China relied on its price effects analysis – specifically, its finding of price undercutting – to support its causation determination.[146] Price undercutting was thus "indispensible and necessary"[147] to China's causation analysis. More generally, it would be impossible to determine that injury was caused based on price effects without information supporting a price effects determination. As the Appellate Body stated in *China – GOES*:

> [T]he 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.[148]

138. As the panel in *China – X-Ray Equipment* stated, referring to the Appellate Body report in *China – GOES*, "the Article 3.2 assessment is an integral part of the establishment of a causal link between the dumped imports and the injury to the domestic industry".[149] Nonetheless, as discussed above, China failed to disclose the information that formed the basis for its price undercutting determination.

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[144] Panel Report, *China – X-Ray Equipment*, para. 7.409.

[145] Appellate Body Report, *China – GOES*, para. 247.

[146] Final Determination, Exhibit EU-30, pp. 65-67.

[147] Panel Report, *EC – Salmon (Norwa*y), para. 7.796.

[148] Appellate Body Report, *China – GOES*, para. 145 (emphasis added).

[149] Panel Report, *China – X-Ray Equipment*, para. 7.405 (citing Appellate Body Report, *China – GOES*, para. 128).

139. With regard to considerations of confidentiality in the requirement to disclose essential facts, such considerations should not have prevented China from complying with Article 6.9 in the present case. Among other things, China could have released sufficiently detailed non-confidential summaries of price information. As stated by the Appellate Body in *China – GOES*:

> With respect to China's argument that disclosing further details would have compromised business confidential information, we agree with the Panel that, when confidential information constitutes "essential facts" within the meaning of Article[] 6.9 …, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts.[150]

140. Moreover, as the panel observed in *China – X-Ray Equipment*, "although the price data underlying China's price effects analysis might properly be treated as confidential, we doubt that the same is true of annual AUVs".[151]

141. For these reasons, China failed to meet its obligations under Article 6.9 of the Anti-Dumping Agreement to disclose to the European Union and Japan and their exporters essential facts considered in its investigation with respect to price effects and whether allegedly dumped imports caused injury to the domestic industry.

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

1. With respect to the dumping determinations

142. The European Union claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide a report stating all relevant information supporting the imposition of definitive anti-dumping duties against the investigated imports as part of its Final Determination.

[150] Appellate Body Report, *China – GOES*, para. 247.

[151] Panel Report, *China – X-Ray Equipment*, para. 7.409, footnote 371.

143. Article 12.2 of the Anti-Dumping Agreement states that, in a preliminary or final determination, an investigating authority must provide a notice or separate report setting out "in sufficient detail the findings and conclusions reached on *all issues of fact and law considered material* by the investigating authorities".[152] Article 12.2.2 of the Anti-Dumping Agreement further specifies this obligation as it applies to a final determination, requiring that the investigating authority's final report detail "*all relevant information on the matters of fact and law and reasons* which have led to the imposition of final measures".[153]

144. Relevant information on the matters of fact and law and reasons is:

> understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the Anti-Dumping Agreement … as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine ….[154]

145. The Final Determination failed to disclose both: (i) the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rates; and (ii) the particular facts that were used to determine the all others rates. It repeated only the same statements from the disclosure that China had decided, with respect to the all others rates, to use the facts available to establish normal values and export prices.[155] Accordingly, China acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

146. As indicated above, these provisions require an investigating authority to disclose in "sufficient detail the findings and conclusions" and reveal "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". The context provided by relevant provisions of the Anti-Dumping Agreement defines the required information.

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[152] Anti-Dumping Agreement, Article 12.2 (emphasis added).

[153] Anti-Dumping Agreement, Article 12.2.2 (emphasis added).

[154] Appellate Body Report, *China – GOES*, para. 257.

[155] Final Determination, Exhibit EU-30, pp. 35 and 41.

147. China based its all others rates on the application of facts available. Under the Anti-Dumping Agreement, before resort to facts available, an investigating authority must first find that an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation.[156] The facts and analysis underlying the decision to resort to facts available therefore were relevant matters of fact and law and reasons necessary to its all others rate determinations.

148. The Final Determination did not provide "sufficient detail" on its justification for applying facts available in its all others rate determinations because it provided no detail. China provided no report of its analysis of how it determined the need for facts available or how it applied them in its definitive all others rate calculations. The bases for applying facts available are matters of fact – presumably, the actions or inactions of interested parties. The analysis of these facts is necessarily the application of law and reason required to justify using facts available. Information supporting the use of facts available thus necessarily fits within the Article 12.2 and 12.2.2 requirements.

149. In similar circumstances, the panel in *China – GOES* found China to have acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.[157] In that dispute, the panel found that "the final determination [did] not set forth all relevant information on matters of fact … supporting the conclusion that unknown … exporters refused to provide necessary information or otherwise impeded the investigation", and therefore created the need for the use of facts available.[158] In the investigation underlying that dispute, the Chinese government had argued that it did not disclose the required information because the "all others" rate was based upon confidential information of one of the responding companies.[159] The panel did not accept

[156] Anti-Dumping Agreement, Article 6.8.

[157] Panel Report, *China – GOES*, paras. 7.419-7.426.

[158] Panel Report, *China – GOES*, para. 7.424.

[159] Panel Report, *China – GOES*, para. 7.416.

that justification for the failure to disclose the required information. Instead, it "concluded that MOFCOM did not disclose in 'sufficient detail the findings and conclusions reached on all issues of fact' or 'all relevant information on matters of fact'", and found that China "acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement".[160] As discussed further below, any confidentiality concerns may be addressed by providing non-confidential summaries of the relevant information.[161]

150. As in *China – GOES*, China in the present case has no valid justification for its failure to reveal: (i) why it resorted to facts available; and (ii) how it determined the highest dumping margin found for the relevant exporters that received an individual margin to be the appropriate all others rates.

151. Thus, at no point in the proceeding did China disclose the factual basis or the legal reasoning supporting its definitive assessment of the all others rates. In failing to provide this information, China failed to satisfy the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

2. With respect to the injury determination

152. As discussed further below, a pillar of China's affirmative determination as to injury and causation was its price effects analysis – specifically, China determined that the domestic industry was injured by the investigated imports due to price undercutting. However, China did not provide all of the relevant information and reasoning supporting its price undercutting conclusions. Specifically, its finding of price undercutting: (i) omitted key factual information; and (ii) did not provide the reasoning behind one critical aspect of its price comparisons by type. In the context of Article 3.2, "'all relevant information on the matters of fact' consists of those facts that are required to

[160] Panel Report, *China – GOES*, para. 7.426.

[161] Appellate Body Report, *China – GOES*, para. 259.

understand an investigating authority's price effects examination leading to the imposition of final measures".[162]

153. First, with regard to the factual information underlying China's price undercutting analysis, China's disclosures in its Final Determination were the same as in its Injury Disclosure. China's failings in this regard are summarized below. While China did disclose certain "trend" information, as the European Union will further explain below, that information is not pertinent to a finding of price undercutting.

154. China's refusal to provide the pricing information underlying its price undercutting analysis and its resulting obstruction of the view into this analysis has been addressed and rejected before by the WTO Appellate Body. China similarly failured to disclose information related to an injury analysis in *China – GOES*, and the Appellate Body in that case found that China consequently had not complied with Article 12.2.2. As in the present case, in the determination underlying *China – GOES*, China had provided only information on price variations "without including the *prices* of domestic products", while at the same time basing its injury determination on a finding that import prices were, in some independently evident sense, "low".[163]

155. The panel and Appellate Body in *China – GOES* rejected this approach. The Appellate Body said that "MOFCOM's disclosure that 'average domestic prices dropped' … is insufficient to convey all the relevant information on the matters of fact relating to MOFCOM's finding that subject imports were at a 'low price'".[164] As the Appellate Body did in *China – GOES*, the Panel in the present case should not accept China's use of price change data in place of the

[162] Appellate Body Report, *China – GOES*, para. 260.

[163] Appellate Body Report, *China – GOES*, para. 263 (original emphasis).

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

data that actually are relevant to its determination that import prices "noticeabl[y]" undercut domestic prices.[165]

156. As a matter of emphasis, it is worth noting that in *China – GOES*, China had made separate findings of price suppression and price depression, and furthermore that China had denied before the panel that its determination relied on price undercutting findings. In that case, the Appellate Body nonetheless rejected these objections, finding that China's conclusions that imports were sold at "low prices" required that it disclose the material facts and reasoning behind these conclusions.[166] Unlike in *China – GOES*, in the present case, China made no price suppression or price depression findings, so its injury determination is based exclusively on its price undercutting findings. Therefore, China's failure to comply with Articles 12.2 and 12.2.2 in the present case is even more egregious than it was in *China – GOES*. China should therefore in the present case be found to be in violation of these provisions.

157. Second, China also failed to satisfy its obligations under Articles 12.2 and 12.2.2 because with regard to its price comparison of imported and domestically produced Product C, China failed to provide any detail on how it purportedly accommodated important "quantitative differences" between the products in its price undercutting analysis.[167] China found that domestic sales of Product C were "small" relative to subject imports of Product C in 2009 and 2010, and China therefore purportedly took these quantitative differences "into consideration".[168] China, however, failed to explain this adjustment, thus making it impossible for respondents to understand this critical step in China's injury analysis. As discussed below, China's price undercutting analysis was essential to its injury determination, and the price comparison by type between imported and domestically produced Product C was an essential part of the

[165] Final Determination, Exhibit EU-30, p. 54.

[166] Appellate Body Report, *China – GOES*, para. 265.

[167] Final Determination, Exhibit EU-30, pp. 53-54.

[168] Final Determination, Exhibit EU-30, pp. 53-54.

price undercutting analysis. China's purported adjustment for "quantitative differences" was, therefore, very much relevant to that analysis.

158. In closing this discussion, the European Union recognizes that Article 12.2.2 requires an authority to pay due regard to confidentiality. However, with regard to China's claims that it rightfully withheld certain import price data and all domestic price data to protect interested parties' confidentiality,[169] this claim lacks foundation. There appears to be no reason why China could not, at a minimum, disclose non-confidential summaries, such as indexed data that would permit a comparison of import prices and domestic prices by type and total product basis, while maintaining the confidentiality requests of interested parties. As the Appellate Body stated in *China – GOES*:

> We note that Article[] 12.2.2 … also provide[s] that the notice or report shall pay "due regard … to the requirement for the protection of confidential information". When confidential information is part of the relevant information on the matters of fact within the meaning of Article[] 12.2.2 …, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of that information.[170]

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

VII. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATIONS

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

[169] Final Determination, Exhibit EU-30, p. 52 (with regard to import prices of Products A and C) and p. 56 (with regard to domestic prices).

[170] Appellate Body Report, *China – GOES*, para. 259.

160. The European Union claims that, in the measure at issue, China did not determine the amounts for administrative, selling and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation (SMST) or in a manner that reasonably reflects the costs associated with the production and sale of Product B (DMV 304HCu).

161. SMST reported SG&A relating to Product B (DMV 304HCu) during the investigation period in its Questionnaire Response (QR) Table 6-5 as [[**BCI**]]%.[171] SMST QR Table 6-5 was based on SMST QR Tables 6-6 (Administrative expenses), 6-7 (Sales Expenses) and 6-8 (Financial Expenses), which were in turn based on the actual records kept by SMST, in accordance with generally accepted accounting principles (GAAP) of the exporting country, which reasonably reflect the costs associated with the production and sale of the product under consideration, such allocations being those historically utilized by SMST. This data was verified during the verification, in particular through reconciliation with the audited and published accounts of SMST and, insofar as is relevant to this claim, China raised no issue with respect to this data.[172]

162. Prior to the consultations in these proceedings, analysis of the disclosure given by China suggested that in the measure at issue China must have used a far higher number for SMST SG&A for Product B (DMV 304HCu), of approximately [[**BCI**]]%, that is, one not based on the actual SG&A data reported by SMST, as outlined above, and verified by China, although no clear explanation was provided by China in this respect. During the consultations,

[171] SMST Dumping Questionnaire Response, Table 6, Table 6-10 (Exhibit EU-12) (BCI) (electronic file).

[172] SMST Verification Disclosure, p. 2: " … The verification team verified the completeness, accuracy and truth and reasonability of the company general information, export sales to China, sales in EU, allocation of production cost and expenses of the subject merchandise, etc. in the headquarter of SMST; and verified raw material input, packaging, warehousing and transportation, etc. at the plants. The companies actively cooperated with the verification team's investigation, answered the relevant questions as requested and provided the relevant information and materials. …" (Exhibit EU-23).

China disclosed, for the first time, that it had used the number [[**BCI**]] from SMST QR Table 6-3.[173] This is an obvious error.

163. Working back through SMST QR Table 6-3 (DMV 304HCu (EU)), whilst examining the formulae, reveals that: the "Unit related expense" [[**BCI**]] (N25) is derived from the "Total related expenses" [[**BCI**]] (N24) divided by the "Total production quantity(ton) in the period" [[**BCI**]] (N6); the "Total related expenses" [[**BCI**]] (N24) are the sum of the "Sales expenses" [[**BCI**]] (N20), "Administrative expense" [[**BCI**]] (N21), "Financial expense" [[**BCI**]] (N22) and "Other expense" (0) [[**BCI**]]; and all this data relates to activity in December 2012 (column G, items 20 to 23).

164. The relevant formula reveals that the "Sales expenses" [[**BCI**]] (G20) were calculated by multiplying the "Total cost of production" [[**BCI**]] (G17) by [[**BCI**]]%. As repeatedly explained to China during the administrative proceedings, this represented a *hypothetical projected* (not the *actual*) sales expenses, the *actual* sales expenses being reported in the duly verified SMST QR Table 6-5 (and SMST QR Table 6-7).[174]

165. Similarly, the relevant formula reveals that the "Administrative expense" [[**BCI**]] (G21) was calculated by multiplying the "Total cost of production" [[**BCI**]] (G17) by [[**BCI**]]%. As similarly repeatedly explained to China during the administrative proceedings, this represented a *hypothetical projected* (not

[173] SMST Dumping Questionnaire Response, Table 6, Table 6-3 (DMV 304HCu (EU)) and SMST QR Table 6-3 (DMV 304HCu (CN)) (Exhibit EU-12) (BCI) (electronic file). The number [[**BCI**]] appears at column N, row 25 (N25) of SMST QR Table 6-3 (DMV 304HCu (EU)).

[174] SMST Dumping Questionnaire Response, p. 69: "… Regarding selling, administrative and financial expenses, the average **planned** overhead rates have been applied. The rate for selling expenses is [[**BCI**]]% of total production costs. The rate for administrative expenses is [[**BCI**]]% of total production costs. The rate for financial expenses is based upon an annual interest rate of [[**BCI**]]% for a financing period of [[**BCI**]] applied to total raw material costs." (emphasis added) (Exhibit EU-10) (BCI).

