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**CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON
HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST")
FROM JAPAN**

AB-2015-4

**CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON
HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST")
FROM THE EUROPEAN UNION**

AB-2015-5

Reports of the Appellate Body

Note:

The Appellate Body is issuing these Reports in the form of a single document constituting two separate Appellate Body Reports: WT/DS454/AB/R; and WT/DS460/AB/R. The cover page, preliminary pages, sections 1-4, 5.3, the subsections of section 5.5 that are not attributed below to only DS454 or DS460, and the annexes contained in the Addendum (document WT/DS454/AB/R/Add.1, WT/DS460/AB/R/Add.1) are common to both Reports. The page header throughout the document bears the two document symbols WT/DS454/AB/R and WT/DS460/AB/R, with the following exceptions: sections 5.5.2.1 and 5.5.3.1.2, which bear the document symbol for the Appellate Body Report WT/DS454/AB/R; and sections 5.1, 5.2, 5.4, 5.5.1.2, and 5.6, which bear the document symbol for the Appellate Body Report WT/DS460/AB/R. Finally, Section 6, on pages JPN-103 and JPN-104, bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS454/AB/R; and Section 6, on pages EU-105 to EU-107, bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS460/AB/R.

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ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
BCI Procedures	Additional Working Procedures of the Panels Concerning Business Confidential Information (contained in Annex A-2 to the Panel Reports)
complainants	Japan and the European Union
COP	cost of production
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU Panel Report	Panel Report, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS460/R, Add.1 and Corr.1
European Union's panel request	Request for the Establishment of a Panel by the European Union, WT/DS460/4, 16 August 2013
GAAP	generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
HP-SSST	high-performance stainless steel seamless tubes
Japan Panel Report	Panel Report, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan</i> , WT/DS454/R and Add.1
Japan's panel request	Request for the Establishment of a Panel by Japan, WT/DS454/4, 11 April 2013
Kobe	Kobe Special Tube Co., Ltd.
MOFCOM	Ministry of Commerce of the People's Republic of China
Panel Reports	Japan Panel Report and EU Panel Report
petitioners	jointly, Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd. and Changshu Walsin Specialty Steel Co., Ltd.
POI	period of investigation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SG&A	administrative, selling and general
SMI	Sumitomo Metal Industries, Ltd.
SMST	Salzgitter Mannesmann Stainless Tubes
Tubacex	Tubacex Tubos Inoxidables, S.A.
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

PANEL EXHIBITS CITED IN THESE REPORTS

Exhibit	Abbreviation (if any)	Description
CHN-5-EN (BCI) EU-10 (BCI)	SMST's Dumping Questionnaire Response	Excerpts of the narrative of SMST's response to MOFCOM's dumping questionnaire of 21 November 2011
CHN-10-CH (BCI) CHN-10-EN (BCI) EU-14 (BCI)	SMST's Supplemental Dumping Questionnaire Response	Excerpts of the narrative of SMST's response to MOFCOM's supplemental dumping questionnaire of 20 February 2012
CHN-11-EN	MOFCOM's Verification Notification to SMST	Notification from MOFCOM to SMST concerning relevant issues for the on-site verification of 3 May 2012
CHN-12-EN (BCI)	MOFCOM's Preliminary Dumping Disclosure to SMST	Letter dated 9 May 2012 from MOFCOM to SMST concerning Disclosure of Basic Facts relied upon in the Dumping Part of the Preliminary Determination concerning Certain High-performance Stainless Steel Seamless Tubes
CHN-16-EN (BCI)		Objections as to the accuracy of English translations of exhibits attached to the first written submissions of Japan and/or the European Union to the Panel
CHN-19-EN (BCI)		Updated English version of Table 6 annexed to SMST's Dumping Questionnaire Response
CHN-20-CH (BCI) CHN-20-EN (BCI)	SMI's Injury Questionnaire Response	Extract (question 8) of the narrative of SMI's response to MOFCOM's injury questionnaire
EU-23-EN	MOFCOM's Verification Disclosure to SMST	MOFCOM, High-performance Stainless Steel Seamless Tubes Antidumping Investigation – Disclosure of Basic Verification Facts, 25 June 2012
EU-25-CH EU-25-EN	MOFCOM's Final Dumping Disclosure to SMST	MOFCOM, High-performance Stainless Steel Seamless Tubes Antidumping Investigation – Dumping Margin Calculation Disclosure before Final Determination, 26 September 2012
EU-27-CH EU-27-EN	MOFCOM's Final Dumping Disclosure to the EU	Annex, Government Disclosure prior to the Anti-Dumping Final Determination on Certain High-performance Stainless Steel Seamless Tubes, 26 September 2012
EU-28-CH (BCI) EU-28-EN (BCI)	SMST's Comments on Final Dumping Disclosure	Comments of the SMST on SMST Final Dumping Disclosure of 8 October 2012
JPN-1-CH JPN-1-EN EU-29	MOFCOM's Final Determination Notice	MOFCOM, Announcement No. 72 of 2012 on the Final Ruling of the Anti-dumping Case against Imports of Certain High-performance Stainless Steel Seamless Tubes Originated in the EU and Japan, 8 November 2012
JPN-2-CH JPN-2-EN EU-30	MOFCOM's Final Determination	Final Determination Notice, Appendix: Final Determination in the Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes from the EU and Japan
JPN-3-CH JPN-3-EN EU-1	Petition by the PRC Industry	Petition by the PRC Industry of Certain High-performance Stainless Steel Seamless Tubes for Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes Originating in Japan and the EU, 15 July 2011
JPN-6-CH JPN-6-EN EU-17	MOFCOM's Preliminary Determination Notice	MOFCOM, Announcement No. 21 of 2012 on Releasing the Preliminary Ruling on Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes from the EU and Japan, 8 May 2012

Exhibit	Abbreviation (if any)	Description
JPN-7-CH JPN-7-EN EU-18	MOFCOM's Preliminary Determination	Preliminary Determination Notice, Appendix: Preliminary Determination in the Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes from the EU and Japan
JPN-18 (BCI)		Letter dated 9 May 2012 from MOFCOM to SMI on the Disclosure of Basic Facts upon Which the Preliminary Dumping Determination in the Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes is Based
JPN-20 (BCI)		Letter 26 September 2012 from MOFCOM to SMI on the Disclosure of Basic Facts upon Which the Final Dumping Determination in the Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes is Based
JPN-23-EN EU-24	MOFCOM's Injury Disclosure	MOFCOM, Notice on Information Disclosure Concerning Industry Injury Investigation in the Anti-dumping Investigation on Imports of Certain High-performance Stainless Steel Seamless Tubes from the EU and Japan, 7 August 2012
JPN-25-EN		Request for Considering Public Interest in the Anti-Dumping Investigation on Certain High-Performance Stainless Steel Seamless Tubes by Sumitomo Metal Industries, Ltd. and Kobe Special Tube Co., Ltd., February 2012
JPN-29 EU-32		Translation exhibit – Comments on Panel Exhibit CHN-16-EN (BCI)

CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041

Short Title	Full Case Title and Citation
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, circulated to WTO Members 13 February 2015 [appeal in progress]
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>China – X-Ray Equipment</i>	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9

Short Title	Full Case Title and Citation
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, p. 85
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Panel Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3

Short Title	Full Case Title and Citation
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION
APPELLATE BODY

China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan (DS454)

AB-2015-4

China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union (DS460)

AB-2015-5

Japan,
*Appellant*¹/*Appellee*²/*Third Participant*³
China,
*Appellant*⁴/*Other Appellant*⁵/*Appellee*⁶
European Union,
*Other Appellant*⁷/*Appellee*⁸/*Third Participant*⁹

Appellate Body Division:

Van den Bossche, Presiding Member
Graham, Member
Ramírez-Hernández, Member

India, *Third Participant*
Korea, *Third Participant*
Russia, *Third Participant*
Saudi Arabia, *Third Participant*
Turkey, *Third Participant*
United States, *Third Participant*

1 INTRODUCTION

1.1. Japan and China each appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R¹⁰ (Japan Panel Report); and China and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R¹¹ (EU Panel Report).¹²

1.2. On 24 May 2013 and 30 August 2013, respectively, two panels were established to consider complaints by Japan¹³ and the European Union¹⁴ (the complainants) with respect to China's

¹ In DS454 only.

² In DS454 only.

³ In DS460 only.

⁴ In DS460 only.

⁵ In DS454 only.

⁶ In DS454 and DS460.

⁷ In DS460 only.

⁸ In DS460 only.

⁹ In DS454 only.

¹⁰ And Addendum thereto, WT/DS454/R/Add.1, 13 February 2015.

¹¹ And Corr. 1 and Addendum thereto, WT/DS460/R/Add.1, 13 February 2015.

¹² The Panel issued its findings in the form of a single document containing two separate reports. The cover page, preliminary pages, descriptive part, sections 1-6, 7.1-7.2, and 7.5-7.11, and the Annexes contained in the Addendum are common to both Panel Reports. Section 8.1 relates to the Japan Panel Report WT/DS454/R only; and Sections 7.3-7.4 and 8.2 relate to the EU Panel Report WT/DS460/R only. We refer to these two reports collectively as the "Panel Reports".

¹³ Request for the Establishment of a Panel by Japan, WT/DS454/4, 11 April 2013 (Japan's panel request).

¹⁴ Request for the Establishment of a Panel by the European Union, WT/DS460/4, 16 August 2013 (European Union's panel request).

measures imposing anti-dumping duties on imports of certain high-performance stainless steel seamless tubes (HP-SSST) from Japan and the European Union.¹⁵

1.3. On 27 September 2013, after consultation with the parties, the Panel¹⁶ adopted additional working procedures concerning business confidential information (BCI Procedures). Following a request for a preliminary ruling by the European Union, the Panel introduced modifications to the BCI Procedures on 22 May 2014.¹⁷

1.4. China's measures at issue in these disputes are set forth in the Preliminary Determination¹⁸ and the Final Determination¹⁹ of the Ministry of Commerce of the People's Republic of China (MOFCOM), including any annexes and amendments thereto.²⁰ MOFCOM identified the scope of the products under investigation as imports of certain HP-SSST from the European Union and Japan.²¹ HP-SSST is mainly used in the manufacture of pressurized components such as superheaters and reheaters of supercritical and ultra-supercritical boilers.²² MOFCOM found that there are three main types or grades of HP-SSST, which the Panel referred to as Grade A, Grade B, and Grade C, respectively.²³

1.5. Both complainants requested the Panel to find that China, in the conduct of the anti-dumping investigation at issue, acted inconsistently with several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), as well as Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994). In particular, they requested the Panel to find that China acted contrary to the provisions of the Anti-Dumping Agreement in its: (i) determination of injury; (ii) treatment of certain confidential information provided by the applicants; (iii) alleged failure to disclose certain essential facts; (iv) application of provisional measures; and (v) alleged provision of inadequate information in its Final Determination Notice. In addition, the European Union requested the Panel to find that China acted inconsistently with the Anti-Dumping Agreement in arriving at its determination of dumping.²⁴

1.6. The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 13 February 2015.²⁵ In the Japan Panel Report, the Panel concluded that MOFCOM's determination of injury is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, for the following reasons:

- a. MOFCOM failed to account properly for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement;

¹⁵ On 29 July 2013, the Director-General composed the Panel to hear Japan's complaint in DS454. On 11 September 2013, the European Union and China agreed to compose the Panel to hear the European Union's complaint in DS460 with the same persons hearing Japan's complaint. (Panel Reports, para. 1.5)

¹⁶ For ease of reference, we refer to the Panels in DS454 and DS460 collectively as the "Panel".

¹⁷ Panel Reports, para. 1.10 and Annex A-2.

¹⁸ Preliminary Determination Notice, 8 May 2012 (Panel Exhibits JPN-6-CH and JPN-6-EN, and EU-17); and Preliminary Determination, 8 May 2012 (Panel Exhibits JPN-7-CH and JPN-7-EN, and EU-18).

¹⁹ Final Determination Notice, 8 November 2012 (Panel Exhibits JPN-1-CH and JPN-1-EN, and EU-29); and Final Determination, 8 November 2012 (Panel Exhibits JPN-2-CH and JPN-2-EN, and EU-30).

²⁰ Panel Reports, paras. 1.1 and 2.1. The period of investigation (POI) for the determination of dumping was from 1 July 2010 to 30 June 2011, and the POI for the determination of injury was from 1 January 2008 to 30 June 2011. (MOFCOM's Preliminary Determination (Panel Exhibits JPN-7-EN and EU-18), internal p. 2)

²¹ MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 1.

²² MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 19-20.

²³ See Petition by the PRC Industry (Panel Exhibits JPN-3-CH and JPN-3-EN, and EU-1), internal pp. 9-10; and MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30) internal pp. 23-28. Japan argued before the Panel that Grade A is the least expensive and lowest grade product; Grade B is in the middle, in terms of both price and grade; and Grade C is the most expensive and highest grade product. Due to differences in the chemical and mechanical properties of these products, manufacturers of ultra-supercritical boilers rely on Grades B and C, while Grade A is used mainly in supercritical boilers. (Japan's first written submission to the Panel, para. 15)

²⁴ Panel Reports, paras. 3.1-3.6.

²⁵ On 17 September 2015, a correction to a clerical error in para. 8.9 of the EU Panel Report was circulated in document WT/DS454/R/Corr.1, WT/DS460/R/Corr.1.

- b. MOFCOM failed to evaluate properly the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
- c. MOFCOM improperly relied on the market share of subject imports, and on its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and
- d. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.²⁶

1.7. The Panel, however, rejected Japan's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement that:

- a. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and
- b. MOFCOM failed to undertake a segmented analysis and to weigh properly the positive and negative injury factors when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement.²⁷

1.8. The Panel concluded that MOFCOM allowed certain information supplied by the petitioners²⁸ to remain confidential without objectively assessing the "good cause" alleged or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement.²⁹

1.9. The Panel also concluded that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require the petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization of this information was not possible.³⁰

1.10. The Panel found that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose adequately essential facts in connection with:

- a. the methodology used to calculate the margins of dumping for Sumitomo Metal Industries, Ltd. (SMI) and Kobe Special Tube Co., Ltd. (Kobe); and
- b. import prices, domestic prices, and price comparisons considered by MOFCOM in its determination of injury.³¹

1.11. The Panel, however, rejected Japan's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose adequately essential facts in connection with:

- a. the data underlying MOFCOM's determination of dumping in respect of SMI and Kobe; and
- b. the determination and the calculation of the dumping margins for all Japanese companies other than SMI and Kobe.³²

²⁶ Japan Panel Report, para. 8.1.a.

²⁷ Japan Panel Report, para. 8.2.a.

²⁸ Jointly, Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd. and Changshu Walsin Specialty Steel Co., Ltd.

²⁹ Japan Panel Report, para. 8.1.b.

³⁰ Japan Panel Report, para. 8.1.c.

³¹ Japan Panel Report, para. 8.1.d.

³² Japan Panel Report, para. 8.2.c.

1.12. The Panel also rejected Japan's claim that MOFCOM's reliance on facts available to calculate the dumping margin for all Japanese companies other than SMI and Kobe is inconsistent with Article 6.8 and paragraph 1 of Annex II to the Anti-Dumping Agreement.³³

1.13. In the EU Panel Report, the Panel found that the European Union's claim under Article 2.2 of the Anti-Dumping Agreement fell outside the Panel's terms of reference.³⁴ The Panel also found that the European Union's claims under Article 2.2.1.1 of the Anti-Dumping Agreement – pertaining to MOFCOM's use of data that: (i) allegedly were not in accordance with generally accepted accounting principles (GAAP); (ii) did not reasonably reflect the costs associated with the product under consideration; and (iii) were not historically utilized by Salzgitter Mannesmann Stainless Tubes (SMST) – fell outside the Panel's terms of reference.³⁵

1.14. Turning to the European Union's claims that were within the Panel's terms of reference, the Panel concluded that:

- a. China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an amount for administrative, selling and general (SG&A) costs for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product³⁶; consequently, the Panel did not consider it necessary to rule on the European Union's claims that China acted inconsistently with Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement³⁷;
- b. China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because MOFCOM failed to address SMST's request for an adjustment to ensure a fair comparison between the export price and the normal value for Grade C HP-SSST³⁸;
- c. China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement because MOFCOM rejected SMST's request for rectification only on the basis that it was not provided prior to the verification visit³⁹; and
- d. MOFCOM's determination of injury is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because:
 - i. MOFCOM failed to account properly for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
 - ii. MOFCOM failed to evaluate properly the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
 - iii. MOFCOM improperly relied on the market share of subject imports, and on its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and
 - iv. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁴⁰

³³ Japan Panel Report, para. 8.2.b. The Panel made additional findings of inconsistency under Articles 7.4, 12.2, and 12.2.2 of the Anti-Dumping Agreement (Japan Panel Report, paras. 8.1.e, 8.1.f, 8.2.d, and 8.3), and consequential findings of inconsistency under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 (Japan Panel Report, para. 8.1.g). None of these findings have been appealed.

³⁴ EU Panel Report, para. 8.9, as amended in document WT/DS454/R/Corr.1, WT/DS460/R/Corr.1.

³⁵ EU Panel Report, para. 8.9.

³⁶ EU Panel Report, para. 8.6.a.

³⁷ EU Panel Report, para. 8.8.

³⁸ EU Panel Report, para. 8.6.b.

³⁹ EU Panel Report, para. 8.6.c.

⁴⁰ EU Panel Report, para. 8.6.d.

1.15. The Panel, however, rejected the European Union's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement that:

- a. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and
- b. MOFCOM failed to undertake a segmented analysis and to weigh properly the positive and negative injury factors when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement.⁴¹

1.16. The Panel also rejected the European Union's claims that China acted inconsistently with Article 6.8 and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement by applying facts available in respect of certain information that SMST sought to rectify at the verification.⁴² Likewise, the Panel rejected the European Union's claims that China's reliance on facts available to calculate the dumping margin for all EU companies other than SMST and Tubacex Tubos Inoxidables, S.A. (Tubacex) is inconsistent with Article 6.8 and paragraph 1 of Annex II to the Anti-Dumping Agreement.⁴³

1.17. The Panel concluded that MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing the "good cause" alleged or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement.⁴⁴

1.18. Similarly, the Panel found that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require the petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization of that information was not possible.⁴⁵

1.19. The Panel also concluded that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose adequately essential facts in connection with:

- a. the methodology used to calculate the margins of dumping for SMST and Tubacex; and
- b. import prices, domestic prices, and price comparisons considered by MOFCOM in its determination of injury.⁴⁶

1.20. The Panel rejected the European Union's claims that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose adequately essential facts in connection with:

- a. the data underlying MOFCOM's determination of dumping in respect of SMST and Tubacex; and
- b. the determination and the calculation of the dumping margins for all EU companies other than SMST and Tubacex.⁴⁷

1.21. In both the Japan and EU Panel Reports, the Panel concluded that, pursuant to Article 3.8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), to the extent that China acted inconsistently with certain provisions of the Anti-Dumping Agreement, China nullified or impaired benefits accruing to Japan and the European Union under that

⁴¹ EU Panel Report, para. 8.7.b.

⁴² EU Panel Report, para. 8.7.a.

⁴³ EU Panel Report, para. 8.7.c.

⁴⁴ EU Panel Report, para. 8.6.e.

⁴⁵ EU Panel Report, para. 8.6.f.

⁴⁶ EU Panel Report, para. 8.6.g.

⁴⁷ EU Panel Report, para. 8.7.d. The Panel made additional findings of inconsistency under Articles 7.4, 12.2, and 12.2.2 of the Anti-Dumping Agreement (EU Panel Report, paras. 8.6.h, 8.6.i, 8.7.e, and 8.8), and consequential findings of inconsistency under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 (EU Panel Report, para. 8.6.j). None of these findings have been appealed.

Agreement.⁴⁸ Accordingly, pursuant to Article 19.1 of the DSU, the Panel recommended that China bring its measures into conformity with its obligations under the Anti-Dumping Agreement.⁴⁹

1.22. On 20 May 2015, Japan notified the Dispute Settlement Body (DSB) of its intention to appeal⁵⁰ certain issues of law covered in the Japan Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission.⁵¹ On 26 May 2015, China notified the DSB of its intention to appeal⁵² certain issues of law covered in the Japan Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and an other appellant's submission.⁵³

1.23. On 20 May 2015, China notified the DSB of its intention to appeal⁵⁴ certain issues of law covered in the EU Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission.⁵⁵ On 26 May 2015, the European Union notified the DSB of its intention to appeal⁵⁶ certain issues of law covered in the EU Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and an other appellant's submission.⁵⁷

1.24. By letter dated 28 May 2015, the Appellate Body informed the participants and third parties that it intended to consolidate the appellate proceedings in these disputes, and gave them an opportunity to comment. No objections were received. By letter dated 1 June 2015, the Appellate Body informed the participants and third parties that, in the interests of "fairness and orderly procedure", as referred to in Rule 16(1) of the Working Procedures for Appellate Review⁵⁸ (Working Procedures), the appellate proceedings in respect of the aforementioned appeals would be consolidated due to the significant overlap in the content of these disputes for which the appeals were filed on the same date. A single Appellate Body Division was selected to hear both appeals, and a single oral hearing was held by the Division.

1.25. On 8 June 2015, Japan, the European Union⁵⁹, and China each filed an appellee's submission.⁶⁰

1.26. On 10 June 2015, the United States filed a third participant's submission.⁶¹ On the same day, India, Korea, Russia, Saudi Arabia, and Turkey each notified its intention to appear at the oral hearing as a third participant.⁶²

⁴⁸ Japan Panel Report, para. 8.4; EU Panel Report, para. 8.10.

⁴⁹ Japan Panel Report, para. 8.5; EU Panel Report, para. 8.11.

⁵⁰ Pursuant to Articles 16.4 and 17 of the DSU.

⁵¹ Pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010 (Working Procedures).

⁵² Pursuant to Articles 16.4 and 17 of the DSU.

⁵³ Pursuant to Rule 23 of the Working Procedures.

⁵⁴ Pursuant to Articles 16.4 and 17 of the DSU.

⁵⁵ Pursuant to Rules 20 and 21, respectively, of the Working Procedures.

⁵⁶ Pursuant to Articles 16.4 and 17 of the DSU.

⁵⁷ Pursuant to Rule 23 of the Working Procedures.

⁵⁸ WT/AB/WP/6, 16 August 2010.

⁵⁹ In its appellee's submission, the European Union referred to Article 5 of the DSU that provides that good offices, conciliation, or mediation may be requested and take place "at any time". The European Union suggested that a "procedural possibility" that it could envisage would be to invite informally the participants to "indicate whether or not they would be prepared to voluntarily participate in a short informal meeting". For the European Union, the purpose of the meeting would be to ascertain whether the parties would be able to reach an agreement concerning the Panel's findings under Article 2.2.2 of the Anti-Dumping Agreement, "or indeed any other matter pending in this appeal". (European Union's appellee's submission, para. 215) At the oral hearing, China was given an opportunity to comment.

⁶⁰ Pursuant to Rules 22 and 23(4) of the Working Procedures.

⁶¹ Pursuant to Rule 24(1) of the Working Procedures.

⁶² Pursuant to Rule 24(2) of the Working Procedures.

1.27. On 15 June 2015, in response to a letter from the Division specifying the dates of the oral hearing in these proceedings, Japan sent a letter to the Division indicating that it had concerns regarding the decision to hold the oral hearing on days 71-72 of these proceedings.⁶³ On 16 June 2015, the Division received a letter from the European Union, in response to Japan's letter, stating that the European Union assumed that, pursuant to Article 17.5 of the DSU, the Appellate Body would inform the DSB, in due course, of the reasons for the delay.⁶⁴ On 17 June 2015, the Appellate Body received a communication from China indicating that it did not have any substantive comments on the procedures adopted by the Division in these appeals. On the same date, the Appellate Body received a letter from India indicating that it did not consider that more specific explanations regarding the Appellate Body's timetable were necessary.

1.28. By letter dated 18 June 2015, the Division hearing these appeals indicated that it would inform the DSB of the reasons for the delay by letter within two months of the date of the filing of these appeals. The Division added that, in that letter, or as soon as possible thereafter, it would provide an estimated date of circulation of the Appellate Body Reports in these disputes.

1.29. By letter dated 19 July 2015, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Reports by the end of the 60-day period, or within the 90-day timeframe provided for in Article 17.5 of the DSU, due to the number and complexity of the issues raised in these appeals and parallel proceedings, scheduling issues arising from the overlap in the composition of the Divisions hearing the different appeals, and shortage of staff in the Appellate Body Secretariat. He further indicated that, due to a pending request for a change in the working schedule in the parallel appellate proceedings in DS381, the Appellate Body was not, at that time, in a position to inform the DSB of the estimated date of circulation of the Appellate Body Reports in DS454 and DS460. The Chair indicated, however, that the Appellate Body expected that matter to be resolved soon and that the Appellate Body would then inform the DSB of the estimated date of circulation.

1.30. Subsequently, after the working schedule in DS381 was decided, the Chair of the Appellate Body informed the Chair of the DSB, by letter dated 28 July 2015, that the Appellate Body Reports in these appeals would be circulated no later than 14 October 2015.

1.31. The oral hearing in these appeals was held on 30-31 July 2015. The participants and two third participants (Turkey and the United States) made oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing these appeals.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.⁶⁵ The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to these Reports, WT/DS454/AB/R/Add.1, WT/DS460/AB/R/Add.1.

⁶³ Japan explained that, given the procedural history of these disputes and current workload of the Appellate Body, Japan was of the view that the appellate proceedings should not be further delayed. Japan requested the Appellate Body to provide the participants and third participants with the reasons for the eventual delay in the circulation of the Appellate Body Reports in these proceedings, together with an estimate of the period within which it would circulate its Reports.

⁶⁴ The European Union clarified that it did not seek from the Appellate Body any further specific explanations regarding the timetable for the above appeal proceedings. The European Union stated that it was confident that the Appellate Body would do what it could to comply with all the provisions of the DSU, including Article 17.5, taking into account the resource constraints upon it.

⁶⁵ Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the United States, as third participant, are reflected in the executive summary of its written submission provided to the Appellate Body⁶⁶, contained in Annex C of the Addendum to these Reports, WT/DS454/AB/R/Add.1, WT/DS460/AB/R/Add.1.

4 ISSUES RAISED IN THESE APPEALS

4.1. The following issues are raised in these appeals:

- a. with respect to the Panel's findings regarding Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement:
 - i. whether the Panel erred in finding that the European Union's panel request, as it relates to Articles 2.2.1 and 2.2.2, complies with the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly and, consequently, in finding that the European Union's claims under these provisions were within the Panel's terms of reference (raised in DS460 by China);
 - ii. whether the Panel erred in its interpretation and application of Article 2.2.2 in finding that China failed to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product (raised in DS460 by China); and
 - iii. whether, in reaching its finding under Article 2.2.2, the Panel acted inconsistently with its obligations under Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement (raised in DS460 by China);
- b. whether the Panel erred in finding that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification of certain information only on the basis that it was not provided prior to verification (raised in DS460 by the European Union);
- c. with respect to the Panel's finding that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement:
 - i. whether the Panel erred in its interpretation and application of Article 6.5 in finding that China acted inconsistently with that provision because MOFCOM permitted the full text of the reports in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012, to remain confidential without objectively assessing the petitioners' showing of "good cause" (raised in DS454 and DS460 by China); and
 - ii. whether the Panel applied an erroneous standard of review and failed to make an objective assessment of the facts contrary to the requirements of Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement (raised in DS454 and DS460 by China);
- d. with respect to the Panel's findings under Article 6.9 of the Anti-Dumping Agreement:
 - i. whether the Panel erred in its interpretation and application of Article 6.9 in rejecting the European Union's claim that China acted inconsistently with that provision because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex (raised in DS460 by the European Union); and

⁶⁶ Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

- ii. whether the Appellate Body can complete the legal analysis and find that China acted inconsistently with Article 6.9 because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex (raised in DS460 by the European Union);
- e. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement:
 - i. whether the Panel erred in its interpretation of Article 3.2 in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may consider simply whether dumped imports sell at lower prices than comparable domestic products (raised in DS454 by Japan and in DS460 by the European Union);
 - ii. whether the Panel erred by rejecting Japan's and the European Union's claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices (raised in DS454 by Japan and in DS460 by the European Union);
 - iii. whether the Appellate Body can complete the legal analysis and find that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports from Japan, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 (raised in DS454 by Japan and in DS460 by the European Union); and
 - iv. whether the Panel erred by rejecting the European Union's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by improperly extending its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A (raised in DS460 by the European Union);
- f. with respect to the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement:
 - i. whether the Panel erred in finding that Japan's claim, that MOFCOM failed to examine whether dumped imports provided explanatory force for the state of the domestic industry, fell outside the Panel's terms of reference (raised in DS454 by Japan); and
 - ii. whether the Panel erred in rejecting Japan's and the European Union's claims that MOFCOM acted inconsistently with Articles 3.1 and 3.4 because MOFCOM was required to, but did not, undertake a segmented impact analysis (raised in DS454 by Japan and in DS460 by the European Union);
- g. with respect to the Panel's finding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement:
 - i. whether, in reaching its finding that MOFCOM improperly relied on the market share of dumped imports in determining a causal link between dumped imports and injury to the domestic industry, the Panel acted inconsistently with Article 6.2 of the DSU by addressing a claim by Japan that was outside the Panel's terms of reference (raised in DS454 by China);
 - ii. whether, in reaching its finding that MOFCOM improperly relied on the market share of dumped imports in determining a causal link between dumped imports and injury to the domestic industry, the Panel acted inconsistently with Article 11 of the DSU because it ruled on a matter that was not before it, or, in the alternative, made the case for the complainant (raised in DS454 and DS460 by China);

- iii. whether the Panel erred in finding that MOFCOM improperly relied on the market share of dumped imports in determining a causal link between dumped imports and injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST (raised in DS454 and DS460 by China);
- iv. whether the Panel erred in finding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports (raised in DS454 and DS460 by China); and
- v. whether the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had not advanced independent claims concerning MOFCOM's price effects and impact analyses, under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis (raised in DS454 by Japan and in DS460 by the European Union); and
- h. with respect to the Panel's designation of business confidential information (BCI) and its adoption of BCI Procedures, whether the Panel erred in its interpretation and application of Articles 18.2 and 13.1 of the DSU and Articles 17.7 and 6.5 of the Anti-Dumping Agreement, and, in particular, in finding that, in the context of a dispute brought under the Anti-Dumping Agreement, the phrase "confidential information" in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5, and which is then provided to a dispute settlement panel pursuant to Article 17.7 (raised in DS460 by the European Union).

5 ANALYSIS OF THE APPELLATE BODY

5.1 Data for SG&A amounts – Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement

5.1. We begin with China's claims as they relate to the Panel's assessment of MOFCOM's determination of dumping for SMST, one of the EU companies that were investigated. We recall, in this regard, that MOFCOM calculated the margin of dumping for a particular type of HP-SSST, referred to in the Panel Reports as Grade B, on the basis of a comparison between SMST's export prices to China and a constructed "normal value"⁶⁷, that is, the sum of: (i) the cost of production (COP) in the country of origin; and (ii) amounts for SG&A costs and profits. With respect to the amounts for SG&A costs and profits, the chapeau of Article 2.2.2 of the Anti-Dumping Agreement states that these "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."⁶⁸

5.2. We examine, first, China's claims that the Panel erred in concluding that the European Union's panel request, as it relates to Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement, provides a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU. Thereafter, we examine China's claim that the Panel erred in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement, and acted inconsistently with its duties under Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement when it found that MOFCOM had failed to determine an amount for SG&A costs for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

5.1.1 The Panel's terms of reference

5.1.1.1 The Panel's findings

5.3. The European Union alleged in its panel request that China acted inconsistently with:

Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement because China did not determine the amounts for [SG&A] costs and for profits on the basis of records and actual data by the exporters or producers under investigation. In particular, the amounts for [SG&A] costs and for profits as constructed by China do not reflect the records and the actual data of the exporters or producers under investigation.⁶⁹

5.4. In its first written submission to the Panel, the European Union relied on this language in its panel request as the basis for its claims that China acted inconsistently with:

- Article 2.2 of the Anti-Dumping Agreement because the unrepresentative and rejected data used by MOFCOM did not permit a proper comparison, and the amount for SG&A was not reasonable;
- Article 2.2.1 of the Anti-Dumping Agreement because MOFCOM used free samples, which by definition are not sales in the ordinary course of trade;
- Article 2.2.1.1 of the Anti-Dumping Agreement because MOFCOM used unrepresentative and rejected data that: (i) did not correspond to the records kept by SMST; (ii) were not in accordance with generally accepted accounting principles (GAAP); (iii) did not reasonably reflect the costs associated with the product under consideration; and (iv) had not been historically utilized by SMST; and

⁶⁷ We recall that Article 2.1 of the Anti-Dumping Agreement identifies a product as "dumped" where the product is introduced into the commerce of another country at less than its "normal value". "Normal value" is understood by that provision to be the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

⁶⁸ Article 2.2.1.1 of the Anti-Dumping Agreement stipulates that "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."

⁶⁹ European Union's panel request, para. 1.

- Article 2.2.2 of the Anti-Dumping Agreement because MOFCOM failed to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.⁷⁰

5.5. China argued that several of these claims were outside the Panel's terms of reference because the European Union had not complied with the requirements under Article 6.2 of the DSU with respect to those claims. In making this argument, China submitted that the European Union had presented two sets of claims in its first written submission: (i) main claims under Article 2.2.2; and (ii) "additional/support claims" under Articles 2.2, 2.2.1, and 2.2.1.1 in support of its main claims.

5.6. With regard to the European Union's "main claims", China accepted that "the European Union's claim under Article 2.2.2 that the SG&A amount was not based on actual data falls within the Panel's terms of reference."⁷¹ However, China contended that "the European Union's panel request does not include a claim under Article 2.2.2 that the SG&A amount did not pertain to production and sales in the ordinary course of trade."⁷² With regard to what it described as the European Union's "additional claims", China accepted that "the European Union's claim under Article 2.2.1.1 that data used did not correspond to the records kept by SMST falls within the Panel's terms of reference."⁷³ However, China maintained that all remaining "additional claims" under Articles 2.2, 2.2.1, and 2.2.1.1 were outside the scope of the European Union's panel request.⁷⁴ According to China, "such non-inclusion" was "not a matter of a lack of any clarity or precision in the European Union's request for establishment of a panel".⁷⁵ Rather, China asserted that the European Union "clearly specified the claims included in its request for establishment", and "expressly limited" its claims under Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 to the claims that the SG&A amounts used by MOFCOM to construct normal value did not reflect the records kept by SMST, and were not based on "actual data".⁷⁶ China contended that the use of the term "in particular" in the European Union's panel request clearly defined the claims raised by the European Union.⁷⁷

5.7. Citing Appellate Body jurisprudence, the Panel recalled that, "when 'a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged'"⁷⁸, and that "compliance with the requirements of Article 6.2 [of the DSU] must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."⁷⁹ The Panel observed that the mere fact that the European Union referred to a particular provision in its panel request, allegedly without specifying the particular obligation being

⁷⁰ See EU Panel Report, para. 7.32 (referring to European Union's first written submission to the Panel, paras. 167, 170, and 172-174).

⁷¹ EU Panel Report, para. 7.39 (referring to China's first written submission to the Panel, paras. 51-53 and 71; second written submission to the Panel, para. 5; and opening statement at the second Panel meeting, para. 51).

⁷² EU Panel Report, para. 7.39 (referring to China's first written submission to the Panel, paras. 54-55; response to Panel question No. 10, paras. 35 and 38; second written submission to the Panel, paras. 4, 6-7, 18, and 27; and opening statement at the second Panel meeting, paras. 51 and 55-56). China argued that Article 2.2.2 contains multiple obligations. According to China, the "actual data" requirement in Article 2.2.2 is distinct from the requirement relating to data pertaining to sales and production in the ordinary course of trade, which is contained in the same provision. (China's first written submission to the Panel, para. 67; opening statement at the first Panel meeting, paras. 19-21; response to Panel question No. 7, paras. 33-34; second written submission to the Panel, para. 21; opening statement at the second Panel meeting, paras. 52-55; comments on European Union's response to Panel question No. 81, para. 22)

⁷³ EU Panel Report, para. 7.39 (referring to China's first written submission to the Panel, paras. 52, 55, and 71; second written submission to the Panel, para. 5; and opening statement at the second Panel meeting, para. 51).

⁷⁴ EU Panel Report, para. 7.39 (referring to China's first written submission to the Panel, paras. 54-55; second written submission to the Panel, para. 57; and opening statement at the second Panel meeting, para. 51).

⁷⁵ EU Panel Report, para. 7.39.

⁷⁶ EU Panel Report, para. 7.39.

⁷⁷ EU Panel Report, para. 7.39 (referring to China's first written submission to the Panel, para. 65; opening statement at the first Panel meeting, para. 19; second written submission to the Panel, paras. 4-7; and comments on European Union's response to Panel question No. 81, para. 21).

⁷⁸ EU Panel Report, para. 7.47 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220; and referring to Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598).

⁷⁹ EU Panel Report, para. 7.47 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

challenged, did not necessarily mean that the European Union's panel request fails to meet the requirements of Article 6.2 of the DSU. The Panel noted that this was "because the relevant WTO obligations may nevertheless be identifiable from a careful reading of the panel request as a whole."⁸⁰ The Panel proceeded, therefore, to "examine whether a careful reading of the European Union's panel request, including any narrative explanation contained therein, permits a sufficiently clear identification of the legal basis regarding each of the Article 2 claims pursued in the European Union's first written submission."⁸¹

5.8. Regarding the European Union's claim under Article 2.2.1, the Panel described Article 2.2.1 as containing "one single obligation relating to when sales of the like product may be treated as not being in the ordinary course of trade"⁸², and considered that a "reference" to Article 2.2.1 was, therefore, "sufficient to clearly present a problem pertaining to the treatment of below-cost sales".⁸³ The Panel concluded that the European Union's panel request, with respect to the claim under Article 2.2.1 of the Anti-Dumping Agreement, complies with Article 6.2 of the DSU.

5.9. With respect to the European Union's claim under Article 2.2.2, the Panel observed that the European Union's panel request alleges that "China did not determine the [SG&A amounts] on the basis of ... actual data by the exporters or producers under investigation", and recalled that China had accepted that the European Union's claim under Article 2.2.2 relating to "actual data" was properly before the Panel.⁸⁴ Further, the Panel pointed out that the panel request includes a reference to Article 2.2.1 of the Anti-Dumping Agreement. Relying on the text of that provision, which stipulates the conditions under which "sales ... at prices below per unit ... costs of production plus [SG&A costs] may be treated as not being in the ordinary course of trade ... and may be disregarded in determining normal value", the Panel considered that "a reasonably informed reader would understand from the reference to Article 2.2.1 that the European Union also takes issue ... with whether or not SG&A amounts are based on data pertaining to the production and sales in the ordinary course of trade."⁸⁵ Thus, the Panel concluded that the European Union's claim under Article 2.2.2 relating to "actual data pertaining to production and sales in the ordinary course of trade" was within the scope of its terms of reference.⁸⁶

5.1.1.2 The relevant legal standard under Article 6.2 of the DSU

5.10. We begin our analysis by reviewing WTO jurisprudence regarding the requirements of Article 6.2 of the DSU. We then address the specific issues raised by China on appeal.

5.11. Article 6.2 of the DSU reads, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5.12. Article 6.2 of the DSU sets out two principal requirements: (i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.⁸⁷ The requirements specified in Article 6.2 are significant because, "pursuant to Article 7 of the DSU, a panel's terms of reference are governed

⁸⁰ EU Panel Report, para. 7.47 (referring to the preliminary ruling of the panel in *US – Countervailing and Anti-Dumping Measures (China)* dated 7 May 2013, para. 3.35, contained in document WT/DS449/4).

⁸¹ EU Panel Report, para. 7.47. (fn omitted)

⁸² EU Panel Report, para. 7.49.

⁸³ EU Panel Report, para. 7.49.

⁸⁴ EU Panel Report, para. 7.51.

⁸⁵ EU Panel Report, para. 7.51.

⁸⁶ EU Panel Report, para. 7.51. Taking this view, the Panel considered it unnecessary to address the European Union's and China's arguments relating to whether Article 2.2.2 contains multiple obligations. The Panel also rejected China's argument that the European Union's panel request was "expressly limited", by the use of the words "in particular", to the obligation for the SG&A amounts to be based on actual data. (EU Panel Report, fn 108 to para. 7.51)

⁸⁷ In addition, Article 6.2 contains two further requirements, namely, that the request be made in writing and that it indicate whether consultations were held. (See Appellate Body Report, *Korea – Dairy*, para. 120)

by the request for establishment of a panel."⁸⁸ In other words, a panel request delimits the scope of a panel's jurisdiction.

5.13. In assessing whether a panel request is "sufficiently precise" to comply with Article 6.2, panels must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".⁸⁹ While submissions and statements made during the course of the panel proceedings may be consulted in order to confirm the meaning of the words used in the panel request⁹⁰, they cannot "cure" defects in the request.⁹¹ Rather, a panel request must be examined on its face as it existed at the time of filing.⁹² The need to examine the panel request "on its face" and "on the basis of the language used" makes the narrative in the panel request a significant part of the assessment of whether the request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".⁹³

5.14. With respect to this requirement, the Appellate Body has explained that the reference in Article 6.2 of the DSU to the "legal basis of the complaint" refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated⁹⁴; and that it is the *claims*, and not the *arguments*, that are to be set out in a panel request in a way that is sufficient to present the problem clearly.⁹⁵ For the purposes of Article 6.2, a "claim" refers to an allegation that "the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."⁹⁶ "Arguments", by contrast, are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".⁹⁷ The Appellate Body has stated that the "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary" and is a "minimum prerequisite if the legal basis of the complaint is to be presented at all".⁹⁸

5.15. Regarding the requirement that a complainant provide a "brief summary" that is sufficient to "present the problem clearly", the Appellate Body has explained that a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".⁹⁹ Thus, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."¹⁰⁰

5.16. A further element relevant to assessing the consistency of a panel request with Article 6.2 of the DSU is whether it complies with the due process objective in that provision of notifying the respondent and third parties of the nature of the complainant's case.¹⁰¹

⁸⁸ Appellate Body Report, *US – Carbon Steel*, para. 124.

⁸⁹ See Appellate Body Report, *EC – Fasteners (China)*, para. 562.

⁹⁰ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁹¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127).

⁹² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787.

⁹³ See Appellate Body Reports, *China – Raw Materials*, paras. 230-232.

⁹⁴ See Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

⁹⁵ See Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

⁹⁶ Appellate Body Report, *Korea – Dairy*, para. 139.

⁹⁷ Appellate Body Report, *Korea – Dairy*, para. 139.

⁹⁸ Appellate Body Report, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, fn 21 at p. 22, DSR 1997:1, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89 and 92-93).

⁹⁹ Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (both quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

¹⁰⁰ Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *Korea – Dairy*, para. 124); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

¹⁰¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Report, *US – Carbon Steel*, para. 126, in turn referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186). See also Appellate Body Reports, *EC – Chicken Cuts*, para. 155; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

5.1.1.3 Whether the European Union's claims under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement were within the scope of the Panel's terms of reference

5.17. China contends, as it did before the Panel, that the European Union's panel request was expressly limited to two claims: (i) that MOFCOM did not determine SG&A amounts and profits *on the basis of the records* of the exporters or producers; and (ii) that MOFCOM did not determine SG&A amounts and profits on the basis of the *actual data* of the exporters or producers.¹⁰² For China, this was clear, given that the European Union alleged in its panel request that China acted inconsistently with the identified provisions of the Anti-Dumping Agreement "because" China did not determine SG&A amounts "on the basis of records and actual data by the exporters or producers under investigation".¹⁰³ China adds that the use of the term "in particular", in the second sentence of paragraph 1 of the European Union's panel request, further defines the claims raised by the European Union.¹⁰⁴

5.18. The European Union counters that it did not expressly limit its panel request through the use of the term "because", but that this term was simply used to introduce a brief summary of the legal basis of the complaint.¹⁰⁵ With respect to the expression "in particular", the European Union argues that the Panel correctly found that this language served to highlight that the European Union's claims under the provisions at issue would focus on the manner in which China determined the amount for SG&A costs for SMST "as constructed" by MOFCOM.¹⁰⁶

5.19. We recall that the European Union's panel request includes specific references to Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement, and a specific listing of the grounds for the European Union's claims. The European Union alleged, in order, that: (i) China had violated Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement; (ii) this was so "because China did not determine the amounts for [SG&A] costs and for profits on the basis of records and actual data by the exporters or producers under investigation"; and (iii) "[i]n particular, the amounts for [SG&A] costs and for profits as constructed by China do not reflect the records and the actual data of the exporters or producers under investigation".¹⁰⁷

5.20. We disagree with China to the extent it argues that it is not relevant to assess the nature of the provisions cited by the European Union in its panel request, including whether they contain a single obligation, or multiple, distinct obligations.¹⁰⁸ Contrary to what China suggests, "[w]hether or not a general reference to a treaty provision will be adequate to meet the requirement of sufficiency under Article 6.2 is to be examined on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue."¹⁰⁹ Moreover, Article 6.2 of the DSU does not prohibit a party from including in the panel request statements "that foreshadow its arguments in substantiating the claim"¹¹⁰, and that the presence of such statements "should not be interpreted to narrow the scope of the measures or the claims".¹¹¹

5.1.1.3.1 Article 2.2.1 of the Anti-Dumping Agreement

5.21. With these considerations in mind, we turn to examine the nature and scope of Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement. We start with Article 2.2.1, which reads, in relevant part:

¹⁰² China's appellant's submission, para. 51.

¹⁰³ China's appellant's submission, para. 52 (quoting European Union's panel request, para. 1, first sentence: "This is clear from the first sentence at stake: an alleged violation of 'Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement *because* China did not determine the amounts for administrative, selling and general costs and for profits on the basis of records and actual data by the exporters or producers under investigation'"). (emphasis added by China)

¹⁰⁴ China's appellant's submission, paras. 55-58.

¹⁰⁵ European Union's appellee's submission, paras. 60-62.

¹⁰⁶ European Union's appellee's submission, para. 65.

¹⁰⁷ EU Panel Report, para. 7.31 (quoting European Union's panel request, para. 1).

¹⁰⁸ See China's appellant's submission, para. 60.

¹⁰⁹ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17 (referring to Appellate Body Report, *US – Carbon Steel*, para. 130, in turn referring to Appellate Body Report, *Korea – Dairy*, para. 124).

¹¹⁰ Such statements may, as they are here, be introduced by terms such as "because" and "in particular".

¹¹¹ Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

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 [SG&A] 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.¹¹²

5.22. Under Article 2.2.1, investigating authorities may treat below-cost sales of the like product as not being "in the ordinary course of trade" by reason of price, and may disregard such sales in determining normal value "only if" the authorities determine that such sales were: (i) made within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time. While an investigating authority can act inconsistently with Article 2.2.1 in different ways – e.g. by disregarding below-cost sales without determining whether they were "made within an extended period of time" or "in substantial quantities" – this does not mean, however, that Article 2.2.1 contains multiple, distinct obligations. Rather, as we see it, Article 2.2.1 sets out a *single* obligation whereby an investigating authority may disregard below-cost sales of the like product *only if* it determines that "such" below-cost sales display the three specific characteristics mentioned above. The fact that the European Union did not include statements in its panel request foreshadowing the arguments it would make in order to substantiate its claim under Article 2.2.1 does not mean that the European Union's panel request does not comply with the standard set out in Article 6.2 of the DSU.¹¹³

5.23. In the light of the above, we uphold the Panel's finding, in paragraph 7.49 of the EU Panel Report, that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in respect of the European Union's claim under Article 2.2.1 of the Anti-Dumping Agreement.

5.1.1.3.2 Article 2.2.2 of the Anti-Dumping Agreement

5.24. Turning to China's claim under Article 2.2.2 of the Anti-Dumping Agreement, we note that this provision sets forth how the amounts for SG&A costs and profits are to be calculated for purposes of constructing normal value. The chapeau of Article 2.2.2 provides, in relevant part, that "the amounts for [SG&A] 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." Article 2.2.2 further clarifies that, "[w]hen such amounts cannot be determined on this basis" – i.e. "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" – an investigating authority may proceed to employ one of the other three methods provided in subparagraphs (i)-(iii) of Article 2.2.2.

5.25. By its express terms, Article 2.2.2 requires that an investigating authority, when calculating constructed normal value under Article 2.2, first attempt to make such a calculation using the "actual data pertaining to production and sales in the ordinary course of trade". Therefore, if *actual* data for SG&A costs and profits in the ordinary course of trade exists for the exporter under investigation, an investigating authority may not calculate constructed value using data from other sources.¹¹⁴

5.26. China reads the reference in the chapeau of Article 2.2.2 to "actual data pertaining to production and sales in the ordinary course" as setting out multiple, distinct obligations, including an obligation to determine an amount for SG&A costs on the basis of "actual data" that is "independent" and "distinct" from the obligation to determine such costs on the basis of data "pertaining to production and sales in the ordinary course of trade".¹¹⁵ Thus, while China accepts, based on the narrative explanation contained in the European Union's panel request, that the European Union's claim under Article 2.2.2 relating to "actual data" was within the Panel's terms of

¹¹² Fns omitted; emphasis added.

¹¹³ See Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

¹¹⁴ See Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.

¹¹⁵ China's appellant's submission, paras. 61-62.

reference, China contends that this is not the case for the European Union's claim relating to the determination of an SG&A amount on the basis of actual data *pertaining to production and sales in the ordinary course of trade*.¹¹⁶ For its part, the European Union submits that the relevant terms in Article 2.2.2 are interlinked.¹¹⁷ Specifically, the European Union argues that the term "pertaining to" is a modifier that links the term "actual data" to what follows, so that "it is only the phrase as a whole that makes sense."¹¹⁸

5.27. Looking at the structure of Article 2.2.2, we note that the noun "data" is immediately preceded by the adjective "actual" and followed by the phrase "pertaining to production and sales in the ordinary course of trade". As we see it, the term "actual data" is clearly linked to the language that follows. The phrase "pertaining to production and sales in the ordinary course of trade" serves, in particular, to specify the actual data that is to be used in order to calculate an amount for SG&A costs for purposes of constructing normal value under Article 2.2.2. Thus, read as a whole, the relevant phrase imposes a single obligation, set out in the chapeau of Article 2.2.2, for investigating authorities to determine amounts for SG&A costs and profits on the basis of actual data that relates to, or concerns, production and sales in the ordinary course of trade. This reading of Article 2.2.2 would appear to be confirmed by the second sentence of that provision, which refers back to the first sentence, and provides that, when SG&A amounts "cannot be determined on this basis", thus referring in the singular to the preferred method to be used to calculate such SG&A amounts. This is consistent with the Appellate Body having referred to the chapeau of Article 2.2.2 as setting out "a general obligation ('shall') on an investigating authority to use 'actual data pertaining to production and sales in the ordinary course of trade' when determining amounts for SG&A and profits."¹¹⁹

5.28. China seeks to overcome the plain language in Article 2.2.2 by referring to the Appellate Body report in *EC – Bed Linen*.¹²⁰ In that dispute, the Appellate Body explained, in the context of examining a substantive claim under Article 2.2.2(ii), that "*all* of 'the actual amounts incurred and realized' by other exporters or producers must be included [when constructing normal value], *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not."¹²¹ In making this statement, the Appellate Body did *not* address the question of whether Article 2.2.2 sets out distinct requirements concerning the determination of constructed normal value that would have to be spelt out explicitly in a panel request pursuant to Article 6.2 of the DSU in order to fall within a panel's terms of reference. The Appellate Body report in *EC – Bed Linen*, therefore, does not support China's position that Article 2.2.2 sets out distinct requirements with respect to "actual data", on the one hand, and "data pertaining to production and sales in the ordinary course of trade", on the other hand.

5.29. China also takes issue with the Panel's reliance on the reference to Article 2.2.1 of the Anti-Dumping Agreement in the European Union's panel request in concluding that the European Union's claim under Article 2.2.2 was within the Panel's terms of reference. This reference, as China contends, cannot be read to include a claim under Article 2.2.2 being within the Panel's terms of reference given that this claim "was not among the two claims to which the [European Union's] panel request was expressly limited".¹²² China adds that Article 2.2.1 and Article 2.2.2 were listed separately in the European Union's panel request, together with a number of other provisions.

5.30. In response, the European Union argues that the reference to Article 2.2.1, with its single obligation regarding the ordinary course of trade, confirms or provides relevant context for

¹¹⁶ China also accepts, as within the Panel's terms of reference, the European Union's claim under Article 2.2.1.1 that the data used by MOFCOM to calculate an amount for SG&A costs did not correspond to the records kept by SMST, given the reference in the European Union's panel request to the records of the exporters.

¹¹⁷ European Union's appellee's submission, para. 52.

¹¹⁸ European Union's appellee's submission, para. 53.

¹¹⁹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.

¹²⁰ China's appellant's submission, paras. 62-63.

¹²¹ China's appellant's submission, para. 63 (quoting Appellate Body Report, *EC – Bed Linen*, para. 80). (emphasis original)

¹²² China's appellant's submission, para. 66.

understanding the reference to Article 2.2.2 in the panel request, since each of these provisions is a development of Article 2.2 "with respect to *if* and *how* normal value may be constructed".¹²³

5.31. We agree with China that the reference to Article 2.2.1 in the European Union's panel request *could* be read to suggest that the European Union considered that MOFCOM erred by *excluding* sales that should have been considered as being in the ordinary course of trade from its determination of an SG&A amount for SMST, rather than by *including* sales that should have been excluded. This does not mean, however, that the Panel would have been precluded from taking into account the reference to Article 2.2.1 in the panel request as relevant context in determining whether the European Union's claim under Article 2.2.2 was properly within the Panel's terms of reference. Although claims under Article 2.2.1 and Article 2.2.2 require distinct identification, the obligations contained in these provisions are related insofar as they pertain to the calculation of constructed normal value. Thus, a reference to Article 2.2.1 may be useful to understand the scope of the claim raised under Article 2.2.2. We agree, therefore, with the Panel that the reference to Article 2.2.1 can relevantly inform the question of whether the European Union had sufficiently articulated a claim under Article 2.2.2. We do not consider that the Panel erred by looking at the language contained in the European Union's panel request as a whole, including the reference to Article 2.2.1 of the Anti-Dumping Agreement.

5.32. China contends that the Appellate Body's reasoning in *EC – Fasteners (China)* lends support to its position in this case, referring to a "similarly structured sentence" found in China's panel request in that case.¹²⁴ We find China's arguments in this regard to be unavailing. Regardless of whether China's panel request in *EC – Fasteners (China)* may have contained a "similarly structured sentence"¹²⁵, as China argues, the sufficiency of a panel request for the purposes of Article 6.2 of the DSU is to be determined on the basis of the language contained in the panel request and the nature of the obligations contained in the provisions at issue. Here, for the reasons described above, we consider the narrative provided by the European Union to be sufficient to identify a claim under Article 2.2.2 of the Anti-Dumping Agreement regarding "actual data pertaining to production and sales in the ordinary course of trade", considering the nature of the single obligation contained in that provision. This was not the basis for the Appellate Body's finding in *EC – Fasteners (China)*, where a claim "regarding the disclosure of the identity of the complainants and supporters" was not mentioned explicitly, and not covered by other language contained in China's panel request, or captured through a reference to any one of the identified treaty provisions by itself.

5.33. China asserts that the Panel "distorted" the meaning of the relevant part of the European Union's panel request, and failed to make an objective assessment of the term "in particular" contained in the European Union's panel request, when it found that the European Union had raised more than two claims under Article 2 of the Anti-Dumping Agreement regarding MOFCOM's calculation of a constructed normal value for SMST.¹²⁶ China also submits that, in finding that the "mere mention" of Article 2.2.1 provides "a brief summary of the legal basis of the complaint" in relation to Article 2.2.2, and considering that "a reasonably informed reader" would understand from this reference to Article 2.2.1 that the European Union also takes issue "with whether or not SG&A amounts are based on data pertaining to the production and sales in the ordinary course of trade", the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU.¹²⁷ Having disagreed with China that the European Union's panel request was "expressly limited" to two claims under Article 2 of the Anti-Dumping Agreement, and having agreed with the Panel that the reference in the European Union's panel request to Article 2.2.1 can relevantly inform the question of whether the European Union had sufficiently articulated a claim under Article 2.2.2, we do not consider it necessary to make additional findings regarding China's claims under Article 11 of the DSU.

¹²³ European Union's appellee's submission, para. 69. (emphasis original)

¹²⁴ China's appellant's submission, para. 53.

¹²⁵ We note that, in *EC – Fasteners (China)*, the Appellate Body found that China's panel request referred explicitly to four claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement relating to: (i) the composition of the domestic industry; (ii) data concerning normal value determination; (iii) information on the adjustments for differences affecting price comparability; and (iv) Eurostat data on which total EU production and consumption figures were based; and that an additional claim regarding the "disclosure of the identity of complainants and supporters" did *not* fall "within the scope of any of the four above descriptions". (Appellate Body Report, *EC – Fasteners (China)*, paras. 596-597)

¹²⁶ See China's appellant submission, para. 67.

¹²⁷ China's appellant submission, para. 80.

5.34. In sum, having reviewed the language in Article 2.2.2 of the Anti-Dumping Agreement, we do not agree with China that Article 2.2.2 sets out separate obligations regarding "actual data" and "data pertaining to production and sales in the ordinary course of trade". Instead, we consider the narrative in the European Union's panel request – "China did not determine the amounts for [SG&A] costs and for profits on the basis of records and *actual data by the exporters or producers under investigation*"¹²⁸ – to be broad enough to encompass the European Union's claim regarding "actual data pertaining to production and sales in the ordinary course of trade". That the European Union did not include further language from the text of Article 2.2.2 of the Anti-Dumping Agreement does not, in our view, limit or reduce the scope of the European Union's claim to "actual data".

5.35. For all these reasons, we uphold the Panel's finding, in paragraph 7.51 of the EU Panel Report, that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in respect of the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement.

5.1.2 The Panel's interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement

5.36. We now turn to address whether, as China claims, the Panel erred in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement and acted inconsistently with Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement in concluding that China acted inconsistently with Article 2.2.2 because MOFCOM did not determine an SG&A amount for SMST on the basis of "actual data pertaining to production and sales in the ordinary course of trade of the like product".

5.1.2.1 The Panel's findings

5.37. Before the Panel, the European Union claimed that China acted inconsistently with Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement because "China did not determine the amount for [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 [Grade B]." ¹²⁹ The European Union argued that "the data from table 6-3 of SMST's questionnaire response, which was used by China to construct normal value, was not 'actual data pertaining to production and sales in the ordinary course of trade'."¹³⁰ According to the European Union, this was because: (i) Table 6-3 included SG&A amounts derived from *planned* rates and not the *actual* expense; and (ii) the SG&A amounts in Table 6-3 were based on "abnormally high" COP, as it included two unrepresentative free sample production transactions.¹³¹ China, for its part, submitted that MOFCOM determined the SG&A amount on the basis of actual data reported by SMST for Grade B HP-SSST sold in the European Union included in Table 6-3. Moreover, China argued that "it is irrelevant whether or not the coefficients used to determine the SG&A amounts are also actual data, because the SG&A amounts at issue were 'based on' actual data, i.e. actual [COP], and Article 2.2.2 does not require the SG&A amount to be actual data in itself."¹³²

5.38. The Panel began its assessment with the text of Article 2.2.2, which sets forth how the amounts for SG&A are to be calculated for purposes of a constructed normal value. The Panel understood the issue to be whether Table 6-3, which China submitted was the basis for the SG&A amounts used in MOFCOM's calculation of normal value, was "based on 'actual data pertaining to production and sales in the ordinary course of trade of the like product'".¹³³ The Panel explained, in this regard, that "[i]t is undisputed that the SG&A amounts in table 6-3 consist of the [COP]

¹²⁸ EU Panel Report, para. 7.31 (quoting European Union's panel request, para. 1) (emphasis added)

¹²⁹ EU Panel Report, para. 7.53 (quoting European Union's first written submission to the Panel, para. 160).

¹³⁰ EU Panel Report, para. 7.55.

¹³¹ EU Panel Report, para. 7.55 (referring to updated English version of Table 6 annexed to SMST's Dumping Questionnaire Response (Panel Exhibit CHN-19-EN (BCI))).

¹³² EU Panel Report, para. 7.59.

¹³³ EU Panel Report, para. 7.65.

multiplied by certain coefficients" and that these coefficients reflect "the planned internal rates used by SMST in preparing price/cost allocations for orders".¹³⁴

5.39. Next, the Panel noted the apparent disagreement between MOFCOM and SMST with respect to the source of the data to be used to determine the SG&A amount. While the European Union asserted that SMST understood that MOFCOM should have been using the SG&A amount based on actual data from Table 6-5, China submitted that MOFCOM made it clear in its disclosures that it was using the data in Table 6-3.¹³⁵ Regardless of the parties' differing understandings, the Panel found that it was undisputed that SMST requested MOFCOM, and MOFCOM accepted, "not to use in the constructed normal value calculations the [COP] in table 6-3 for Grade B sales in the European Union, because such [COP] was distorted due to the inclusion of the two free sample transactions."¹³⁶ However, MOFCOM used the SG&A amounts in Table 6-3, even though these had been derived by applying certain coefficients to the disregarded COP data.