SMST Supplemental Dumping Questionnaire Response, p. 4: "The sales and administrative expenses reported in Table 6-3 are based upon the internal rates used by SMST in preparing price/cost calculations for orders. In principle, these rates are [[**BCI**]]. As explained in the questionnaire response, the rate for financial expenses reported in Table 6-3 is [[**BCI**]]. *See* response to Section 6, question II.3.

By contrast, the selling, administrative and financial expense reported in Tables 6-6, 6-7 and 6-8 are based upon actual expenses." (emphasis added) (Exhibit EU-14) (BCI).

the *actual*) administrative expense, the *actual* administrative expense being reported in the duly verified SMST QR Table 6-5 (and SMST QR Table 6-6).[175]

166. Similarly, the relevant formula reveals that the "Financial expense" [[**BCI**]] (G22) was calculated by multiplying the "Raw materials purchased from affiliates" [[**BCI**]] (G8) by [[**BCI**]]% (an annual interest rate) and dividing by 4 [[**BCI**]]. As similarly repeatedly explained to China during the administrative proceedings, this represented a *hypothetical projected* (not the *actual*) financial expense, the *actual* financial expense being reported in the duly verified SMST QR Table 6-5 (and SMST QR Table 6-8).[176]

167. Furthermore, as also repeatedly explained to China during the administrative proceedings, and as appears from the preceding paragraphs, these hypothetical projected SG&A costs in SMST QR Table 6-3 (DMV 304HCu (EU)) were derived using a formula based either on "Total cost of production" [[**BCI**]] (G17), of which "Raw materials purchased from affiliates" [[**BCI**]] (G8) was by far the most important component, or (in the case of "Financial expense") directly using "Raw materials purchased from affiliates" [[**BCI**]] (G8). However, in this instance, the "Raw materials purchased from affiliates" [[**BCI**]] (G8) number was extraordinarily high in relation to the "Total production quantity(ton) in the period" [[**BCI**]] (G6). That is because this data relates to two free sample product transactions.[177] Producing a sample involves extraordinarily high raw material costs relative to the weight of the final sample. That is because the full quantity of raw material (a full steel hollow) must be used in the production process, in order to prepare the (relatively

[175] *See* above footnote 174.

[176] *See* above footnote 174.

[177] SMST Dumping Questionnaire Response, Table 4-2 (Exhibit EU-11) (BCI) (electronic file). The transactions appear at lines 16 and 17 and are listed as zero price samples. See also SMST-Germany Verification Exhibit 18 (Exhibit EU-22) (BCI), which contains the underlying documents relating to these transactions, demonstrating that they were zero price samples.

smaller) sample to be dispatched to the prospective customer. Consequently, this data is not representative and cannot be used to construct normal value.[178]

168. During the administrative proceedings, China itself agreed and accepted this point and rejected such data as unrepresentative when calculating the cost of production (COP) for Product B (DMV 304HCu), using instead the representative data in SMST QR Table 6-3 (DMV 304HCu (CN)), which relates to the Chinese market.[179] The decision to use COP data relating to the Chinese market to establish normal value is not a matter that is in dispute between the Parties. However, without explanation, and inexplicably, China nevertheless used the very same unrepresentative and rejected data referenced above when it used the hypothetical projected data from SMST QR Table 6-3 (DMV 304HCu (EU)) as a basis for Product B (DMV 304HCu) SG&A, instead of the duly verified actual data in SMST QR Table 6-5, despite SMST's repeated objections.[180] In this respect, the European Union would particularly

[178] SMST Dumping Questionnaire Response, pp. 68 and 47: "… The December 2010 production costs for models DMV 304HCu and DMV 310N sold in the EU market are abnormally high and should not be used in BOFT's cost or constructed value calculations. This production relates to the zero price samples discussed above with respect to question 9, Item 6 of Section 4. These were test orders in very small quantities. This led to abnormally high per-unit raw material costs because, despite the small production quantity, an entire hollow had to be used for each order." … "As discussed above in Section 2, products [[**BCI**]] were sold in the EU market during the POI. The [[**BCI**]]." (Exhibit EU-10) (BCI).

[179] Specifically, in constructing normal value for DMV 304HCu, China used the COP for DMV 304HCu (CN) of [[**BCI**]], as stated in SMST QR Table 6-3 (DMV 304HCu (CN)) at O18. *See* SMST Dumping Questionnaire Response, Table 6 (Exhibit EU-12) (BCI) (electronic file).

Preliminary Determination, p. 30, explaining that, as regards Model B (DMV 304HCu), China decided, given the specificities of this model domestically sold in the EU, to provisionally use manufacturing costs for products to be exported to China, the three cost components for domestic sales in the EU, as well as a reasonable profit ratio, to determine the constructed normal value. (Exhibit EU-18).

Final Determination, p. 42, explaining that, as regards Model B (DMV 304HCu), China decided, in the Final Determination, to use the same method for calculating normal value that it had used in the Preliminary Determination. (Exhibit EU-30).

[180] SMST Comments on Preliminary Dumping Disclosure, pp. 1-2: "SMST accepts that BOFT used constructed value to calculate DMV 304HCu's normal value. SMST further accepts that BOFT should use 304HCu's unit cost of production (Table 6-3 export to China) to calculate DMV 304HCu's constructed value. SMST also accepts that BOFT used the following formula to calculate DMV 304HCu's constructed value: DMV 304HCu's unit cost of production (Table 6-3 export to China) + DMV 304HCu's SG&A (Table 6-5 sales in EU) + DMV 304HCu's Profit (Table 6-5 sales in EU) - DMV 304HCu's freight (Table 6-5 sales in EU). However, SMST cannot accept the results of BOFT's calculation … the SG&A rate of 19% used by BOFT in calculating the constructed value for DMV 304HCu is not supported by any information on the record of this proceeding and BOFT has not explained how it calculated this rate. Rather than using this unsupported SG&A rate, BOFT should have used the [[**BCI**]]% SG&A rate reported in Table 6-5 for EU sales. The SG&A amounts reported in Table 6-5 are taken directly from the applicable

point out that the SG&A rate indicated in SMST QR Table 6-3 (DMV 304HCu (CN)) is [[**BCI**]]%.[181] By contrast, the SG&A rate for DMV 304HCu disclosed by China for the first time during the consultations would, as indicated above, be in excess of [[**BCI**]]%.[182] Evidently, there is no reason or justification for such a difference. The distortion arises because China has used data relating to two sample sales that is unrepresentative in order to establish SG&A; data that was in fact rejected for the purposes of establishing COP. If the data was unusable for establishing COP, it was equally unusable for establishing SG&A.

169. China's approach is all the more difficult to understand because, in the context of establishing normal value for Product C (DMV 310N), China *accepted to exclude samples*, precisely because they would not provide a representative basis on which to establish normal value.[183]

170. Thus, the European Union submits that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement[184] because, as outlined above, the amounts for administrative, selling and general costs were not based on *actual* data pertaining to production and sales in the ordinary course of trade of the

Tables 6-6, 6-7 and 6-8. In each of the Tables 6-6, 6-7 and 6-8, SMST fully explained how the relevant expenses were being allocated to the product under investigation. … " (Exhibit EU-19) (BCI).

SMST Comments on Final Dumping Disclosure, p. 1: "In calculating normal value for model DMV 304HCu, BOFT used the constructed value method. In its disclosure material, BOFT has not explained how it calculated the SG&A amount used in its calculations. BOFT appears to have used an SG&A rate in excess of the [[**BCI**]]% rate reported in Table 6-5 for domestic sales of subject merchandise during the POI. This [[**BCI**]]% rate was thoroughly verified by BOFT." (Exhibit EU-28) (BCI)

[181] [[**BCI**]] (O25) as a percentage of [[**BCI**]] (O18).

[182] 1.459 as a percentage of [[**BCI**]] (O18).

[183] Preliminary Determination, p. 29, explaining that SMST Italia argued that, when calculating normal value, as regards model A (DMV 310N), transactions concerning samples and transactions of a very small sales volume should be excluded, and that China provisionally accepted the request of the company to exclude samples related transactions. (Exhibit EU-18).

Final Determination, p. 41, explaining that, when establishing the normal value, as regards Model A (DMV 310N), the company requested that transactions concerning samples be excluded, and this request was accepted by China. (Exhibit EU-30).

[184] Article 2.2.2 provides in relevant part: "For the purpose 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. …".

like product, and particularly Product B (DMV 304HCu), by SMST, as recorded in SMST QR Table 6-5 and duly verified.[185]

171. China's error is egregiously compounded by the fact that, as outlined above, the unrepresentative and rejected data that China disclosed during consultations that it did use from SMST QR Table 6-3 (DMV 304HCu (EU)) did not pertain to production and sales *in the ordinary course of trade*, as required by Article 2.2.2 of the Anti-Dumping Agreement. First, as explained above, the activity in question, namely the production of a sample, cannot be described as *ordinary*. On the contrary, the production of a sample is an extraordinary activity, not the core business or purpose of the firm. No firm would exist for any length of time, or even be created, if its only function would be to produce such samples: rather the firm's long term purpose is, of course, to manufacture the product and sell it in quantities that will be profitable. In the context of determining export price, it is clear that such a small number of transactions (two) relating to zero price samples of a product would not be considered representative and would not be considered a reliable basis for establishing a dumping margin. A basic requirement of even-handedness dictates that the same logic is no less compelling in the case of normal value.[186] Second, the item in question was not even *traded*, but provided free, in the hope of generating future sales and

[185] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97: "… In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the "actual data pertaining to production and sales in the ordinary course of trade". If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method."

[186] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144-145: "144. We observe that the *inclusion* of *lower*-priced transactions, between affiliates, in the calculation of *normal value* would result in a *lower* normal value, which would make a finding of dumping *less* likely, and would also *lower* the amount of any margin of dumping, all to the *advantage* of the exporter. Conversely, the *inclusion* of *higher* -priced transactions in the calculation of normal value would result in a *higher* normal value, which would make a finding of dumping *more* likely and would also *raise* the amount of any margin of dumping, all to the *disadvantage* of the exporter.

145. In our view, the duties of investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not "in the ordinary course of trade". Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made "in the ordinary course of trade". To include such sales in the calculation, whether the price is high or low, would distort what is defined as "*normal* value"."

production. For both of these reasons, the unrepresentative and rejected data used by China cannot be said to pertain to production and sales in the *ordinary* course of *trade*, as required by Article 2.2.2 of the Anti-Dumping Agreement.[187]

172. The European Union finds further support for its claim in the immediate context of Article 2.2.1.1 of the Anti-Dumping Agreement.[188] Thus, as outlined above, 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.

[187] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 140-141: "140. In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.

141. We can envisage many reasons for which transactions might not be "in the ordinary course of trade …".

[188] Article 2.2.1.1 provides as follows: "For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations." (footnote omitted)

173. The European Union finds further support for its claim in the immediate context of Article 2.2.1.[189] Article 2.2.1 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.[190] By definition, free samples are below cost, and thus not in the ordinary course of trade within the meaning of Articles 2.2.1 and 2.1, nor Article 2.2.2.

174. Finally, the European Union finds further support for its claim in the immediate context of Article 2.2,[191] which supports the view that the data used by an investigating authority must "permit a proper comparison", and that the 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.

175. Accordingly, the European Union respectfully requests the Panel to find that, in the measure at issue, China has acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement, as well as Articles 2.2, 2.2.1 and 2.2.1.1.

[189] Article 2.2.1 provides as follows: "Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time." (footnotes omitted).

[190] Panel Report, *US – Hot-Rolled Steel*, para. 7.108 and footnote 84: "Article 2.2.1 of the Agreement does provide that sales made below cost may be treated as not in the ordinary course of trade and disregarded in calculating normal value if certain conditions are satisfied. Thus, it implies that sales below cost are not in the ordinary course of trade."

[191] Article 2.2 provides as follows: " When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[191], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." (footnote omitted)

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

176. 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).

177. In calculating normal value for model 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 China's preliminary determination, normal boiler tubes (i.e., those used in a primary boiler system) have an outer diameter of well over 30mm. This is evidenced by the sales of Product C (DMV 310N) exported to China, which all had an outer diameter of [[**BCI**]]mm. Large differences in tube outer diameter markedly affect price comparability. Thin diameter tube requires more extensive rolling/drawing, resulting in higher costs of production and prices. Thin diameter tubes also cannot be used in a primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves.

178. It was therefore not appropriate for China to include the [[**BCI**]] sales in question in calculating normal value for Product C (DMV 310N). The [[**BCI**]] sales both involved tubes having an outer diameter of only [[**BCI**]]mm,[192] which were designed and produced for secondary systems. These sales were therefore not comparable, without adjustment, to the Product C (DMV 310N) primary boiler tube exported to China, having an outer diameter of [[**BCI**]]mm (i.e., more than [[**BCI**]] times greater than the secondary system tube sold to the EU customer). This issue was thoroughly reviewed at verification. At verification, China's officials reviewed technical information concerning boiler construction, as well as technical specifications and invoices for these [[**BCI**]]

[192] SMST-Germany Verification Exhibit 10, pp. 3 and 5 ("AD x WD **14,00mm** * 3,20") (Exhibit EU-21) (BCI).

transactions.[193] This information confirmed the difference between primary and secondary systems[194] and showed that the secondary system tube sold to the EU customer in question had a price per metric tonne that was approximately [[**BCI**]] as much as the thicker DMV 310N primary boiler tube sold in the EU and Chinese markets (EUR [[**BCI**]] per metric tonne as opposed to EUR [[**BCI**]] per metric tonne).[195] 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."[196] It is however not an issue of whether secondary system tube is included within the scope of subject merchandise but rather whether secondary system tube can properly be compared, without adjustment, to primary boiler

[193] SMST-Germany Verification Exhibit 10 (Exhibit EU-21) (BCI).

[194] SMST-Germany Verification Exhibit 10, diagram on p. 24-6, used by SMST to illustrate the location of the large-diameter tubes for the boiler systems, as opposed to the thin tubes, which are not used in the superheater units, but rather in secondary systems not directly related to heating steam in boilers, such as tubes used for temperature gauges or controlling valves. The document is marked with hand-written text that translates as: "Why SMST-I's [[**BCI**]] domestic transactions (H310N, [[**BCI**]]T) cannot be included in the domestic sales and compared with the export sales? Because the small tube of H310N is used for the connection of boiler's control system." (Exhibit EU-10) (BCI). *See also* SMST Comments on Final Dumping Disclosure, pp. 1-3, at footnote 197 of this submission. (Exhibit EU-28) (BCI).

[195] SMST-Germany Verification Exhibit 10, p. 3 (net weight [[**BCI**]]Kg, net price EUR [[**BCI**]], price per unit EUR [[**BCI**]] per metric tonne) and p. 5 (net weight [[**BCI**]]Kg, net price EUR [[**BCI**]], price per unit EUR [[**BCI**]] per metric tonne) (Exhibit EU-21) (BCI). By comparison the SMST Final Dumping Disclosure refers to a CIF export price for DMV 310N of EUR [[**BCI**]] per metric tonne) (Exhibit EU-25) (BCI). Furthermore, EU sales of Product C (DMV 310N) having a comparable outside diameter to the Product C (DMV 310N) tube exported to China also have prices more comparable to the CIF export price. *See* Invoice No. [[**BCI**]] contained in SMST Dumping Questionnaire Response, Exhibit 4-10, p. 109 (showing an outside diameter of [[**BCI**]]mm, net weight [[**BCI**]]Kg, net price EUR [[**BCI**]], price per unit EUR [[**BCI**]] per metric tonne) (Exhibit EU-13) (BCI).

[196] SMST Final Dumping Disclosure, p. 2: "Regarding DMV 310N, your company presented the supporting documents in the verification and claimed to exclude [[**BCI**]] small quantity sales because the processing technology, etc of the products were different from those exported to China. But your company did not prove that these products do not meet the scope description of the subject merchandise in the initiation notice. Therefore, the investigating authority decides to maintain the decision in the preliminary determination that the above [[**BCI**]] small quantity sales will not be excluded from the calculation of the normal value." (Exhibit EU-25) (BCI)

Final Determination, p. 42, explaining that during the on-the-spot verification, the company provided evidence to support the argument that [[**BCI**]] transactions should be excluded because they involve products that are different from those exported to China as regards processing technology etc., but that this request was rejected on the grounds that there is no evidence to prove that these products are not covered by the specific description of the products under investigation in the Notice of Initiation. (Exhibit EU-30).

tube, having particular regard to the terms of Article 2.4 of the Anti-dumping Agreement.[197]

179. Article 2.4 of the Anti-Dumping Agreement provides in relevant part as follows:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of

[197] SMST Comments on Final Dumping Disclosure, pp. 1-3: "In calculating normal value for model DMV 310N, BOFT included [[**BCI**]] EU sales of merchandise that were not comparable to the merchandise sold for export to China. As explained in SMST's comments on BOFT's preliminary determination, normal boiler tubes (*i.e.*, those used in the primary boiler system) have an outer diameter of well over 30mm. This is evidenced by the sales of DMV 310N exported to China, which all had an outer diameter of [[**BCI**]]mm. Large differences in tube outer diameter markedly affect price comparability. Thin diameter tube requires more extensive rolling/drawing, resulting in higher costs of production and prices. Thin diameter tubes also cannot be used in the primary boiler system but rather are used in secondary systems such as measuring temperatures or controlling valves and therefore are sold in much smaller quantities than normal boiler tube. This also affects price comparability.

It is therefore not appropriate for BOFT to continue to include the [[**BCI**]] small sales made to [[REDACTED]] in calculating normal value for DMV 310N. The [[**BCI**]] sales made to [[REDACTED]] both involved tubes having an outer diameter of only [[**BCI**]]mm, which were designed and produced for secondary systems. These sales are therefore not comparable to the DMV 310N primary boiler tube exported to China, having an outer diameter of [[**BCI**]]mm (*i.e.*, more than [[**BCI**]] greater than the secondary system tube sold to [[REDACTED]]).

This issue was thoroughly reviewed at verification. At verification, the BOFT officials reviewed technical information concerning boiler construction, as well as technical specifications and invoices for the [[**BCI**]] [[REDACTED]] transactions. *See* SMST-Germany Verification Exhibit 10. This information confirmed the difference between primary and secondary boiler systems and showed that the secondary system tube sold to [[REDACTED]] had a price per metric ton that was approximately [[**BCI**]] as much as the thicker DMV 310N primary boiler tube sold in the EU and Chinese markets.

The only reason given by BOFT in its disclosure before the final determination 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." It is however not an issue of whether secondary system tube is included within the scope of subject merchandise but rather whether secondary system tube can properly be compared to primary boiler tube under Article 2.4 of the WTO Antidumping Agreement.

Article 2.4 of the WTO Antidumping Agreement requires that a "fair comparison shall be made between the export price and the normal value" and that "due allowance" shall be made for any "differences which affect price comparability," including differences in "physical characteristics." As discussed above the verified record evidence in this case demonstrates that major differences in outer dimensions affect the price comparability of secondary system tube and primary boiler tube, with the unit prices of secondary system tube being approximately [[**BCI**]] as much as primary boiler tube. Given the fact that there were sufficient home market sales of DMV 310N primary boiler tube for comparison with the DMV 310N primary boiler tube exported to China, BOFT should have excluded the secondary system tube sold to [[REDACTED]] in its calculation of normal value for DMV 310N." (Exhibit EU-28) (BCI)

> trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. … (footnote omitted)

180. Article 2.4 requires that a fair comparison shall be made between the export price and the normal value, and that, in making this comparison, due allowance must be made for differences affecting price comparability, including differences in physical characteristics.

181. Article 2.4 does not impose a specific methodology on an investigating authority in performing the price comparison analysis, and an investigating authority is afforded a certain level of discretion in choosing a methodology that it considers appropriate.

182. Nonetheless, Article 2.4 requires an investigating authority to ensure that a fair comparison is made between export price and normal value for the purposes of determining whether any dumping margin exists, and if so, its degree. It requires an investigating authority to ensure comparability and, where necessary, make allowances, including for differences in physical characteristics. In the submission of the European Union, there can be no question that the export and domestic prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence and extent of any dumping of the exported product as compared with the domestic like product, which determination may then be relied upon in assessing injury and causation. In this respect, an investigating authority's discretion is also circumscribed by the overarching obligation to ensure a fair comparison. A comparison of export prices with domestic prices that are not comparable would not, in the submission of the European Union, satisfy the requirement for the investigating authority to ensure a fair comparison.

183. A fundamental determining factor of the price and cost of a product is the physical characteristics of the product. Articles 2.4 and 2.1 of the Anti-Dumping Agreement mandate an analysis of whether dumping exists and, if so, its degree, on the basis of a comparison between the allegedly dumped product and the like domestic product. Yet, in the submission of the European Union,

ensuring that the particular products being compared both fall within the broader categories of "the product" and "the like domestic product" will not always suffice to ensure price comparability. Where the products under investigation are not homogenous, and where various products command significantly different prices, an investigating authority must ensure that the products compared on both sides of the comparison are sufficiently similar that any resulting difference between export price and domestic price is informative of whether dumping exists, and if so, its degree. In a situation in which an investigating authority performs a price comparison on the basis of a "basket" of products or transactions, it must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any difference can reasonably be said to result from dumping and not merely differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and allow for relevant differences in the physical characteristics of the products.

184. If the product mix between the two sets of data being compared varies, there is a high risk that the differences resulting from the comparison reflect these variations in product mix, rather than the actual degree of dumping. It is not in dispute that the product mix varied considerably between the two sets of data compared by China in the investigation at issue. In fact, it is not in dispute that the firm's sales in China were limited *only* to goods with larger outer diameters suitable for use in primary boiler systems, whereas the domestic goods in question included goods with smaller outer diameters suitable *only* for use in secondary boiler systems. Moreover, the information before the investigating authority revealed important price differences between the different products. This meant that the differences in product mix just mentioned risked affecting comparability and distorting any comparison between export prices and domestic prices if steps were not taken to control for product mix, or necessary adjustments made.

185. In this respect, the European Union recalls that there are now three cases that expressly confirm this line of reasoning in the context of the comparison that

must be made in a price undercutting analysis under Article 3 of the Anti-Dumping Agreement, and in doing so refer expressly to Article 2.4 of the Anti-Dumping Agreement.[198] This line of reasoning, which is very closely followed in the argument set out above, is even more compelling in the context of the comparison that must be made under Article 2.4, which concerns the threshold question of whether or not dumping exists, and if so, its degree.

186. In light of the foregoing, the European Union respectfully requests the Panel to conclude that China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it relied for its findings of dumping on a comparison of export prices and domestic prices that included different product mixes without taking any steps to control for differences in physical characteristics affecting comparability or making necessary adjustments.

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

187. 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.

188. Furthermore, 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[199] without

[198] Panel Report, *China – GOES*, para. 7.528; Appellate Body Report, *China – GOES*, paras. 197-203; Panel Report, *China – X-Ray Equipment*, paras. 7.49-7.50; Panel Report, *China – Broiler Products*, paras. 7.474-7.483 and 7.490-7.494.

[199] Final Determination, Exhibit EU-30, p. 35.

notifying them of all the information required and of the consequences of not submitting that information.

189. To be clear, this claim is based on the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, which allows for the possibility that there may be WTO consistent ways, other than the approach adopted by China in this particular case, permitting the imposition of an all others rate based on facts available. In other words, this claim does not seek to expand in any degree the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, as they applied to the particular fact pattern in that case, and it is the EU position that any such extension would be inappropriate and not supported by the covered agreements. In particular, the European Union is not arguing that the use of facts available is not permitted in the calculation of an all others rate, provided that some additional effort is made, over and above what was done in *Mexico – Anti-Dumping Measures on Rice*, in terms of seeking to identify other firms or specifying the consequences of not providing information. Provided that such additional effort is made, the use of facts available to calculate an all others rate is fully consistent with the Anti-Dumping Agreement.

190. The Anti-Dumping Agreement provides that resorting to facts available is only permitted if an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation. Paragraph 1 of Annex II of the Anti-Dumping Agreement further requires that an investigating authority "specify in detail the information required from any interested party" and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available".

191. It is clear that in this particular case, as a matter of fact, the approach adopted by China was the same as the approach adopted by the investigating authorities in *Mexico – Anti-Dumping Measures on Rice* and *China – GOES*. China did not notify or adequately ensure notification of EU exporters, particularly of the

consequences of the failure to submit the relevant information. In failing to comply with that obligation, China failed to satisfy the precondition required for resorting to facts available found in Paragraph 1 of Annex II of the Anti-Dumping Agreement, and therefore frustrated entirely the requirements of Article 6.8 of the Anti-Dumping Agreement.

VIII. SUBSTANTIVE CLAIMS RELATING TO THE INJURY DETERMINATION

192. In the Preliminary and Final Determinations, China found that the domestic industry producing HP-SSST suffered material injury caused by HP-SSST imports.[200] Moreover, China stated that EU and Japanese producers of HP-SSST "would likely increase exports of the subject products to China, which would in turn cause adverse impact on the domestic industry".[201]

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

194. First, the European Union addresses the legal standard under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, explaining that these provisions require injury and causation determinations to involve an "objective examination" based on "positive evidence", and contemplate a "logical progression" of inquiry. Second, the European Union establishes that China's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because: (i) China's analysis of the price effects of imported Product C is analytically and factually flawed; and (ii) China improperly extended its conclusions concerning the price undercutting of Products B and C to the domestic HP-SSST industry as a whole. Third, the

[200] Final Determination, Exhibit EU-30, pp. 64 and 67.

[201] Final Determination, Exhibit EU-30, p. 65.

European Union establishes that China's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because: (i) China's impact analysis did not logically follow from its volume and price effects analyses and conclusions; (ii) China failed to evaluate or properly evaluate the magnitudes of the margins of dumping in its overall impact assessment; and (iii) China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. Fourth, the European Union establishes that China's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because: (i) China's causation determination lacks any foundation in its volume, price effects, and impact analyses; and (ii) 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.

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

195. Article 3.1 of the Anti-Dumping Agreement provides as follows:

> A determination of injury for purposes of Article VI of GATT 1994 shall be *based on positive evidence* and involve an *objective examination* of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (emphasis added)

196. Article 3.1 "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to an injury determination, and "informs the more detailed obligations in succeeding paragraphs".[202] The term "positive evidence" relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires

[202] Appellate Body Report, *China – GOES*, para. 126; Appellate Body Report, *Thailand – H-Beams*, para. 106.

the evidence to be affirmative, objective, verifiable, and credible.[203] "Positive evidence" refers to "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy".[204]

197. The term "objective examination" is concerned with the investigative process and relates "to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally".[205] An objective examination requires that an investigating authority's analysis "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[206]

198. Article 3.1 also outlines the focus of a proper injury and causation investigation, which consists of "three essential components"[207]: (i) the volume of imports; (ii) the effect of such imports on the prices of the like domestic product; and (iii) the consequent impact of such imports on the domestic producers of the like product. These components "are closely interrelated for purposes of the injury determination."[208] Articles 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement further stipulate, in detail, an investigating authority's obligations in determining if there is any injury to the domestic industry caused by the relevant imports. None of the obligations set out in those paragraphs can be read independently from the "overarching" obligation contained in Article 3.1.

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[203] Appellate Body Report, *China – GOES*, para. 126; Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[204] Panel Report, *China – X-Ray Equipment*, para. 7.32; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 164-165.

[205] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[206] Appellate Body Report, *China – GOES*, para. 126; Appellate Body Report, *US – Hot-Rolled Steel*, para. 193; Appellate Body Report, *EC – Fasteners (China)*, para. 414.

[207] Appellate Body Report, *China – GOES*, para. 127.

[208] Appellate Body Report, *EC – Tube or Pipe Fittings*, para.115.

199. Turning to the relationship between Articles 3.1 and 3.2, Article 3.2 requires an investigating authority to "consider" the volume and price effects of the relevant imports. With regard to the volume of imports, an investigating authority shall "consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". With regard to the effect of such imports on domestic prices, the authority must "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, or whether the effect of such imports is otherwise to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree".

200. By the use of the word "consider", Article 3.2 does not impose an obligation on an investigating authority to make a *definitive* determination on the volume of dumped imports and the effect of such imports on domestic prices.[209] However, an authority's consideration of the volume and price effects of the imports is also governed by the overarching obligation under Article 3.1 that it be based on positive evidence and involve an objective examination. Thus, the fact that no definitive determination is required "does not diminish the rigour that is required of the inquiry under Article 3.2".[210]

201. Furthermore, while the consideration of a matter is to be distinguished from a definitive determination of that matter, "this does not diminish the scope of *what* the investigating authority is required to consider",[211] which includes whether there has been "significant price undercutting" by the imports as compared with the price of like domestic products. In this respect, Article 3.2

[209] Appellate Body Report, *China – GOES*, para. 130; Panel Report, *Thailand – H-Beams*, para. 7.161; Panel Report, *Korea – Certain Paper*, para. 7.253.

[210] Appellate Body Report, *China – GOES*, para. 130.

[211] Appellate Body Report, *China – GOES*, para. 131 (original emphasis); Panel Report, *China – X-Ray Equipment*, para. 7.45.

establishes a *link* between the price of subject imports and that of like domestic products, by requiring that a comparison be made between them.[212]

202. Finally, an investigating authority's "consideration" under Article 3.2 must be reflected in relevant documentation, such as the authority's final determination, so as to allow an interested party to verify whether the authority indeed considered such factors.[213]

203. Turning to the relationship between Articles 3.1 and 3.4, Article 3.4 further details the overarching obligation, set out in Article 3.1, for an investigating authority to rely on "positive evidence" in examining the impact of dumped imports on domestic producers.[214] The terms of Article 3.4 do "not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of the impact of subject imports on the basis of such an examination." Thus Article 3.4 is concerned with the relationship between the imports and the state of the domestic industry, which is "analytically akin to the type of link contemplated by the term 'the effect of' under Article 3.2", and "require[s] an examination of the explanatory force of subject imports for the state of the domestic industry".[215]

204. As with Article 3.2[216], the corollary of this interpretation is that the identification of the state of the domestic industry based on "all relevant economic factors and indices" can only be "of a preliminary nature". As the examination of "the impact of" the imports "is intrinsic to the identification of" the state of the domestic industry, the inquiry for the purpose of Article 3.4 cannot be completed unless "an examination of the explanatory force of subject imports for the state of the domestic industry" is made.