5.40. While noting China's argument that the affected SG&A data could have been corrected by the relevant coefficients, the Panel did not consider that "an unbiased and objective investigating authority could have assumed the corrective potential of the relevant coefficients without any supporting analysis or evidence."¹³⁷ Instead, the Panel agreed with the European Union that "any such assumption would have been 'speculative'."¹³⁸ Thus, the Panel opined that, "by using SG&A data based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value, MOFCOM failed to fulfil the requirements of Article 2.2.2."¹³⁹ Put differently, the Panel concluded that MOFCOM improperly utilized data relating to two free samples, which MOFCOM had excluded for the purpose of determining the COP, to establish the SG&A amounts. On this basis, the Panel concluded that "China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product."¹⁴⁰

5.1.2.2 Analysis of the Panel's findings regarding MOFCOM's determination of an SG&A amount for SMST

5.41. China begins by raising a claim under Article 12.7 of the DSU, arguing that the Panel did not set out the findings of fact, the applicability of the relevant provisions, and the basic rationale behind its findings. According to China, it is not clear whether the Panel considered the measure at issue to be inconsistent with Article 2.2.2 of the Anti-Dumping Agreement because it is not based "on actual data or on data pertaining to production and sales in the ordinary course of trade, or both".¹⁴¹ In addition, China argues that the Panel: (i) failed to set out how and why China allegedly violated these requirements; (ii) failed to address the interpretation of these requirements and the relevant facts that would lead to a conclusion of violation of these requirements; and (iii) precluded China from making an informed decision about whether and what to appeal.¹⁴² Moreover, China contends that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to provide an adequate explanation for its findings.¹⁴³

¹³⁴ EU Panel Report, para. 7.65 (referring to SMST's Supplemental Dumping Questionnaire Response (Panel Exhibits CHN-10-CH and CHN-10-EN (BCI), and EU-14 (BCI)), internal p. 4; and SMST's Dumping Questionnaire Response (Panel Exhibit EU-10 (BCI)), internal p. 69).

¹³⁵ See EU Panel Report, para. 7.66 and fn 130 thereto.

¹³⁶ EU Panel Report, para. 7.66 (referring to SMST's Dumping Questionnaire Response (Panel Exhibit CHN-5-EN (BCI)), internal p. 17; MOFCOM's Preliminary Dumping Disclosure to SMST (Panel Exhibit CHN-12-EN (BCI)), internal pp. 2-3; MOFCOM's Preliminary Determination (Panel Exhibits JPN-7-EN and EU-18), internal p. 27; MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 38; European Union's first written submission to the Panel, para. 168; and China's first written submission to the Panel, paras. 98, 107, and 116; response to Panel question No. 22(b)(iii), para. 78; and second written submission to the Panel, para. 42).

¹³⁷ EU Panel Report, para. 7.66.

¹³⁸ EU Panel Report, para. 7.66.

¹³⁹ EU Panel Report, para. 7.66.

¹⁴⁰ EU Panel Report, para. 7.66.

¹⁴¹ China's appellant's submission, para. 94.

¹⁴² China's appellant's submission, para. 96.

¹⁴³ China's appellant's submission, para. 97.

5.42. In response, the European Union argues that "the way forward for China is clear", and that "China can ensure that the measure taken to comply complies with Article 2.2.2, by ensuring that the amounts for [SG&A] are based on actual data pertaining to production and sales in the ordinary course of trade by SMST"¹⁴⁴ contained in Table 6-5 (Profitability), Table 6-6 (Detailed Chart of Allocation of Administrative Expenses), Table 6-7 (Detailed Chart of Allocation of Sales Expenses), and Table 6-8 (Detailed Chart of Allocation of Financial Expenses) annexed to SMST's Dumping Questionnaire Response of 21 November 2011.¹⁴⁵ The European Union submits that China's arguments are "largely a re-iteration of its arguments concerning the scope of the [European Union's] Panel Request, insofar as they attempt to de-link the relevant interlinked terms of Article 2.2.2".¹⁴⁶ The European Union further argues that MOFCOM disregarded SMST's repeated statements directing MOFCOM to the actual data pertaining to production and sales in the ordinary course of trade by SMST contained in Tables 6-5 through 6-8, and that China had ample opportunity to defend itself during the Panel proceedings.¹⁴⁷

5.43. We consider that China's arguments, although raised in the context of Articles 11 and 12.7 of the DSU, in fact concern the proper construction and application of the requirement in Article 2.2.2 of the Anti-Dumping Agreement to determine constructed normal value on the basis of "actual data pertaining to production and sales in the ordinary course of trade". We have already addressed China's arguments pertaining to the interpretation of Article 2.2.2 of the Anti-Dumping Agreement and disagreed with China's assertion that Article 2.2.2 sets out "independent" and "distinct" obligations in relation to "actual data" and "data pertaining to production and sales in the ordinary course of trade". We, therefore, do not consider there to be any basis for us to find that the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU, or that the Panel failed to provide, in its Reports, the basic rationale for its findings as required under Article 12.7 of the DSU.

5.44. As a second ground of appeal, China asserts that "[t]he Panel misinterpreted Article 2.2.2 as requiring an investigating authority not to base the SG&A amount on data that were not used for the determination of the [COP] amount."¹⁴⁸ China submits that the Panel "seems to have erroneously considered" that it follows from "the fact that SG&A data are derived from [COP] that had not been taken into account by MOFCOM for the [COP] calculation in the normal value determination" that such data are, therefore, "not based on actual data and/or that these are not based on data pertaining to production and sales in the ordinary course of trade of the like product".¹⁴⁹

5.45. Contrary to what China seems to suggest, the Panel did *not* make a finding as to whether or not the SG&A amount had to be determined on the basis of data that were used for the determination of COP amounts. Nor did the Panel address the issue of whether or not the coefficients reported by SMST, that is, "the planned internal rates used by SMST in preparing price/cost allocations for orders, are 'actual data' for purposes of Article 2.2.2."¹⁵⁰

5.46. As a third ground of appeal, China submits that the Panel "should have assessed how, in fact, the SG&A amount was determined and how the data underlying this determination were obtained", and whether the SG&A amount used by MOFCOM in its calculation of normal value "was 'based on' data that: (i) is actual; and (ii) pertains to production and sales in the ordinary course of trade".¹⁵¹ In China's view, there was no reason for the Panel "to assume that MOFCOM disregarded the [COP] of Grade B sold domestically because it was not actual or did not pertain to production or sales in the ordinary course of trade".¹⁵² According to China, instead, the Panel should have analysed this question, and should also have looked into precisely which factual circumstances constituted the "certain particularity" referred to by MOFCOM when MOFCOM

¹⁴⁴ European Union's appellee's submission, para. 187.

¹⁴⁵ Updated English version of Table 6 annexed to SMST's Dumping Questionnaire Response (Panel Exhibit CHN-19-EN (BCI)).

¹⁴⁶ European Union's appellee's submission, para. 188.

¹⁴⁷ European Union's appellee's submission, para. 190.

¹⁴⁸ China's appellant's submission, para. 99.

¹⁴⁹ China's appellant's submission, para. 99.

¹⁵⁰ EU Panel Report, fn 137 to para. 7.66.

¹⁵¹ China's appellant's submission, para. 100.

¹⁵² China's appellant's submission, para. 101.

explained in its Preliminary Dumping Disclosure that it had "used the [COP] of Grade B sold in the Chinese market 'due to [a] certain particularity of the transactions of this model in the EU'".¹⁵³

5.47. The European Union responds that the facts on the Panel record demonstrate that MOFCOM accepted SMST's request "not to use in the constructed normal value calculations the COP in table 6-3 for Grade B sales in the European Union, because such COP was abnormally high due to the inclusion of the two free samples."¹⁵⁴ The European Union maintains that "the only pertinent particularity of the transactions" is that "the COP was abnormally high due to the two free samples."¹⁵⁵ The European Union argues that the Panel was, therefore, "correct to state that it was undisputed that SMST requested MOFCOM, and MOFCOM accepted, not to use in the constructed normal value calculations the COP in Table 6-3 for Grade B sales in the European Union, because such COP was distorted due to the two free samples."¹⁵⁶ The European Union adds that China had many opportunities during the Panel proceedings to step forward and assert that the phrase "certain particularity" means something other than the fact that the COP was abnormally high due to the two free samples, yet it failed to do so.¹⁵⁷ The European Union submits that "China is precluded at this stage from making any new factual assertions in this respect", and cannot "reasonably fault the Panel" for concluding as it did based on the facts and evidence that were before it.¹⁵⁸

5.48. China appears to conflate the obligations that apply to investigating authorities with those that apply to WTO panels. It was not for the Panel in the present case to determine what MOFCOM meant when it referred to a "certain particularity"; rather, this was an issue for MOFCOM to *explain* in its written determination. We also do not agree with China that the Panel "assumed" that MOFCOM disregarded the COP of Grade B sold domestically for the reason that "it was not actual or did not pertain to production or sales in the ordinary course of trade."¹⁵⁹ Rather, as we understand it, the basis for the Panel's finding under Article 2.2.2 of the Anti-Dumping Agreement was, instead, that MOFCOM "assumed the corrective potential of the relevant coefficients" used to calculate an SG&A amount for SMST "without supporting analysis or evidence".¹⁶⁰ The Panel saw error, in particular, in MOFCOM's decision, without explanation or analysis, "to disregard the [COP] data in table 6-3 for Grade B sales in the European Union", while at the same time using "the SGA amounts in table 6-3, even though [those amounts] had been derived by applying certain coefficients to that disregarded [COP] data."¹⁶¹

5.49. As a fourth ground of appeal, China takes issue with the Panel's finding that "it is undisputed that ... MOFCOM accepted not to use in the constructed normal value calculations the [COP] in table 6-3 for Grade B sales in the European Union, because such [COP] was distorted due to the inclusion of the two free sample transactions."¹⁶² China states that "it is undisputed that MOFCOM accepted not to use the [COP] in table 6-3 for Grade B sales in the European Union to determine the COP in the normal value determination."¹⁶³ However, China considers that the Panel acted inconsistently with Article 11 of the DSU to the extent that it found that "MOFCOM decided not to use the [COP] of domestic sales *because* these costs were 'distorted due to the inclusion of the two free sample transactions' in the sense that they were not 'actual' and/or did not pertain to production and sales 'in the ordinary course of trade'".¹⁶⁴

¹⁵³ China's appellant's submission, para. 107 (quoting MOFCOM's Preliminary Dumping Disclosure to SMST (Panel Exhibit CHN-12-EN (BCI)), internal p. 2).

¹⁵⁴ European Union's appellee's submission, para. 194. (fn omitted)

¹⁵⁵ European Union's appellee's submission, para. 195. (fn omitted)

¹⁵⁶ European Union's appellee's submission, para. 195.

¹⁵⁷ European Union's appellee's submission, paras. 196-197 (referring to China's appellant's submission, para. 108).

¹⁵⁸ European Union's appellee's submission, para. 197.

¹⁵⁹ China's appellant's submission, para. 101.

¹⁶⁰ EU Panel Report, para. 7.66.

¹⁶¹ EU Panel Report, para. 7.66.

¹⁶² China's appellant's submission, para. 109 (quoting EU Panel Report, para. 7.66).

¹⁶³ China's appellant's submission, para. 109.

¹⁶⁴ China's appellant's submission, para. 109. (emphasis original)

5.50. As noted above, SMST stated in its response to MOFCOM's initial dumping questionnaire that:

[t]he December 2010 production costs for [Grade B was] 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.¹⁶⁵

5.51. MOFCOM responded that:

... due to [a] *certain particularity* of the transactions of [Grade B] in the EU, according to Article 4 of the Anti-Dumping Regulation of the People's Republic of China ("AD Regulation"), the Investigating Authority decides to provisionally use the production costs of [Grade B] exported to China, SG&A of sales in the EU and reasonable profitability as the basis to determine the constructed value.¹⁶⁶

5.52. Regardless of what MOFCOM meant when it referred to a "certain particularity of the transactions of [Grade B] in the EU", and whether MOFCOM considered that the COP was distorted or not due to the inclusion of the two free samples, MOFCOM was required, *in its determination*, to *explain why* it determined an amount for SG&A costs "based on the application of coefficients to data *that had already been excluded for the purpose of constructing normal value*".¹⁶⁷ In the absence of such an explanation provided by MOFCOM in its written report, we fail to see how the Panel could have found China to have acted consistently with its obligations under Article 2.2.2 of the Anti-Dumping Agreement. We do not consider that the Panel erred in finding that "an unbiased and objective investigating authority could [not] have *assumed* the corrective potential of the relevant coefficients *without any supporting analysis or evidence*."¹⁶⁸ Contrary to what China appears to argue, this does not constitute a finding, by the Panel, that MOFCOM *could not rely* on these (rejected) "transactions for the purposes of determining SG&A amounts"; rather, we understand the Panel simply to have found that MOFCOM was required to *explain why* it chose to do so, and failed to give such explanation.

5.53. China argues that the Panel acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement by failing to take into account that "MOFCOM requested SMST to clarify the nature of the coefficients, but did not obtain the requested clarification."¹⁶⁹ China contends that an objective assessment of the methodology used by MOFCOM to obtain the SG&A amount "would have led the Panel to conclude that China complied with its obligations to ensure that the SG&A amount is 'based on' data that is 'actual' and pertains to 'production and sales in the ordinary course of trade'."¹⁷⁰

5.54. The European Union responds that "[t]here are no facts or evidence on the record that would explain how the use of the planned coefficients might have cancelled out the use of the COP of the samples and China has never offered any explanation in this respect."¹⁷¹ The European Union further submits that SMST did respond to MOFCOM's request for clarification, and directed MOFCOM to the actual data pertaining to production and sales in the ordinary course of trade by SMST, contained in Tables 6-5 through 6-8.¹⁷²

5.55. It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Instead, panels should test whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the explanations

¹⁶⁵ SMST's Dumping Questionnaire Response (Panel Exhibits CHN-5-EN (BCI) and EU-10 (BCI)), internal p. 17.

¹⁶⁶ MOFCOM's Preliminary Dumping Disclosure to SMST (Panel Exhibit CHN-12-EN (BCI)), internal p. 2. (emphasis added)

¹⁶⁷ EU Panel Report, para. 7.66. (emphasis added)

¹⁶⁸ EU Panel Report, para. 7.66. (emphasis added)

¹⁶⁹ China's appellant's submission, para. 111.

¹⁷⁰ China's appellant's submission, para. 112.

¹⁷¹ European Union's appellee's submission, para. 203.

¹⁷² European Union's appellee's submission, para. 204.

provided by the investigating authority in its written determination.¹⁷³ Contrary to what China suggests, it was for MOFCOM to explain why it considered that the relevant coefficients had corrective potential, and why it used SG&A data based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value. Even accepting, as China argues, that MOFCOM had "requested SMST to clarify the nature of the coefficients, but did not obtain the requested clarification"¹⁷⁴, this does not mean that the Panel erred in finding that "an unbiased and objective investigating authority could [not] have assumed the corrective potential of the relevant coefficients without any supporting analysis or evidence."¹⁷⁵

5.56. Finally, with regard to the *translation* of SMST's request to MOFCOM to exclude the COP in Table 6-3 for Grade B sales in the European Union, China argues that the European Union "distorts SMST's response" by claiming that "SMST requested that MOFCOM not use the December production costs in constructed *value* calculations", whereas "the correct translation of SMST's request refers to 'constructed *cost* calculation' rather than 'constructed *value* calculation'".¹⁷⁶

5.57. The European Union responds that, although China originally submitted its own translation of the relevant phrase in SMST's request as "cost or constructed *value* calculations"¹⁷⁷, China subsequently changed its position and argued that the correct translation of this phrase was "cost or constructed *cost* calculations".¹⁷⁸ For the European Union, these submissions are "manifestly unreasonable and untenable", since, "[i]f the COP of the free samples was unfit for the purposes of determining COP, it was equally unfit for the purposes of determining an amount for SG&A [costs]".¹⁷⁹ The European Union contends that, when the Anti-Dumping Agreement uses the term "constructed", it clearly refers to the entire calculation, and not merely to part of it, such as the COP.¹⁸⁰ Furthermore, the European Union submits that the term "costs" on its own is not limited to the COP, to the exclusion of SG&A costs.¹⁸¹

5.58. The Panel found, in the light of its finding under Article 2.2.2 of the Anti-Dumping Agreement, that it did not need to address the disagreement between the European Union and China concerning the correct translation into English of SMST's request to exclude the COP in Table 6-3.¹⁸² We see no error in the approach taken by the Panel in this regard, and certainly no error arising to a violation of Article 11 of the DSU or Article 12.7 of the DSU.¹⁸³

¹⁷³ Appellate Body Report, *US – Tyres (China)*, para. 123.

¹⁷⁴ China's appellant's submission, para. 111.

¹⁷⁵ Panel Report, para. 7.66.

¹⁷⁶ China's appellant's submission, para. 89 (quoting China's second written submission to the Panel, para. 39 (emphasis original)). See also para. 87. Before the Panel, China submitted that there is a difference between the Chinese characters for "cost" and "value", and that SMST only requested MOFCOM not to use the information in Table 6.3 in the "cost or constructed cost calculation". According to China, SMST thus never requested MOFCOM to disregard the SG&A amounts in that table. (China's second written submission to the Panel, paras. 39-42)

¹⁷⁷ European Union's appellee's submission, para. 163 (referring to SMST's Dumping Questionnaire Response (Panel Exhibits CHN-5-EN (BCI) and EU-10 (BCI)), internal p. 16). (emphasis original)

¹⁷⁸ European Union's appellee's submission, para. 163 (referring to China's second written submission to the Panel, paras. 39-42). (emphasis original)

¹⁷⁹ European Union's appellee's submission, para. 163.

¹⁸⁰ European Union's appellee's submission, para. 163 (referring to Articles 2.3, 2.4, 5.2(ii), and 9.3.3 of the Anti-Dumping Agreement).

¹⁸¹ European Union's appellee's submission, para. 163. The European Union notes that, whereas in some instances the Anti-Dumping Agreement refers specifically to COP (Articles 2.2 and 2.2.1), in other instances it refers particularly and expressly to SG&A costs (Articles 2.2, 2.2.1, and 2.2.2), or to costs generally (Articles 2.2.1, 2.2.1.1, fns 5 and 6, and Article 2.4).

¹⁸² EU Panel Report, fn 137 to para. 7.66 (referring to China's opening statement at the first Panel meeting, para. 19). See also China's first written submission to the Panel, para. 65; second written submission to the Panel, para. 6; and comments on European Union's response to Panel question No. 81, para. 21.

¹⁸³ We also note that certain of China's claims on appeal refer to both Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. China, however, does not develop separate arguments concerning the latter in its submissions. We recall, in this regard, the Appellate Body's finding in *US – Hot-Rolled Steel* that both Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU "require[] panels to 'assess' the facts and this ... clearly necessitates an active review or examination of the pertinent facts", and that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment' of the facts of the matter." (Appellate Body Report, *US – Hot-Rolled Steel*, para. 55 (emphasis original)) Accordingly, the two provisions set out a similar standard of review. We understand that this is not in dispute.

5.1.2.3 Conclusion

5.59. In the light of the above, we uphold the Panel's finding, in paragraphs 7.66 and 8.6.a of the EU Panel Report, that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

5.1.3 The European Union's conditional appeal under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement

5.60. The European Union conditionally appeals the Panel's findings that both the European Union's claim under Article 2.2.1.1 of the Anti-Dumping Agreement, as it relates to the obligation to "reasonably reflect the costs associated with the production and sale of the product under consideration", and its claim under Article 2.2 of the Anti-Dumping Agreement, do not comply with the requirements of Article 6.2 of the DSU and that these claims were, therefore, outside the scope of the Panel's terms of reference.¹⁸⁴ The European Union submits, however, that we need not consider these aspects of its appeal in the event that we uphold the Panel's findings concerning the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement, or complete the legal analysis and confirm its claim under Article 2.2.2.¹⁸⁵

5.61. Having upheld the Panel's finding that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product, we need not address this aspect of the European Union's appeal.

5.2 MOFCOM's alleged failure to take into account certain information provided during the verification visit

5.62. We now turn to address China's appeal of the Panel's findings that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification of information on the sole basis that this request was not made before the verification started.

5.63. We begin by summarizing the relevant findings of the Panel before addressing specific arguments raised by China on appeal.

5.2.1 The Panel's findings

5.64. Before the Panel, the European Union contended that: (i) SMST submitted to MOFCOM that certain financial expenses had been inadvertently double-counted in SMST's Dumping Questionnaire Response; and (ii) SMST "adduced corrected information that was duly verified".¹⁸⁶ The European Union claimed that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by refusing to take into account the corrected information provided during the on-the-spot investigation.¹⁸⁷ Pointing to language in MOFCOM's Final Determination and Final Dumping Disclosure to SMST, the European Union argued that the only reason provided by MOFCOM "for refusing to take the corrected information into account was that SMST did not raise this point before the verification started".¹⁸⁸

5.65. In response, China argued that investigating authorities are not required, under Article 6.7 and paragraph 7 of Annex I, to accept all information presented during a verification visit. Moreover, while accepting that the *purpose* of a verification visit is to verify information provided

¹⁸⁴ European Union's other appellant's submission, paras. 70 and 78.

¹⁸⁵ European Union's other appellant's submission, paras. 70 and 78 (referring to China's Notice of Appeal, para. 5.a.i-ii).

¹⁸⁶ EU Panel Report, para. 7.93.

¹⁸⁷ EU Panel Report, para. 7.93 (referring to European Union's first written submission to the Panel, paras. 98-99 and 109).

¹⁸⁸ EU Panel Report, para. 7.93 and fn 178 thereto.

or to obtain further details, China asserted that this "does not imply that an investigating authority is compelled to verify information provided or to obtain further details".¹⁸⁹

5.66. The Panel began its analysis by observing that the European Union's claim was of a procedural nature and concerned the question of whether China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement because MOFCOM refused to take into account the information provided by SMST on the sole basis that SMST did not raise this matter before the on-the-spot investigation started.¹⁹⁰

5.67. The Panel noted that, in a communication sent to SMST prior to the on-the-spot investigation, MOFCOM had requested SMST to prepare certain documents relating to, *inter alia*, Table 6-5 ("Profitability"), which summarized the information concerning SG&A costs contained in Tables 6-6 ("Detailed Chart of Allocation of Administrative Expenses") and 6-8 ("Detailed Chart of Allocation of Financial Expenses") supplied by SMST as annexes to its initial dumping questionnaire response.¹⁹¹ The Panel considered, therefore, that there was "a clear and direct connection" between the information that SMST sought to correct in Tables 6-6 and 6-8 and the information expressly requested by MOFCOM relating to Table 6-5.¹⁹² Recalling that, under paragraph 7 of Annex I, "the main purpose of the on-the-spot investigation is to verify information", the Panel considered "that an investigating authority would normally welcome the rectification of information in these circumstances".¹⁹³ The Panel found that, by first requesting SMST to prepare documents relating to Table 6-5, but then rejecting potentially relevant information "on the *sole ground* that SMST did not raise this matter before the verification started", MOFCOM acted contrary to the main purpose of the on-the-spot investigation.¹⁹⁴ Having said this, the Panel agreed with China that Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement do not contain an *obligation* for an investigating authority "to accept *all* information presented to it during the verification visit".¹⁹⁵ The Panel also agreed that an investigating authority "does not necessarily have to accept new information during verification"¹⁹⁶, and that an investigating authority does not "have to accept voluminous amounts of corrected information".¹⁹⁷ Turning to the specific facts before it, the Panel highlighted, however, that the European Union's claim concerned the rectification of "one piece of information", namely, the financial expenses of SMST's headquarters.¹⁹⁸ The Panel therefore saw "no valid reason why MOFCOM did not accept the rectified information from SMST, particularly since MOFCOM appear[ed] to have understood the matter explained by SMST concerning the financial expenses at issue".¹⁹⁹ In these circumstances, the Panel agreed with the European Union that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement because MOFCOM rejected this

¹⁸⁹ EU Panel Report, para. 7.95 (referring to China's first written submission to the Panel, paras. 216-222).

¹⁹⁰ EU Panel Report, para. 7.98 and fn 194 thereto.

¹⁹¹ EU Panel Report, para. 7.99. MOFCOM requested that SMST prepare "two complete sets of questionnaire responses and supplemental questionnaire responses for verification including all data, information and manuscripts or original copies of the supporting materials". In particular, MOFCOM requested "working sheets of Tables 6-3, 6-4 and 6-5". (MOFCOM's Verification Notification to SMST (Panel Exhibit CHN-11-EN), internal pp. 2-3; China's first written submission to the Panel, para. 202)

¹⁹² EU Panel Report, para. 7.99.

¹⁹³ EU Panel Report, para. 7.99.

¹⁹⁴ EU Panel Report, para. 7.99. (emphasis added) In its Final Determination, MOFCOM stated with regard to SMST's rectification request:

During verification, SMST Italia raised the point that certain financial expenses were entered more than once in the questionnaire response, and requested for adjustments to be made. On the ground that the company *did not raise this point before the onsite verification started*, the Investigation Authority decided to deny the above request.

(Panel Exhibits JPN-2-EN and EU-30, internal pp. 38-39 (emphasis added))

¹⁹⁵ EU Panel Report, para. 7.100 (quoting China's first written submission to the Panel, para. 218). (emphasis added)

¹⁹⁶ EU Panel Report, para. 7.100 (referring to United States' third party written submission to the Panel, paras. 7 and 12).

¹⁹⁷ EU Panel Report, para. 7.100.

¹⁹⁸ EU Panel Report, para. 7.100.

¹⁹⁹ EU Panel Report, para. 7.100. The Panel noted that, in the Verification Disclosure to SMST, MOFCOM stated that SMST "provided the relevant materials supporting that certain expenses were double counted". (EU Panel Report, fn 201 to para. 7.100)

information submitted by SMST on the sole basis that it was not provided prior to the on-the-spot investigation.²⁰⁰

5.2.2 Whether the Panel erred in finding that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's rectification request

5.68. On appeal, China contends that the Panel erred in finding that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification of information relating to SMST's financial expenses on the sole basis that this request was not made before the verification visit started. China maintains that, by creating the obligation to act in line with the main purpose of the verification visit, the Panel read into Article 6.7 and paragraph 7 of Annex I words that are not there. For China, Article 6.7 and paragraph 7 of Annex I do not contain an obligation for an investigating authority to act in line with the main purpose of the verification visit. China also maintains that Article 6.7 does not impose on an investigating authority an obligation to conduct on-the-spot verification in the territory of an exporting Member. Rather, for China, Article 6.7 grants an investigating authority the right to carry out a verification visit subject to a number of limitations, "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".²⁰¹

5.69. The European Union counters that the Panel correctly found that "*th[e] specific fact pattern* [of the present case] demonstrates an inconsistency with Article 6.7 and paragraph 7".²⁰² Referring to the language in paragraph 7 of Annex I concerning the main purpose of the on-the-spot investigation, the European Union argues that "it is inherently contradictory and internally inconsistent to ask for something, receive it, and then later reject it."²⁰³ According to the European Union, while an investigating authority enjoys a certain margin of appreciation under Article 6.7 and paragraph 7 to Annex I, it should decide whether to accept or reject information submitted to it "on the basis of objective criteria, such as the risk of undue delay in the conduct of the proceedings".²⁰⁴

5.70. The first sentence of Article 6.7²⁰⁵ stipulates that, "[i]n order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required". This right to carry out on-the-spot investigations in the territory of another Member is limited, however, to instances where: (i) the investigating authority has obtained the agreement of the firm(s) concerned; (ii) the investigating authority has notified the representatives of the government of the Member in question; and (iii) that Member has not objected to the investigation.²⁰⁶ The second sentence of Article 6.7 prescribes that the procedures described in Annex I "shall apply to investigations carried out in the territory of other Members". While Article 6.7 lays out the basic framework for verifications in the territory of another Member, Annex I, entitled "Procedures for on-the-spot investigations pursuant to Paragraph 7 of Article 6", sets out further parameters for the conduct of such investigations.

5.71. Paragraph 7 of Annex I states that, "[a]s the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details", such investigation should generally "be carried out" after the investigating authority has received the response to the questionnaire that was used in the anti-dumping investigation. Paragraph 7 further provides that "it should be

²⁰⁰ EU Panel Report, para. 7.101.

²⁰¹ China's appellant's submission, para. 127.

²⁰² European Union's appellee's submission, para. 124. (emphasis original)

²⁰³ European Union's appellee's submission, para. 125.

²⁰⁴ European Union's appellee's submission, para. 127.

²⁰⁵ Article 6.7 reads, in relevant part:

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.

²⁰⁶ The third sentence of Article 6.7 further provides: "Subject to the requirement to protect confidential information, the authorities shall make the results of any [investigations carried out under Article 6.7] available, or shall provide disclosure thereof pursuant to [Article 6.9], to the firms to which they pertain and may make such results available to the applicants."

standard practice" to advise firms in advance about the "general nature of the information to be verified and of any further information which needs to be provided", but that "this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained."

5.72. Moving to the immediate context for Article 6.7 and paragraph 7 of Annex I, we note that Article 6.6 of the Anti-Dumping Agreement stipulates that investigating "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."²⁰⁷ The investigating authority can do so in several ways, including by conducting on-the-spot investigations, as contemplated under Article 6.7, "[i]n order to verify information provided or to obtain further details".²⁰⁸

5.73. We further note that Article 6 of the Anti-Dumping Agreement situates the conduct of on-the-spot investigations within a broader set of provisions regulating the process of identifying and gathering evidence for anti-dumping duty investigations.²⁰⁹ In addition to laying down evidentiary rules that apply *throughout* the course of an anti-dumping investigation, Article 6 speaks to the due process rights that are enjoyed by interested parties during the investigation. This further reinforces the textual directive under Article 6.6 for investigating authorities to satisfy themselves as to the accuracy of the information supplied by interested parties, including in the context of carrying out on-the-spot investigations under Article 6.7.

5.74. The requirement that investigating authorities "satisfy themselves as to the accuracy of the information supplied by interested parties" does not mean that they are under an obligation to accept and use all information that is submitted to them. Circumstances will vary, and investigating authorities have some degree of latitude in deciding whether to accept and use information submitted by interested parties during on-the-spot investigations or thereafter. That latitude is limited, however, by the investigating authority's obligation under Article 6.6 to ensure that the information on which its findings are based is accurate, and by the legitimate due process interests of the parties to an investigation.²¹⁰ An investigating authority must balance these due process interests with the need to control and expedite the investigating process.²¹¹ This balance between the due process interests of the parties and controlling and expediting the investigating process applies throughout the investigation, including during on-the-spot investigations.

5.75. Depending on the particularities of each case, factors bearing upon the latitude of an investigating authority to accept or reject information submitted during an on-the-spot investigation may include, for example, the timing of the presentation of new information; whether the acceptance of new information would cause undue difficulties in the conduct of the investigation²¹²; whether the interested party has submitted voluminous amounts of information or merely seeks to have an arithmetical or clerical error corrected; whether the information at issue relates to facts that are "essential" within the meaning of Article 6.9 of the Anti-Dumping Agreement; or whether the information supplied by an interested party relates to the information

²⁰⁷ We note that Article 6.6 includes the qualification "[e]xcept in circumstances provided for in paragraph 8". In this regard, we note that it would not be possible for investigating authorities to "satisfy themselves as to the accuracy of the information" in circumstances where interested parties refuse access to, or otherwise do not provide, such information. The Appellate Body made a similar statement regarding Article 12.5 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) in *US – Carbon Steel (India)*. (See Appellate Body Report, *US – Carbon Steel (India)*, fn 1077 to para. 4.418)

²⁰⁸ Alternatively, an investigating authority may, for example, send additional questionnaires to a respondent, as contemplated under Article 6.1 of the Anti-Dumping Agreement, and request written responses to such questionnaires.

²⁰⁹ See Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 138; *EC – Bed Linen (Article 21.5 – India)*, para. 136; and *US – Carbon Steel (India)*, para. 4.418.

²¹⁰ Including the interests of the party submitting particular information in having that information taken into account. (See Article 6.1 of the Anti-Dumping Agreement, which reads, in relevant part: "All interested parties in an anti-dumping investigation shall be given ... ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.")

²¹¹ See Appellate Body Report, *US – Hot-Rolled Steel*, para. 86. See also Article 6.14 of the Anti-Dumping Agreement, which reads, in relevant part: "The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations ... or from applying provisional or final measures".

²¹² The panel in *EC – Salmon (Norway)* said that it could not "see how the mere fact that ... cost information was submitted after the on-the-spot investigation means that it could not be used without 'undue difficulties'." (Panel Report, *EC – Salmon (Norway)*, para. 7.367)

specifically requested by the investigating authority. We agree with the Panel that Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement do not contain an obligation for an investigating authority "to accept *all* information presented to it during a verification visit".²¹³ We also agree with the Panel that an investigating authority does not necessarily "have to accept voluminous amounts of corrected information".²¹⁴ At the same time, an investigating authority may accept information provided during the on-the-spot investigation or, in appropriate circumstances, even at a later stage.²¹⁵

5.76. With these considerations in mind, we recall that MOFCOM requested SMST to prepare documents relating to Table 6-5, and that SMST sought to correct information contained in Tables 6-6 and 6-8, which, in turn, were summarized in Table 6-5.²¹⁶ The Panel found, therefore, that there was a "clear and direct connection" between the information that SMST sought to correct and the information expressly requested by MOFCOM.²¹⁷ China does not contest this finding.²¹⁸ It is also uncontested that SMST's request for rectification concerned one specific piece of information, that is, the financial expenses of SMST's headquarters.²¹⁹ In refusing to take that information into account, MOFCOM did not reason that the acceptance of that information would have caused undue difficulties in the conduct of the investigation; that SMST would have submitted voluminous amounts of additional information to the investigating authority late in the proceedings; or impeded or delayed the conduct of the anti-dumping proceedings in some way. Instead, as the Panel found, MOFCOM rejected SMST's rectification request "on the *sole ground* that SMST did not raise this matter before the verification started".²²⁰ China does not contest that this was the only reason for the rejection given by MOFCOM in the Final Determination.²²¹

5.77. In these circumstances, and in the absence of any further explanation by MOFCOM, we see no error in the Panel's finding that there seems to have been no valid reason why MOFCOM did not accept the corrected information provided by SMST. Moreover, contrary to what China suggests, the Panel did not find that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I because MOFCOM acted contrary to the main purpose of the verification visit. Instead, as we understand it, the Panel based its findings on the fact that, while MOFCOM expressly requested SMST to prepare certain information for the on-the-spot investigation, it then refused to take into account corrected information even though it had a "clear and direct connection" to the information that had been requested. MOFCOM rejected the corrected information although it consisted of only "one piece of information" regarding the financial expenses of SMST's headquarters, and did so solely on the basis that it was not provided prior to the verification visit, and without providing other reasons.

5.78. In the light of the foregoing, we uphold the Panel's finding, in paragraphs 7.101 and 8.6.c. of the EU Panel Report, that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification.

5.2.3 The European Union's conditional appeal under Article 6.8 and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement

5.79. In the event that we reverse the Panel's findings under Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement, the European Union appeals the Panel's rejection of the European Union's claim under Article 6.8 and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement.²²²

²¹³ EU Panel Report, para. 7.100 (quoting China's first written submission to the Panel, para. 218). (emphasis added)

²¹⁴ EU Panel Report, para. 7.100.

²¹⁵ Panel Report, *EC – Salmon (Norway)*, para. 7.367.

²¹⁶ EU Panel Report, para. 7.99 (referring to MOFCOM's Verification Disclosure to SMST (Panel Exhibit EU-23-EN), internal p. 3; and SMST's Comments on Final Dumping Disclosure (Panel Exhibit EU-28-EN (BCI)), p. 2).

²¹⁷ EU Panel Report, para. 7.99.

²¹⁸ China's response to questioning at the oral hearing.

²¹⁹ EU Panel Report, para. 7.100.

²²⁰ EU Panel Report, para. 7.99. (emphasis added)

²²¹ China's response to questioning at the oral hearing.

²²² European Union's other appellant's submission, paras. 84 and 107-108.

5.80. We recall that the Panel rejected the European Union's claims under Article 6.8 and paragraphs 3 and 6 of Annex II that MOFCOM had applied "facts available", and found, instead, that "MOFCOM based its determination on evidence contained in the records, which at that time MOFCOM considered were the correct facts submitted by SMST."²²³

5.81. Having upheld the Panel's finding that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's rectification request on the sole basis that it was not provided prior to the verification visit, we need not further address this aspect of the European Union's appeal.

²²³ EU Panel Report, para. 7.102.

5.3 Showing of "good cause" under Article 6.5 of the Anti-Dumping Agreement

5.82. China claims that the Panel erred in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement in finding that China acted inconsistently with its obligations under that provision by permitting the full text of certain reports submitted by the petitioners in the underlying investigation "to remain confidential without objectively assessing 'good cause' and scrutinizing the petitioners' showing".²²⁴ China further claims, on three grounds, that the Panel applied an erroneous standard of review and failed to make an objective assessment of the facts before it, contrary to the requirements of Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. First, China alleges that the Panel erroneously limited its review to assessing whether MOFCOM had explained why it considered that the full text of the reports at issue warranted confidential treatment. Second, China contends that the Panel applied internally inconsistent reasoning in its analysis of the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. Third, China asserts that the Panel improperly made the case for the complainants with regard to their claims under Article 6.5 of the Anti-Dumping Agreement.

5.83. Before addressing the specific claims raised by China, we first summarize the relevant findings of the Panel, and the context in which the Panel made those findings. We then examine Article 6.5 of the Anti-Dumping Agreement, and the disciplines that apply thereunder.

5.3.1 The Panel's findings

5.84. Before the Panel, Japan and the European Union argued that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of four reports to remain confidential without objectively assessing the "good cause" alleged for confidential treatment and scrutinizing the petitioners' showing.²²⁵ These reports are contained in: (i) appendix V to the petition; (ii) appendix VIII to the petition; (iii) appendix 59 to the petitioners' supplemental evidence of 1 March 2012; and (iv) the appendix to the petitioners' supplemental evidence of 29 March 2012.

5.85. China responded that "good cause" had been adequately shown by the petitioners because they had provided several substantiated reasons as to why confidential treatment was warranted both for the names of the relevant third party institutes and the full text of the four reports at issue.²²⁶ In addition, China argued that the Anti-Dumping Agreement does not impose an obligation on an investigating authority "to explain why it considers that confidential treatment [of information] is warranted".²²⁷

5.86. The Panel identified the issue before it as involving an examination of whether MOFCOM permitted the *full text* of the four reports to remain confidential without objectively assessing the "good cause" alleged for confidential treatment and scrutinizing the petitioners' showing to determine whether the requests were sufficiently substantiated.²²⁸ With regard to China's allegation that the European Union had failed to establish a *prima facie* case of violation, the Panel found that, although the European Union "could have been more specific in setting out its [] claim" under Article 6.5 in its first written submission, overall, it considered that the European Union had "sufficiently connected its Article 6.5 claim to the relevant appendices".²²⁹

²²⁴ Panel Reports, para. 7.303.

²²⁵ Panel Reports, para. 7.285. The Panel noted that the complainants accepted that the petitioners had demonstrated "good cause" for treating as confidential the names of the third parties providing the reports and considered that the petitioners' concerns could have been addressed by withholding such names. (Ibid., fn 452 to para. 7.285)

²²⁶ Panel Reports, para. 7.287.

²²⁷ Panel Reports, para. 7.287.

²²⁸ Panel Reports, para. 7.290. The Panel noted that "the complainants also argue[d] that the petitioners [had] failed to show 'good cause' for treating as confidential the full text of the four confidential reports at issue." The Panel decided to start its review with MOFCOM's assessment of the alleged showing of "good cause". (Ibid., fn 461 to para. 7.290)

²²⁹ Panel Reports, fn 460 to para. 7.290.

5.87. The Panel noted that, in evaluating the complainants' claims under Article 6.5 of the Anti-Dumping Agreement, it would be guided by the Appellate Body's pronouncements on "good cause" in *EC – Fasteners (China)*.²³⁰ Turning to the specific facts before it, the Panel examined the petitioners' requests for confidential treatment of information contained in the four appendices at issue, and MOFCOM's statement granting confidential treatment.²³¹

5.88. Regarding the scope of MOFCOM's statement, the Panel found that, although it was directed at the requests for confidential treatment of appendix V, it could "also be reasonably understood" to apply to the appendix to the petitioners' supplemental evidence of 29 March 2012, as the latter "builds on" the former.²³²

5.89. The Panel next turned to examine whether MOFCOM's statement was sufficient to demonstrate that MOFCOM objectively assessed the petitioners' showing of "good cause" with regard to both the names of the third party institutes and the full text of appendix V and the appendix to the petitioners' supplemental evidence of 29 March 2012. The Panel found that, while the petitioners' requests referred to both the names of the institutes and the full text of the reports, when accepting the petitioners' requests for confidential treatment, "MOFCOM limited its statement to address only 'the legitimacy of the petitioners' application to treat the *name* of the 'authoritative third party institute' as confidential'".²³³ With respect to the confidential treatment of the full text of the two reports at issue, the Panel noted that MOFCOM's statement only "summariz[ed] the petitioners' arguments for confidential treatment and requests; rather than [having] reflect[ed] MOFCOM's explanation or reasoning".²³⁴ The Panel concluded that there was thus "no evidence" that "MOFCOM objectively assessed the 'good cause' alleged for confidential treatment, and scrutinized the petitioners' requests relating to the *full text* of appendix V, and appendix to the petitioners' supplemental evidence of 29 March 2012."²³⁵ With regard to appendix VIII to the petition and appendix 59 to the petitioners' supplemental evidence of 1 March 2012, the Panel found that, in the absence of any evidence that MOFCOM objectively assessed the "good cause" alleged and scrutinized the petitioners' requests, it had no basis to conclude that MOFCOM had done so.²³⁶

5.90. Having upheld the European Union's claim that MOFCOM did not objectively assess the "good cause" alleged by the petitioners for confidential treatment of the full text of the four appendices at issue, the Panel noted China's argument that "the 'Anti-Dumping Agreement does not require an investigating authority which found that confidential treatment is warranted to do or specify anything, beyond the obligation to treat such information as confidential'".²³⁷ The Panel found that, "[i]n the absence of any explanation by MOFCOM", there was "no basis to conclude that MOFCOM properly determined that the petitioners had shown 'good cause' for their requests for confidential treatment".²³⁸ The Panel also considered that it had "no basis ... to imply that MOFCOM properly determined that the petitioners had shown 'good cause' for their requests for confidential treatment from the fact that MOFCOM ultimately granted their request".²³⁹

5.91. The Panel concluded that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by permitting the full text of the reports in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012 "to remain confidential without objectively assessing 'good cause' and scrutinizing the petitioners' showing".²⁴⁰

²³⁰ Panel Reports, para. 7.291 (referring to Appellate Body Report, *EC – Fasteners (China)*, paras. 537-539).

²³¹ Panel Reports, paras. 7.292-7.296.

²³² Panel Reports, para. 7.298. The Panel disagreed with China that MOFCOM's statement also applied to the two remaining appendices at issue. (*Ibid.*)

²³³ Panel Reports, para. 7.299 (quoting MOFCOM's Preliminary Determination (Panel Exhibits JPN-7-EN and EU-18), internal p. 33; and MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 46). (emphasis added by the Panel)

²³⁴ Panel Reports, para. 7.299.

²³⁵ Panel Reports, para. 7.299. (emphasis original)

²³⁶ Panel Reports, para. 7.300.

²³⁷ Panel Reports, para. 7.301 (quoting China's first written submission to the Panel, para. 725).

²³⁸ Panel Reports, para. 7.302 and fn 487 thereto.

²³⁹ Panel Reports, para. 7.302.

²⁴⁰ Panel Reports, para. 7.303.

5.3.2 Assessment of the Panel's analysis

5.92. On appeal, China argues that the Panel erred in construing Article 6.5 of the Anti-Dumping Agreement as imposing an obligation on an investigating authority to explain why it considers that confidential treatment is warranted.²⁴¹ China refers to the panel report in *Mexico – Steel Pipes and Tubes* and the Appellate Body report in *EC – Fasteners (China)* to argue that, while an investigating authority must review and decide whether "good cause" was shown, there is no obligation for an investigating authority to provide any explanation regarding its assessment and scrutiny of the alleged showing of "good cause".²⁴²

5.93. Japan and the European Union observe that, contrary to what China suggests, the Panel did not find that Article 6.5 of the Anti-Dumping Agreement contains an obligation for the investigating authority to "provide an explanation" for its reasons for granting confidentiality. Rather, the Panel's finding was that, in the absence of any explanation by MOFCOM, the Panel had no basis to conclude that MOFCOM undertook an objective assessment and properly determined that the petitioners had shown "good cause" for their requests for confidential treatment with respect to the full text of the four reports at issue.²⁴³ At the oral hearing, Japan and the European Union agreed that the degree of substantiation required from an investigating authority depends on the nature of the information for which confidential treatment is sought, noting however that, in the absence of any evidence that MOFCOM had objectively assessed the "good cause" alleged for confidential treatment, the Panel correctly concluded that China had acted inconsistently with Article 6.5.²⁴⁴

5.94. We begin our analysis by examining the text of Article 6.5 of the Anti-Dumping Agreement, which provides:

Any information which is by nature confidential (for example, 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), 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. Such information shall not be disclosed without specific permission of the party submitting it.[*]

[*original fn]¹⁷ Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

5.95. In *EC – Fasteners (China)*, the Appellate Body explained that Article 6.5 covers information that is "by nature confidential", as well as information that is "provided on a confidential basis", and that a "good cause" showing by the party seeking confidential treatment is required for both of these categories of information.²⁴⁵ The Appellate Body added that "[t]he 'good cause' alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation."²⁴⁶ According to the Appellate Body, "[g]ood cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party."²⁴⁷ The Appellate Body further stated:

²⁴¹ China's appellant's submission, paras. 284-286 and 290.

²⁴² China's appellant's submission, paras. 288-289; other appellant's submission, paras. 195-196 (referring to Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.380 and 7.382; and Appellate Body Report, *EC – Fasteners (China)*, para. 539 and fn 784 thereto).

²⁴³ Japan's appellee's submission, para. 61; European Union's appellee's submission, para. 268 (referring to Panel Reports, paras. 7.299-7.300 and 7.302).

²⁴⁴ Japan's and the European Union's responses to questioning at the oral hearing.

²⁴⁵ Appellate Body Report, *EC – Fasteners (China)*, paras. 536-537. The Appellate Body also stated that the "question of whether information is 'by nature' confidential depends on the *content* of the information. Information that is 'provided on a confidential basis' is not necessarily confidential by reason of its content, but rather, confidentiality arises from the circumstances in which it is provided to the authorities. These two categories may, in practice, overlap." (Ibid., para. 536 (emphasis original))

²⁴⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 537.

²⁴⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 537.

In practice, a party seeking confidential treatment for information must make its "good cause" showing to the investigating authority upon submission of the information. The authority must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged. The obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a "good cause" showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only "upon good cause shown".²⁴⁸

5.96. The Appellate Body further noted that, "[w]henver information is treated as confidential, transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation."²⁴⁹ The Appellate Body stated that "Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon 'good cause' shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests."²⁵⁰

5.97. The Appellate Body added that an investigating authority "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".²⁵¹ However, the Appellate Body did not further say *how* the sufficiency of a showing of "good cause" is to be assessed by an investigating authority, or how it is to be assessed by a reviewing panel. As we see it, a panel tasked with reviewing whether an investigating authority has objectively assessed the "good cause" alleged by a party must examine this issue on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue²⁵² and the reasons given by the submitting party for its request for

²⁴⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 539. (fn omitted)

²⁴⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 541.

²⁵⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 542. (fns omitted) The Appellate Body noted that:

Article 6.5.1 serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process[. In respect of information treated as confidential under Article 6.5, 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.

(Ibid. (fns omitted))

²⁵¹ Appellate Body Report, *EC – Fasteners (China)*, para. 539.

²⁵² As the Appellate Body in *EC – Fasteners (China)* noted, "[t]he confidentiality of information that is 'by nature' confidential will often be readily apparent. Article 6.5 provides illustrative examples of information that falls into the category of 'by nature' confidential, including information that is sensitive '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'." (Appellate Body Report, *EC – Fasteners (China)*, para. 536)

confidential treatment.²⁵³ The type of evidence and the extent of substantiation the investigating authority must require will depend on the nature of the information at issue and the particular "good cause" alleged.²⁵⁴ In reviewing whether an investigating authority has assessed and determined objectively that "good cause" for confidential treatment has been shown to exist, it is not for a panel to engage in a *de novo* review of the record of the investigation and determine for itself whether the existence of "good cause" has been sufficiently substantiated by the submitting party.

5.98. Turning to the present case, we note that, in finding that there was no evidence that MOFCOM objectively assessed the "good cause" alleged for confidential treatment, the Panel stressed that it was not concluding that MOFCOM could *not* have treated the full text of the reports contained in appendix V and the appendix to the petitioners' supplemental evidence of 29 March 2012 as confidential.²⁵⁵ Rather, the Panel found that there was "no evidence that MOFCOM ever considered whether good cause had been shown for such treatment"²⁵⁶, and thus no evidence of an objective assessment.

5.99. Pursuant to Article 6.5 of the Anti-Dumping Agreement, it is for the investigating authority to require a party that seeks confidential treatment of information to explain and provide reasons as to why the information at issue should be treated as confidential. The investigating authority, in turn, is under an obligation to assess objectively the "good cause" alleged by the submitting party for confidential treatment, and to "scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".²⁵⁷ As the Appellate Body has explained, "[g]ood cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party."²⁵⁸ In the present case, however, MOFCOM merely summarized the reasons provided by the petitioners for confidential treatment of the full text of two of the four reports at issue.²⁵⁹

5.100. Therefore, we see no error in the Panel's finding that, in the absence of *any evidence* that MOFCOM objectively assessed the "good cause" alleged, it had no basis to conclude that MOFCOM undertook an objective assessment and properly determined that the petitioners had shown "good cause" for their requests for confidential treatment.²⁶⁰ In these circumstances, we also see no error in the Panel's conclusion that there was no basis for it to find that "MOFCOM properly

²⁵³ In this respect, we note that the Appellate Body found that "the examples provided in Article 6.5 in the context of information that is 'by nature' confidential are helpful in interpreting 'good cause' generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved." The Appellate Body emphasized that "[t]hese examples are only illustrative, however, and ... consider[ed] that a wide range of other reasons could constitute 'good cause' justifying the treatment of information as confidential under Article 6.5." (Appellate Body Report, *EC – Fasteners (China)*, para. 538)

²⁵⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 539.

²⁵⁵ Panel Reports, fn 482 to para. 7.299.

²⁵⁶ Panel Reports, fn 482 to para. 7.299.

²⁵⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 539.

²⁵⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 537.

²⁵⁹ In its Injury Disclosure and Final Determination, MOFCOM summarized in a footnote the reasons provided by the petitioners for confidential treatment of the full text of the two reports as follows:

According to the reason provided by the petitioners for confidential treatment, a certain authoritative institute in the domestic stainless steel tube industry provided information on domestic and international markets for certain high-performance stainless steel seamless tubes. To do this, the institute in question spent a large amount of time and energy on the research, analysis and selection of relevant data and information, and provided the final report to the petitioners at a certain price. If the petitioners were to disclose the full report itself and the name of the said institute, it would on the one hand create obstacles for this institute to carry out similar research in the future (for example, a third party may not want to cooperate with the institute on its future researches) and on the other hand seriously affect the prospects of the institute to sell reports with same or similar information and data to other third parties. In addition, it would also cause serious negative impacts on the daily operations of the institute. Therefore, at the request of this institute, the petitioners applied for confidential treatment for the full text of the report.

(Panel Reports, para. 7.296 (quoting MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 46, fn 18; and MOFCOM's Injury Disclosure (Panel Exhibits JPN-23-EN and EU-24), internal p. 22, fn 17 (translation amended by Panel Exhibit CHN-16-EN, and accepted by the complainants in Panel Exhibits JPN-29 and EU-32)))

²⁶⁰ Panel Reports, paras. 7.299-7.300.

determined that the petitioners had shown 'good cause' for their requests for confidential treatment from the fact that MOFCOM ultimately granted their request for confidential treatment."²⁶¹

5.101. China also submits that, in reaching its findings under Article 6.5 of the Anti-Dumping Agreement, the Panel applied an erroneous standard of review and failed to make an objective assessment of the facts before it, contrary to the requirements of Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement.²⁶² According to China, the Panel applied an incorrect standard of review because it failed to take into account the information on the record that was before MOFCOM.²⁶³ Although China brings this claim as a separate one, it appears to be premised on the same contention as its claim that the Panel erred in the interpretation and application of Article 6.5, namely, that the Panel should have looked into the facts that were before MOFCOM in order to determine whether MOFCOM objectively assessed the "good cause" alleged.

5.102. We do not consider that the Panel would have complied with the applicable standard of review if, in the absence of any evidence of an objective assessment by MOFCOM of the "good cause" alleged, it had engaged in a *de novo* review of evidence on the record of the investigation and determined for itself, or on the basis of subjective concerns of the petitioners, whether the request for confidential treatment was sufficiently substantiated and that "good cause" for such treatment objectively existed. Having rejected China's claim of error under Article 6.5 of the Anti-Dumping Agreement, we also do not agree with China that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement by failing to take into account the information on the record, including the requests for confidential treatment by the petitioners.²⁶⁴ We fail to see how the Panel, having found that there was no evidence that MOFCOM objectively assessed the "good cause" alleged, and that MOFCOM had instead only summarized the petitioners' requests and arguments for confidential treatment²⁶⁵, could have concluded that MOFCOM undertook an objective assessment and properly determined that the petitioners had shown "good cause" for their requests for confidential treatment.

5.3.3 Whether the Panel applied internally inconsistent reasoning in violation of Article 11 of the DSU

5.103. We next turn to China's claim that the Panel applied internally inconsistent reasoning in its analysis of Japan's and the European Union's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, contrary to the requirements of Article 11 of the DSU. China contends that, unlike under Article 6.5, in its analysis under Article 6.5.1 of the Anti-Dumping Agreement, the Panel did not take issue with the absence of explanations by MOFCOM, and focused its examination, instead, on the non-confidential summaries provided by the petitioners, as well as the statements provided by the petitioners as to why summarization was not possible.²⁶⁶ In support of its position, China argues that, in *EC – Fasteners (China)*, in the context of its assessment under Article 6.5.1, "the Appellate Body examined the statements provided by *certain parties* who claimed that they could not provide a non-confidential summary of information submitted in confidence, and did not require an analysis of statements by the *investigating authority*."²⁶⁷ In China's view, such internally inconsistent reasoning of the Panel in its analyses under Article 6.5 and Article 6.5.1 cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU.

5.104. Japan and the European Union respond that, while there may be similarities between the obligations of an investigating authority under Article 6.5 and Article 6.5.1 of the Anti-Dumping Agreement, a precondition for triggering the obligation under Article 6.5.1 for the investigating

²⁶¹ Panel Reports, para. 7.302.

²⁶² China's Notice of Appeal, para. 5.e.ii; Notice of Other Appeal, para. 5.c.ii; appellant's submission, para. 294; other appellant's submission, para. 201.

²⁶³ China's appellant's submission, para. 295; other appellant's submission, para. 202.

²⁶⁴ China's appellant's submission, para. 295; other appellant's submission, para. 202 (referring to Appellate Body Reports, *US – Tyres (China)*, para. 329; and *US – Countervailing Duty Investigation on DRAMs*, paras. 187-188); responses to questioning at the oral hearing.

²⁶⁵ Panel Reports, para. 7.299.

²⁶⁶ China's appellant's submission, paras. 301-303; other appellant's submission, paras. 208-210.

²⁶⁷ China's appellant's submission, para. 301; other appellant's submission, para. 208 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 553). (emphasis original)

authority "to scrutinize the reasons advanced for not supplying non-confidential summaries" is "the existence of a statement by the party pertaining to such reasons".²⁶⁸ According to the complainants, the Panel's finding that the record did not contain any reasons advanced by the petitioners for not supplying non-confidential summaries was not a finding on the adequacy of the reasons.²⁶⁹

5.105. Article 6.5 and Article 6.5.1 of the Anti-Dumping Agreement each imposes distinct obligations on an investigating authority. Under Article 6.5, the investigating authority is required objectively to assess the "good cause" alleged by the party requesting confidential treatment. By contrast, under Article 6.5.1, the investigating authority is obliged, in respect of information that an investigating authority has decided to treat as confidential under Article 6.5, "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'".²⁷⁰ When it is not possible to supply a non-confidential summary, Article 6.5.1 requires a party "to identify the exceptional circumstances and provide a statement explaining the reasons why summarization is not possible".²⁷¹ For its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given explain why summarization is not possible.²⁷² Thus, although the subject matter of Article 6.5 and Article 6.5.1 is similar, the nature of the obligations that apply under the two provisions is different.

5.106. In the present disputes, the issue before the Panel under Article 6.5 was whether MOFCOM permitted the full text of the four appendices to remain confidential without objectively assessing and scrutinizing the petitioners' showing of "good cause". By contrast, under Article 6.5.1, the issue before the Panel was: (i) whether MOFCOM required the petitioners to provide sufficient non-confidential summaries of the confidential information contained in reports found in the four appendices at issue; and (ii) whether MOFCOM required the petitioners to provide adequate statements as to why summarization was not possible with respect to the remaining 32 appendices.²⁷³

5.107. As we have noted above, whether an investigating authority has objectively assessed the "good cause" alleged by a party under Article 6.5 is to be examined on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue and the reasons given by the interested party for its request for confidential treatment. We have also found that the Panel did not err in stating that, in the absence of any evidence that MOFCOM had objectively assessed whether the petitioners had made a showing of "good cause" in the present case, it could not find that MOFCOM had complied with its obligation under Article 6.5.²⁷⁴

5.108. In addressing the complainants' claim under Article 6.5.1 that MOFCOM failed to require the petitioners to provide sufficient non-confidential summaries of the confidential information, the Panel compared confidential versions and the non-confidential summaries of the four appendices at issue. We recall that, in *EC – Fasteners (China)*, the Appellate Body held that the sufficiency of the summary provided depends on the confidential information at issue, and that it must permit "a reasonable understanding of the substance of the information withheld".²⁷⁵ Thus, in order to determine whether MOFCOM ensured that the non-confidential summaries of the four reports at issue were sufficiently detailed, the Panel compared those summaries with the confidential versions of the underlying reports. Further, in assessing whether MOFCOM required the petitioners to provide adequate statements as to why summarization was not possible with regard to the remaining 32 appendices, the Panel examined the statements by the petitioners.²⁷⁶

²⁶⁸ Japan's appellee's submission, para. 72; European Union's appellee's submission, para. 278.

²⁶⁹ Japan's appellee's submission, para. 74; European Union's appellee's submission, para. 281.

²⁷⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 542.

²⁷¹ Appellate Body Report, *EC – Fasteners (China)*, para. 544.

²⁷² Appellate Body Report, *EC – Fasteners (China)*, para. 544. (fn omitted)

²⁷³ Panel Reports, para. 7.304.

²⁷⁴ Panel Reports, para. 7.299 and fn 482 thereto.

²⁷⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 542.

²⁷⁶ Panel Reports, para. 7.324.

5.109. We do not consider that the Panel's approach to addressing the complainants' claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement was "internally inconsistent". Rather, as we see it, the Panel properly reflected the distinct nature of the substantive legal obligation at issue in each case.

5.110. China also argues that the Panel's approach under Article 6.5 in the present disputes contradicts the approach adopted by the Appellate Body in *EC – Fasteners (China)* in its analysis of the claims under Article 6.5.1 of the Anti-Dumping Agreement. In *EC – Fasteners (China)*, the Appellate Body considered whether the investigating authority had ensured that two domestic producers – Agrati and Fontana Luigi – had provided adequate statements as to why summarization of confidential information was not possible. Having examined the Panel's assessment of the statements by Agrati and Fontana Luigi, the Appellate Body concluded that those statements did not contain sufficient explanations as to why summarization of certain information was not possible, and, accordingly, that the European Union had failed to comply with its obligations under Article 6.5.1.²⁷⁷ Moreover, the Appellate Body found that the investigating authority had failed to scrutinize the reasons provided in the statements of Agrati and Fontana Luigi, in violation of Article 6.5.1. We do not view the approach taken by the Appellate Body in *EC – Fasteners (China)* to support China's position regarding the alleged application of inconsistent reasoning by the Panel in the present disputes. Similarly to what we have noted above, we consider that the difference in the approaches taken by the Panel in its analysis under Article 6.5 and by the Appellate Body in *EC – Fasteners (China)* in its analysis under Article 6.5.1 reflects the distinct nature of the substantive legal obligations at issue. For all these reasons, we do not agree with China that the Panel failed to make an objective assessment of the matter before it by applying an "internally inconsistent" reasoning in its examination of the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

5.3.4 Whether the Panel made a case for the complainants

5.111. China argues that the Panel acted inconsistently with Article 11 of the DSU by finding that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement on grounds not alleged by the complainants in their first written submissions, contrary to paragraph 7 of the Joint Working Procedures of the Panels.²⁷⁸ More specifically, China explains that it had understood, on the basis of the complainants' panel requests, as well as the complainants' first written submissions, that they were claiming that China had violated Article 6.5 of the Anti-Dumping Agreement because MOFCOM granted confidential treatment to the four appendices at issue "without 'good cause' being shown by the petitioners".²⁷⁹ According to China, it was not until after the parties had received question No. 67 from the Panel that the issue arose as to whether or not MOFCOM had objectively assessed and determined the showing of "good cause" by the petitioners.²⁸⁰

5.112. In response, Japan and the European Union submit that China's arguments are based on its erroneous understanding of the nature of the analysis under Article 6.5.²⁸¹ According to the complainants, an allegation that confidential treatment was extended without "good cause" being shown is merely another way of expressing that the investigating authority failed to undertake an objective assessment as to whether "good cause" had been shown by the applicant.²⁸²

5.113. We understand China to distinguish between what it sees as two distinct issues: (i) whether MOFCOM "objectively assessed" and scrutinized the "good cause" alleged for confidential treatment in order to determine whether the petitioners' requests were sufficiently substantiated; and (ii) whether MOFCOM granted confidential treatment without a showing of "good cause" by the petitioners. China considers that the complainants did not argue – at any stage during the Panel proceedings, and, in any event, not in their first written submissions – the

²⁷⁷ Appellate Body Report, *EC – Fasteners (China)*, paras. 553-554.

²⁷⁸ China's appellant's submission, para. 304; other appellant's submission, para. 211 (referring to Joint Working Procedures of the Panels of 22 May 2014, as modified, contained in document WT/DS454/R/Add.1, WT/DS460/R/Add.1, Annex A-1, para. 7).

²⁷⁹ China's appellant's submission, fn 300 to para. 304; other appellant's submission, fn 210 to para. 211.

²⁸⁰ China's appellant's submission, paras. 274-275; other appellant's submission, paras. 180-181.

²⁸¹ European Union's appellee's submission, para. 285; Japan's appellee's submission, para. 78.