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[212] Appellate Body Report, *China – GOES*, para. 136.

[213] Appellate Body Report, *China – GOES*, para. 131; Panel Report, *Thailand – H-Beams*, para. 7.161; Panel Report, *Korea – Certain Paper*, para. 7.253.

[214] Appellate Body Report, *EC – Fasteners (China)*, para. 413; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 112.

[215] Appellate Body Report, *China – GOES*, para. 149.

205. In conducting such an examination, Article 3.4 provides that the investigating authority must evaluate:

> all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

206. An investigating authority has an obligation to evaluate *all* fifteen factors listed above, which constitute a "mandatory list" to be taken into account in its entirety.[217] As with Article 3.2, the fact that the investigating authority must "evaluate" all the relevant economic factors and indices does not mean that it must draw definitive conclusions on the basis of any of those factors.

207. However, the analysis of the elements listed in Article 3.4 is subject to the general obligation set out in Article 3.1 for the investigating authority to conduct an "objective examination". In this respect, the Appellate Body has found that "Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it."[218] The panel in *EC – Pipe Fittings* further clarified that:

> Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor would not suffice.[219]

208. In particular, where there are "positive movements in a number of factors", the investigating authority must provide "a compelling explanation of why and

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[216] Appellate Body Report, *China – GOES*, para.142.

[217] Panel Report, *China – X-Ray Equipment*, para. 7.179; Appellate Body Report, *Thailand – H-Beams*, para. 125.

[218] Appellate Body Report, *US – Hot-Rolled Steel*, para. 197 (original emphasis).

[219] Panel Report, *EC – Pipe Fittings*, para. 7.314 (footnotes omitted, emphases added); Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report, *China – X-Ray Equipment*, para. 7.180.

how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".[220]

209. Finally, the Appellate Body articulated the requirement that the investigating authority conduct an objective examination when examining the domestic industry by part, sector, or segment:

> [I]t may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, *all of the other parts that make up the industry, as well as examine the industry as a whole*. Or, in the alternative, the investigating authorities should provide a *satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry*.[221]

210. This is because:

> Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry.[222]

211. The Appellate Body went on to conclude:

> Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the Anti-Dumping Agreement.[223]

212. Thus, in light of the case law, an investigating authority finding that *a segment* of the domestic industry is impacted by dumped imports cannot automatically

[220] Panel Report, *China – X-Ray Equipment*, para. 7.195; Panel Report, *Thailand – H-Beams*, para. 7.249.

[221] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 191-204, particularly para. 204 (emphases added).

[222] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

[223] Appellate Body Report, *US – Hot-Rolled Steel*, para. 206.

extend that conclusion to the *entire* industry without analysing the impact of dumped imports on the *other segments* that constitute part of that industry, as well as the *industry as a whole*, and providing a *satisfactory explanation* as to why injury to one segment may be extended to the entire industry. For example, where one segment does not in practice compete with another segment, it may be inappropriate to extend the conclusion with respect to that one segment to the industry as a whole. This is consistent with the overarching obligation that "any segmented analysis must be conducted in an 'objective manner'".[224]

213. Turning to the relationship between Article 3.1 and 3.5, Article 3.5 requires an investigating authority to demonstrate "that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury". This demonstration of a causal link "shall be based on an examination of all relevant evidence before the authorities".

214. Moreover, the investigating authority is also required to take into account "non-attribution factors", that is:

> any known factors other than the dumped imports which at the same time are injuring the domestic industry …. [T]he injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

215. As noted by the Appellate Body, the text of Article 3.5 does not prescribe any particular way in which the investigating authority has to carry out the process of separating and distinguishing the injurious effects of dumped imports from those of the other known causal factors.[225] However, irrespective of the methodology used, an objective examination requires that an investigating authority *must* separate and distinguish the effects of dumped imports from those of non-attribution factors, and that such separation and distinction are

[224] Panel Report, *China X-Ray Equipment*, para. 7.187.

[225] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

apparent from that authority's determinations.[226] In other words, if an investigating authority decides to disregard or diminish the importance of a given non-attribution factor, it should, at the very least, *provide a satisfactory explanation* on which factual and legal bases it decided to do so.

216. To conclude, read together, the provisions outlined above provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. Most importantly, the Appellate Body has made clear that these provisions "contemplate a *logical progression of inquiry* leading to an investigating authority's ultimate injury and causation determination".[227] In particular:

> [P]ursuant 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 form the basis for the overall causation analysis contemplated in Article 3.5 ….[228]

217. Thus the Appellate Body clarifies that the analyses pursuant to each provision of Article 3 are "closely interrelated"[229] rather than independent of each other, and an investigating authority can reach a proper injury and causation determination only if it follows the necessary logical progression.

218. This interrelationship among the provisions of Article 3 finds further support in the text of Article 3.1 itself. Specifically, Article 3.1 identifies the three components of inquiry, i.e. (i) "the volume of the dumped imports; (ii) "the effect of the dumped imports on prices in the domestic market for like products; and (iii) "the *consequent* impact of these imports on domestic producers of such products". As the Appellate Body explained, Article 3.2 concerns the first two components whereas Article 3.4 concerns the third component, i.e. "the consequent impact" of the imports on the domestic

[226] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

[227] Appellate Body Report, *China – GOES*, paras. 127 and 128 (emphasis added).

[228] Panel Report, *China – X-Ray Equipment*, para. 7.49; Appellate Body Report, *China – GOES*, para. 128.

[229] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

industry. Thus the word "consequent" in Article 3.1 as it appears in the third component expressly establishes the link between the first two components, on the one hand, and the third, on the other, and suggests that the "impacts" to be examined under Article 3.4 follow as a result of, or are logically consistent with, the volume and/or price effect analysis under Article 3.2.[230] In other words, Article 3.1 contemplates that the consequence of the volume and/or price effect of the imports would form the basis for the examination of the "impact" under Article 3.4 (and ultimately the overall causation analysis under Article 3.5).

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

219. Pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement, China was required to consider whether there had been "a significant price undercutting by the dumped imports" as compared with the price of like domestic products, or whether the effect of such imports was "otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree".

220. China concluded only that the imports undercut domestic prices, and did not reach any conclusions that the imports had a depressing or suppressing effect on domestic prices. The following discussion therefore focuses on the issue of price undercutting.

221. China began its price effects analysis by considering the import and domestic prices of the HP-SSST product as a whole and observed that, during the relevant period, "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products".[231] Based on its analysis of import and domestic price data for the product as a whole, China did not reach

[230] The meanings of the term "consequent" include "1 Following as an effect or result …; 2 Following as an inference or logical conclusion; 4 Observing or characterized by logical sequence; logical consistent" (Oxford English Dictionary).

[231] Final Determination, Exhibit EU-30, p. 53 (emphasis added).

any conclusion that imports undercut domestic prices, or that imports had a depressing or suppressing effect on domestic prices.

222. China then compared the prices of each type of import with those of the corresponding like domestic products. China did *not* analyze the effects of imports of a particular type on the prices of domestic like products of a different type.

223. With respect to Product A, China observed that there was only a small volume of imports of this type in 2008, and no imports at all thereafter.[232] China then found the "import price of the subject products of this grade was higher than the domestic sales price of the domestic like products" in 2008.[233] Because "the import volume of [this grade] was very small compared with the domestic sales volume of [this grade]", China concluded that "the imports of [Product A] had limited substantive impact on the domestic sales price of the domestic like products".[234] Thus, China did not find any price effects of imports of this type on the corresponding domestic like products.

224. With respect to Product B and Product C, China found that imports of those types had a "relatively noticeable price undercutting impact on the domestic sales price of the domestic like products".[235] For Product B, China found margins of undercutting to be 3% to 28% in 2008 to 2010, and 15% in the first half of 2011.[236] For Product C, China found price undercutting only in 2010. Specifically, China found import prices to be 10% higher than domestic prices in 2009, but that import prices "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products" in 2010.[237]

[232] Final Determination, Exhibit EU-30, p. 53.

[233] Final Determination, Exhibit EU-30, p. 53.

[234] Final Determination, Exhibit EU-30, p. 53.

[235] Final Determination, Exhibit EU-30, p. 54.

[236] Final Determination, Exhibit EU-30, p. 54.

[237] Final Determination, Exhibit EU-30, p. 53.

225. After completing its analysis by product type, China reverted back to considering price effects for the HP-SSST product as a whole, and determined that "*in general*, the products under investigation … had a relatively noticeable price undercutting effect on the price of domestic like products".[238]

226. The European Union submits that China's price effects analysis does not involve an objective examination and is not based on positive evidence, and is therefore inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In particular: (i) China's analysis of the price effects of imported Product C is analytically and factually flawed; and (ii) China improperly extended its conclusions concerning the price undercutting effect of Products B and C to the domestic HP-SSST industry as a whole. The EU addresses these claims in turn.[239]

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

227. China found that in 2010, "the large scale sales of [imports of Product C] at a low price had relatively noticeable price undercutting impact on the domestic sales price of the domestic like products".[240] China's analysis of the price effects of imported Product C is erroneous, and falls short of an objective examination, based on positive evidence.

228. First, China observed that the sales of the domestic products corresponding to type C were "small" in 2009 and 2010, because imported products of that type took up a market share of more than 99% and therefore the import volume of the imported products of this type far exceeded the domestic sales volume of the corresponding like domestic products. Accordingly, in its price effects analysis for this type, China purportedly "t[ook] into consideration the

[238] Final Determination, Exhibit EU-30, p. 54 (emphasis added).

[239] The European Union understands that China did not make a finding of price effects with respect to Product A. The discussion that follows rests on this understanding. The European Union reserves its right, in case China argues that China did find price effects for Product A, to submit arguments concerning China's conclusions as to the price effects of imported Product A in future submissions to the Panels.

[240] Final Determination, Exhibit EU-30, p. 54.

quantitative difference between the import volume of the subject products and the sales volume of domestic like products".[241] In short, China stated that, in its price-undercutting analysis, it took into account the fact that imports were 99% by volume of this type of product, compared to 1% domestic sales.

229. However, the Final Determination, does not provide any explanation as to the criteria and economic methodology used to accommodate those "quantitative differences" into China's price comparison, other than a basic suggestion that price comparisons for 2009 and 2010 should be permitted because "a similar quantitative difference" existed in both years.[242] Nor is any such explanation contained in the relevant documentation issued by China during the course of the investigation. As a result, it was not possible for the interested parties to understand and verify how China considered the "quantitative differences" – let alone to express constructive comments and engage with the investigating authority on this issue. As the Appellate Body has consistently stated, "an investigating authority's consideration under Article[] 3.2 … must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed considered such factors".[243] Accordingly, by failing to explain the methodology used to take into account a factor as important as "quantitative differences" in its price comparison, China's analysis falls short of an objective examination of positive evidence within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[244]

230. Second, China grounded its price undercutting conclusion for Product C on the fact that, in 2009, the price of imported Product C was over 10% higher than the sales price of the corresponding like domestic products, but, in 2010, the

[241] Final Determination, Exhibit EU-30, p. 53.

[242] Final Determination, Exhibit EU-30, pp. 53-54.

[243] Appellate Body Report, *China – GOES*, para. 131; Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.253. (emphasis omitted).

[244] Appellate Body Report, *China – GOES*, para. 131; Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.253.

import price of the subject product "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products".[245]

231. This analysis is partial and skewed, and does not provide an adequate ground for a proper comparison of the prices of imported and domestic like products of this type. The table below, containing excerpts from Table 5 above, summarizes China's pricing data for Product C, with the figures for 2010 italicized for emphasis.

Table 7: Pricing Data for Product C

IMPORT PRICES	**2008**	**2009**	***2010***	**H1 2011**	**Source of Data**
Yuan/tonne*	159,983	152,819	*101,863*	109,236	FD, p. 55
% chg from prior period	N/A	-4.27%	*-36.32%*	5.99%	FD, p. 52
DOMESTIC PRICES	**2008**	**2009**	***2010***	**H1 2011**	**Source of Data**
Yuan/tonne	None	???	*???*	???	2008: FD, p. 53
% chg from prior period	N/A	N/A	*112.80%*	???	FD, pp. 52-53
MARGIN OF UNDERCUTTING (- value indicates undercutting by imports)	**2008**	**2009**	***2010***	**H1 2011**	**Source of Data**
Product C	N/A	+10%	*-50%*	???	FD, p .54

* Derived from MOFCOM's disclosure at FD, p. 55, that the Product C import price was 142.46%, 162.92%, 121.70%, and 142.05% of the Product B import price in 2008, 2009, 2010, and the first half of 2011, respectively.

???	Indicates data should have been available, but was not disclosed.
None	Indicates no product existed for the period in question.
N/A	Indicates data is properly not available for the period in question.

232. As the table above indicates, according to China's own analysis, in 2010 the price of the domestic Product C *increased* by 112.80% from 2009, while the price of the imports of the same type *decreased* by 36.32%. The fact that the sales prices of domestic Product C more than doubled from 2009 to 2010 explains why, over the course of that year, the price of imported products became relatively low by comparison. However, China did not mention this abrupt increase in the prices of domestic products in the section of its Final Determination devoted to comparing the prices of imported and domestic Product C. In other words, the dynamic relationship of the prices of *both*

[245] Final Determination, Exhibit EU-30, p. 54.

imported and domestic products shows that imports of Product C did not have a significant undercutting effect on the prices of the corresponding like domestic products.

233. To illustrate this further, consider the data on Product C price levels disclosed by China in its Final Determination. As explained in the table, it is possible to derive the import prices for Product C to be 152,819 yuan/tonne in 2009 and 101,863 yuan/tonne in 2010.[246] If the import price of Product C was indeed 10% higher than the domestic price in 2009, that would imply a 2009 domestic price of 138,826 yuan/tonne. If the domestic price then increased by 112.80% in 2010, that would imply a 2010 domestic price of 295,635 yuan/tonne. Thus, in 2009, imports of Product C were priced at 152,819 yuan/tonne while domestic like products were priced at 138,826 yuan/tonne; and in 2010, import prices *decreased* to 101,863 yuan/tonne while the prices of domestic like products *increased* to 295,635 yuan/tonne.[247] Such facts do not support the conclusion that imports of Product C had a significant undercutting effect on the prices of the corresponding like domestic products in 2010.