²⁸² European Union's appellee's submission, para. 285; Japan's appellee's submission, para. 78.

issue of whether MOFCOM objectively assessed the reasons given by the petitioners for their requests for confidential treatment.²⁸³

5.114. We note that, in their panel requests, the complainants alleged that China acted inconsistently with Article 6.5 because MOFCOM treated information supplied by the petitioners as confidential "without good cause shown".²⁸⁴ We consider this language to have been sufficient to put China on notice that the question of whether MOFCOM objectively assessed the "good cause" alleged by the petitioners would be an issue in these disputes.

5.115. In their first written submissions, the complainants further argued that the petitioners did not show "good cause" for treating the full text of the relevant appendices as confidential, and therefore China acted inconsistently with Article 6.5 "in permitting the full texts of these Appendices to remain confidential".²⁸⁵ The complainants also contended that, by granting the confidential treatment to the full texts of the four aforementioned reports "without a showing of good cause", China violated Article 6.5.²⁸⁶ Moreover, in response to question No. 67 from the Panel, the complainants argued that "the authority must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".²⁸⁷

5.116. China takes issue with the fact that the complainants referred expressly to the obligation of the investigating authority to assess objectively the "good cause" only after having received the Panel's question.²⁸⁸ We recall that paragraph 7 of the Joint Working Procedures of the Panels provided that, "[b]efore the first substantive meeting of the Panels with the parties, each party shall submit a written submission in which it presents the facts of its case and its arguments, in accordance with the timetable adopted by the Panels."²⁸⁹ However, we see no reason why this language should be construed to have precluded the complainants from further elaborating on the claims identified in their panel requests in response to the Panel's questioning. We also note that the Appellate Body has previously found that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them."²⁹⁰ Moreover, it is within the competence of a panel "freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration".²⁹¹

5.117. Accordingly, we disagree with China's argument that the Panel made the case for the complainants and thereby acted inconsistently with Article 11 of the DSU.

5.3.5 Conclusion

5.118. In the light of the above, we uphold the Panel's findings, in paragraphs 7.290 and 7.297-7.303 of the Panel Reports, paragraph 8.1.b. of the Japan Panel Report, and paragraph 8.6.e of the EU Panel Report, that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the reports contained in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without objectively assessing the petitioners' showing of "good cause".

²⁸³ China's appellant's submission, para. 276; other appellant's submission, para. 182.

²⁸⁴ Japan's panel request, p. 2; European Union's panel request, p. 2.

²⁸⁵ Japan's first written submission to the Panel, para. 271; European Union's first written submission to the Panel, para. 85.

²⁸⁶ Japan's first written submission to the Panel, paras. 272 and 280; European Union's first written submission to the Panel, para. 88.

²⁸⁷ European Union's response to Panel question No. 67, para. 144; Japan's response to Panel question No. 67, para. 49 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 539).

²⁸⁸ China's appellant's submission, para. 274; other appellant's submission, para. 180.

²⁸⁹ Joint Working Procedures of the Panels of 22 May 2014, as modified, contained in document WT/DS454/R/Add.1, WT/DS460/R/Add.1, Annex A-1, para. 7.

²⁹⁰ Appellate Body Report, *Thailand – H-Beams*, para. 135 (quoting Appellate Body Report, *Canada – Aircraft*, para. 185).

²⁹¹ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215 (quoting Appellate Body Report, *EC – Hormones*, para. 156; and referring to Appellate Body Report, *US – Certain EC Products*, para. 123).

5.4 Disclosure of the essential facts concerning MOFCOM's dumping determination

5.119. The European Union appeals the Panel's rejection of the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to adequately disclose the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex.²⁹² In its appeal, the European Union asserts that the Panel erred both in its interpretation and application of Article 6.9.

5.120. We begin by recalling the relevant findings by the Panel before addressing the specific issues raised by the European Union on appeal, as well as China's contention that the European Union's challenge goes to the objectivity of the Panel's assessment of the facts and should therefore have been brought under Article 11 of the DSU.

5.4.1 The Panel's findings

5.121. Before the Panel, Japan and the European Union contended that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM had not disclosed the essential facts that formed the basis for its dumping determinations.²⁹³ In particular, the complainants argued that, in its dumping determinations, MOFCOM failed to disclose any information relating to: (i) the specific cost and sales data used to calculate normal value and export prices underlying the margin calculations; (ii) adjustments to this data, for instance, to take account of taxes and freight; and (iii) information on the calculation methodology, namely, the formulae used in calculations, the data applied in these formulae, and how MOFCOM applied these data in constructing normal value, export price, and production costs.²⁹⁴

5.122. In response, China argued that the complainants failed to make a *prima facie* case and, instead, relied on general, unsubstantiated allegations without any specific reference to the disclosure documents. China further contended that, contrary to the European Union's allegations, MOFCOM had disclosed all essential facts pertaining to its dumping determinations in its preliminary and final dumping disclosures. In particular, with regard to production costs, SG&A, and profits, China submitted that MOFCOM had "explained when it accepted the data submitted by the exporters, and when it resorted to constructed normal values or export prices".²⁹⁵ According to China, MOFCOM also indicated when it used the adjustments requested by the exporters, and the amount of the adjustments made in other instances. In addition, China argued that MOFCOM provided the necessary information for the respondents to understand the methodology used to calculate the margins of dumping.²⁹⁶

5.123. The Panel started its analysis of the complainants' claims by referring to WTO jurisprudence establishing that "the basic data underlying an investigating authority's dumping determination constitute 'essential facts' within the meaning of Article 6.9."²⁹⁷ Moreover, the Panel noted that, in *China – Broiler Products*, the panel found that "a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the respondent."²⁹⁸ On this basis, the Panel found that Article 6.9 does not require investigating authorities to "prepare disclosures containing the entirety of the essential facts under consideration" in cases where the relevant essential facts are in the possession of the respondent.²⁹⁹ The Panel therefore did not consider that an investigating authority would necessarily need to disclose "a spread sheet 'duly completed with the data actually

²⁹² In particular, the European Union takes issue with the Panel's findings in paras. 7.234-7.236 and 8.7.d.i. of the EU Panel Report. (European Union's Notice of Other Appeal, para. 10 and fn 14 thereto) We note that Japan has not appealed the Panel's findings under Article 6.9 of the Anti-Dumping Agreement regarding this aspect of MOFCOM's determination of dumping margins for Kobe and SMI.

²⁹³ In particular, Japan claimed that MOFCOM failed to disclose the data used to determine the existence of dumping and the dumping margins for SMI and Kobe. (Japan's second written submission to the Panel, para. 89) The European Union, in turn, argued that MOFCOM failed to disclose the data forming the basis of the dumping determination for SMST and Tubacex. (European Union's second written submission to the Panel, para. 53)

²⁹⁴ EU Panel Report, para. 7.226.

²⁹⁵ EU Panel Report, para. 7.230.

²⁹⁶ EU Panel Report, para. 7.230.

²⁹⁷ EU Panel Report, para. 7.235 (referring to Panel Report, *China – X-Ray Equipment*, para. 7.402).

²⁹⁸ EU Panel Report, para. 7.235 (referring to Panel Report, *China – Broiler Products*, para. 7.95).

²⁹⁹ EU Panel Report, para. 7.235.

relied on by the investigating authority'", as the European Union suggested.³⁰⁰ The Panel noted that, "[w]hile this would be one way of complying with Article 6.9, a narrative description would also suffice in the appropriate circumstances, provided that such description does not leave uncertainty as to the essential facts under consideration."³⁰¹

5.124. The Panel further observed that MOFCOM had made both preliminary and final dumping disclosures to the exporters at issue, the narrative of which "described the sales data under consideration, the basis for determining normal value and export price, and the adjustments made thereto".³⁰² Moreover, "MOFCOM specified when it used data or made adjustments requested by the exporters" and "disclosed actual data when it departed from the data submitted by the exporters".³⁰³ The Panel expressed the view that, "[o]ther than observing that MOFCOM failed to provide actual data that was already in the respondents' possession, the complainants ha[d] not identified any flaws in MOFCOM's narrative description, or otherwise explained how such description would not have been sufficient for the relevant exporters to defend" their interests.³⁰⁴ Therefore, the Panel saw "no basis ... to find that the narrative descriptions provided by MOFCOM do not satisfy the requirements of Article 6.9 of the Anti-Dumping Agreement".³⁰⁵

5.4.2 Whether the Panel erred in rejecting the European Union's claim under Article 6.9 of the Anti-Dumping Agreement

5.125. As noted, the European Union takes issue with the Panel's interpretation and application of Article 6.9 of the Anti-Dumping Agreement with respect to the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex.³⁰⁶ The European Union submits, as it did before the Panel, that the "essential facts supporting an anti-dumping margin determination include the data underlying the margin calculations and adjustments to the data"³⁰⁷, as well as information on the calculation methodology, such as the formulae used in calculations and the data applied in the formulae. According to the European Union, the lack of disclosure of such facts in the underlying investigation impaired the interested parties' ability to defend their interests, because the interested parties did not have "an opportunity to 'provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts'".³⁰⁸ The European Union argues, in particular, that Article 6.9 "requires disclosure of all the essential facts under consideration which form the basis for the decision whether to apply definitive measures"³⁰⁹, and submits, contrary to what the Panel's analysis suggests, that the "[m]ere possession of the data set from which the facts have been selected is clearly insufficient for the interested party to defend its interests."³¹⁰

5.126. In response, China argues that the European Union appears to challenge the Panel's examination and weighing of the evidence, rather than the Panel's interpretation and application of Article 6.9.³¹¹ China notes that the European Union has not raised a claim under Article 11 of the DSU concerning this aspect of the Panel's findings, and argues, on this basis, that the European Union's appeal concerning the Panel's findings under Article 6.9 should be rejected. In the alternative, China submits that the Panel correctly found that "there are several ways in which an investigating authority can satisfy" its obligations under Article 6.9.³¹² China adds that the Panel did not find that an investigating authority "is excused from disclosing the essential facts if they are already in the possession of the interested party".³¹³ For China, the Panel simply distinguished

³⁰⁰ EU Panel Report, para. 7.235 (quoting European Union's first written submission to the Panel, para. 111).

³⁰¹ EU Panel Report, para. 7.235.

³⁰² EU Panel Report, para. 7.236.

³⁰³ EU Panel Report, para. 7.236.

³⁰⁴ EU Panel Report, para. 7.236.

³⁰⁵ EU Panel Report, para. 7.236.

³⁰⁶ Specifically, the European Union takes issue with paras. 7.234-7.236 and 8.7d.i of the EU Panel Report. (European Union's Notice of Other Appeal, para. 10 and fn 14 thereto; other appellant's submission, fn 155 to para. 179)

³⁰⁷ European Union's other appellant's submission, para. 181.

³⁰⁸ European Union's other appellant's submission, para. 187 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.805).

³⁰⁹ European Union's other appellant's submission, para. 188.

³¹⁰ European Union's other appellant's submission, para. 189.

³¹¹ China's appellee's submission, para. 323.

³¹² China's appellee's submission, para. 333.

³¹³ China's appellee's submission, para. 334. (emphasis original)

between two possible manners of complying with Article 6.9: (i) the actual *provision* of specific data; and (ii) the inclusion of a narrative description of the data used that is in the possession of the respondents.

5.127. Before embarking on our analysis, we note that, in addition to claiming that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose the essential facts underlying MOFCOM's determination of dumping for SMST and Tubacex, the European Union also claimed before the Panel that MOFCOM acted inconsistently with that provision because it did not disclose information on the calculation methodology applied by MOFCOM to determine the margins of dumping for the investigated companies. The Panel reasoned that an interested party would not be able properly to defend its interests if it were not informed of the methodology applied by the investigating authority to determine the margin of dumping. The Panel added that "merely disclosing the underlying data under consideration, without also disclosing the methodology under consideration, would be of little use in clarifying the factual basis of the investigating authority's determinations."³¹⁴ The Panel concluded that, by failing to disclose the methodology used to calculate the margin of dumping, MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement. These findings have not been appealed. Instead, the European Union's appeal concerns MOFCOM's alleged failure to disclose the specific cost and sales data used to calculate the normal value and export prices underlying the margin calculations, and the adjustments to this data, for instance, to take account of taxes and freight.

5.128. Turning to China's contention that the European Union ought to have brought this claim under Article 11 of the DSU, we recall the Appellate Body's finding that allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU, whereas "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue" and is, therefore, a legal question.³¹⁵ As we understand it, the European Union's key contention is that the Panel erred in determining that MOFCOM adequately disclosed the "essential facts" underlying its dumping determinations as required under Article 6.9. Although there are aspects of the Panel's analysis that concern the facts that were before MOFCOM, we understand the European Union's appeal to focus on the manner in which the Panel interpreted and applied Article 6.9 in its assessment of whether MOFCOM's dumping disclosures complied with the legal standard under that provision. In particular, we consider that the European Union's appeal raises issues as to the meaning and scope of the investigating authority's duty under Article 6.9 to disclose the "essential facts" under consideration. Hence, we do not agree with China that the European Union's appeal merely challenges the Panel's examination and weighing of the evidence, and should therefore have been brought under Article 11 of the DSU. We turn, therefore, to examine the issues raised by the European Union on appeal concerning the Panel's interpretation and application of the legal standard under Article 6.9 to MOFCOM's dumping disclosures.

5.129. The first sentence of Article 6.9 of the Anti-Dumping Agreement stipulates that "[t]he authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The second sentence of Article 6.9 provides that "[s]uch disclosure should take place in sufficient time for the parties to defend their interests."³¹⁶ As to the scope of information that must be disclosed, the Appellate Body has explained that Article 6.9 "cover[s] 'facts under consideration', that is, 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 ... duties".³¹⁷ As to what kinds of facts are "essential" under Article 6.9, the Appellate Body, in *China – GOES*, explained that:

³¹⁴ EU Panel Report, para. 7.238 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.805; and *China – Broiler Products*, para. 7.91).

³¹⁵ Appellate Body Report, *EC – Hormones*, para. 132.

³¹⁶ This suggests that disclosure of facts that are essential in the process of reaching a decision must occur in a timely fashion to give interested parties an opportunity to comment on or challenge the essential facts that are "under consideration" by the investigating authority in the process of assessing whether or not to apply anti-dumping measures.

³¹⁷ Appellate Body Report, *China – GOES*, para. 240.

Article[] 6.9 ... do[es] not require the disclosure of *all* the facts that are before an authority but, instead, those that are "essential"; a word that carries a connotation of significant, important, or salient. In considering which facts are "essential", the following question arises: essential for what purpose? The context provided by the latter part of Article[] 6.9 ... clarifies that such facts are, first, those that "form the basis for the decision whether to apply definitive measures" and, second, those that ensure the ability of interested parties to defend their interests. Thus, we understand the "essential facts" to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Article[] 6.9 ... is paramount for ensuring the ability of the parties concerned to defend their interests.³¹⁸

5.130. Essential facts are, therefore, "those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome."³¹⁹ In order to apply a definitive measure, an investigating authority must find dumping, injury to the domestic industry, and a causal link between the dumping and the injury. These findings, in turn, are based on various intermediate findings and conclusions reached by the investigating authority. Whether a particular fact is essential or "significant in the process of reaching a decision"³²⁰ depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties.³²¹ An investigating authority must disclose such facts "in a coherent way" that permits an interested party to understand the factual basis for each of the intermediate findings and conclusions reached by the authority, such that it is able properly to defend its interests.

5.131. Thus, an investigating authority is expected, with respect to the determination of dumping, to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping. The mere fact that the investigating authority refers in its disclosure to data that are in the possession of an interested party does not mean that the investigating authority has disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts.³²² Thus, while Article 6.9 does not prescribe a particular form for the disclosure of the essential facts, it does require in all cases that the investigating authority disclose those facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping.³²³

5.132. On appeal, the European Union's challenge focuses on paragraphs 7.235 and 7.236 of the EU Panel Report, where the Panel set out its understanding of the interpretation and application of Article 6.9 of the Anti-Dumping Agreement. The Panel stated:

³¹⁸ Appellate Body Report, *China – GOES*, para. 240. (fns omitted; emphasis original)

³¹⁹ Appellate Body Report, *China – GOES*, para. 240.

³²⁰ Appellate Body Report, *China – GOES*, para. 240.

³²¹ See Appellate Body Report, *China – GOES*, para. 241.

³²² Appellate Body Report, *China – GOES*, fn 390 to para. 240; Panel Report, *EC – Salmon (Norway)*, para. 7.805.

³²³ While disclosure may take various forms, we note our agreement with the United States that, "[w]ithout a full disclosure of the *entirety* of the essential facts under consideration underlying the dumping determination, it is difficult to see how a party would be in a position to identify whether the determination contains clerical or mathematical errors, or whether the investigating authority actually did what it purported to do. Such failure to provide this information would result in an interested party being unable to defend its interests because it could not identify in the first instance the particular issues that are adverse to its interests." (United States' third participant's submission, para. 36 (fn omitted; emphasis original))

Previous WTO dispute settlement panels have established that the basic data underlying an investigating authority dumping determination constitute "essential facts" within the meaning of Article 6.9. We agree. In addition, the panel in *China – Broiler Products* found that a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the respondent.[*] We agree. In cases where the relevant essential facts are already in the possession of the respondents, we do not consider that Article 6.9 requires investigating authorities to prepare disclosures containing the entirety of the essential facts under consideration. In particular, we do not consider that the authority need necessarily disclose a spread sheet "duly completed with the data actually relied on by the investigating authority", as suggested by the European Union. While this would be one way of complying with Article 6.9, a narrative description would also suffice in the appropriate circumstances, provided that such description does not leave uncertainty as to the essential facts under consideration.³²⁴

[*original fn]³⁹⁶ Panel Report, *China – Broiler Products*, para. 7.95.

5.133. While the Panel's reading of the scope and meaning of Article 6.9 is not entirely clear, it appears to us that the Panel considered that a determination of whether an investigating authority has complied with its obligations under that provision hinges largely on whether the essential facts under consideration by the investigating authority were in the possession of an interested party affected by the determination.³²⁵ However, contrary to what the Panel stated, it does not suffice for an investigating authority to disclose "the essential facts under consideration"³²⁶ but, rather, it must disclose the essential facts under consideration that "*form the basis for the decision* whether to apply definitive measures". To the extent that the Panel suggested that a narrative description of the data used would constitute sufficient disclosure simply because the essential facts that the authority is referring to "are in the possession of the respondent", we disagree. Instead, we agree with the European Union that, "when the investigating authority has *selected* from amongst the facts originally provided by the interested party, [that] party has no way of knowing which facts have been selected."³²⁷ We do not see how the mere fact that the investigating authority may be referring to data that are in the possession of an interested party would mean that it has disclosed the essential facts "that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome ... in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures"³²⁸, and to defend its interests.

5.134. In the light of the above, we find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement set out in paragraph 7.235 of the EU Panel Report. The Panel subsequently relied on this erroneous interpretation of Article 6.9 in finding, in paragraph 7.236 of the EU Panel Report, that, "[o]ther than observing that MOFCOM failed to provide actual data that was already in the respondents' possession, the complainants have not identified any flaws in MOFCOM's narrative description, or otherwise explained how such description would not have been sufficient for the relevant exporters to defend its interests."³²⁹ We therefore reverse the Panel's finding, in paragraphs 7.235 and 7.236, and the Panel's conclusion, in paragraph 8.7.d.i. of the EU Panel Report, rejecting the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex.

³²⁴ EU Panel Report, para. 7.235 and fn 396 thereto. (fns 395 and 397 omitted)

³²⁵ See EU Panel Report, para. 7.235. We agree with the United States that, "to the extent that the Panel relied on the fact that such data was already in the possession of a given respondent, this would not result in the disclosure of such essential facts to other respondents or the domestic industry." (United States' third participant's submission, fn 27 to para. 36)

³²⁶ EU Panel Report, para. 7.235.

³²⁷ European Union's other appellant's submission, para. 189. (emphasis original)

³²⁸ Appellate Body Report, *China – GOES*, para. 240.

³²⁹ EU Panel Report, para. 7.236.

5.135. This brings us to the question of whether we can complete the legal analysis by ruling on the European Union's claim that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex.³³⁰ Having reviewed MOFCOM's Preliminary and Final Dumping Disclosures³³¹, we consider that MOFCOM did not disclose the essential facts underlying its dumping determinations so as to permit the companies concerned to understand clearly what data MOFCOM had used, and how that data had been used to determine the margins of dumping for SMST and Tubacex. Accordingly, we find that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the data underlying its determination of dumping concerning SMST and Tubacex.

³³⁰ European Union's other appellant's submission, para. 190.

³³¹ See MOFCOM's Final Dumping Disclosure to SMST (Panel Exhibit EU-25-EN (BCI), internal pp. 2-5); MOFCOM's Final Dumping Disclosure to the EU (Panel Exhibit EU-27-EN), internal pp. 14-21; and MOFCOM's Preliminary Determination (Panel Exhibits JPN-7-EN and EU-18), internal pp. 25-29.

5.5 MOFCOM's injury determination

5.136. Each of the three participants has appealed different aspects of the Panel's findings relating to MOFCOM's injury determination. Before turning to our analysis of the issues raised by the participants on appeal, we first summarize briefly the relevant obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement regarding the conduct of injury investigations.³³²

5.137. The Appellate Body has found that Article 3.1 of the Anti-Dumping Agreement "is an overarching provision that sets forth a Member's fundamental, substantive obligation" concerning the injury determination, and informs the more detailed obligations in the succeeding paragraphs.³³³ Article 3.1 states:

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.

5.138. As the Appellate Body has found, the term "positive evidence" focuses on the facts underpinning and justifying the injury determination.³³⁴ It relates to the quality of the evidence that the investigating authorities may rely on in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible.³³⁵ Furthermore, the Appellate Body has interpreted the term "objective examination" as requiring an injury investigation under Article 3 to "conform to the dictates of the basic principles of good faith and fundamental fairness", and to be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".³³⁶

5.139. Several of the remaining paragraphs of Article 3 then elaborate on the elements that must be objectively examined, based on positive evidence, pursuant to Article 3.1. Article 3.2 specifies the content of an investigating authority's consideration regarding the volume of dumped imports and the effect of such imports on domestic prices. Articles 3.4 and 3.5 concern the consequent impact of the dumped imports on the domestic industry. Specifically, Article 3.4 sets out the economic factors that must be evaluated in the examination of the impact of the dumped imports on the domestic industry, while Article 3.5 requires an investigating authority to demonstrate that dumped imports are causing injury to the domestic industry.³³⁷

5.140. These paragraphs of Article 3 thus contemplate a "logical progression" in the investigating authority's examination leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry.³³⁸ This process entails a consideration of the volume of dumped imports and their price effects, and requires an examination of the impact of such imports on the state of the domestic industry as revealed by a number of economic factors and indices. These various elements are linked through a causation and non-attribution analysis between the dumped imports and the injury to the domestic industry, taking into account all factors that must be considered and evaluated.³³⁹

³³² Footnote 9 of the Anti-Dumping Agreement defines the word "injury" as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".

³³³ Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

³³⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

³³⁵ Appellate Body Report, *China – GOES*, para. 126 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 192).

³³⁶ Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

³³⁷ Appellate Body Report, *China – GOES*, para. 127.

³³⁸ Appellate Body Report, *China – GOES*, para. 128.

³³⁹ Appellate Body Report, *China – GOES*, para. 128.

5.141. Article 3 does not prescribe a specific methodology to be relied on by an investigating authority in its determination of injury.³⁴⁰ Nor is there a prescribed template or format that an investigating authority must adhere to in making its determination of injury, provided that its determination comports with the disciplines that apply under the discrete paragraphs of Article 3. These disciplines are necessary, interlinked elements of a single, overall analysis addressing the question of whether dumped imports are causing injury to the domestic industry. Indeed, by its terms, Article 3.5 states that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. Thus, the inquiries under Articles 3.2 and 3.4 should not be viewed in isolation, as they are necessary components to answering the ultimate question in Article 3.5 as to whether dumped imports are causing injury to the domestic industry.³⁴¹ The interpretation of Articles 3.2, 3.4, and 3.5 should therefore be consistent with the role they play in the overall framework of an injury determination.

5.142. With these considerations in mind, we turn to address the complainants' appeals as they relate to the Panel's assessment, under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, of MOFCOM's price effects analysis. Thereafter, we examine the complainants' claims that the Panel erred in its findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding MOFCOM's impact analysis. Finally, we address the appeals by the complainants and China regarding the Panel's assessment of MOFCOM's causation analysis.

5.5.1 Price effects – Articles 3.1 and 3.2 of the Anti-Dumping Agreement

5.143. Before the Panel, Japan and the European Union submitted that MOFCOM's consideration of whether there had been a significant price undercutting by the imports of Grade B and Grade C HP-SSST was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, on three grounds. First, the complainants argued that MOFCOM's analysis of the price effects of Grade C dumped imports was analytically and factually flawed because MOFCOM improperly compared the price of Grade C dumped imports with the price of domestic Grade C, despite significant differences between the quantities of imported and domestic products sold. Second, the complainants asserted that MOFCOM improperly found price undercutting on the basis that the price of Grade C dumped imports was lower than the price of domestic Grade C products, without considering evidence suggesting that Grade C dumped imports did not place downward pressure on domestic prices, or prevent an increase in the prices of those domestic products.³⁴² Third, the complainants submitted that MOFCOM improperly extended, without any analysis or explanation, its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A.³⁴³

5.144. The Panel addressed the three grounds of the complainants' claims separately. The Panel concluded that MOFCOM's failure to account properly for differences in quantities when comparing the price of Grade C dumped imports with the domestic Grade C price is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.³⁴⁴ However, the Panel rejected the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices.³⁴⁵ The Panel also rejected the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by improperly extending its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A.³⁴⁶

5.145. On appeal, Japan and the European Union claim that the Panel erred in rejecting their claim that MOFCOM's determination of price undercutting in respect of Grade C imports was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products,

³⁴⁰ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 113 and 118. Thus, "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation." (See Panel Report, *Thailand – H-Beams*, para. 7.159)

³⁴¹ Appellate Body Report, *China – GOES*, para. 128.

³⁴² Panel Reports, paras. 7.105 and 7.118.

³⁴³ Panel Reports, para. 7.105. See also para. 7.132.

³⁴⁴ Panel Reports, para. 7.115.

³⁴⁵ Panel Reports, para. 7.130.

³⁴⁶ Panel Reports, para. 7.143.

in the sense of placing downward pressure on those domestic prices by being sold at lower prices.³⁴⁷ The European Union also appeals the Panel's assessment of whether MOFCOM's findings of price undercutting in respect of Grades B and C were sufficient to comply with MOFCOM's obligation to consider whether or not the prices of the dumped imports had a significant effect on the prices of the domestic product as a whole, including Grade A.³⁴⁸ We address each of the issues raised on appeal in turn.

5.5.1.1 The Panel's interpretation of "price undercutting" in its review of MOFCOM's assessment of price effects for Grade C imports

5.5.1.1.1 The Panel's findings

5.146. Before the Panel, Japan and the European Union asserted that MOFCOM improperly found price undercutting on the basis that the price of Grade C dumped imports was less than the price of domestic Grade C, without also considering evidence suggesting that Grade C dumped imports did not lead to any *effect* on the domestic prices such as lost sales volumes, downward pressure, or a prevention in the increase of those domestic prices.³⁴⁹ The complainants argued that a determination of price undercutting cannot be based solely on the existence of a mathematical difference between import and domestic prices. Instead, given that Article 3.2 is concerned with "the effect of the dumped imports on prices", the complainants contended that an investigating authority must also consider whether any price difference enabled the dumped imports to have an effect on domestic prices, such as a "loss of domestic sales volumes or at least [having] placed downward pressure on domestic prices".³⁵⁰

5.147. The Panel recalled the Appellate Body's observation that Article 3.2 establishes a "link" between the price of subject imports and the price of domestic like products by requiring that a comparison be made between the two.³⁵¹ The Panel considered that the phrase "whether the effect of" in Article 3.2 applies only in respect of price depression or suppression, on the basis that the text of Article 3.2 does not refer to "whether the effect of subject imports is price undercutting".³⁵² The Panel considered, therefore, that the question of whether there had been significant price undercutting within the meaning of Article 3.2 "was a simple factual issue" that could be answered by means of "a comparison of prices for domestic and imported product[s]".³⁵³

5.148. The Panel acknowledged the complainants' references to recognized dictionary definitions of the term "undercut" that spoke to the notion of "supplanting" or "rendering unstable".³⁵⁴ However, noting that there was no explicit reference to the notion of "supplanting" or "rendering unstable" in the text or context of Article 3.2, the Panel saw no reason why an investigating authority should not simply consider whether dumped imports "sell at lower prices than" comparable domestic products.³⁵⁵

5.149. The Panel further reasoned that, if an investigating authority were required to show that price undercutting by dumped imports had the effect of depressing or suppressing prices, as suggested by the complainants, this would duplicate the other price effects considerations provided for in Article 3.2. According to the Panel, the fact that Article 3.2 identifies three distinct price effects, and distinguishes between price undercutting, on the one hand, and price depression and price suppression, on the other hand, suggests that there is no need to establish price depression or suppression when considering the existence of price undercutting, or *vice versa*.³⁵⁶

³⁴⁷ Japan's appellant's submission, para. 2; European Union's other appellant's submission, para. 109.

³⁴⁸ European Union's other appellant's submission, para. 134.

³⁴⁹ Panel Reports, paras. 7.105 and 7.118.

³⁵⁰ Panel Reports, para. 7.117.

³⁵¹ Panel Reports, para. 7.124 (quoting Appellate Body Report, *China – GOES*, para. 137).

³⁵² Panel Reports, para. 7.126.

³⁵³ Panel Reports, para. 7.126.

³⁵⁴ Panel Reports, paras. 7.127-7.128 (referring to Japan's second written submission to the Panel, para. 21; and Oxford English Dictionary online, definition of "undercut", available at: <http://www.oed.com/view/Entry/211547>), accessed 30 January 2014).

³⁵⁵ Panel Reports, para. 7.128.

³⁵⁶ In this regard, the Panel noted that Article 6.3(c) of the SCM Agreement refers separately to price undercutting, price depression, price suppression, and "lost sales". In the Panel's view, this provision strongly suggests, therefore, that the phenomenon of lost sales is distinct from price undercutting. (See Panel Reports, fn 251 to para. 7.129)

The Panel therefore found that, while price undercutting by imports may lead to lost domestic sales, or to price depression or price suppression, there is no requirement in Article 3.2 to demonstrate the existence of these other phenomena when considering the existence of price undercutting.³⁵⁷

5.150. Based on this analysis, the Panel rejected the claims by the complainants that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices.³⁵⁸

5.5.1.1.2 Arguments on appeal

5.151. On appeal, Japan claims that the Panel erred in its interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement by finding that the question of whether price undercutting exists is a "simple factual" question that "can be answered ... by a comparison of prices for domestic and imported product[s]", and that "the existence of price undercutting itself provides the requisite insight into the effect of the dumped imports (and the relationship of subject import prices with domestic prices)".³⁵⁹ Japan submits that the Panel appears to have considered "that an investigating authority may conclude the price effect analysis under Articles 3.1 and 3.2 by simply finding that import prices are mathematically lower than the price of a domestic like product."³⁶⁰ Japan submits that the mere fact of dumped import prices being mathematically lower than comparable domestic prices does not, in and of itself, provide a "meaningful basis" for conducting a further causation analysis under Article 3.5 of the Anti-Dumping Agreement.³⁶¹

5.152. The European Union, for its part, claims that the Panel erred in finding that the obligation in Article 3.2 of the Anti-Dumping Agreement can be met, and was met in this case, on the basis of the fact that, in 2010, the price of the dumped imports under consideration was below the price of the domestic product being compared.³⁶² Given MOFCOM's decision to conduct a grade-by-grade analysis, the European Union submits that MOFCOM was required under Articles 3.1 and 3.2 to consider more than the "mere juxtaposition" of the price of the dumped imports under consideration and the price of the domestic product being compared.³⁶³ In particular, it was required to consider whether the juxtaposition of the price of the dumped imports under consideration and the price of the domestic product being compared, together with other relevant facts – such as specifically identified quantitative differences, inverse price movements, a sudden and substantial increase in the domestic prices, an increase in the market share of domestic Grade C products, and an absence of substitutability – have explanatory force for the effect of the prices of the dumped imports under consideration on the prices of the domestic product being compared.³⁶⁴

5.153. By contrast, China agrees with the Panel's interpretation of "price undercutting" in Article 3.2, and supports the Panel's finding that an investigating authority can "simply consider whether subject imports 'sell at lower prices than' comparable domestic products".³⁶⁵

³⁵⁷ Panel Reports, para. 7.129.

³⁵⁸ Panel Reports, para. 7.130.

³⁵⁹ Japan's appellant's submission, para. 13 (referring to Panel Reports, para. 7.126).

³⁶⁰ Japan's appellant's submission, para. 13.

³⁶¹ Japan's appellant's submission, para. 31.

³⁶² European Union's other appellant's submission, para. 113.

³⁶³ European Union's other appellant's submission, para. 114 (referring to Appellate Body Report, *China* – *GOES*, paras. 129-132).

³⁶⁴ European Union's other appellant's submission, para. 114.

³⁶⁵ China's appellee's submission, para. 137 (referring to Panel Reports, para. 7.128).

5.5.1.1.3 Analysis

5.154. The second sentence of Article 3.2 of the Anti-Dumping Agreement reads:

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

5.155. The second sentence of Article 3.2 begins with the clause "[w]ith regard to the effect of the dumped imports on prices". The definition of the word "effect" is, *inter alia*, "something accomplished, caused, or produced; a result, a consequence".³⁶⁶ By referring to "the effect of the dumped imports", Article 3.2 postulates certain inquiries with regard to the *effect* of those imports on domestic prices.³⁶⁷ In particular, an investigating authority is required to 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 prevent price increases, which otherwise would have occurred, to a significant degree."³⁶⁸ With regard to the latter inquiry, the Appellate Body has noted that, to examine whether the *effect* of dumped imports "is otherwise to depress prices to a significant degree or prevent price increases", "an investigating authority is required to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable – that is, domestic prices."³⁶⁹

5.156. The Appellate Body has further noted that the two inquiries under the second sentence of Article 3.2 are separated by the words "or" and "otherwise".³⁷⁰ The elements that are relevant to a consideration of whether there has been "significant price undercutting" may, therefore, "differ from those relevant to the consideration of significant price depression and suppression".³⁷¹ We do not read Article 3.2 as suggesting that the "effect" of price undercutting must either be price depression or price suppression. Instead, we agree with the Panel that, while price undercutting by imports *may* lead to price depression or price suppression, "there is *no requirement* in Article 3.2 to demonstrate the existence of these other phenomena when considering the existence of price undercutting."³⁷²

5.157. Having said this, we recall that the focus of these appeals is on the meaning and scope of an investigating authority's obligation to consider whether there has been "significant price undercutting" within the meaning of the second sentence of Article 3.2 of the Anti-Dumping Agreement.

5.158. Beginning with the ordinary meaning of the term "price undercutting", we note that dictionary definitions of the word "undercut" include: "sell at lower prices than"; and "make unstable or less firm, undermine".³⁷³ These definitions cover a range of possible meanings. However, in order to determine the ordinary meaning of the term "price undercutting", it should be read in the context in which it appears in Article 3.2. With this in mind, we recall that the introductory part of the second sentence – i.e. "With regard to the *effect* of the dumped imports on prices" – requires an investigating authority to 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

³⁶⁶ Appellate Body Report, *China – GOES*, para. 135 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 798).

³⁶⁷ Appellate Body Report, *China – GOES*, para. 135.

³⁶⁸ Appellate Body Report, *China – GOES*, para. 136.

³⁶⁹ Appellate Body Report, *China – GOES*, para. 136.

³⁷⁰ Appellate Body Report, *China – GOES*, para. 137.

³⁷¹ Appellate Body Report, *China – GOES*, para. 137.

³⁷² Panel Reports, para. 7.129. (emphasis added)

³⁷³ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3423.

Member. The meaning of "effect" is "a result" of something else.³⁷⁴ In the context of Article 3.2, this suggests inquiries as to the "effect" of dumped imports on domestic prices, and each inquiry links the dumped imports with the prices of the like domestic products.³⁷⁵ With respect to "price undercutting", the Appellate Body has found that Article 3.2 thus expressly establishes "a link between the price of subject imports and that of like domestic products" by requiring that a comparison be made between the two.³⁷⁶

5.159. Still in this regard, we observe that the term "price undercutting" in Article 3.2 is used in present participle, suggesting that the inquiry under Article 3.2 concerns pricing conduct that continues over time. Hence, Article 3.2 does not ask the question of whether an investigating authority can identify an isolated instance of the dumped imports being sold at lower prices than the domestic like products. Rather, a proper reading of "price undercutting" under Article 3.2 suggests that the inquiry requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI). An examination of such developments and trends includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices.

5.160. We note that the Panel described the investigating authority's obligation to consider whether there has been price undercutting as consisting of "a simple factual issue – is there price undercutting or not? – which can be answered, as Article 3.2 suggests, by a comparison of prices for domestic and imported product[s]."³⁷⁷ The Panel also found that an investigating authority should "*simply consider whether subject imports 'sell at lower prices than' comparable domestic products*".³⁷⁸ As we see it, the Panel appears to have assumed that price undercutting, under Article 3.2, is merely concerned with the question of whether there is a mathematical difference, at any point in time during the POI, between the prices of the dumped imports and the comparable domestic products. We disagree. As discussed above, while price undercutting involves situations where imports are being sold at prices *lower than* the domestic like products, an inquiry into price undercutting under Article 3.2 is not satisfied by a static examination of whether there is a mathematical difference at any point in time during the POI without any assessment of whether or how these prices interact over time. Rather, as noted above, Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI.

5.161. Moreover, we note that the term "price undercutting" in Article 3.2 is qualified by the word "significant", which is relevantly defined as "important, notable, consequential".³⁷⁹ As noted above, with respect to "price undercutting", Article 3.2 expressly establishes a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two.³⁸⁰ This comparison contemplates a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI. The *significance* of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting.³⁸¹ What amounts to *significant* price undercutting – that is, whether the undercutting is important, notable, or consequential – will therefore necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting. In all cases, an investigating authority must, pursuant to Article 3.1, objectively examine all positive evidence, and may not disregard relevant

³⁷⁴ The definition of the word "effect" is, *inter alia*, "something accomplished, caused, or produced; a result, a consequence". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 798) See also Appellate Body Report, *China – GOES*, para. 135.

³⁷⁵ Appellate Body Report, *China – GOES*, para. 135.

³⁷⁶ Appellate Body Report, *China – GOES*, para. 136.

³⁷⁷ Panel Reports, para. 7.126.

³⁷⁸ Panel Reports, para. 7.128. (emphasis added)

³⁷⁹ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2833. See also Appellate Body Report, *US – Upland Cotton*, para. 426; and Panel Report, *US – Upland Cotton*, para. 7.1326.

³⁸⁰ Appellate Body Report, *China – GOES*, para. 136.

³⁸¹ See e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.638.

evidence suggesting that prices of dumped imports have no, or only a limited, effect on domestic prices.³⁸²

5.162. Furthermore, we recall that Article 3 contemplates a "logical progression" in the investigating authority's examination leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry.³⁸³ Indeed, as the Appellate Body has explained, the outcome of the price effects inquiry under Article 3.2 must be one that enables the investigating authority to advance its analysis so as to serve as a meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry.³⁸⁴ A proper assessment of price effects under Article 3.2 is, therefore, a necessary building block for the ultimate determination of injury.

5.163. Turning to the case before us, we observe that the Panel, in its interpretation, focused only on the term "price undercutting" in Article 3.2, and appears not to have accorded any importance to the word "significant" or its implications for the inquiry required under Article 3.2. We are not persuaded that an outcome of a price effects inquiry under Article 3.2 that consists of a mere mathematical comparison is one that could serve as a meaningful basis for an investigating authority's determination of injury and causation. The fact that Article 3.2 expressly establishes "a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two"³⁸⁵, does not mean that an investigating authority can comply with its obligations under Article 3.2 by simply considering "whether subject imports 'sell at lower prices than' comparable domestic products".³⁸⁶ While an examination of whether there is a price differential between imported and domestic products may be a useful starting point for an analysis of price undercutting, it does not provide a sufficient basis for an investigating authority to satisfy its obligation under Article 3.2.

5.164. In the light of the above, we find that the Panel erred in its interpretation of Article 3.2 of the Anti-Dumping Agreement in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may "simply consider whether subject imports 'sell at lower prices than' comparable domestic products".³⁸⁷ The Panel's finding rejecting the complainants' claims regarding MOFCOM's analysis of whether there was significant price undercutting by Grade C dumped imports was based on the Panel's erroneous interpretation of Article 3.2.³⁸⁸ We therefore reverse the Panel's findings, in paragraphs 7.130 and 7.144 of the Panel Reports, paragraph 8.2.a.i of the Japan Panel Report, and paragraph 8.7.b.i. of the EU Panel Report, regarding MOFCOM's finding of price undercutting with respect to Grade C HP-SSST.

5.165. This brings us to the question of whether we can complete the legal analysis, as requested by the complainants, and find that MOFCOM's consideration of price undercutting in respect of Grade C HP-SSST is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, including because MOFCOM failed to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products. In previous cases, the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.³⁸⁹ The Appellate Body has completed the legal analysis when sufficient factual findings by the panel and undisputed facts on the panel record allowed it to do so.³⁹⁰

³⁸² In this respect, the Appellate Body also clarified that, although there is no explicit requirement in Article 3.2, a failure to ensure price comparability is inconsistent with the requirement under Article 3.1 that a determination be based on "positive evidence" and involve an "objective examination" of the effect of dumped imports on the prices of domestic like products. (Appellate Body Report, *China – GOES*, para. 200)

³⁸³ Appellate Body Report, *China – GOES*, para. 128.

³⁸⁴ Appellate Body Report, *China – GOES*, para. 154.

³⁸⁵ Appellate Body Report, *China – GOES*, para. 136.

³⁸⁶ Panel Reports, para. 7.128.

³⁸⁷ Panel Reports, para. 7.128.

³⁸⁸ See Panel Reports, paras. 7.116 and 7.121.

³⁸⁹ See Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.82; *Australia – Salmon*, paras. 117-136; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

³⁹⁰ See Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.82; *US – Gasoline*, p. 19, DSR 1996:I, p. 18; *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *EC – Poultry*, para. 156; *EC – Hormones*, para. 222; *US – Shrimp*, paras. 123-124; *Japan – Agricultural Products II*, para. 112; *US – FSC*, para. 133; *Australia – Salmon*, paras. 117-118; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, para. 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; and *US – Large Civil Aircraft (2nd complaint)*, paras. 1272-1274.

5.166. Turning to the case before us, we note China's assertion that, to the extent that the complainants have made arguments challenging the comparability of the prices between the Grade C dumped imports and domestic Grade C, we should exclude such arguments from our consideration.³⁹¹ However, we see no reason why, in our assessment of the claims on appeal, we would be precluded from taking into account the totality of the parties' legal arguments to the extent that they are relevant to the issue raised on appeal.

5.167. We note the Panel's finding that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because MOFCOM did not properly establish that the prices of imports and domestic like products were "comparable" for the purpose of considering price undercutting by imports of Grade C products given that it failed "to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price".³⁹² This finding by the Panel, not appealed by China, implies that MOFCOM could not have had an objective basis to determine the existence of price undercutting for Grade C HP-SSST.

5.168. Moreover, we note, as did the Panel, that "MOFCOM failed to account for record evidence that trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices."³⁹³ The Panel stated that this was particularly apparent in respect of domestic Grade C, "the price of which increased by 112.80% from 2009-2010, without any corresponding movement in prices for subject imports" of Grade C, "which actually fell over that period".³⁹⁴ As explained above, in order properly to carry out an analysis of whether there had been significant price undercutting by dumped imports of Grade C, MOFCOM would have been required, pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement, to undertake a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports of Grade C and those of the domestic Grade C over the duration of the POI. Yet, we note that MOFCOM did not explain the basis for its finding that imports of Grade C were underselling domestic Grade C despite the fact that the price of domestic Grade C "increased by 112.80% from 2009-2010", while the prices of dumped imports of Grade C "*actually fell over that period*".³⁹⁵

5.169. As explained above, the inquiry under Article 3.2 is concerned with the effect of the dumped imports on the prices of domestic like products. It was therefore not sufficient for MOFCOM to make a finding of price undercutting based only on the fact that, in 2010, there was a mathematical difference between the prices of the imports of Grade C HP-SSST and those of domestic Grade C HP-SSST. Instead, MOFCOM ought to have taken into account whether that mathematical difference amounted to significant price undercutting in the light of the facts underlying the investigation and the considerations we explained above. To our minds, an objective examination would have taken into account all the positive evidence relating to, *inter alia*, the contrary price movements of the Grade C imports and domestic Grade C, as well as the limited period during which the perceived mathematical difference occurred.

5.170. We further recall that the provisions of Article 3 of the Anti-Dumping Agreement contemplate a "logical progression" in the investigating authority's examination leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry.³⁹⁶ Accordingly, the outcome of the price effects inquiry under Article 3.2 must be one that enables the investigating authority to advance its analysis and to have a meaningful basis for its determination as to whether dumped imports, through such price effects, are causing injury to the domestic industry.³⁹⁷ We do not see how MOFCOM, under the specific facts of this case, could have provided a "meaningful basis" for an analysis of whether the dumped imports were causing injury without considering "record evidence that trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices".³⁹⁸

³⁹¹ China's appellee's submission, paras. 139-140 and 174-175.

³⁹² Panel Reports, para. 7.115.

³⁹³ Panel Reports, para. 7.186.

³⁹⁴ Panel Reports, para. 7.186.

³⁹⁵ Panel Reports, para. 7.186. (emphasis added)

³⁹⁶ Appellate Body Report, *China – GOES*, para. 128.

³⁹⁷ Appellate Body Report, *China – GOES*, para. 154.

³⁹⁸ Panel Reports, para. 7.186.

5.171. In the light of the above, we find that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports from Japan and the European Union, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

5.172. Having addressed the first issue raised on appeal under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, we now turn to the European Union's claim that the Panel erred in finding that MOFCOM was not required to make a finding of price undercutting for the product as a whole, including Grade A HP-SSST.

5.5.1.2 Whether MOFCOM was required to make a finding of price undercutting for the product as a whole

5.5.1.2.1 The Panel's findings

5.173. Before the Panel, the complainants submitted that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because MOFCOM extended its finding of price undercutting in respect of imports of Grades B and C HP-SSST to the domestic like product as a whole, including domestic Grade A HP-SSST.³⁹⁹

5.174. The Panel did not agree with the complainants that MOFCOM was required under Articles 3.1 and 3.2 to find price undercutting in respect of the domestic like product *as a whole*, encompassing the three product types (Grades A, B, and C).⁴⁰⁰ The Panel noted that, when an investigating authority considers the existence of price undercutting for the purpose of Article 3.2, it need only consider the existence of price undercutting in respect of the dumped imports at issue. For the Panel, where dumped imports are of different grades, it is appropriate to consider price undercutting with respect to the comparable domestic grades.⁴⁰¹

5.175. The Panel noted the complainants' argument that Article 3.1 refers to "the effect of the dumped imports on prices in *the* domestic market for like products".⁴⁰² According to the complainants, the use of the definite article "the" in conjunction with "domestic market for like products" necessarily constitutes a reference to the entire domestic market and, therefore, the like product as a whole. The Panel disagreed and saw nothing in Article 3.1 to suggest that the existence of price undercutting must be considered in respect of the entire range of the like product in the domestic market of the importing Member. For the Panel, the reference to "the" domestic market simply meant that prices in the domestic market should be used, rather than those in any other market. The Panel noted, in that context, that there can be one or more domestic like products corresponding to the imports subject to an anti-dumping investigation. Thus, the Panel found that, while the text of Article 3.1 "leaves open the possibility of more than one like product, it does not ... establish that price undercutting must be found with respect to the entire range of goods making up the domestic like product(s)".⁴⁰³

5.176. The Panel also rejected the complainants' argument that MOFCOM improperly found the relevant price undercutting to be "significant", given that the majority⁴⁰⁴ of domestic production (of Grade A products) was unaffected by such price undercutting. In the Panel's view, this argument was predicated on the complainants' understanding that MOFCOM was required by Article 3.2 to establish that dumped imports had a price undercutting effect in respect of the domestic like product *as a whole*, including domestic Grade A. Relying on the panel's finding in *US – Upland Cotton*, the Panel considered that the significance of price undercutting by dumped imports of Grades B and C should be assessed in relation to the price of domestically produced Grades B and C, and not in relation to other factors, such as the proportion of domestic production for which no price undercutting was found.⁴⁰⁵ Furthermore, the Panel recalled that price undercutting must be established on the basis of a comparison of the prices of comparable goods. As a result, there may well be domestic product models or grades for which no price undercutting is established. The Panel considered that this fact should not preclude a finding of "significant"

³⁹⁹ Panel Reports, para. 7.105. See also para. 7.132.

⁴⁰⁰ Panel Reports, para. 7.139.

⁴⁰¹ Panel Reports, para. 7.139.

⁴⁰² Panel Reports, para. 7.141. (emphasis original)

⁴⁰³ Panel Reports, para. 7.141.

⁴⁰⁴ At fn 270 to para. 7.142 of the Panel Reports, the Panel highlighted that the complainants' estimate that only about 20% of domestic production concerned Grade B or C products, with the remaining +/-80% concerning Grade A products. (Japan's first written submission to the Panel, para. 148; European Union's first written submission to the Panel, para. 243) The Panel also noted that China challenged the accuracy of Japan's estimates, but did not provide actual numbers. The Panel considered it unnecessary to examine this discrepancy in any detail, since China, in any event, acknowledged that "the majority" of domestic HP-SSST production related to Grade A. (China's comments on Japan's response to Panel question No. 84, para. 31)

⁴⁰⁵ Panel Reports, para. 7.142 (referring to Panel Report, *US – Upland Cotton*, paras. 7.1325 and 7.1328).

price undercutting. The Panel noted, however, that this fact may become relevant in the consideration of causation of injury, pursuant to Article 3.5 of the Anti-Dumping Agreement.⁴⁰⁶

5.5.1.2.2 Arguments on appeal

5.177. On appeal, the European Union notes that there "were no relevant imports of Grade A", and that most of the domestic sales were of Grade A.⁴⁰⁷ Yet, MOFCOM found that price undercutting by imported Grades B and C had a significant effect on the domestic product, without conducting any cross-grade analysis. In the European Union's view, the Panel accepted this conclusion solely on the basis of its erroneous finding that Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not require any consideration of the effect of the price of the dumped product on the price of the domestic product.⁴⁰⁸

5.178. China counters that the Panel correctly noted that MOFCOM did not make a finding of price undercutting with respect to the domestic like product as a whole, and that, instead, it found undercutting only for Grades B and C.⁴⁰⁹ In addition, China submits that the European Union's argument is predicated on the contention that an investigating authority is *always* to consider price undercutting for the domestic like product as a whole, and that the Panel properly rejected that proposition.⁴¹⁰

5.5.1.2.3 Analysis

5.179. Turning to the facts of the present dispute, we note that MOFCOM defined the domestic like product as certain HP-SSST, encompassing three product types or grades referred to by the Panel as Grades A, B, and C.⁴¹¹ The Panel noted that MOFCOM "conducted grade-by-grade price comparisons" and found "price undercutting in respect of Grades B and C".⁴¹² The Panel also noted that "MOFCOM did not make any finding of price undercutting in respect of Grade A, because this product was only imported in 2008, in very small quantities."⁴¹³

5.180. We agree with the Panel that an investigating authority is not required, under Article 3.2 of the Anti-Dumping Agreement, to establish the existence of price undercutting for each of the product types under investigation, or with respect to the entire range of goods making up the domestic like product.⁴¹⁴ That said, an investigating authority is under an obligation to examine objectively the effect of the dumped imports on domestic prices. As discussed above, with respect to its consideration of whether there has been a significant price undercutting, an investigating authority must undertake a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of the domestic like product over the duration of the POI, taking into account all relevant evidence including, where appropriate, the relative market share of each product type. Importantly, and as discussed above, an investigating authority's consideration of price effects under Article 3.2 must provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry within the meaning of Article 3.5 of the Anti-Dumping Agreement.⁴¹⁵ We therefore disagree with the Panel that MOFCOM was not required to assess the significance of price undercutting by the dumped imports in relation to "the proportion of domestic production for which no price undercutting was found".⁴¹⁶

⁴⁰⁶ Panel Reports, para. 7.142 and fn 273 thereto.

⁴⁰⁷ European Union's other appellant's submission, para. 138.

⁴⁰⁸ European Union's other appellant's submission, para. 138 (referring to Panel Reports, para. 7.138).

⁴⁰⁹ China's appellee's submission, para. 197 (quoting Panel Reports, para. 7.137).

⁴¹⁰ China's appellee's submission, para. 207.

⁴¹¹ MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 23-28. In MOFCOM's Final Determination, Grade A corresponds to TP347HFG, Grade B corresponds to S30432, and Grade C corresponds to TP310HNbN. We note that MOFCOM's definition of the domestic like product was not the subject of a claim by the complainants before the Panel.

⁴¹² Panel Reports, para. 7.137.

⁴¹³ Panel Reports, para. 7.137.

⁴¹⁴ Panel Reports, para. 7.141.

⁴¹⁵ Appellate Body Report, *China – GOES*, paras. 149 and 154.

⁴¹⁶ Panel Reports, para. 7.142.

5.181. In its investigation, MOFCOM observed that, during the POI, the dumped imports and domestic sales were concentrated in different segments of the HP-SSST market.⁴¹⁷ On the one hand, the majority of Chinese domestic HP-SSST production related to Grade A.⁴¹⁸ As such, the majority of domestic sales was of Grade A. The market share held by Grade A dumped imports in 2008 was only 1.45%.⁴¹⁹ There were no Grade A dumped imports thereafter. On the other hand, during the POI, the dumped imports of Grades B and C each held a market share of around 90% of its respective market segment.⁴²⁰ We further recall that Japan argued before the Panel, and China did not dispute, that Grade B is approximately double the price of Grade A, and Grade C is approximately triple the price of Grade A.⁴²¹ In the case before us, we consider that an objective examination by MOFCOM of whether there had been a significant price undercutting by the dumped imports as compared with the prices of the domestic like product (encompassing all three product types) should have taken into account the relevant market shares of the respective product types. Likewise, a proper analysis of price effects ought to have taken into account the fact that there were significant differences in the prices of these product types. As discussed above, an investigating authority may not disregard evidence suggesting that the dumped imports have no, or only a limited, effect on domestic prices.

5.182. In the light of the above, we reverse the Panel's finding, in paragraphs 7.143, 7.144, and 8.7.b.i. of the EU Panel Report; and find instead that MOFCOM's assessment of whether there had been a significant price undercutting by the dumped imports, as compared with the prices of the domestic like product, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

⁴¹⁷ Panel Reports, para. 7.182.

⁴¹⁸ Panel Reports, fn 270 to para. 7.142.

⁴¹⁹ Panel Reports, para. 7.182 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 65).

⁴²⁰ Panel Reports, para. 7.182 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 66 (translation amended by Panel Exhibit CHN-16-EN, and accepted by the complainants in Panel Exhibits JPN-29 and EU-32)).

⁴²¹ Panel Reports, fn 333 to para. 7.184.

5.5.2 MOFCOM's impact analysis – Articles 3.1 and 3.4 of the Anti-Dumping Agreement

5.183. Japan and the European Union claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in rejecting their claims that MOFCOM was required to undertake a segmented analysis of the impact of dumped imports on the state of the domestic industry, having found no significant increase in the volume of dumped imports, and having found price effects with respect to Grades B and C only. In addition, Japan asserts that the Panel erred in finding that Japan's claim that MOFCOM failed to examine whether dumped imports provided explanatory force for the state of the domestic industry fell outside the Panel's terms of reference.

5.184. Before the Panel, the complainants submitted that MOFCOM's impact analysis was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement on several grounds. The Panel addressed three of the claims pursued by the complainants. The Panel rejected the complainants' claims that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by assessing the impact of dumped imports on the domestic industry producing all three grades of HP-SSST, even though it found no significant increase in the volume of dumped imports⁴²², and found price effects with respect to Grades B and C only. The Panel also disagreed with the complainants that MOFCOM acted inconsistently with Articles 3.1 and 3.4 by failing to weigh properly the positive and negative injury factors. However, the Panel agreed with the complainants that MOFCOM failed to evaluate the magnitude of the margins of dumping, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The latter two findings of the Panel are not the subject of these appeals.

5.185. We begin by addressing Japan's claim under Article 6.2 of the DSU. Thereafter, we will review the complainants' appeal of the Panel's legal findings and conclusions concerning the interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

⁴²² In its Final Determination, MOFCOM noted:

Based on data provided by foreign producers in their *Response to Questionnaire for Producers/Exporters of Other Countries/Regions* and relevant subsequent supplemental materials, during the period of investigation, the import volumes of the subject products from the EU and Japan decreased year by year from 20,100 tons in 2008 to 16,400 tons in 2009, a decrease of 18.49% from 2008, and to 4500 tons in 2010, a decrease of 72.79% from 2009. From January to June 2011, the import volume of the subject products was 2600 tons, down 21.89% year on year.

(Panel Exhibits JPN-2-EN and EU-30, internal p. 43)

5.5.2.1 Japan's claim under Article 6.2 of the DSU

5.186. Japan contends that the Panel acted inconsistently with Article 6.2 of the DSU in finding that Japan's claim regarding MOFCOM's alleged failure to examine whether dumped imports provided explanatory force for the state of the domestic industry under Articles 3.1 and 3.4 of the Anti-Dumping Agreement was outside its terms of reference. The Panel made this finding on the basis that the claim was not sufficiently identified in Japan's panel request.

5.187. China requests that we uphold the Panel's finding. In addition, China takes issue with what it views as Japan's attempt to rely on the arguments concerning the absence of any explanatory force in support of its claim on appeal that the Panel erred in rejecting the complainants' claims that MOFCOM was required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement to undertake a segmented impact analysis. China submits that, given that the Panel found Japan's "explanatory force" claim to be outside its terms of reference, this aspect of Japan's appeal should be rejected.⁴²³

5.188. Japan's panel request states, in relevant part:

Japan considers that the measures at issue are inconsistent with, at least, China's obligations under the following provisions of the Anti-Dumping Agreement:

1. Articles 3.1, 3.2, 3.4, and 3.5 because China's injury determination was not based on positive evidence and did not involve an objective examination of the volume of the dumped imports under investigation, the effect of those imports on prices in the domestic market for like products, and the consequent impact of those imports on domestic producers of such products. Specifically:

(a) ...

(b) China's analysis of the impact of the dumped imports on the domestic industry: (i) failed to make an objective examination, based on positive evidence, of the impact of subject imports on the domestic industry based on the volume of such imports and their effect on prices; (ii) failed to evaluate the magnitude of the margin of dumping; and (iii) failed to objectively determine the relative importance and weight to be attached to relevant economic factors and indices, and improperly disregarded the majority of those factors and indices indicating that the domestic industry did not suffer material injury. Accordingly, China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.⁴²⁴

5.189. We recall our discussion in section 5.1.1.2 of these Reports⁴²⁵ of the requirements that a complainant must satisfy in its panel request pursuant to Article 6.2 of the DSU. Based on our reading of the plain language in Japan's panel request, we understand Japan to have made three claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement – namely that, in conducting its impact analysis, China: "(i) failed to make an objective examination, based on positive evidence, of the impact of subject imports on the domestic industry based on the volume of such imports and their effect on prices; (ii) failed to evaluate the magnitude of the margin of dumping; and (iii) failed to objectively determine the relative importance and weight to be attached to relevant economic factors and indices, and improperly disregarded the majority of those factors and indices indicating that the domestic industry did not suffer material injury."⁴²⁶

5.190. Japan contends that its statement in the panel request, that "China's analysis of the impact of the dumped imports on the domestic industry ... failed to make an objective examination, based on positive evidence, of the impact of subject imports on the domestic industry based on the volume of such imports and their effect on prices", encompassed two separate claims – namely: (a) that MOFCOM failed to examine "the consequent impact", and thus

⁴²³ China's appellee's submission, para. 243 (referring to Japan's appellant's submission, paras. 49, 55-61, and 63-66).

⁴²⁴ Japan's panel request, pp. 1-2.

⁴²⁵ *Supra*, paras. 5.11-5.16.

⁴²⁶ Japan's panel request, para. 1(b).

a logical connection with its volume and price effects conclusions; and (b) that MOFCOM failed to examine the "explanatory force" of dumped imports.⁴²⁷

5.191. We do not see, in Japan's panel request, a claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding MOFCOM's alleged failure to examine whether dumped imports provided "explanatory force" for the state of the domestic industry.⁴²⁸ The reference to "explanatory force" is drawn from the Appellate Body's interpretation of Article 3.4 in its report in *China – GOES*. This reference formed part of the Appellate Body's reasoning in interpreting Article 3.4 in that dispute and should not be read to create an obligation that is distinct from that expressed in Article 3.4. Accordingly, we view Japan's submissions, insofar as they refer to "explanatory force", as setting out arguments, based on the Appellate Body's reasoning in *China – GOES*, in support of Japan's claims under Article 3.4. These claims were properly within the Panel's terms of reference, and were addressed by the Panel.

5.192. Further, we note that China takes issue with what it views as Japan's attempt to rely on new arguments concerning the absence of any explanatory force in support of its claim on appeal that the Panel erred in rejecting the complainants' claims that MOFCOM was required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement to undertake a segmented impact analysis. We recall that, before the Panel, Japan argued that MOFCOM improperly considered the impact of dumped imports on the domestic industry as a whole, in respect of all three product grades, even though it had only found price effects in respect of Grades B and C. In its claim under Article 3.4, Japan argued that MOFCOM's reliance on its flawed and partial price effects analysis for purposes of its impact examination does not constitute "an objective examination 'of the *explanatory force* of subject imports for the state of the domestic industry' as a whole".⁴²⁹ We therefore disagree with China to the extent that it contends that Japan's arguments concerning "explanatory force" under Article 3.4 are new arguments.

5.193. In sum, we do not consider that Japan's arguments regarding "explanatory force" could constitute grounds for a separate "claim" under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Accordingly, there was no basis for the Panel to consider, as it did, whether such "claim" was properly within the scope of its terms of reference. Consequently, we declare the Panel's findings, in paragraphs 6.29-6.31 and footnote 274 of the Japan Panel Report, to be moot and of no legal effect.