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,[248] with one importer even observing that "[d]omestically produced [Product C] has never been used in domestic power plants and its

[246] The EU notes that the derived import price data for Product C indicate year-on-year declines of 4.48% and 33.34% for 2009 and 2010, respectively, as opposed to the 4.27% and 36.32% declines reported by China at p. 52 of the Final Determination. There appears to be no explanation for these discrepancies.

[247] The EU notes that the derived import price and domestic price data for Product C for 2010 implies that the import price of Product C was at a level of 34.5% of the domestic price of Product C in 2010 (taking 101,863 yuan/tonne as a percentage of 295,635 yuan/tonne), as opposed to "a level of over 50% of the domestic sales price" as reported by China at p. 54 of the Final Determination. There appears to be no explanation for this discrepancy.

[248] Minmetals Questionnaire Response, Exhibit EU-5, questions 19, 22, 31; Shanghai Boiler Works Questionnaire Response, Exhibit EU-6, questions 19, 22, 31; Babcock & Wilcox Questionnaire Response, Exhibit EU-7, questions 19, 22, 31; Shanghai Foreign Trade Questionnaire Response, Exhibit EU-8, questions 19, 22, 31; Harbin Boiler Questionnaire Response, Exhibit EU-9, questions 19, 22, 31.

quality is yet to be tested through actual application".[249] 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.

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

235. As already observed above, China determined that during the relevant period "the adjusted import prices of the subject products were *higher* than the sales prices of the domestic like products".[250] Further, as also explained above, China concluded that imports of Product A did not have a significant price undercutting effect on domestic like products of the same type.

236. In addition, the European Union has shown above that China's analysis of the price effects of imports of Product C was analytically and factually flawed, and that 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.

237. Notwithstanding all of those considerations, China concluded that during the relevant period, "*in general*, the products under investigation … had a relatively noticeable price undercutting effect on the price of domestic like products".[251] Thus, China extended its price undercutting findings with respect to Products B and C[252] to the *whole* domestic industry to conclude that imports

[249] Harbin Boiler Questionnaire Response, Exhibit EU-9, question 19. See also: Minmetals Questionnaire Response, Exhibit EU-5, question 31.

[250] Final Determination, Exhibit EU-30, p. 53 (emphasis added).

[251] Final Determination, Exhibit EU-30, p. 54 (emphasis added).

[252] To recall, China observed that, from 2008 to 2010, subject import prices for Product B were 3% to 28% lower than the domestic sales prices of the domestic like products, and in the first half of 2011, subject

of HP-SSST products had a price undercutting effect on like domestic products.

238. 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.

239. Since a price undercutting analysis "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"[253] and the subject matter of inquiry under Article 3.2, i.e. the effect of subject imports on price is "analytically akin to" the relationship between subject imports and the state of the domestic industry to be examined under Article 3.4[254], useful interpretative guidance as to the prices to be compared can be derived from WTO case law on Article 3.4 of the Anti-Dumping Agreement. In this context, the Appellate Body in *US – Hot-Rolled Steel* stated:

> [I]t may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, *all of the other parts that make up the industry, as well as examine the industry as a whole*. Or, in the alternative, the investigating authorities should provide a *satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry*.
>
> …

import prices for this grade were lower than the domestic sales prices of the domestic like products by a margin of over 15%. Therefore, China concluded that "during the period of investigation, the imports of S30432 subject products had a relatively noticeable price undercutting impact on the domestic sales price of the domestic like products". With regard to Product C, based on its observation that subject import prices were 10% higher than domestic prices in 2009, but subject import prices "had a big decrease to a level of over 50% of the domestic sales price of the domestic like products" in 2010, MOFCOM concluded that Product C" had relatively noticeable price undercutting impact on the domestic sales price of the domestic like products". Final Determination, Exhibit EU-30, p. 54.

[253] Panel Report, *China – X-Ray Equipment*, para. 7.50.

[254] Appellate Body Report, *China – GOES*, para. 149.

> [A]n examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the Anti-Dumping Agreement.[255]

240. The Appellate Body's approach finds further support in Article 4.1 of the Anti-Dumping Agreement, which provides that "the term 'domestic industry' shall be interpreted as referring to the domestic producers *as a whole* of the like products". Moreover, according to Article 3.6, "[t]he effect of the dumped imports shall be assessed in relation to *the domestic production of the like product*".[256] In this respect, the panel in *Mexico – Corn Syrup* stated that the combined effect of Articles 3.6 and 4.1 "inescapably require[s] the conclusion that the domestic industry with respect to which injury is considered and determined must be … the domestic producers of the like product as a whole".[257]

241. As recalled above, China found that all the different types of HP-SSST products at issue in this dispute are "like".[258] It is worth recalling that this "likeness" determination was reached despite the opposition of several interested parties.[259] According to its own determination, China was required to conduct a global analysis of the price effects of the *group* of imported HP-SSST products on the prices of like domestic products *as a whole*. Indeed, China appears to have recognized the need to ultimately reach a price effects finding with respect to the product as a whole in its attempt to extend its finding with respect to Products B and C to the entire industry. However, the present dispute arises because China had no basis on which to justify such extension.

242. The European Union does not suggest that China should not have conducted a price effects analysis based on each product type at issue. However, China's

[255] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204 and 206 (emphasis added).

[256] Emphasis added.

[257] Panel Report, *Mexico – Corn Syrup*, para. 7.147.

[258] Final Determination, Exhibit EU-30, pp. 23-28.

[259] Final Determination, Exhibit EU-30, pp. 23-28.

ultimate conclusion with respect to the product *as a whole* required a proper grounding in its analysis by type in order to be consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

243. Had it applied the proper approach, China would have concluded that there was no significant price undercutting for the product *as a whole*, because the facts on the record do not support such a conclusion. As previously discussed, China found an alleged price undercutting effect for only Products B and C. However, during the reference period, the aggregate domestic production of Products B and C was limited, as it amounted to only 2,644 tonnes[260] – i.e., 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, amounted to 10,500 tonnes[261] – i.e., it accounted for almost 80% of the domestic production of HP-SSST. If one focuses on the investigation period itself, China's conclusion of price-undercutting appears to be even more tenuous.

244. In light of those data, it becomes evident that China erroneously applied its findings with respect to a *minority* sector of domestic production to the domestic HP-SSST industry as a whole, despite the fact that, according to China's own conclusions, the *vast majority* of domestic production was not subject to price undercutting by subject imports.

245. China could have examined "all of the other parts that make up the industry"[262] by conducting a *cross-type* analysis of price effects – i.e., by examining whether imports of each type had a price effect on like domestic products of *other* types. However, China did not do so. Instead, it selected the minority sub-categories of the like domestic products where it determined that there was

[260] Table 4 above, rows 14 and 20 (stating domestic volume figures for Product B (1,727 tonnes, 438 tonnes, 394 tonnes, and, 59 tonnes for 2008, 2009, 2010, and the first half of 2011, respectively) and for Product C (0 tonnes, 2 tonnes, 7 tonnes, and 17 tonnes for 2008, 2009, 2010, and the first half of 2011, respectively)). Moreover, as the European Union notes in this submission, its finding on Products C is analytically and factually flawed.

[261] Table 4 above, row 8 (summing the figures 1,491 tonnes, 2,001 tonnes, 4,629 tonnes, and 2,379 tonnes for 2008, 2009, 2010, and the first half of 2011, respectively).

[262] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

a price undercutting effect and unduly extended its findings with respect to those sub-categories to the whole group of like domestic products.

246. Moreover, and in any event, the evidence on the record indicated that the different types of HP-SSST products did not in fact compete with one another in the Chinese market. The Applicants themselves explained that "the three grades of products under investigation are noticeably different from one another", and "in actual market transactions, downstream enterprises, in making price comparison, compare different suppliers' prices of the products of the same grade to determine which is cheaper".[263] In other words, consumers do not cross-shop types; rather, they appear to pre-select the type they wish to use in their boilers, and then seek the best price for that type in the market. Further, the record shows that domestic importers unanimously considered subject imports (almost all of which were of Products B and C) to be not substitutable with domestic like products (the vast majority of which were of Product A).[264] Under such circumstances, where the imports of one product type do not actually compete with the vast majority of domestic production of another product type, there is no basis to extend a price undercutting conclusion with respect to one product type to the industry as a whole. As discussed in above, this approach is inconsistent with the objectivity requirements set out, as an overarching obligation, in Article 3.1 of the Anti-Dumping Agreement.

247. This flaw in China's analysis also runs counter to the language of Article 3.2, which requires that the investigating authority consider "whether there has been a *significant* price undercutting". Indeed, the word "significant" indicates something that is "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential"; "noticeable, substantial, considerable,

[263] Final Determination, Exhibit EU-30, p. 55.

[264] Minmetals Questionnaire Response, Exhibit EU-5, questions 19, 22, 31; Shanghai Boiler Works Questionnaire Response, Exhibit EU-6, questions 19, 22, 31; Babcock & Wilcox Questionnaire Response, Exhibit EU-7, questions 19, 22, 31; Shanghai Foreign Trade Questionnaire Response, Exhibit EU-8, questions 19, 22, 31; Harbin Boiler Questionnaire Response, Exhibit EU-9, questions 19, 22, 31. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307 (with respect to Article 15.2 of the SCM Agreement).

large".[265] The panel in *US – Upland Cotton* also interpreted the word "significant" in the context of "significant price suppression" under Article 6.3(c) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") as meaning "important, notable or consequential".[266]

248. Once again, the fact that China found *some* price undercutting limited to a *minority* industry sector that *does not actually compete* with other sectors 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. As a result, China did not establish that the limited price undercutting it found is "*significant*" within the meaning of Article 3.2 of the Anti-Dumping Agreement.

249. As discussed in above, this approach is not consistent with the objectivity requirements set out, as an overarching obligation, in Article 3.1 of the Anti-Dumping Agreement..

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

250. Pursuant to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, China was required to examine "the impact of the [allegedly] dumped imports on the domestic industry" by conducting an objective evaluation of "all relevant economic factors and indices having a bearing on the state of the industry".

251. In order to discharge that obligation, China reviewed a number of relevant economic factors and indices, namely: the apparent consumption of HP-SSST products in China;[267] Chinese manufacturers' production capacity for like domestic products;[268] the output,[269] sales volume,[270] market share,[271] and sales

[265] Oxford English Dictionary; Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307 (with respect to Article 15.2 of the SCM Agreement).

[266] Panel Report, *US – Upland Cotton*, para. 7.1325; Appellate Body Report, *US – Upland Cotton*, para. 426.

[267] Final Determination, Exhibit EU-30, p. 57.

[268] Final Determination, Exhibit EU-30, pp. 57-59.

prices[272] of like domestic products; the sales revenue,[273] pre-tax profit, [274] return of investment,[275] and capacity utilization[276] with respect to like domestic products; employment,[277] labour productivity,[278] salary per head,[279] end-of-period inventories,[280] and net cash flow[281] in the Chinese industry for like domestic products; and the Chinese HP-SSST industry's capacity for investment and financing.[282]

252. However, China's impact analysis is flawed in several respects, and falls short of an objective examination, based on positive evidence, of the impact of imported HP-SSST on the domestic industry producing the like product. In particular: (i) China's impact analysis was based on its flawed price effect analysis, because China assessed the impact of HP-SSST imports as a whole on the domestic industry as a whole, while it found no significant increase in the volume of subject imports and properly found price effects with respect to only Product B; (ii) China failed to evaluate the role played by the magnitude of the margin of dumping in its overall impact assessment; and (iii) China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured. The European Union addresses these claims in turn.

[269] Final Determination, Exhibit EU-30, p. 59.

[270] Final Determination, Exhibit EU-30, p. 59.

[271] Final Determination, Exhibit EU-30, p. 59.

[272] Final Determination, Exhibit EU-30, p. 59.

[273] Final Determination, Exhibit EU-30, p. 59.

[274] Final Determination, Exhibit EU-30, p. 60.

[275] Final Determination, Exhibit EU-30, p. 60.

[276] Final Determination, Exhibit EU-30, pp. 60-61.

[277] Final Determination, Exhibit EU-30, p. 61.

[278] Final Determination, Exhibit EU-30, p. 61.

[279] Final Determination, Exhibit EU-30, p. 61.

[280] Final Determination, Exhibit EU-30, pp. 61-62.

[281] Final Determination, Exhibit EU-30, p. 62.

[282] Final Determination, Exhibit EU-30, pp. 63-64.

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

253. In assessing the impact of imports on the domestic HP-SSST industry, China examined the economic factors and indices listed above. China conducted the analysis with respect to each of these factors by considering the impact of subject imports as a whole on the domestic HP-SSST industry as a whole. To be clear, the European Union considers that, as a rule, investigating authorities are entitled to proceed on that basis. However, 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. Thus, if the product comprises three types (A, B and C); the volume analysis reveals no increase by type; and the price analysis, properly conducted, reveals no price effects for types A and C – then as a simple matter of logic data relating to types A and C has no further explanatory force for the purposes of the injury assessment: that is, they are non-attribution factors. Accordingly, in considering impact data relating to a domestic industry producing types A, B and C, an investigating authority should not simply *assume* that a negative indicator is attributable to type B. It may equally be the case that the negative indicator is attributable to types A and C, which have already been identified as non-attribution factors. In these particular factual circumstances, the investigating authority must at least *address* this issue in its impact analysis. That is, in these particular factual circumstances, there may, or may not, be a valid explanation for nevertheless continuing to rely on data relating to Products A, B and C, but at the very least the investigating authority must indicate why that should be the case.

254. In short, whilst there is no general obligation to consider an impact assessment other than on the basis of the domestic industry producing the like product as a whole, if, in a particular case, an investigating authority nevertheless itself elects to embark on an assessment driven by the logic of a type-based analysis,

it must follow that logic through by at least explaining how it has viewed the industry-wide data in that light, and cannot just arbitrarily, and without explanation, disregard intermediate results because these are inconvenient or contradict the proposition that the domestic industry has been injured.

255. In the present case, China chose to conduct its volume analysis not only with respect to the import volumes and market shares of the investigated product as a whole, but also by type,[283] finding no significant volume increases on either basis. Further, as discussed above, China found that the imports, in general, had a relatively noticeable price undercutting effect on the price of domestic like products. However, with respect to Products A and C, this conclusion was not supported by the facts and evidence on the record.

256. As the Appellate Body in *EC – Tube or Pipe Fittings* observed:

> Article 3.1 and the succeeding paragraphs of Article 3 [of the Anti-Dumping Agreement] clearly indicate that volume and prices [of the dumped imports], and the consequent impact on the domestic industry, are *closely interrelated* for purposes of the injury determination.[284]

257. Moreover, Article 3.4 is "concerned with the relationship between subject imports and the state of the domestic industry" and requires "an examination of the explanatory force of subject imports for the state of domestic industry"[285]. As the text of Article 3.1 indicates, the impact of imports on the domestic industry is contemplated to be the consequence of the volume or price effects of the same imports. In this case, China's reliance on its flawed partial price effect analysis in the impact examination did not constitute an objective examination "of the explanatory force of subject imports for the state of domestic industry" as a whole.

258. The European Union notes that the Appellate Body in *China – GOES* stated that the various paragraphs of Article 3 of the Anti-Dumping Agreement:

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[283] Final Determination, Exhibit EU-30, pp. 44-45.

[284] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115 (emphasis added).

[285] Appellate Body Report, *China – GOES*, para.149.

> contemplate a *logical progression of inquiry* leading to an investigating authority's ultimate injury and causation determination. 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.[286]

259. Failure to conduct an analysis of the kind outlined above would lead to the manifestly unreasonable conclusion that injury could be found even in a case where only part of the domestic industry, on which the investigating authority found neither volume nor price effects, suffers from injury caused by factors other than the imports. Consequently, China's impact analysis runs counter to China's obligation to conduct an objective examination based on positive evidence, inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

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

260. As explained above, China examined a number of relevant economic factors and indices in order to assess the impact of imports on the domestic HP-SSST industry. However, China failed to examine the role played by the magnitude of the margins of dumping, properly calculated, in its overall impact assessment. Rather, it simply referred to the dumping margins in the sub-section entitled "Dumping Margin" at page 41 of its Final Determination, as well as in the section entitled "Final Conclusions" at pages 79 and 80 of the same document.[287] 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.

261. Furthermore, for the reasons stated in this submission, China's determination of the margins of dumping with respect to one EU producer was flawed, as it was also flawed with respect to the all others rates applied to the European Union

[287] Final Determination, Exhibit EU-30, pp. 41, 79-80.

and Japan. These flawed dumping margin determinations consequently necessarily vitiate China's injury determination.

262. The "magnitude of the margin of dumping" is expressly mentioned among the relevant economic factors and indices listed in Article 3.4. The text of the provision in question clearly mandates that each of the factors be evaluated.[288] On this basis, the Appellate Body and a number of panels have found that "it is mandatory for an investigating authority to evaluate each of the 15 factors listed in Article 3.4 of the Anti-Dumping Agreement".[289] For instance, in *Thailand – H-Beams* the Appellate Body stated:

> The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities …". We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.[290]

263. The panel in *China – X-Ray Equipment* specified that, for the purposes of conducting an "evaluation" under Article 3.4, it is not sufficient for an investigating authority to simply list the margins of dumping "in the 'Final Conclusion' and 'Dumping' sections of the [final] determination".[291] Rather, the investigating authority "is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment".[292] On this basis, the panel in that dispute found that China had acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to evaluate the "magnitude of the margins of dumping".[293]

264. In light of the above, China's failure to evaluate the magnitude of the margins of dumping, properly calculated, and to assess their relevance and the weight to be attributed to them in the injury assessment, is inconsistent with China's

[288] Panel Report, *China X-Ray Equipment*, para. 7.181.

[289] Panel Report, *China X-Ray Equipment*, para. 7.179.

[290] Appellate Body Report, *Thailand – H-Beams*, para. 125 (footnote omitted); Panel Report, *China X-Ray Equipment*, para. 7.179.

[291] Panel Report, *China X-Ray Equipment*, para. 7.183.

[292] Panel Report, *China X-Ray Equipment*, para. 7.183.

[293] Panel Report, *China X-Ray Equipment*, para. 7.185.

obligation to conduct an objective examination, based on positive evidence, of all the economic factors and indices relevant to the analysis of the impact of the imports on the domestic HP-SSST industry, as required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

265. To be clear, the European Union is not arguing that any variation in the magnitudes of the margins of dumping necessarily changes the outcome of an injury impact assessment. There may well be circumstances in which, once it is clear that the margins of dumping are significant, variations of the margins of dumping within reasonable parameters may not alter the outcome of the impact assessment. However, what is clear is that Article 3.4 of the Anti-Dumping Agreement, as clarified by the case law, mandates that the impact assessment include at least a reference to this factor, and in these circumstances, China was not entitled to pass in silence over this issue, as it did in this case.

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

266. As discussed previously, in assessing the impact of the imports on the domestic HP-SSST industry, China reviewed all of the economic factors and indices listed in Article 3.4 of the Anti-Dumping Agreement except for the magnitude of the margins of dumping. China reviewed these factors and indices with respect to the Chinese HP-SSST industry as a whole. Table 6 above summarizes China's findings in its Final Determination with respect to each of these indicators.

267. As Table 6 shows, the outcomes of China's analysis were mixed. Some of the factors and indices evaluated by China provide a negative outlook of certain features of the Chinese HP-SSST industry. For instance, China noted that the apparent consumption of HP-SSST products in China declined.[294] Similarly, China observed that the sales prices of like domestic products, as well as the Chinese industry's pre-tax profit, return on investment, and ability to raise

[294] Final Determination, Exhibit EU-30, p. 57.

capital or investments on those products, decreased.[295] Finally, it found that the end-of-period inventories were rising year-on-year during the reference period.[296]

268. However, many economic factors and indices reviewed by China present general trends *favourable* for the domestic industry, and are therefore supportive of the position that the domestic industry has not suffered material injury. For example, the output, sales volume, and market shares of like domestic products registered a significant increase on the whole.[297] In particular, the market shares of like domestic products rose by approximately 35%.[298] As for the sales volume of domestic HP-SSST products, China noted that, although that indicator decreased by 44.72% from 2008 to 2009, it subsequently rose by 171.16% from 2009 to 2010, and further increased by 9.15% in the first half of 2011.[299]

269. Similarly, the number of employees, labour productivity, and salaries per head were marked by an "upward trend" over the same period.[300] The production capacity of Chinese HP-SSST producers also registered a significant increase – it grew by 7.89% from 2008 to 2009, by 17.07% from 2009 to 2010, and by 13.89% in the first half of 2011 compared to the same period in 2010.[301] Chinese producers were able to improve the utilization of such expanded capacity by 2.68%.[302] Moreover, the production equipment destined for domestic HP-SSST products was used, in some cases, to produce other products.[303]

[295] Final Determination, Exhibit EU-30, pp. 59, 60, 63-64.

[296] Final Determination, Exhibit EU-30, pp. 61-62.

[297] Final Determination, Exhibit EU-30, p. 59.

[298] Final Determination, Exhibit EU-30, p. 59.

[299] Final Determination, Exhibit EU-30, p. 59.

[300] Final Determination, Exhibit EU-30, p. 61.

[301] Final Determination, Exhibit EU-30, p. 57.

[302] Final Determination, Exhibit EU-30, p. 60.

[303] Final Determination, Exhibit EU-30, pp. 60-61.

270. China itself agreed that, at least, production capacity, output, sales volume, market share, employment, labour productivity and salary per head exhibited positive trends.[304] Yet, after reviewing all the relevant factors and indices, China simply concluded that, "based on the above … the domestic industry is materially injured".[305] In so doing, China appears to have attached a high degree of importance to the other relevant factors and indices highlighting negative aspects of the Chinese HP-SSST industry. At the same time, China disregarded many factors and indices that, as shown above, suggest that the Chinese HP-SSST industry was not suffering injury. China did not provide any explanation regarding the weight attributed to any given factor, nor of the conclusions it drew from those factors and indices that were positive for the domestic industry.

271. The European Union agrees that none of the factors listed in Article 3.4 of the Anti-Dumping Agreement is, in and of itself, decisive in an investigating authority's assessment of the impact of the imported products under investigation on domestic producers of like products. Nonetheless, an objective examination, based on positive evidence, of those factors requires that an investigating authority explain in detail the factual, logical and analytical steps leading it to downplay the importance of certain factors and indices and to magnify the significance of certain others. As noted by the panel in *EC – Pipe Fittings*:

> [A]n "evaluation" … is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist. As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. *Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors.* The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least

[304] Final Determination, Exhibit EU-30, p. 63.

[305] Final Determination, Exhibit EU-30, p. 64.

> implicitly apparent from the determination. *Silence on the relevance or irrelevance of a given factor would not suffice.*[306]

272. In the same vein, the panel in *Thailand – H-Beams* stated:

> While we do not consider that … positive trends in a number of factors during the IP would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a number of factors would require a *compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement*. In particular, we consider that such a situation would require a thorough and *persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP*.[307]

273. Further, in *China – X-Ray Equipment*, the panel 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".[308]

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.[309] In doing so, China was improperly selective in the ways it treated the relevant factors and indices listed in Article 3.4.

275. In sum, and in light of the preceding observations, China failed to examine whether imported HP-SSST provided explanatory force for the state of the domestic industry.

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[306] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314 (footnotes omitted, emphases added); Panel Report, *Thailand – H-Beams*, para. 7.225.

[307] Panel Report, *Thailand – H-Beams*, para. 7.249 (emphases added). Para. 7.248 indicates that the Panel was referring to trends during the reference period.

[308] Panel Report, *China – X-Ray Equipment*, para. 7.216.

[309] Final Determination, Exhibit EU-30, p. 68.

276. In light of the above, the European Union submits that China failed to conduct an objective examination, based on positive evidence, within the meaning of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Moreover, the gaps and inconsistencies in China's reasoning, coupled with the flaws in China's price effects analysis, further undermine China's overall conclusion that the Chinese HP-SSST industry was suffering injury as a result of imports of certain HP-SSST products from the European Union.

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

277. As mentioned above, China concluded in its Final Determination that a "causal link" existed between imports of HP-SSST and the injury purportedly suffered by the domestic industry.[310]

278. In order to reach such a conclusion, China recalled its volume, price effects, and impact analyses. In particular, with regard to volume, China explained that, "[i]n a nutshell" for the duration of the reference period "although the imports of the subject products showed year-on-year declines and their share of the domestic market moved up and down, the share itself remained high at around 50%".[311] Moreover, imports of Product B represented over 70% of the total imports and had close to or above 90% share in the domestic market for this type, and imports of Product C represented over 20% of the total imports and had above 90% share in the domestic market for this type.[312] With regard to price, China recalled its price undercutting findings for Product B and Product C.[313] And with regard to impact, China recalled the economic factors and performance indicators it found to have exhibited negative trends.[314]

[310] Final Determination, Exhibit EU-30, p. 67.

[311] Final Determination, Exhibit EU-30, p. 66.

[312] Final Determination, Exhibit EU-30, pp. 65-66.

[313] Final Determination, Exhibit EU-30, p. 66-67.

[314] Final Determination, Exhibit EU-30, p. 66-67.

279. In addition, China conducted a review of a number of "non-attribution" factors, including: changes in the apparent consumption of the like domestic products and the relative consumption patterns;[315] the impact on the domestic industry of imports from countries or territories other than Japan and the European Union;[316] the operational management of the domestic industry;[317] the technological advancement in the domestic industry;[318] the shift in commercial distribution and trade policy in China;[319] the impact of end-user designated purchasing;[320] the export status of like domestic products;[321] *force majeure*;[322] the expansion of domestic production capacity;[323] the growing financial outlays in the domestic industry;[324] the increased cost of production in the domestic industry;[325] and the decrease in the price of nickel.[326]

280. The European Union submits that China's causation determination is flawed and does not constitute an objective examination of positive evidence as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In particular: (i) the grounds of China's causation determination, namely its volume, price effects, and impact analyses, are analytically flawed and factually unsupported; and (ii) China failed to separate and distinguish the injurious effects of the decline in domestic demand for HP-SSSTs and the expansion in capacity of domestic producers from the injurious effects of HP-SSST imports. The European Union addresses these claims in turn.

[315] Final Determination, Exhibit EU-30, pp. 67-69.

[316] Final Determination, Exhibit EU-30, p. 70.

[317] Final Determination, Exhibit EU-30, p. 70.

[318] Final Determination, Exhibit EU-30, p. 70.

[319] Final Determination, Exhibit EU-30, p. 71.

[320] Final Determination, Exhibit EU-30, pp. 71-72.

[321] Final Determination, Exhibit EU-30, pp. 72-73.

[322] Final Determination, Exhibit EU-30, p. 73.

[323] Final Determination, Exhibit EU-30, pp. 73-75.

[324] Final Determination, Exhibit EU-30, p. 75.

[325] Final Determination, Exhibit EU-30, pp. 75-76.

[326] Final Determination, Exhibit EU-30, pp. 75-77.

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

281. As the order of the paragraphs of Article 3 of the Anti-Dumping Agreement suggests, the demonstration of a causal relationship between dumping and injury to the domestic industry constitutes the last step in an investigating authority's "logical progression of inquiry"[327] leading to the final injury determination. As the Appellate Body stated:

> 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 form *the basis* for the overall causation analysis contemplated in Article 3.5.[328]

282. As such, a finding of causation is *dependent* upon the outcomes of the investigating authority's analyses of the previous steps – namely, the volume and price effects of dumped imports and their impact on the domestic industry producing like products.

283. In applying the legal standard outlined above, the panel in *China – X-Ray Equipment* found that, because China's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and given that China relied upon such an analysis in determining causation, "the flaws in the price effects analysis *also* undermine[d] … the conclusion on the causal link between the subject imports and the injury suffered by the industry".[329]

284. In the present dispute, China substantiated its conclusion concerning the existence of a causal link between imports of HP-SSST and the injury to the domestic industry by referring to its volume, price effects, and impact analyses.[330] However, China found no significant increase in the volume of subject imports, and China's conclusions with respect to price effects and

[327] Appellate Body Report, *China – GOES*, para. 128.

[328] Appellate Body Report, *China – GOES*, para. 128 (emphasis added); Panel Report, *China – X-Ray Equipment*, para. 7.49.

[329] Panel Report, *China – X-Ray Equipment*, para. 7.239 (emphasis added).

[330] *See* para. 278 above. *See also* Panel Report, *China – GOES*, para. 7.260.

impact were factually unsupported and analytically flawed. Since China wrongly found that there was injury to the domestic industry based on its examination of these elements, it follows, *a fortiori*, that China's finding of a causal link between the subject imports and the injury to domestic HP-SSST producers is unwarranted.

285. The European Union has already addressed the flaws in China's reasoning concerning the existence of injury to the domestic industry. Here, the European Union reviews that discussion and explains further why neither China nor any reasonable investigating authority could have found that the domestic industry was materially injured by reason of the relevant imports.

286. With respect to the analysis of volume, in light of the wording of Articles 3.1 and 3.2 read together, China was required to consider whether there was a *significant increase* in the imports of products under investigation, whether in absolute terms or relative to production or consumption in China. Indeed, China conducted this analysis with respect to both the *volume* of imports and the *market shares* of the imported products under investigation vis-à-vis like domestic products.

287. In its Final Determination, China found that the absolute volume of imports did not significantly increase – indeed, it concluded that it *decreased* by a considerable margin. In fact, the Final Determination specifies that the import volume amounted to 20.1 thousand tonnes in 2008, 16.4 thousand tonnes in 2009 (a decrease of 18.49%), and 4.5 thousand tonnes in 2010 (a decrease of 72.79%). Compared to the first half of 2010, imports in the first half of 2011 fell by 21.89%.[331] These findings are summarized in Table 4 above, row 1.