⁴²⁷ Japan's appellant's submission, para. 73.

⁴²⁸ See Panel Reports, paras. 6.29-6.31.

⁴²⁹ Japan's first written submission to the Panel, para. 165. (emphasis added; fn omitted)

5.5.2.2 The Panel's assessment of MOFCOM's impact analysis

5.194. We begin by recalling the relevant findings of the Panel, before turning to the specific issues raised by the complainants on appeal.

5.5.2.2.1 The Panel's findings

5.195. Before the Panel, Japan and the European Union submitted that MOFCOM's impact analysis was at odds with, and did not follow from, its volume and price effects analyses. The complainants asserted that, having found no significant increase in volume whatsoever and price effects with respect to only Grades B and C, to ensure a logical progression of inquiry, MOFCOM should have analysed the impact of the dumped imports only on the segment of the domestic industry producing Grades B and C. China disagreed, arguing that Article 3.4 requires MOFCOM to have assessed the impact of dumped imports on the domestic industry *as a whole*. Moreover, China argued that the two domestic producers making up the domestic industry are "producers of all three grades of the like product"⁴³⁰, such that it is not possible to distinguish any part of the domestic industry that is producing only Grade A.⁴³¹

5.196. The Panel considered that the complainants' claims regarding the scope of MOFCOM's impact analysis were premised on their interpretation of Article 3.2 of the Anti-Dumping Agreement, and reiterated its finding that, "in finding price undercutting in respect of Grades B and C, MOFCOM was not required by Article 3.2 to consider the *effect* of subject Grade B and C imports on domestic Grade A."⁴³² The Panel considered on this basis that MOFCOM's failure to conduct such a cross-grade price analysis did not preclude a finding that the segment of the domestic industry producing Grade A products could be impacted by dumped imports. The Panel further reasoned that the complainants' approach to Article 3.4 was overly "focused on the causal connotations of the term 'impact'"⁴³³, and overlooked the obligation in Article 3.4 to evaluate the state of the "domestic industry" as defined by Article 4.1 of the Anti-Dumping Agreement. The Panel recalled that, in the present case, "MOFCOM defined the domestic industry as comprising two domestic producers accounting for a major proportion of total domestic production of the domestic product like the subject imports."⁴³⁴ According to the Panel, an evaluation of the state of the domestic industry envisaged by Article 3.4 must therefore consider the state of those two producers, with respect to their production of all types of HP-SSST. Thus, the Panel saw no basis in Article 3.4 "for limiting this evaluation to the state of those two domestic producers with respect to their production of only Grades B and C".⁴³⁵

5.197. The Panel clarified that it was not suggesting that the scope of MOFCOM's price effects conclusions was of "no relevance to the remainder of MOFCOM's injury analysis".⁴³⁶ Instead, it noted that "a limited finding of price undercutting will have obvious implications for an authority's assessment of whether dumped imports caused material injury to the domestic industry."⁴³⁷ However, for the Panel, this was "an assessment to be made pursuant to Article 3.5, rather than 3.4, of the Anti-Dumping Agreement."⁴³⁸

5.198. Based on the foregoing, the Panel rejected the complainants' claims that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because MOFCOM was required to, but did not, undertake a segmented impact analysis and, instead, assessed the impact of dumped imports on the domestic industry as a whole, even though it found no significant increase in the volume of dumped imports and found price effects with respect to HP-SSST of Grades B and C only.⁴³⁹

⁴³⁰ China's second written submission to the Panel, para. 179.

⁴³¹ Panel Reports, paras. 7.148-7.149.

⁴³² Panel Reports, para. 7.152. (emphasis original)

⁴³³ Panel Reports, para. 7.153.

⁴³⁴ Panel Reports, para. 7.153.

⁴³⁵ Panel Reports, para. 7.153.

⁴³⁶ Panel Reports, fn 281 to para. 7.152.

⁴³⁷ Panel Reports, fn 281 to para. 7.152.

⁴³⁸ Panel Reports, fn 281 to para. 7.152.

⁴³⁹ Panel Reports, para. 7.170.

5.5.2.2.2 Arguments on appeal

5.199. On appeal, Japan and the European Union argue that the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the Panel failed properly to take into account the logical progression of inquiry contemplated under the various paragraphs of Article 3. In particular, Japan argues that, if an investigating authority, pursuant to the inquiry under Article 3.2, finds no increase in the volume of imports, and finds price effects only for certain, but not all, grades of the product, the investigating authority should conduct its analysis under Article 3.4 on the premise that those grades for which no price effects were found were not impacted by the dumped imports. In Japan's view, failing to do so would violate an investigating authority's obligation to make an objective examination of the consequent impact of the dumped imports based on positive evidence.

5.200. The European Union, for its part, argues that the Panel failed to take into consideration what the European Union refers to as a "unitary analysis": one which recognizes that it is "highly problematic" to distinguish between the concept of injury and the concept of causation, given that only what is caused by the dumped imports is correctly characterized as "injury" within the meaning of footnote 9 of the Anti-Dumping Agreement.⁴⁴⁰ Accordingly, if, in the application of Article 3.5 of the Anti-Dumping Agreement, an investigating authority determines that a particular thing is a non-attribution factor, then, at the same time, anything caused by that non-attribution factor is not "injury" within the meaning of footnote 9 of the Anti-Dumping Agreement. The European Union argues that "[t]his necessarily means that it is not part of the 'impact of the dumped imports on the domestic industry' within the meaning of Article 3.4."⁴⁴¹ According to the European Union, in the present case, given that MOFCOM did not find volume and price effects arising out of imports of Grade A HP-SSST, Grade A should have been considered as a "non-attribution factor" within the meaning of Article 3.5, and should therefore not have formed part of the impact analysis under Article 3.4.⁴⁴²

5.201. China requests that we reject the appeals by the complainants and uphold the Panel's findings. China notes that Article 3.4 contemplates that an investigating authority must derive an understanding of the impact of dumped imports on the basis of the examination of the state of the industry. China considers that the obligation to derive an understanding of the impact of the dumped imports on the domestic industry must be distinguished from the obligation to determine that the dumped imports are causing injury. China emphasizes that "the 'requirement to conduct a non-attribution analysis regarding all factors causing injury to the domestic industry' is laid down in Article 3.5, rather than in Article 3.4."⁴⁴³ Furthermore, China highlights that Article 3.4 requires an investigating authority to derive an understanding of the impact of dumped imports on the state of the domestic industry as defined in Article 4.1 of the Anti-Dumping Agreement. This requirement applies irrespective of whether the consideration under Article 3.2 reveals price undercutting with respect to all domestic like products, or only with respect to some of such domestic like products.⁴⁴⁴

5.5.2.2.3 Analysis

5.202. Article 3.4 of the Anti-Dumping Agreement provides:

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of 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. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

⁴⁴⁰ European Union's other appellant's submission, para. 154.

⁴⁴¹ European Union's other appellant's submission, para. 155.

⁴⁴² European Union's response to questioning at the oral hearing.

⁴⁴³ China's appellee's submission, para. 249 (quoting Appellate Body Report, *China – GOES*, paras. 128 and 149-150).

⁴⁴⁴ China's appellee's submission, para. 251.

5.203. As discussed at paragraph 5.140 above, the various paragraphs of Article 3 contemplate a "logical progression" in the investigating authority's inquiry leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry.⁴⁴⁵ As part of this logical progression of inquiry, Article 3.4 requires an investigating authority to examine "the impact of the dumped imports on the domestic industry". This examination must include "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". Article 3.4 then lists certain factors that "are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities".⁴⁴⁶ Importantly, the Appellate Body has stressed that the evaluation of the relevant factors must respect the overarching principles set out in Article 3.1, requiring investigating authorities to conduct an objective examination based on positive evidence.⁴⁴⁷

5.204. While the second sentence of Article 3.2 requires an investigating authority to consider the effect of the dumped imports on *prices*, the focus of Article 3.4 is on the state of the *domestic industry*.⁴⁴⁸ The Appellate Body has clarified that it would be compatible with Article 3.4 for investigating authorities to evaluate factors having a bearing on the state of the domestic industry on the basis of an evaluation of specific parts, sectors, or segments within the domestic industry.⁴⁴⁹ Such a sectoral analysis "may be highly pertinent, from an economic perspective, in assessing the state of an industry *as a whole*".⁴⁵⁰ As we see it, while there is no exclusive methodology prescribed for an investigating authority to conduct an examination under Article 3.4, an investigating authority's examination of the relationship between the dumped imports and the state of the domestic industry must be one that enables the investigating authority to derive an understanding about the impact of the dumped imports on the domestic industry *as a whole*.

5.205. Article 3.4 does not merely require an examination of the state of the domestic industry, but contemplates that "an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination".⁴⁵¹ Consequently, Article 3.4 is concerned with "the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term 'the effect of' under Article[] 3.2".⁴⁵² In other words, Article 3.4 requires an examination of the "explanatory force" of subject imports for the state of the domestic industry.⁴⁵³ As noted, the Appellate Body stated in *China – GOES* that the inquiries under Article 3.2, and the examination required under Article 3.4, are necessary in order to answer the ultimate question in Article 3.5 as to whether dumped imports are causing injury to the domestic industry. The Appellate Body has clarified that, similar to the consideration under Article 3.2, the examination under Article 3.4 "*contributes to*, rather than duplicates, the overall determination required under Article[] 3.5".⁴⁵⁴ However, whilst an investigating authority is required to *examine* the impact of dumped imports on the domestic industry pursuant to Article 3.4, it is *not* required to *demonstrate* that dumped imports are causing injury to the domestic industry, which is an analysis specifically mandated by Article 3.5.⁴⁵⁵

5.206. Turning to the specific facts of this case, we recall that there were no imports of Grade A HP-SSST after 2008, and that MOFCOM did not make a finding of price undercutting in respect of Grade A.⁴⁵⁶ We also recall that MOFCOM defined the domestic industry as comprising two domestic

⁴⁴⁵ Appellate Body Report, *China – GOES*, para. 128.

⁴⁴⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 194 (referring to Appellate Body Report, *Thailand – H-Beams*, fn 36 to para. 128).

⁴⁴⁷ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 196-197.

⁴⁴⁸ We observe that Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" as the "domestic producers as a whole of the like products" or "[domestic producers] whose collective output of the products constitutes a major proportion of the total domestic production".

⁴⁴⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 195.

⁴⁵⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 195 (referring to Panel Report, *Mexico – Corn Syrup*, fn 30 to para. 7.154). (emphasis added)

⁴⁵¹ Appellate Body Report, *China – GOES*, para. 149. (emphasis original)

⁴⁵² Appellate Body Report, *China – GOES*, para. 149.

⁴⁵³ Appellate Body Report, *China – GOES*, para. 149.

⁴⁵⁴ Appellate Body Report, *China – GOES*, para. 149. (emphasis original)

⁴⁵⁵ Appellate Body Report, *China – GOES*, para. 150.

⁴⁵⁶ Panel Reports, para. 7.137 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 53).

producers accounting for a major proportion of total domestic production of the domestic product comprising Grades A, B, and C.⁴⁵⁷

5.207. As noted, Article 3.4 requires the evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry. These factors include actual and potential decline in sales, market share, and factors affecting domestic prices. Article 3.4, read together with Article 3.1, instructs investigating authorities to evaluate, objectively and on the basis of positive evidence, the importance and the weight to be attached to all the relevant factors. In every investigation, this evaluation turns on the "bearing" that the relevant factors have on the state of the domestic industry.⁴⁵⁸

5.208. In the present case, MOFCOM found that dumped imports of Grades B and C each held a market share of around 90% of its respective market segment.⁴⁵⁹ The majority of domestic sales, however, were of Grade A. The market share held by Grade A dumped imports in 2008 was only 1.45%, and there were no Grade A imports thereafter.⁴⁶⁰ In the light of these factual findings by MOFCOM, we note the following finding by the Panel:

We do not mean to suggest that the scope of MOFCOM's price effects conclusions is of no relevance to the remainder of MOFCOM's injury analysis. As previously noted, a limited finding of price undercutting will have obvious implications for an authority's assessment of whether dumped imports caused material injury to the domestic industry. However, this is an assessment to be made pursuant to Article 3.5, rather than 3.4, of the Anti-Dumping Agreement.⁴⁶¹

5.209. We agree with the Panel that the results of the inquiries, pursuant to Article 3.2, relating to the volume of the dumped imports and the effects of the dumped imports on prices are relevant to the causation analysis required under Article 3.5. However, unlike the Panel, we consider that the results of these inquiries are also relevant to the impact analysis required under Article 3.4, given that this provision requires the evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry, including market share and factors affecting domestic prices. Significantly, as discussed at paragraph 5.141 above, the disciplines that apply under Article 3, while distinct, are interlinked and logically progress to answering the question of whether the dumped imports are causing injury to the domestic industry. As the Appellate Body stated in *EC – Tube or Pipe Fittings*, "Article 3.1 and the succeeding paragraphs of Article 3 clearly indicate that volume and prices, and the consequent impact on the domestic industry, are closely interrelated for purposes of the injury determination."⁴⁶² Accordingly, we do not agree with the Panel that, because the results of the inquiry under Article 3.2 are relevant for an investigating authority's causation and non-attribution analyses under Article 3.5, they are not relevant for the impact analysis under Article 3.4.⁴⁶³

5.210. We recall that, in the present case, the majority of Chinese domestic production consisted of Grade A HP-SSST⁴⁶⁴, but Chinese producers also produced Grades B and C. We further note that MOFCOM "defined the domestic industry as comprising two domestic producers accounting for the major proportion of total domestic production" of HP-SSST.⁴⁶⁵ We agree with the Panel that it was therefore appropriate for MOFCOM to examine the impact of the dumped imports on the state of "those two producers, with respect to their production of all types of HP-SSST".⁴⁶⁶ Contrary to

⁴⁵⁷ MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 28. See also Panel Reports, para. 7.153. The two domestic producers are Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd. and Changshu Walsin Specialty Steel Co., Ltd.

⁴⁵⁸ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 196-197.

⁴⁵⁹ Panel Reports, para. 7.182 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 66 (translation amended by Panel Exhibit CHN-16-EN, and accepted by the complainants in Panel Exhibits JPN-29 and EU-32)).

⁴⁶⁰ Panel Reports, para. 7.182 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 65).

⁴⁶¹ Panel Reports, fn 281 to para. 7.152.

⁴⁶² Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115.

⁴⁶³ We note, moreover, that the Panel's reading of Article 3.4 appears to have been premised on its interpretation of Article 3.2 of the Anti-Dumping Agreement, which we have reversed above. (See Panel Reports, para. 7.152)

⁴⁶⁴ Panel Reports, fn 270 to para. 7.142, and fn 324 to para. 7.182.

⁴⁶⁵ Panel Reports, para. 7.153.

⁴⁶⁶ Panel Reports, para. 7.153.

what the European Union appears to suggest, such an approach would not necessarily mean that the investigating authority's *ultimate* determination of injury will include injury that is *not attributable* to the dumped imports.⁴⁶⁷ Moreover, Article 3.5 expressly requires an investigating authority to "also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

5.211. Having said this, we note that Article 3.4 does not merely require an examination of the state of the domestic industry, but contemplates that an investigating authority "must derive an understanding of *the impact of* subject imports on the basis of such an examination."⁴⁶⁸ The evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including market share and factors affecting domestic prices, must be such that it provides a "meaningful basis"⁴⁶⁹ for an analysis of whether the dumped imports are, through the effects of dumping, as set forth in Articles 3.2 and 3.4, causing injury to the domestic industry. Depending on the particular circumstances of each case, an investigating authority may therefore be required to take into account, as appropriate, the relative market shares of product types with respect to which it has made a finding of price undercutting; and, for example, the duration and extent of price undercutting, price depression or price suppression, that it has found to exist.

5.212. In the light of the above, we find that the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the extent it found that the results of the inquiries under Article 3.2 are not relevant to the impact analysis under Article 3.4. We understand the Panel to have relied on its erroneous interpretation of Articles 3.1 and 3.4 in rejecting, in paragraphs 7.170 of the Panel Reports, paragraph 8.2.a.ii of the Japan Panel Report, and paragraph 8.7.b.ii of the EU Panel Report, the complainants' claims that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because MOFCOM was required to, but did not, undertake a segmented impact analysis. Accordingly, we reverse these findings by the Panel. Having found that China acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and in the light of the Panel's finding that MOFCOM's analysis of the impact of dumped imports on the domestic industry is inconsistent with China's obligations under Articles 3.1 and 3.4 because MOFCOM failed to evaluate properly the magnitude of the margin of dumping, we do not consider that additional findings under Articles 3.1 and 3.4 are required to resolve these disputes.

5.5.3 MOFCOM's causation analysis – Articles 3.1 and 3.5 of the Anti-Dumping Agreement

5.213. Before the Panel, Japan and the European Union claimed that MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement for several reasons. The Panel found that MOFCOM's reference to the market shares held by subject imports was "not sufficient to establish that subject imports, through price undercutting, had 'a relatively big impact on the price of the like domestic products', and therefore caused injury to the domestic industry through their price effects."⁴⁷⁰ In addition, the Panel concluded that, because it had found that certain aspects of MOFCOM's price effects and impact analyses were inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement, MOFCOM's subsequent reliance on those analyses in the context of its causation determination was inconsistent with Article 3.5 of the Anti-Dumping Agreement.⁴⁷¹ The Panel also found that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed properly to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports.⁴⁷²

5.214. Each of the participants appeals different aspects of the Panel's findings. China alleges that the Panel erred in concluding that Japan's panel request, as it relates to MOFCOM's reliance on the market share of dumped imports in order to determine causation, provides a "brief summary of

⁴⁶⁷ See European Union's other appellant's submission, paras. 154-156.

⁴⁶⁸ Appellate Body Report, *China – GOES*, para. 149. (emphasis original)

⁴⁶⁹ Appellate Body Report, *China – GOES*, paras. 145 and 154.

⁴⁷⁰ Panel Reports, para. 7.188.

⁴⁷¹ Panel Reports, para. 7.191.

⁴⁷² Panel Reports, para. 7.204. We note that the Panel referred interchangeably in its discussion to the "decline" or "decrease in apparent consumption" and the "drop" or "decline in domestic demand". (See e.g. Panel Reports, paras. 7.169, 7.196, and 7.203)

the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU.⁴⁷³ China submits that the Panel incorrectly interpreted and applied Article 3.5 of the Anti-Dumping Agreement in finding that MOFCOM improperly relied on the market share of dumped imports in determining that such imports, through price undercutting, caused injury to the domestic industry. China also asserts, in this regard, that the Panel acted inconsistently with Article 11 of the DSU by ruling on a claim for which the complainants failed to make a *prima facie* case.⁴⁷⁴ For their part, Japan and the European Union contend that the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had not brought independent claims under Article 3.5 of the Anti-Dumping Agreement other than those concerning MOFCOM's reliance on the market share of dumped imports, and MOFCOM's non-attribution analysis. We begin by recalling the Panel's findings before turning to the specific issues raised in these appeals.

5.5.3.1 The Panel's assessment of MOFCOM's causation analysis

5.5.3.1.1 The Panel's findings

5.215. The Panel summarized MOFCOM's causation analysis as follows:

MOFCOM determined that "the large quantities of imports of the subject products ... dumped into China at low prices" caused material injury to the domestic industry. The determination was based on the price effects of the subject imports. MOFCOM did not find that subject imports had any volume effects on the domestic industry, in light of the fact that the absolute volume of subject imports declined during the period of investigation. However, MOFCOM did find that the market share of subject imports as a whole "remained high at around 50%". MOFCOM also found that the market share held by subject imports of both Grade B and C was around 90%. MOFCOM considered this market share relevant in assessing the price undercutting effect of subject imports. After considering the market share data and pricing information, MOFCOM found that "the imports of the subject products had a relatively big impact on the price of domestic like products".⁴⁷⁵

5.216. Based on its review of MOFCOM's analysis, the Panel found that "MOFCOM [had] failed to account for the fact that the market share of subject imports had actually dropped from around 90% in 2008 and 2009 to around 50% in 2010 and [the first half of] 2011, and that domestic market shares increased correspondingly."⁴⁷⁶ The Panel observed that, "[w]hile an investigating authority might properly determine, given the necessary facts, that high market shares exacerbate the price effects of dumped imports, an objective and impartial investigating authority would also consider whether the fact that import market shares are declining significantly indicates that the price effects are in fact somewhat attenuated."⁴⁷⁷

5.217. The Panel recalled that the market share of imported Grade B fluctuated, the market share of imported Grade C decreased during the POI, and the majority of domestic sales were of Grade A.⁴⁷⁸ The Panel also found that the market share held by Grade A dumped imports in 2008 was only 1.45%, and that there were no Grade A dumped imports thereafter.⁴⁷⁹ The Panel noted that, although dumped imports and domestic sales were concentrated in different segments of the HP-SSST market, "MOFCOM made no finding of cross-grade price effects, whereby price

⁴⁷³ China's other appellant's submission, para. 57.

⁴⁷⁴ China's appellant's submission, para. 165; other appellant's submission, para. 70.

⁴⁷⁵ Panel Reports, para. 7.171 (quoting MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 65-67 (translation amended by Panel Exhibit CHN-16-EN and accepted by the complainants in Panel Exhibits JPN-29 and EU-32); and referring to China's first written submission to the Panel, paras. 516-518). See also Panel Reports, para. 7.172 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 66).

⁴⁷⁶ Panel Reports, para. 7.181 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 43-49).

⁴⁷⁷ Panel Reports, para. 7.181.

⁴⁷⁸ Panel Reports, para. 7.182 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 44 and 66).

⁴⁷⁹ Panel Reports, para. 7.182 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 65).

undercutting by subject imports of Grades B and C might be shown to affect the price of domestic sales of Grade A."⁴⁸⁰ The Panel stated that it:

... would [have] expect[ed] an objective and impartial investigating authority to have examined and explained how the 90% market shares of Grade B and C subject imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, notwithstanding the fact that the bulk of domestic production was of Grade A, the sales and market share of domestic Grade A increased, the negligible market share of subject imports of Grade A and the absence of cross-grade price effects, and despite the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B.⁴⁸¹

5.218. The Panel added that, in the absence of any such examination or analysis, it remained "unclear" how the market shares of imports of Grade B and Grade C HP-SSST were "relevant in assessing whether subject imports caused injury to a domestic industry producing primarily Grade A".⁴⁸²

5.219. Responding to China's argument that the existence of cross-grade price correlation is a "normal feature" for a single product consisting of high-end and low-end grades, the Panel observed that there was no "meaningful analysis" in MOFCOM's Final Determination of whether or how this feature manifests itself in the specific circumstances of this case.⁴⁸³ Instead, MOFCOM left open the degree of impact that movements of prices of imported Grades B and C might have on the price of domestic Grade A, and made no assessment of whether the effect would be minimal, or sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts that they did.⁴⁸⁴

5.220. The Panel also found that MOFCOM had failed to evaluate record evidence indicating that trends in domestic prices by grade had no apparent relationship in terms of magnitude or trends in import prices, noting that "[a]n objective and impartial investigating authority would not have found price correlation without at least addressing, and explaining, such contrary price movements."⁴⁸⁵ The Panel added that, in addition to not making a finding that the prices of imported Grades B and C had "pushed down" the price of domestic Grade A, "MOFCOM never considered, and certainly failed to exclude, the equally logical possibility that Grade B and C subject import prices declined in response to the decline in domestic Grade A prices in 2009 and 2010, in order to maintain the price differential between the various grades."⁴⁸⁶

5.221. For these reasons, the Panel concluded that "MOFCOM's reference to the market shares held by subject imports was not sufficient to establish that subject imports, through price undercutting, had 'a relatively big impact on the price of the domestic like products', and therefore caused injury to the domestic industry through their price effects."⁴⁸⁷ Having found that MOFCOM's reliance on the market share of dumped imports was "central" to its ultimate determination that dumped imports, through their price effects, caused injury to the domestic industry, the Panel concluded that the flaws in MOFCOM's analysis of the market share of dumped imports rendered its causation determination inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁴⁸⁸

⁴⁸⁰ Panel Reports, para. 7.182.

⁴⁸¹ Panel Reports, para. 7.182.

⁴⁸² Panel Reports, para. 7.182.

⁴⁸³ Panel Reports, paras. 7.183-7.184.

⁴⁸⁴ Panel Reports, para. 7.185 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 48).

⁴⁸⁵ Panel Reports, para. 7.186 and fn 335 thereto (referring to China's second written submission to the Panel, para. 155).

⁴⁸⁶ Panel Reports, para. 7.187.

⁴⁸⁷ Panel Reports, para. 7.188.

⁴⁸⁸ Panel Reports, paras. 7.188 and 7.205.

5.5.3.1.2 Japan's panel request and Article 6.2 of the DSU

5.222. We begin by examining China's claim that the Panel erred in concluding that Japan's panel request, as it relates to MOFCOM's reliance on the market share of dumped imports in order to determine causation, provides a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU. According to China, Japan's panel request, as it relates to MOFCOM's analysis of causation, was limited to "claims" regarding the lack of volume effects and flaws in MOFCOM's price effects and impact analyses, and did not include a claim regarding MOFCOM's reliance on the market share of dumped imports.⁴⁸⁹

5.223. In response, Japan argues that it properly raised a claim regarding MOFCOM's reliance on the market share of dumped imports. Japan further disputes China's contention that its claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were limited to a "volume analysis based claim" and claims based on MOFCOM's price effects and impact analyses, which are "purely consequential" to the alleged violations of Articles 3.2 and 3.4 of the Anti-Dumping Agreement.⁴⁹⁰

5.224. Japan's panel request states, in relevant part:

Japan considers that the measures at issue are inconsistent with, at least, China's obligations under the following provisions of the Anti-Dumping Agreement:

1. Articles 3.1, 3.2, 3.4, and 3.5 because China's injury determination was not based on positive evidence and did not involve an objective examination of the volume of the dumped imports under investigation, the effect of those imports on prices in the domestic market for like products, and the consequent impact of those imports on domestic producers of such products. Specifically:

...

(c) China's demonstration of the alleged causal relationship between the imports under investigation and the alleged injury to the domestic industry was not based on an objective examination of all relevant evidence before the authorities. In particular, China determined that the allegedly dumped imports are causing injury despite an absence of a significant increase in the volume of dumped imports, and based on its flawed price effects and impact analyses. Accordingly, China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁴⁹¹

5.225. As discussed, the obligations that apply to an investigating authority's determination of injury are found in Article 3 of the Anti-Dumping Agreement. The first two sentences of Article 3.5 identify the *causal link* that must be shown in reaching an injury determination. These sentences expressly require investigating authorities to demonstrate that the dumped imports are causing injury, and stipulate that such "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".⁴⁹² Moreover, the disciplines under Article 3.5 are linked to the fundamental obligations set out in Article 3.1, namely, that an investigating authority must conduct an "objective examination" based on "positive evidence".

5.226. In relation to its claims under Article 3.5 of the Anti-Dumping Agreement, Japan stated in its panel request that MOFCOM's injury determination "did not involve an objective examination of the volume of the dumped imports under investigation, the effect of those imports on prices in the domestic market for like products, and the consequent impact of those imports on domestic producers of such products."⁴⁹³ Japan submitted, "[i]n particular", that MOFCOM "determined that the allegedly dumped imports are causing injury despite an absence of a significant increase in the

⁴⁸⁹ China's other appellant's submission, paras. 58-59 and 61 (referring to Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.53; and Japan Panel Report, para. 7.188). China also argues that Japan's subsequent submissions to the Panel confirm the limited scope of Japan's panel request. (China's other appellant's submission, para. 66)

⁴⁹⁰ Japan's appellee's submission, para. 16 (referring to China's other appellant's submission, para. 49).

⁴⁹¹ Japan's panel request, pp. 1-2.

⁴⁹² Emphasis added.

⁴⁹³ Japan's panel request, para. 1.

volume of dumped imports, and based on its flawed price effects and impact analyses."⁴⁹⁴ With regard to MOFCOM's allegedly "flawed price effects and impact analyses", we recall that paragraphs 1(a) and 1(b) of Japan's panel request read as follows:

(a) In its price effects analysis, China failed to conduct proper analyses with respect to the three different grades of HP-SSST products under investigation and the HP-SSST products as a whole, and China improperly concluded that the imports under investigation had an overall significant effect on the prices of like domestic products. Accordingly, China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

(b) China's analysis of the impact of the dumped imports on the domestic industry: (i) failed to make an objective examination, based on positive evidence, of the impact of subject imports on the domestic industry based on the volume of such imports and their effect on prices; (ii) failed to evaluate the magnitude of the margin of dumping; and (iii) failed to objectively determine the relative importance and weight to be attached to relevant economic factors and indices, and improperly disregarded the majority of those factors and indices indicating that the domestic industry did not suffer material injury. Accordingly, China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.227. We are of the view that this language in Japan's panel request, when read together with the reference to Articles 3.1 and 3.5 of the Anti-Dumping Agreement, is sufficiently clear to present, in a manner consistent with Article 6.2 of the DSU, a problem concerning MOFCOM's analysis of whether "the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry, as required under Article 3.5 of the Anti-Dumping Agreement. We do not see why Japan would have been obliged to present a *separate* "problem" regarding MOFCOM's "reliance on the market share of subject imports" on *separate* grounds, distinct from the other issues it raised with regard to MOFCOM's determination of causation.

5.228. As we understand it, the Panel characterized the issues raised by the complainants (including Japan), under Article 3.5 of the Anti-Dumping Agreement, as a problem relating to whether MOFCOM's "reliance on the market share of subject imports" constituted a sufficient basis for MOFCOM's finding of causation under Article 3.5. In addressing this question, the Panel noted, for example, that MOFCOM had not explained:

... how the 90% market shares of Grade B and C subject imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, notwithstanding the fact that the bulk of domestic production was of Grade A, the sales and market share of domestic Grade A increased, the negligible market share of subject imports of Grade A and the absence of cross-grade price effects, and despite the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B imports. MOFCOM failed to provide any such explanation. In the absence of any such examination or analysis, it remains unclear how the market shares of imports of Grade B and C HP-SSST are relevant in assessing whether subject imports caused injury to a domestic industry producing primarily Grade A HP-SSST.⁴⁹⁵

5.229. The Panel's reasoning quoted above makes clear, in our view, that the Panel referred to the issues raised by the complainants, both in the context of MOFCOM's price effects and impact analyses, *as well as in the context of causation*, as questions going to whether MOFCOM erred in relying on the "market share" of dumped imports. Rather than referring *directly* to factors that MOFCOM *did not* rely on (or explain) in the context of its causation analysis, the Panel referred to what MOFCOM, in the Panel's view, *did* rely on – i.e. the "market share" of dumped imports. The fact that the Panel described Japan's claim (and the European Union's claim) in this manner does not mean that it was, therefore, addressing a claim that was outside the scope of its terms of reference. Nor does it mean that Japan's panel request does not comply with the standard set out in Article 6.2 of the DSU.

⁴⁹⁴ Japan's panel request, para. 1(c).

⁴⁹⁵ Japan Panel Report, para. 7.182.