288. As for the market shares of imported products, China found that, despite fluctuations, the domestic market shares of the investigated products *as a*

[331] Final Determination, Exhibit EU-30, p. 43.

whole decreased from 86.20% in 2008 to 51.43% in the first half of 2011.[332] These findings are summarized in Table 4 above, row 4.

289. China then proceeded to analyse changes in market share for each of the types of the subject merchandise. It concluded that the market share of imported Product A was only 1.45% in 2008, and that those products were no longer imported to China in 2009, 2010, and the first half of 2011.[333] The market share of imported Product B was 89.48% in 2008, 96.65% in 2009, 90.49% in 2010, and 97.63% in the first half of 2011, thereby presenting fluctuations and not following a defined trend.[334] Finally, the market share of imported Product C was 100% in 2008, 99.94% in 2009, 99.10% in 2010, and 90.69% in the first half of 2011, which shows a decrease of almost 10 percentage points.[335] These findings are summarized in Table 4 above, rows 10, 16, and 22.

290. Accordingly, by China's own analysis, during the POI, there was no significant increase in the imports of investigated products, whether in terms of absolute volume or in terms of market shares of those products vis-à-vis like domestic products. To the contrary, there was a very significant *decrease* in the volume and market shares of imported products taken as a whole.

291. However, these findings did not prevent China from concluding that, overall, the domestic HP-SSST industry was injured by the imports of HP-SSST. In particular, China reasoned that despite the decrease in imports of the investigated products, their market share "remained high at around 50%" as a whole, and around or above 90% for Products B and C.[336] Moreover, China reasoned that the absence of an increase in dumped imports "may not necessarily suffice as determinative guidance".[337] China's reasoning is flawed.

[332] Final Determination, Exhibit EU-30, p. 44.

[333] Final Determination, Exhibit EU-30, p. 44.

[334] Final Determination, Exhibit EU-30, p. 44.

[335] Final Determination, Exhibit EU-30, p. 44.

[336] Final Determination, Exhibit EU-30, pp. 65-66.

[337] Final Determination, Exhibit EU-30, p. 47.

292. First, the fact that the market share of imported products under investigation was still relatively large at the end of the reference period is irrelevant for an objective examination under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and accordingly for a causation determination under Article 3.5. To recall, an investigating authority is required, pursuant to Article 3.2, to consider "whether there has been a *significant increase* in dumped imports".[338] The term "increase" indicates "[t]he action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension"; "[t]he becoming more numerous or frequent; growth in numbers; multiplication".[339] In turn, the term "significant" indicates something "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential"; "noticeable, substantial, considerable, large".[340] In other words, the notion of "increase" implies a *dynamic* inquiry into the trends in import volumes throughout the reference period, as opposed to a *static* picture of the situation of imports at the end of that period; and to be "significant", any such increase must be *substantial*. Nowhere in the text of Article 3.2 is there a provision mandating an investigating authority to examine the market share *retained* by imported products at the end of the reference period. Nor do Articles 3.2 or 3.5 allow an investigating authority to attach importance to this fact in its injury or causation analyses.

293. Second, while agreeing that the absence of a significant increase in imported products under investigation is not, in and of itself, sufficient to prevent a conclusion that the domestic industry is being injured,[341] the European Union submits that this factor cannot be stripped of all significance. An increase in imports is one of the first and most obvious consequences of dumping, which makes the imported products more appealing to consumers in the importing country. In the present case, the alleged dumping has not even had the effect of

[338] Emphasis added.

[339] Oxford English Dictionary.

[340] Oxford English Dictionary*;* Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307 (with respect to Article 15.2 of the SCM Agreement).

[341] Appellate Body Report, *China – GOES*, paras. 129-132.

increasing imports. Rather, the rapid development of the Chinese HP-SSST industry resulted in a momentous *drop* in the import volume and market share of imported HP-SSST products – the latter being as significant as 35%.

294. Third, China's conclusion regarding Product C in its analysis of apparent consumption as a non-attribution factor has no basis in fact. With respect to Product C, China concluded that "the drop in the domestic sales volume of the domestic like product outstripped the decline in its apparent consumption".[342] China reached this conclusion because during the first half of 2011, "the domestic sales of the domestic like product were down 100% compared with the same period of 2010" and "[i]n absolute terms, for the first six months of 2011, the decline in apparent consumption of the domestic like product was much greater than the decline in sales volume of the domestic like product for the same period".[343] However, these facts are simply incorrect based on the volume and market share data disclosed by China elsewhere in its Final Determination, as summarized in Table 4 above. Those data provide that apparent consumption of Product C declined during the reference period as follows: 5,387 tonnes, 3,755 tonnes, 758 tonnes, and 185 tonnes in 2008, 2009, 2010, and the first half of 2011, respectively. Meanwhile, domestic sales of Product C actually *increased* during the reference period as follows: 0 tonnes, 2 tonnes, 7 tonnes, 17 tonnes in 2008, 2009, 2010, and the first half of 2011, respectively. Further, China explained that during the first half of 2011, the import market share for Product C was 90.69%, down by 8.63% from the first half of 2010. In other words, the domestic market share of Product C actually *increased* between the first half of 2010 and the first half of 2011 by 8.63%.

295. In light of the above, China should have addressed the other elements allegedly substantiating an injury determination – i.e., the price effects of subject imports and their impact on the domestic HP-SSST industry – with the utmost care, as the decrease in imports to China of HP-SSST has a high degree of explanatory

[342] Final Determination, Exhibit EU-30, p. 69.

[343] Final Determination, Exhibit EU-30, p. 69.

force with respect to the proposition that imports of HP-SSST did *not* cause injury to the domestic industry.

296. Turning to price effects, as discussed above, China's conclusions with respect to price effects did not involve an objective examination based on positive evidence, as required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In particular, China found no volume effects with respect to imported HP-SSST products (whether considered as a whole or by type), and no price effects for imported Product A. China's analysis of the price effects of imported product C was analytically and factually flawed. And China improperly extended its conclusions concerning the price undercutting effect of Products B and C to the domestic HP-SSST industry as a whole.

297. Turning finally to China's impact analysis, as explained above, it suffered from three major flaws and fell short of an objective examination based on positive evidence, as required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In particular, China's impact analysis was based on its flawed volume and price effects analyses. China failed to evaluate the role played by the magnitude of the margins of dumping in its overall impact assessment. And China improperly disregarded the relevant economic factors and indices showing that the domestic industry was not injured.

298. In light of the above, 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.

299. Had China conducted an unbiased and objective evaluation of the facts, as required by Article 3 of the Anti-Dumping Agreement, then China – like any

reasonable investigating authority – would have concluded that the domestic industry was not being injured by the imports of the investigated products. Accordingly, by grounding its causation determination on its volume, price effects, and impact analyses, which did not support a finding of injury, China failed to conduct an objective examination, based on positive evidence, of the existence of a causal link between HP-SSST imports and injury, inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

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

300. In conducting its causation analysis, China was required, under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, to consider a number of known factors other than the dumped imports that may have explained the injury to the domestic industry during the investigation period. According to the Appellate Body, the purpose of the analysis of those "non-attribution factors" may be summarized as follows:

> In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports.[344]

301. China conducted a review of the "non-attribution" factors, which include: changes in the apparent consumption of HP-SSST products and consumption patterns;[345] the impact on the domestic industry of imports from countries or territories other than the European Union and Japan;[346] the operational management of the domestic industry;[347] the technological advancement in the

[344] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

[345] Final Determination, Exhibit EU-30, pp. 67-69.

[346] Final Determination, Exhibit EU-30, p. 70.

[347] Final Determination, Exhibit EU-30, p. 70.

domestic industry;[348] the shift in commercial distribution and trade policy in China;[349] the impact of end-user designated purchasing;[350] the export status of like domestic products;[351] *force majeure*;[352] the expansion of domestic production capacity;[353] the growing financial outlays in the domestic industry;[354] the increased cost of production in the domestic industry;[355] and the decrease in the price of nickel.[356]

302. The review of the above-listed factors did not affect China's conclusion that a "causal link" existed between the allegedly dumped imports and the injury suffered by the domestic industry. Remarkably, China agreed that two of these other factors – namely, reduced apparent consumption and increased domestic production capacity – could have had negative effects on the domestic industry. Nonetheless, it rejected these two other factors as potential exogenous events that could sever the causal link between the allegedly dumped imports and the injury suffered by the domestic HP-SSST industry, without any attempt to separate and distinguish the injury caused by these other factors to the domestic industry. In doing so, China erred under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[357]

303. With regard to domestic demand for HP-SSSTs, China began its analysis by examining the apparent consumption and domestic sales trends for the HP-SSST product as a whole. In particular, China observed that there was a significant decrease in domestic demand for HP-SSST:

[348] Final Determination, Exhibit EU-30, p. 70.

[349] Final Determination, Exhibit EU-30, p. 71.

[350] Final Determination, Exhibit EU-30, pp. 71-72.

[351] Final Determination, Exhibit EU-30, pp. 72-73.

[352] Final Determination, Exhibit EU-30, p. 73.

[353] Final Determination, Exhibit EU-30, pp. 73-75.

[354] Final Determination, Exhibit EU-30, p. 75.

[355] Final Determination, Exhibit EU-30, pp. 75-76.

[356] Final Determination, Exhibit EU-30, pp. 75-77.

[357] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

> … investment in thermal power plants was withdrawn, resulting in year-on-year declines in the apparent consumption of certain high-performance stainless steel seamless tubes at the downstream. Consumption level dropped by 19.27% in 2009 compared with 2008 and 49.85% in 2010 compared with 2009. From 2008 to 2010, the annualized decline was 36.37%. In the first six months of 2011, the decline compared with the same period of 2010 was 12.08%.[358]

304. At the same time, domestic sales were up on the whole, with an annualized increase of 22.43% from 2008 to 2010, and an increase of 9.15% in the first half of 2011.[359] Thus, according to China, "domestic sales of domestic like products were not materially injured by the decline in apparent consumption".[360]

305. After making this general finding, China proceeded to assess the trends of apparent consumption of HP-SSST products with respect to each type, and compared them to the trends in sales volumes of corresponding like domestic products.

306. With respect to Product A, China found that there was no decline in apparent consumption. In particular, China observed, from 2008 to 2010, Product A "saw [an] annual increase in apparent consumption of 74.07%. In the first six months of 2011, apparent consumption grew 16.75% compared with the same period of 2010".[361] Thus, for Product A, "annual consumption was on the rise overall and the change had no adverse effect on the domestic sales volume of the domestic like product".[362]

307. With respect to Product B, China noted that, from 2008 to 2010, there was an "annual decline in apparent consumption of 50.00%" and that "the domestic sales volume of the domestic like product decreased at 54.69%". In the first six months of 2011, the apparent consumption of the imported product "decreased by 15.78%", whereas the "domestic sales volume of the domestic like product

[358] Final Determination, Exhibit EU-30, p. 68.

[359] Final Determination, Exhibit EU-30, p. 68.

[360] Final Determination, Exhibit EU-30, p. 68.

[361] Final Determination, Exhibit EU-30, p. 68.

[362] Final Determination, Exhibit EU-30, p. 68.

decreased by 99.89% during the same period".[363] Thus, the drop in "the domestic sales volume of the domestic like product outstripped the decline in apparent consumption of the subject product", or put differently, the domestic like product of this type lost market share to imports.[364]

308. Finally, with regard to Product C, China observed that, from 2008 to 2010, the apparent consumption of imported products "declined by 62.66% annually", and further decreased by 75.48% in the first six months of 2011. At the same time, the domestic sales of Product C "rose by 326.65% in 2010 from the level of 2009, not affected by the decline in apparent consumption of the subject product". But for the first six months of 2011, the domestic sales of Product C "were down 100% compared with the same period of 2010". For China "[t]his means the drop in domestic sales volume of the domestic like product outstripped the decline in its apparent consumption", and "[i]n absolute terms, for the first six months of 2011, the decline in apparent consumption of the domestic like product was much greater than the decline in sales volume of the domestic like product for the same period".[365]

309. The following table summarizes China's findings in this regard as stated in its non-attribution analysis at pages 67-70 of the Final Determination.

Table 8: Trends of HP-SSST Apparent Consumption and Sales Volume of the Domestic Like Product in China

Product	Trend of Apparent Consumption		Trend of Domestic Sales Volume	
	2008 to 2010 (annual average)	H1 2011	2008 to 2010 (annual average)*	H1 2011
A	+74.07%	+16.75%	N/A	N/A
B	-50.00%	-15.78%	-54.69%	-99.89%
C	-62.66%	-75.48%	+326.65%	-100.0%
HP-SSST As a Whole	-36.37%	-12.08%	+22.43%	+9.15%

* For Product C, the +326.65% figure represents only the change from 2009 to 2010.

310. On the bases of its findings with respect to Products B and C, China concluded that it could not dismiss the causal link between the subject imports and

[363] Final Determination, Exhibit EU-30, p. 69.

[364] Final Determination, Exhibit EU-30, p. 69.

[365] Final Determination, Exhibit EU-30, p. 69.

material injury suffered by the domestic industry, and that price undercutting by the imports was the reason for the observed drop in domestic prices.[366]

311. China's findings and analysis do not satisfy its obligations under Articles 3.1 and 3.5 to conduct an objective examination based on positive evidence and ensure that injury caused by other known factors are not attributed to dumped imports for two reasons. Whilst acknowledging that the decline in domestic demand could have an injurious effect on the domestic industry, China never separated and distinguished the effects of the decline in domestic demand from *the effe*cts of allegedly dumped imports, as the Appellate Body has said it must do.[367]

312. To recall, China acknowledged that "reduced levels of apparent consumption would likely have an *immediate negative effect on the domestic sales volume and price[s]* of domestic like products, which would in turn *dampen other economic factors and indicators*".[368] China further noted "[i]ts *conclusion* is that the *decline in apparent consumption has a negative effect on the domestic sales price* of domestic like products".[369] Finally, China found no volume or price effects for Product A, and acknowledged that, throughout the reference period, there was a significant decrease in domestic demand for Products B and C. It is reasonable to infer that a su*dden drop* in domestic demand of a good on a given market causes the market price of such a good to decrease accordingly. Indeed, it is appropriate to conclude that it was the decrease in domestic demand, rather than the imports, that caused injury to the domestic industry.

313. However, despite recognizing that there was a compression in domestic demand for HP-SSST products, China simply concluded that "the price undercutting effect of the imports of subject products [was] the reason for the drop in price of domestic like products".[370] This conclusion is inherently

[366] Final Determination, Exhibit EU-30, pp. 69-70.

[367] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

[368] Final Determination, Exhibit EU-30, p. 68 (emphases added).

[369] Final Determination, Exhibit EU-30, pp. 69-70 (emphases added).

[370] Final Determination, Exhibit EU-30, p. 70.

contradictory with China's own analysis, and largely disregards the effects of the global financial crisis that broke out in 2008, and whose adverse impact on the world's economy was still biting in 2010-2011. In effect, China entirely disregarded its own finding that reduced levels of apparent consumption were a proximate cause of the injury suffered by the domestic industry, and failed to separate the injurious effects of this non-attribution factor from those of the subject imports.

314. As for China's finding that that there was no decline in the apparent consumption of Product A, this fact is immaterial to its causation analysis, because China had already found that imported products of this type "had limited substantive impact on the domestic sales price of the domestic like products".[371]

315. In light of all the above, the European Union submits that China failed to conduct the analysis required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to the decline in domestic demand as another known factor causing injury to the Chinese HP-SSST industry. Importantly, China did not "separat[e] and distinguish[] the injurious effects" of this non-attribution factor "from the injurious effects of the dumped imports",[372] thereby acting inconsistently with China's obligations under Article 3.5 and failing to conduct an objective examination, based on positive evidence, under Article 3.1 of the Anti-Dumping Agreement.

316. Turning to the issue of production capacity, the investigation period saw a momentous expansion in the production capacity of Chinese producers of HP-SSST products. As China recognized:

> [F]rom 2008 to 2010, capacity in the domestic industry had been growing at 12.39% annually. For the same period, output growth was at 21.85%. In the first six months of 2011, capacity increased by 13.89% compared with the same period of 2010 while output grew 7.16%.[373]

[371] Final Determination, Exhibit EU-30, p. 54. *See* para. 223 above.

[372] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

[373] Final Determination, Exhibit EU-30, p. 74.

317. Coupled with the decline in domestic demand for HP-SSST products, this capacity expansion seems to have led to a decrease in the prices of domestic products and thereby caused injury to the domestic industry. In this regard, China itself stated that "capacity expansion can lead to output increase and supply increase in the domestic market, thus intensifying competition and *indirectly affecting such operational metrics as price, sales volume, sales revenue and pretax profit*".[374]

318. Elsewhere in its Final Determination, China found that, during the investigation period, the domestic industry further expanded its capacity, although its capacity utilization remained under 30% during the whole period.[375] Given the shrinking domestic demand, this capacity expansion by the domestic industry was clearly irrational and, by incurring unnecessary costs, contributed to the injury of the domestic industry.

319. Therefore, the expansion in capacity constitutes another known factor causing injury to the domestic industry. China, however, dismissed its relevance for the following two erroneous reasons.

320. First, China observed that, during the investigation period, "there was no case of oversupply", meaning that the output of like domestic products "was much less than apparent consumption among domestic producers" and "remained far below demand". Therefore, China concluded that the "capacity expansion in the domestic industry and the accompanying output growth did not substantially raise the level of competition", thereby having "no material effect on the sales price of domestic like products".[376] China's conclusion is untenable because it is based on a flawed supply-demand comparison in the domestic market.

321. As an initial matter, to the extent that "the level of competition among domestic producers" has any relevance, China erroneously compared domestic

[374] Final Determination, Exhibit EU-30, p. 74 (emphasis added).

[375] Final Determination, Exhibit EU-30, p. 60.

[376] Final Determination, Exhibit EU-30, p. 74.

production, the vast majority of which was of Product A, to the Chinese market demand for all HP-SSST products instead of to Chinese market demand for domestically produced HP-SSST products. To recall, with respect to Product A, which accounted for the vast majority of domestic production, there were virtually no imports. Therefore, to properly evaluate the impact of the domestic industry's capacity expansion and oversupply, the output of domestic like products should have been compared to domestic demand for Product A.[377] In any event, since there were no imports of Product A, such imports could not possibly have had any effects on domestic prices.

322. More fundamentally, China failed to take account of imports in its comparison of supply and demand in the domestic market as a whole. To recall, in contrast to Product A, the vast majority of supply in the domestic market for Products B and C was provided by imports (in fact imports accounted for more than 90% market share for each product type). Thus, on a product-wide basis, a sizable volume of supply in the domestic market came from foreign sources. Still, China disregarded these imports completely and instead focused exclusively on "competition among domestic producers". However, the impact of domestic capacity expansion and possible oversupply on domestic prices and competition, if any, on a product-wide basis in the domestic market as a whole cannot possibly be analysed without examining the supply-side in its entirety – i.e., supply from both domestic and foreign sources – in the supply-demand equation on the market as a whole.

323. Further, the non-attribution analysis required China to isolate the effect of dumping from other factors (here domestic capacity expansion). Even assuming China correctly determined that dumping existed during the investigation period, foreign suppliers were capable of producing and supplying the product to the Chinese market at non-dumped prices (at least for Products B and C). China therefore could and should have examined whether the expansion of domestic capacity could have had any injurious effect on the

[377] Such comparison would have been consistent with China's price effects analysis, which was based on a type-by-type price comparison.

domestic industry (as a whole) had HP-SSST products been imported at non-dumped prices. China failed to conduct such an analysis.

324. Second, following the comparison between the output of domestic like products and domestic demand, China analysed the relationship between the capacity expansion and return on investment (ROI). Having stated that "capacity expansion could also lead to higher investment in like products, hence lower ROI on such products", China confirmed that "ROI on domestic like products had been declining year on year" during the investigation period. Nonetheless, China concluded that a main reason for the decrease in ROI was "reduced pretax profits" rather than "greater average investment as a result of capacity expansion".[378] This conclusion was not supported by any explanation or analysis as to why reduced pre-tax profits, rather than domestic capacity expansion, was "a main reason" for declining ROI. Nor did China make, notwithstanding its remarks to the contrary, any separate examination as to why and how excessive capacity expansion did not cause any negative impact on ROI, even though it explicitly acknowledged such possibility.

325. For these reasons, China disregarded or failed to evaluate the relevance of the expansion of the production capacity of Chinese HP-SSST producers in its causation determination, and did not "separat[e] and distinguish[] the injurious effects" of this non-attribution factor "from the injurious effects of the dumped imports".[379] China thereby acted inconsistently with China's obligations under Article 3.5, and failed to conduct an objective examination, based on positive evidence, under Article 3.1 of the Anti-Dumping Agreement.

IX. OTHER CLAIMS

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

[378] Final Determination, Exhibit EU-30, p. 74.

[379] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

326. The European Union submits that China acted inconsistently with Article 7.4 of the Anti-Dumping Agreement by applying provisional measures for a period exceeding four months. Article 7.4 provides:

> The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

327. In the present case, China imposed provisional anti-dumping measures starting from 9 May 2012.[380] These provisional measures continued until 9 November 2012, when China imposed final anti-dumping measures.[381] China therefore applied provisional measures for a period of six months.

328. However, there was no request by exporters representing a significant percentage of the trade involved to apply provisional measures for a period of six months instead of four months. There was also no examination by China as to whether a duty lower than the margin of dumping would be sufficient to remove injury. Therefore, the maximum period allowed for provisional measures by Article 7.4 of the Anti-Dumping Agreement in the present case was four months. By applying provisional measures for six months in these circumstances, China acted inconsistently with Article 7.4.

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

329. Article 1 of the Anti-Dumping Agreement provides:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

[380] Preliminary Determination, Section II (Exhibit EU-18).

[381] Final Determination, Sections II, III and IV (Exhibit EU-30).

330. As a consequence of the breaches of the Anti-Dumping Agreement described above, China's anti-dumping measures on HP-SSST from the European Union are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. The European Union requests the Panel to make a finding to that effect.

X. REQUEST THAT THE PANEL EXERCISE ITS RIGHT TO SEEK INFORMATION PURSUANT TO ARTICLE 13.1 OF THE DSU

331. The European Union respectfully requests that the Panel exercise its right to seek information from China pursuant to Article 13.1 of the DSU. Article 13.1 of the DSU gives the Panel the right to seek information from any body that it deems appropriate, and requires Members to respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Article 13.1 further specifically provides that confidential information which is provided to a panel by a Member shall not be revealed (that is, to the public in a panel report) without formal authorisation from the individual, body, or authorities of the Member providing the information. Panels have frequently had recourse to Article 13.1 of the DSU, particularly in circumstances where the defending Member has previously failed to comply with applicable rules concerning the disclosure of information.[382]

332. In these proceedings, the only explanation given by China for failing to comply with its WTO obligations concerning disclosure and making information available is alleged confidentiality. The European Union has explained why this is not a valid explanation, also given the possibility of preparing non-

[382] Panel Report, *EC – Hormones (Canada)*, para. 6.4; Panel Report, *EC – Hormones (US)*, para. 6.5; Panel Report, *US – Shrimp*, para. 5.1; Panel Report, *Australia – Salmon*, para. 6.1; Panel Report, *Japan – Agricultural Products II*, para. 6.12; Panel Report, *India – Quantitative Restrictions*, para. 5.12; Panel Report, *Canada – Aircraft*, para. 9.52; Appellate Body Report, *Canada – Aircraft*, paras. 185-196; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 6.1; Panel Report, *EC – Asbestos*, paras. 5.6-5.13; Panel Report, *US - Wheat Gluten*, paras. 8.7-8.12; Appellate Body Report, *US – Wheat Gluten*, paras. 168-176; Panel Report, *US – Section 211 Appropriations Act*, para. 8.12; Panel Report, *US – Line Pipe*, para. 7.4; Panel Report, *Japan – Apples*, footnote 215; Panel Report, *US – Upland Cotton*, paras. 7.20-7.22, 7.602, 7.615 and 7.631; Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.52; Panel Report, *EC – Chicken Cuts (Thailand)*, para. 7.52; Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.14;

confidential summaries. However, now that this Panel has adopted procedures to protect Business Confidential Information, there is clearly no longer any basis for China not to provide the necessary information.

333. Evidently, there is a particular problem in terms of the ability of complaining Members to obtain prompt settlement when the WTO inconsistency in question relates to the threshold question of the provision of information. One could envisages a first set of proceedings simply directed at obtaining the essential facts, involving original panel proceedings, appeal, and even compliance panel proceedings and appeal. Once the essential facts would finally be obtained, there would then by a second set of proceedings on the substance of the WTO inconsistencies. This is not an operational vision of the WTO dispute settlement system. It would take years to obtain relief, and the time and cost involved would be terminally dissuasive to interested parties and Members.

334. That is why, in these panel proceedings, the European Union does two things. First, we ask that the Panel draw the reasonable and logical conclusions from the *procedural* inconsistencies that we have identified with respect to the *substantive* aspects of the measure at issue. For example, we have explained that China has breached its procedural obligations with regard to the disclosure of the essential facts relating to the injury determination, and particularly the price-undercutting finding with respect to Product B. Our submission is that, as a consequence, the price-undercutting analysis with respect to Product B is unreliable, and we ask the Panel to make a finding to that effect. Thus, what we seek from China in terms of implementation is not merely disclosure. Rather, we seek: disclosure; a full opportunity for all interested parties and Members to comment and defend their interests; and a consequent re-assessment of this aspect of the injury determination, and thus of the injury determination as a whole. We ask the Panel to make it clear that this is what China is expected to do.

Panel Report, *Australia – Apples*, para. 7.52; Panel Reports, *EC – IT Products*, para. 2.3. See also *US – Large Civil Aircraft (Second Complaint) (Article 21.5 – EU)*.

335. Second, at the same time, already in these proceedings, we seek full and proper disclosure from China (duly protected by the BCI rules now in place). In effect, if China believes that it has nothing to hide, China should see this as an opportunity to defend itself, by bringing forth the information that China believes supports its findings in the measures at issue, thus averting (if China would be correct) the need for China to re-visit the issue during implementation. The European Union respectfully submits that this approach is consistent with, and indeed required by, the principle of the prompt settlement of disputes.

336. Accordingly, we respectfully request the Panel to exercise its right under Article 13.1 of the DSU to seek from China information equivalent to the full disclosure that should have been made, that is, of all the essential facts, having particular regard to the concerns raised by the European Union and Japan, and given the BCI procedures in place. In this respect, we insist particularly (but not only) on the price-undercutting finding with respect to Product B. We ask that China provide complete, specific and precise information on the import and domestic products that were compared, including full product descriptions, dates of transactions, volumes, prices and terms of each transaction, and any adjustments. These are the essential facts without which it is impossible to verify the accuracy of China's determination, which, as we have indicated above, there is good reason to believe may be flawed.

XI. REQUEST THAT THE PANEL MAKE A SUGGESTION PURSUANT TO ARTICLE 19.1 OF THE DSU

337. The European Union respectfully requests the Panel to make a suggestion pursuant to Article 19.1 of the DSU. Article 19.1 of the DSU provides that the panel or Appellate Body may suggest ways in which the responding Member could implement the recommendations. Suggestions have been made in several past cases, including anti-dumping cases.[383]

[383] GATT Panel Report, *New Zealand – Finnish Transformers*, para. 4.11; GATT Panel Report (unadopted), *US - Cement*, para. 6.2; GATT Panel Report (unadopted), *US - Swedish Steel*, para. 5.24;

338. The European Union submits that, having reviewed the submissions of the Parties and Third Parties, and indeed already by the time of the first meeting with the Parties, it will be clear to the Panel that the measure at issue is inconsistent with various provisions of the Anti-Dumping Agreement, and for the same or very similar reasons that have been given in other recent cases concerning Chinese anti-dumping measures. There is no justification for China to keep repeatedly adopting anti-dumping measures that are vitiated with the same types of inconsistencies, obliging other Members as well as the WTO dispute settlement system to expend considerable time and resources on obtaining and handing down repetitive rulings to that effect, whilst trade protected by the WTO Agreement is unlawfully restricted and the European Union and Japan and their exporters suffer unlawful injury. The European Union will therefore be seeking steps to ensure that this latest WTO inconsistent measure is rectified and eventually dis-applied "immediately" (to borrow the language of Article 21.3 of the DSU) and in any event as soon as possible. Accordingly, the European Union respectfully requests the Panel to formulate suggestions to that effect, and reserves the right to request or re-iterate specific suggestions as the proceedings go forward.

XII. CONCLUSION

339. For the reasons set forth in this submission, the European Union respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Anti-Dumping Agreement. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement, and make appropriate suggestions to that effect.

Panel Report – *Guatemala – Cement I*, para. 8.6; Panel Report – *Guatemala Cement II*, para. 9.6; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.6-8.7; Panel Report, *EC-Bananas III (Article 21.5 – Ecuador)*, paras. 6.154-6.157.

James Flett
Agent for the Commission and the European Union
Legal Service
European Commission

October 1, 2013

Re: China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (DS454/DS460)

Dear Mr. Flett,

On behalf of Salzgitter Mannesmann Stainless Tubes GmbH ("SMST") and all its affiliates involved in the Chinese domestic anti-dumping proceeding concerning High Performance Stainless Steel Seamless Tubes from the European Union and Japan, I hereby authorise the submission in the WTO disputes DS454 and DS460, in accordance with the Dispute Settlement Understanding and the Joint Working Procedures of the Panels, including the BCI procedures, of any confidential information submitted by or on behalf of SMST or its said affiliates in the course of the said anti-dumping proceeding.

Sincerely,

Christophe Le Rigoleur
Managing Director / Geschäftsführer