5.230. China asserts that the expression "in particular", in Japan's panel request, limits the coverage of the panel request to *claims* regarding the lack of volume effects, and flaws in MOFCOM's price effects and impact analyses.⁴⁹⁶ We recall that compliance with the requirements of Article 6.2 of the DSU must be assessed in the light of the language contained in Japan's panel request *as a whole*. The second sentence of paragraph 1(c) of the panel request starts with the expression "in particular", and refers to MOFCOM's determination that "the allegedly dumped imports are causing injury despite an absence of a significant increase in the volume of dumped imports, and based on its flawed price effects and impact analyses". We understand the expression "in particular" to indicate that Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement *focused* on the manner in which MOFCOM determined that the dumped imports were causing injury, "despite an absence of a significant increase in the volume of dumped imports, and based on its flawed price effects and impact analyses".

5.231. China also argues that the reference in Japan's panel request to MOFCOM's causation determination being "based on" MOFCOM's flawed price effects analysis "unambiguously shows that the claim is purely consequential to the claim of violation of Article 3.2 as regards the price effects analysis".⁴⁹⁷ In addition, China submits that "the reference to 'flawed' *presupposes* a finding that the price effects analysis is found to be violating Article 3.2."⁴⁹⁸

5.232. As noted above, Japan's panel request refers to MOFCOM's determination that "the allegedly dumped imports are causing injury despite an absence of a significant increase in the volume of dumped imports, and based on its flawed price effects and impact analyses."⁴⁹⁹ As the Appellate Body has explained, while being "necessary" and forming the "basis" for the overall causation analysis, the inquiries under Articles 3.2 and 3.4 do not result in duplicating, but rather contribute to, the causation analysis under Article 3.5.⁵⁰⁰ While we understand Japan's claims under Article 3.2 to have concerned MOFCOM's consideration of the relationship between the prices of the dumped imports and *domestic prices*, we read the language in Japan's panel request to indicate that its claims under Article 3.5 were more *broadly* concerned with MOFCOM's alleged failure to demonstrate properly the existence of a "causal relationship" between the dumped imports and *injury to the domestic industry*⁵⁰¹ on the basis of an examination of "all relevant evidence" before the investigating authority *including*: (i) the volume of the dumped imports *and* their price effects listed under Article 3.2; as well as (ii) the results of the evaluation of all the relevant economic factors and indices having a bearing on the state of the domestic industry, as required under Article 3.4. Thus, while Japan may have also brought consequential claims under Article 3.5 flowing from errors under Articles 3.2 and 3.4 of the Anti-Dumping Agreement, we understand Japan's primary claim under Article 3.5 to have related to MOFCOM's failure to make an overall determination of causation in the light of record evidence regarding the volume, price effects, *and* impact of dumped imports (consisting mainly of Grades B and C) on the domestic industry (producing mainly Grade A HP-SSST).

5.233. In the light of the above, we find that the Panel did not act inconsistently with Article 6.2 of the DSU by addressing Japan's claims under Article 3.5 of the Anti-Dumping Agreement regarding "MOFCOM's reliance on the market share of subject imports", in paragraphs 7.180-7.188 of the Japan Panel Report.

⁴⁹⁶ China's other appellant's submission, para. 62. We have discussed the legal standard applicable under Article 6.2 of the DSU at paras. 5.11-5.16 of these Reports.

⁴⁹⁷ China's other appellant's submission, para. 64.

⁴⁹⁸ China's other appellant's submission, para. 64. (emphasis added)

⁴⁹⁹ Japan's panel request, para. 1(c). (emphasis added)

⁵⁰⁰ Appellate Body Report, *China – GOES*, paras. 147 and 149.

⁵⁰¹ Appellate Body Report, *China – GOES*, paras. 147 and 149.

5.5.3.1.3 Whether the Panel made the case for the complainants

5.234. China argues that, in making findings regarding "MOFCOM's reliance on the market share of subject imports", the Panel acted inconsistently with Article 11 of the DSU by ruling on a claim that had not been articulated by the complainants, and in relation to which the complainants had raised no arguments. In the alternative, China argues that the Panel deprived China of its due process rights and "made the case" for both Japan and the European Union by ruling on a claim in respect of which the complainants had failed to make a *prima facie* case.⁵⁰²

5.235. Referring to their first and second written submissions to the Panel and opening statements at the first and second meetings of the Panel, the complainants submit that they made a *prima facie* case regarding MOFCOM's reliance on the market share of dumped imports, factoring in the same aspects of MOFCOM's price effects and impact analyses that the Panel considered in its assessment of the matter at paragraphs 7.181 to 7.188 of the Panel Reports.⁵⁰³ The complainants submit that they presented "evidence and legal argument" to establish that MOFCOM's failure to consider the market share of dumped imports in the context of all relevant evidence, including evidence relating to price effects and impact, resulted in a causation determination that is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁵⁰⁴ They argue that China appears to divide improperly and artificially their overarching claim and arguments under Articles 3.1 and 3.5 "into pieces", when these claims and arguments should instead be considered "as a whole".⁵⁰⁵

5.236. In *US – Gambling*, the Appellate Body specified that "[a] *prima facie* case must be based on 'evidence and legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."⁵⁰⁶ The Appellate Body further stated that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."⁵⁰⁷ Moreover, the evidence and legal argumentation put forward in a *prima facie* case must be sufficient to identify the challenged measure and its basic import, to identify the relevant WTO provision and obligation contained therein, and to explain the basis for the claimed inconsistency of the measure with that provision.⁵⁰⁸ In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body explained that, "while a panel cannot make the case for a complainant, it has the competence 'freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration'."⁵⁰⁹ Once a complainant has made out a *prima facie* case, a panel is required to develop its own reasoning in order to make an objective assessment of the matter before it and is required to set out in its report the basic rationale behind any findings and recommendations that it makes.⁵¹⁰ Panels and the Appellate Body are not constrained by the parties' arguments in developing legal reasoning.

5.237. In their first written submissions to the Panel, the complainants argued that MOFCOM's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of dumped imports, and stated that "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

⁵⁰² See China's appellant's submission, para. 165; and other appellant's submission, paras. 91 and 98.

⁵⁰³ Japan's appellee's submission, para. 25; European Union's appellee's submission, para. 241.

⁵⁰⁴ Japan's appellee's submission, para. 25 (emphasis original; fn omitted); European Union's appellee's submission, para. 241.

⁵⁰⁵ Japan's appellee's submission, para. 26; European Union's appellee's submission, para. 242 (quoting Appellate Body Reports, *US – Carbon Steel*, para. 127; *Korea – Dairy*, paras. 124-127; and *Thailand – H-Beams*, para. 95). (emphasis added by Japan and the European Union)

⁵⁰⁶ Appellate Body Report, *US – Gambling*, para. 140 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 336). (emphasis added in *US – Gambling*)

⁵⁰⁷ Appellate Body Report, *US – Gambling*, para. 140 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191).

⁵⁰⁸ Appellate Body Report, *US – Gambling*, para. 141.

⁵⁰⁹ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215 (quoting Appellate Body Report, *EC – Hormones*, para. 156).

⁵¹⁰ See Articles 11 and 12.7 of the DSU. Article 12.7 provides in relevant part: "[T]he report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes."

products."⁵¹¹ The complainants further referred to alleged flaws in MOFCOM's (i) volume analysis, (ii) price effects analysis, and (iii) impact analysis to argue that, "by grounding its causation determination on its volume, price effects, and impact analyses, which did not support a finding of injury, [MOFCOM/China] failed to conduct an objective examination, based on positive evidence, of the existence of a causal link between [the subject imports/HP-SSST imports] and [the injury itself/injury], inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement."⁵¹² Both complainants also referred to MOFCOM's determination of causation on the basis of the "market share" held by dumped imports at the end of the POI.⁵¹³

5.238. In the light of the above, we consider that Japan and the European Union put forward sufficient evidence *and* legal argument to support their claims under Article 3.5 of the Anti-Dumping Agreement. Accordingly, we find that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or making the case for the complainants.

5.5.3.1.4 Whether the Panel erred in finding that MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

5.239. China alleges that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and acted inconsistently with Article 11 of the DSU, in concluding that MOFCOM's reliance on the market share of dumped imports was not sufficient to establish that these imports had "a relatively big impact on the price of the domestic like products", and that they caused injury to the domestic industry through their price effects.⁵¹⁴

5.240. China challenges, in essence, two aspects of the Panel's assessment. First, China takes issue with the Panel's review of MOFCOM's analysis of the market share of dumped imports. In this context, China raises a claim under Article 11 of the DSU as its primary claim. China then raises a claim regarding the Panel's interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, alleging that the Panel erred to the extent that it found that "MOFCOM was required to assess the nature and extent of the injurious effects of the dumped imports (as distinguished from those of other known factors), in order to find that the imports of the subject products had an impact on the domestic industry through their price effects."⁵¹⁵

5.241. Second, China asserts that the Panel erred in dismissing MOFCOM's finding of "price correlation" as a sufficient basis for a demonstration of cross-grade price effects, including, in particular, the requirement to assess how the market shares of Grade B and C dumped imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, which produces mainly Grade A products.⁵¹⁶ As further analysed below, we understand that most of China's arguments raised in this context relate to the objectivity of the Panel's assessment of the matter before it, rather than going to the question of whether the Panel correctly applied the legal standard under Articles 3.1 and 3.5 of the Anti-Dumping Agreement to the facts of the case.

5.242. In our following analysis, we begin, therefore, by briefly setting out WTO jurisprudence regarding the requirements of Article 11 of the DSU. We then analyse the arguments raised by China in the context of its claim of error under Article 11 of the DSU. For each issue raised by

⁵¹¹ Japan's first written submission to the Panel, para. 190; European Union's first written submission to the Panel, paras. 280-282. (emphasis original)

⁵¹² Japan's first written submission to the Panel, para. 209; European Union's first written submission to the Panel, para. 299.

⁵¹³ See e.g. Japan's first written submission to the Panel, paras. 198-201. See also European Union's oral statement at the first Panel meeting, paras. 117-119 and 122-123). In their second written submissions to the Panel, the complainants referred back to their first written submissions, reiterating that "MOFCOM's causation analysis was flawed because it did not logically progress from its volume, price effects, and impact analyses"; and "China's causation determination lacks any foundation in its analysis of the volume, price effects, and impact of HP-SSST imports." (See Japan's second written submission to the Panel, para. 56; and European Union's second written submission to the Panel, para. 176)

⁵¹⁴ China's appellant's submission, para. 207; other appellant's submission, para. 114.

⁵¹⁵ China's appellant's submission, para. 216; other appellant's submission, para. 123. According to China, such an obligation may exist in the context of a non-attribution analysis, but does not apply in the context of the first step of the causation analysis, which is the subject of this aspect of China's appeal.

⁵¹⁶ See China's other appellant's submission, para. 125.

China, we will also examine separately any arguments that implicate the Panel's application of the law to the facts.

5.5.3.1.4.1 Article 11 of the DSU

5.243. In previous disputes, the Appellate Body has noted that a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".⁵¹⁷ Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings."⁵¹⁸

5.244. A claim that a panel has failed to conduct an "objective assessment of the matter before it" is "a very serious allegation".⁵¹⁹ An appellant may not effectively recast its arguments before the panel under the guise of a claim under Article 11 of the DSU, but must identify specific errors⁵²⁰ that are so material that, "taken together or singly"⁵²¹, they undermine the objectivity of the panel's assessment of the matter before it.⁵²² A challenge under Article 11 of the DSU must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."⁵²³

5.245. With these considerations in mind, we turn to consider the two specific elements of China's challenge to the Panel's assessment of MOFCOM's findings on causation.

5.5.3.1.4.2 The Panel's assessment regarding MOFCOM's findings concerning the market share of imports

5.246. With regard to the market share of dumped imports, the Panel found that:

... although MOFCOM relied on the fact that the market share of subject imports "remained high at around 50%", MOFCOM failed to account for the fact that the market share of subject imports had actually dropped from around 90% in 2008 and 2009 to around 50% in 2010 and [the first half of] 2011, and that domestic market shares increased correspondingly. While an investigating authority might properly determine, given the necessary facts, that high market shares exacerbate the price effects of dumped imports, an objective and impartial investigating authority would also consider whether the fact that import market shares are declining significantly indicates that the price effects are in fact somewhat attenuated.⁵²⁴

5.247. China takes issue with these findings by the Panel, arguing that the Panel "disregard[ed] the part of MOFCOM's Final Determination addressing causation and distorts the findings reached by MOFCOM".⁵²⁵ China points to an excerpt of MOFCOM's Final Determination, stating that, in 2008, 2009, and 2010, dumped imports held a market share of 86.20%, 87.03%, and 47.23%, respectively, and that, although the market share of imports fluctuated, it remained high at around

⁵¹⁷ Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185).

⁵¹⁸ Appellate Body Reports, *US – COOL*, para. 299 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

⁵¹⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).

⁵²⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 442.

⁵²¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.

⁵²² Appellate Body Reports, *China – Rare Earths*, para. 5.179. See also Appellate Body Report, *EC – Fasteners (China)*, para. 499.

⁵²³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Australia – Apples*, para. 406). See also Appellate Body Report, *Peru – Agricultural Products*, para. 5.66. In case of similarly overlapping claims of error in the application of a legal standard to the relevant facts of a case and under Article 11 of the DSU, there is no basis to have an additional examination of whether a panel has conducted an objective assessment of the facts under Article 11 of the DSU. (Appellate Body Reports, *China – Rare Earths*, para. 5.174 (referring to Appellate Body Report, *China – GOES*, para. 184))

⁵²⁴ Panel Reports, para. 7.181. (fns omitted)

⁵²⁵ China's appellant's submission, para. 213; other appellant's submission, para. 120.

50% in 2010.⁵²⁶ China states that it fails to see how any objective assessment of the quoted paragraph can lead to a conclusion that MOFCOM relied on a remaining high market share of 50%, but did not account for the declining market share of imports.⁵²⁷ China also argues that the expression "remained high at around 50%" in itself shows that MOFCOM took into account the evolution of the market share, contrary to what the Panel suggested.⁵²⁸

5.248. We do not agree with China's characterization of the Panel's reasoning. Contrary to what China appears to suggest, the Panel in fact agreed with China that "an investigating authority *might properly* determine, given the necessary facts, that high market shares exacerbate the price effects of dumped imports."⁵²⁹ The Panel added, however, that an objective and impartial investigating authority would "consider whether the fact that import market shares are declining significantly indicates that the price effects are in fact somewhat attenuated".⁵³⁰

5.249. Other than pointing to the expression "remained high at around 50%" in MOFCOM's Final Determination to argue that this "*in itself* ... shows that MOFCOM took into account the evolution of the market share"⁵³¹, China has not pointed to any analysis or explanation in the passage quoted above or elsewhere in the Final Determination regarding whether or not such declining market shares of imports indicated that the price effects are in fact somewhat attenuated. We therefore see no error, nor failure to make an objective assessment of the matter, in this part of the Panel's analysis.

5.250. We also do not understand the Panel to have suggested that MOFCOM was required to assess the nature and extent of dumped imports, as opposed to other known factors, when it noted that MOFCOM had provided no explanation or analysis of declining market shares of dumped imports when considering the price effects of such imports. This aspect of the Panel's analysis related to MOFCOM's assessment of the market share of the dumped imports, and not to "other known factors" that may also be injuring the domestic industry, which must be considered in the context of a non-attribution analysis.

5.5.3.1.4.3 MOFCOM's finding of price correlation

5.251. China also takes issue with several aspects of the Panel's assessment of MOFCOM's finding of price correlation, asserting that this finding was sufficient to demonstrate cross-grade price effects and, consequently, to satisfy MOFCOM's obligation to assess "how the 90% market shares of Grade B and C subject imports enabled those imports, through price effects, to cause injury to the domestic industry as a whole, notwithstanding the fact that the bulk of domestic production was of Grade A [and] the negligible market share of subject imports of Grade A and the absence of cross-grade price effects".⁵³² We address each of China's arguments in turn below.

Whether price correlation can be assumed for a single product consisting of multiple product grades

5.252. With regard to cross-grade price effects, China argues that price correlation is a "normal feature" for a single product consisting of high-end and low-end grades; hence, China fails to see why an investigating authority would have been required to do more than MOFCOM did – that is, to state that Grade A products belong to the same category of products as Grade B and Grade C products and that "the price changes of the three [grades] are to a certain extent correlated with one another."⁵³³ According to China, there was no evidence before MOFCOM to suggest that this "normal feature" did not manifest itself in relation to HP-SSST.⁵³⁴ Moreover, China submits that the Final Determination included a brief discussion of the basis on which MOFCOM found price

⁵²⁶ China's appellant's submission, para. 210; other appellant's submission, para. 117 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 65-66).

⁵²⁷ China's appellant's submission, para. 211; other appellant's submission, para. 118.

⁵²⁸ China's appellant's submission, para. 212; other appellant's submission, para. 119.

⁵²⁹ Panel Reports, para. 7.181. (emphasis added)

⁵³⁰ Panel Reports, para. 7.181.

⁵³¹ China's appellant's submission, para. 212; other appellant's submission, para. 119. (emphasis added)

⁵³² Panel Reports, para. 7.182.

⁵³³ China's appellant's submission, para. 228; other appellant's submission, para. 135 (quoting MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 48).

⁵³⁴ China's appellant's submission, para. 228.

correlation. In any event, China submits that Articles 3.1 and 3.5 of the Anti-Dumping Agreement cannot be interpreted as requiring MOFCOM to set out the "obvious", that is, that price correlation follows as a matter of logic from the fact that the high-end products (Grades B and C) can substitute for the low-end products (Grade A).⁵³⁵

5.253. Japan the European Union contend that MOFCOM's finding of cross-grade price effects was based solely on assertions made by the petitioners, without any proper evaluation or analysis of those assertions. The complainants argue that, if such a finding were sufficient to justify affirmative causation determinations, it would render meaningless the requirements for an investigating authority to provide "reasoned and adequate" explanations of its findings and to conduct an "unbiased and objective" analysis.⁵³⁶

5.254. With respect to China's assertion that the existence of cross-grade price correlation is a "normal feature" for a single product consisting of high-end and low-end grades, the Panel observed that there was "no meaningful analysis in MOFCOM's Final Determination of whether or how this feature manifests itself in the specific circumstances of the product at issue".⁵³⁷ Instead, after recording the petitioners' argument that price correlation existed, MOFCOM seemed to have simply accepted that view "without any consideration of the accuracy thereof".⁵³⁸ The Panel added that MOFCOM had asserted that prices of the different grades were to a "certain extent" correlated with one another, leaving open the degree of impact that movements of prices of imported Grades B and C might have on the price of domestic Grade A, and making no assessment of whether the effect would be minimal, or sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts that they did.⁵³⁹

5.255. We recall that the task of a WTO panel is to examine whether the investigating authority has adequately performed its investigative function, and has adequately explained how the evidence supports its conclusions. It follows from the requirement that the investigating authority provide a "reasoned and adequate" explanation for its conclusions that the entire rationale for the investigating authority's decision must be set out in its report on the determination. This is not to say that the meaning of a determination cannot be explained or buttressed by referring to evidence on the record. Yet, in all instances, it is the explanation provided in the written report of the investigating authorities (and supporting documents) that is to be assessed in order to determine whether the determination was sufficiently explained and reasoned.

5.256. In the present case, we disagree with China to the extent it suggests that MOFCOM could simply "assume" that price correlation between different grades of HP-SSST is a "normal feature" for a single product consisting of high-end and low-end grades on the basis of assertions made by domestic applicants, and without any further discussion that would be reflected in its determination of whether substitutability of lower- and higher-end HP-SSST actually exists. Nor do we consider that it was sufficient for MOFCOM merely to state, in its Final Determination, that the prices of the different grades "were to a certain extent correlated with one another" without any analysis or explanation, or supporting evidence, of the degree of impact that movements of prices of imported Grades B and C might have on the price of domestic Grade A, and without an assessment of whether the effect would be sufficiently pronounced to cause prices of domestic Grade A to fall by the amounts that they did. We fail to see how a mere statement by MOFCOM regarding a "certain extent" of price correlation between different grades of HP-SSST, without any further explanation, provides a "meaningful basis"⁵⁴⁰ for an analysis of whether the subject imports are, through the effects of dumping, as set forth in Articles 3.2 and 3.4, causing injury to the domestic industry.

⁵³⁵ China's appellant's submission, para. 230; other appellant's submission, para. 137.

⁵³⁶ Japan's appellee's submission, para. 33; European Union's appellee's submission, para. 251.

⁵³⁷ Panel Reports, para. 7.184.

⁵³⁸ Panel Reports, para. 7.184.

⁵³⁹ Panel Reports, para. 7.185 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 48).

⁵⁴⁰ Appellate Body Report, *China – GOES*, paras. 145 and 154.

5.257. Furthermore, we find no merit in China's assertion that the Panel should have *inferred*, "in line with its duties under Article 11 of the DSU", from certain references in MOFCOM's Final Determination, that MOFCOM had "evaluate[d]" the petitioners' argument and had "concluded that it agreed with the argument".⁵⁴¹ China argues, in this regard, as follows:

The Panel acknowledges MOFCOM's reference to the Applicants' argument that "[a] large margin decrease of the prices of [Grade C] and [Grade B] products, both high-end products, will certainly drive down the price of [Grade A] products, so that a certain price difference among the three can be maintained" before concluding that "[Grade A] products belong to the same category of products as [Grade C] and [Grade B] products; that the price changes of the three are to a certain extent correlated with one another; that while assessing the impact on the domestic industry by imports of each individual grade, the Investigation Authority shall also consider the three grades of products collectively as belonging to the same product category".⁵⁴²

5.258. Beyond a reference to the petitioners' arguments and MOFCOM's statement that the prices of the three types of HP-SSST "to a certain extent correlated", we are unable to identify, in the passage referred to by China, any explanation or reasoning indicating that MOFCOM actually examined the degree of impact that movements of prices of imported Grades B and C might have on prices of domestic Grade A, including whether the effect would be sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts that they did. In assessing the WTO-consistency of a decision by an investigating authority, it is *not* for a panel to develop an explanation of the basis for the investigating authority's conclusions, *nor* to "infer" the existence of such a basis as China seems to suggest from some general economic logic. Rather, it is the task of a panel to examine whether the *investigating authority* has adequately performed its investigative function, and has adequately explained in its published report (and its related supporting documents) how the evidence supports its conclusions. We therefore do not agree with China to the extent it suggests that the Panel should have sought to find a basis, in MOFCOM's Final Determination, for MOFCOM's statement that the prices of the three types of HP-SSST are "to a certain extent correlated".

5.259. China also argues that the Panel acted inconsistently with Article 11 of the DSU by characterizing, as *ex post* rationalization, China's argument that higher-grade imports can "obviously" substitute for lower-grade domestic products.⁵⁴³ Referring to the oral statements made by the complainants before the Panel, China argues that even Japan and the European Union seemed to agree that it is "obvious that the high end products (B and C) can substitute the low-end grade (Grade A)". We recall MOFCOM's finding that "the price changes of the three [grades] are to a certain extent correlated with one another"⁵⁴⁴, and that there was no discussion, in MOFCOM's Final Determination, of the basis on which MOFCOM made that finding. We also note the Panel's finding that there was "no evidence" on the record that there had been "any consideration" by MOFCOM of whether higher-grade imported products can substitute for the lower-grade domestic products.⁵⁴⁵ In the absence of any analysis and explanation by MOFCOM regarding substitutability of the different grades of HP-SSST, we see no error in the Panel's finding that China's argument regarding "'obvious' substitutability" constituted an "*ex post* rationalization" provided by China in the Panel proceedings, "rather than an element of MOFCOM's analysis".⁵⁴⁶ Instead, we are of the view that the Panel properly focused on the language and reasoning contained in MOFCOM's Final Determination regarding price correlation between the different grades of dumped products, rather than on explanations provided by China during the Panel proceedings.

5.260. China further argues that the Panel dismissed China's reference to *substitutability* on the basis that MOFCOM did not analyse the extent of actual *substitution*.⁵⁴⁷ While acknowledging that the Panel's focus on actual substitution would be correct if it were analysing the consistency of a finding of causation based on volume effects, China emphasizes that MOFCOM's causation analysis

⁵⁴¹ China's appellant's submission, para. 229; other appellant's submission, para. 136.

⁵⁴² China's appellant's submission, para. 229; other appellant's submission, para. 136. (fns omitted)

⁵⁴³ China's appellant's submission, paras. 234-235; other appellant's submission, paras. 140-141.

⁵⁴⁴ MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 48.

⁵⁴⁵ Panel Reports, para. 7.184.

⁵⁴⁶ Panel Reports, para. 7.184.

⁵⁴⁷ China's appellant's submission, para. 232; other appellant's submission, para. 139.

was based on price effects.⁵⁴⁸ China submits that, as an investigating authority has discretion as to how it carries out its causation analysis, there was no need for MOFCOM to carry out any additional analysis regarding the *actual degree of substitution*.⁵⁴⁹

5.261. The complainants submit that, notwithstanding whether "actual or logical evidence of substitutability or price correlation" may exist, the Panel correctly found that there was "[no] consideration by MOFCOM of how this unspecified degree of substitutability, and resultant price correlation, might enable Grade B and C subject imports *to cause injury* to the domestic industry's Grade A operations."⁵⁵⁰ The complainants also note that, for dumped imports to have an "effect" on domestic prices, such imports must be "in fact", or "actually", substitutable for the domestic like products.⁵⁵¹

5.262. The Appellate Body has explained that "[a]n examination of the competitive relationship between products is ... required so as to determine whether such products form part of the same market."⁵⁵² It also noted that a set of products are in the same market when they "are in actual or potential competition with each other"⁵⁵³, that "a market comprises only those products that exercise competitive constraint on each other", and that products would be in the same market "when the relevant products are substitutable".⁵⁵⁴ While the Appellate Body made these statements in the context of examining claims brought under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), we read them as supporting the proposition that an analysis of "substitutability" or "price correlation" may well be required in cases, such as here, involving a dumped product and a like domestic product consisting of a range of different product types that are distinguished by considerable price differences. We note, in particular, that, in order to make a finding of present material injury under Article 3.5 of the Anti-Dumping Agreement, the investigating authority must demonstrate that the dumped imports (consisting of Grades B and C) have the "effect" of causing material injury to the domestic industry (producing mainly Grade A). We do not see how such a finding could be made if the relevant imports are not substitutable for the domestic like products. Moreover, as noted above, we do not see how MOFCOM, under the specific facts of this case, could provide a "meaningful basis" for an analysis of whether the dumped imports are causing injury, without considering the degree of impact that movements of prices of imported Grades B and C might have on the price of domestic Grade A.

5.263. With regard to substitutability of different product types, we note the Appellate Body's explanation that "whether two products compete in the same market is not determined simply by assessing whether they share particular physical characteristics or have the same general uses"; and that "it may also be relevant to consider whether customers demand a range of products or whether they are interested in only a particular product type."⁵⁵⁵ We consider these findings to be pertinent to the present disputes, where Japan argued before the Panel, *and China did not dispute*, that "Grade B is about double the price of Grade A, and Grade C is about triple the price of Grade A."⁵⁵⁶ We also note the physical differences in the dumped products, including, for example, that the higher-grade products B and C are capable of enduring the greater pressures and temperatures produced in ultra-supercritical boilers, and that the lower-grade product A is used in lower pressure and temperature environments in supercritical boilers.⁵⁵⁷ Given the considerable price and physical differences between the different product grades at issue, MOFCOM should, at the very least, have assessed the existence and the extent of substitutability of lower- and higher-end HP-SSST in order to show that "alleged substitutability demonstrates price correlation" between each product type. As noted by the Panel, there was no "consideration by MOFCOM of how [the] unspecified degree of substitutability, and the resultant price correlation, might enable Grade B and C subject imports to cause injury of the domestic industry's Grade A operations."⁵⁵⁸

⁵⁴⁸ China's appellant's submission, para. 236; other appellant's submission, para. 142.

⁵⁴⁹ China's appellant's submission, para. 237; other appellant's submission, para. 143.

⁵⁵⁰ Japan's appellee's submission, para. 35; European Union's appellee's submission, para. 253 (quoting Panel Reports, para. 7.184). (emphasis added by Japan and the European Union)

⁵⁵¹ Japan's appellee's submission, para. 36; European Union's appellee's submission, para. 255.

⁵⁵² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

⁵⁵³ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

⁵⁵⁴ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

⁵⁵⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

⁵⁵⁶ Panel Reports, fn 333 to para. 7.184.

⁵⁵⁷ See Japan's oral statement at the second Panel meeting, para. 35.

⁵⁵⁸ Panel Report, para. 7.184.

5.264. Additionally, China argues that there was evidence on the record of actual substitution, and asserts that the Panel acted contrary to Article 11 of the DSU by disregarding this evidence simply because it was not referred to in the Final Determination.⁵⁵⁹ China points, in particular, to the following statements made by the investigated Japanese exporters:

Due to significant differences in their mechanical and chemical properties, steel tubes used in ultra-supercritical power plant boilers ([Grade B] and [Grade C]) *significantly outperform* steel tubes used in supercritical power plant boilers ([Grade A]) *in the aspects of steam resistance oxidation thickness and fly ash corrosion resistance*. Consequently, their usages are different. [Grade B] and [Grade C] products are used in the superheaters and reheaters of ultra-supercritical power plant boilers (as well as in the superheaters and reheaters of supercritical power plant boilers), while [Grade A] products can *only* be used in the superheaters and reheaters of supercritical power plant boilers.⁵⁶⁰

5.265. China also notes that it referred the Panel to SMI's Injury Questionnaire Response⁵⁶¹, where SMI states that "the boiler manufacturers in China *primarily* use ... steel products other than [Grades B and C] to produce the super-heater and re-heater of the supercritical power plant boiler".⁵⁶² The passages to which China refers do not establish that MOFCOM actually explained and analysed whether imported Grades B and C are substitutable for domestic Grade A HP-SSST, and the extent of such substitutability. It was not for the Panel to provide such an explanation, nor to "infer" the existence of one, contrary to what China seems to suggest.

5.266. Furthermore, China submits that the Panel erred in suggesting that MOFCOM was required to assess the *extent* of the effect of the dumped imports in order to find a causal link, including whether such effect would be "sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts that they did".⁵⁶³ Referring to the Appellate Body's findings in *US – Hot-Rolled Steel*, China argues that "[a]n investigating authority's 'explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports' should be provided in the non-attribution analysis, not in the first part of the causation determination."⁵⁶⁴

5.267. We note that China raised a similar argument regarding MOFCOM's treatment of declining import volumes, which we have addressed at paragraphs 5.248-5.249 above. With respect to China's argument as it relates to *price correlation*, we do not understand the Panel to have suggested that MOFCOM was required to assess the nature and extent of dumped imports, as opposed to other known factors, when it noted that MOFCOM had provided no assessment of the degree of impact that movements in the prices of imported Grades B and C might have on the price of domestic Grade A, including whether it would be "minimal, or sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts they did".⁵⁶⁵

⁵⁵⁹ China's appellant's submission, paras. 238-239; other appellant's submission, paras. 144-145.

⁵⁶⁰ China's appellant's submission, para. 238; other appellant's submission, para. 144 (quoting Request for Considering Public Interest in the Anti-Dumping Investigation on Certain High-Performance Stainless Steel Seamless Tubes by Sumitomo Metal Industries, Ltd. & Kobe Special Tube Co., Ltd., February 2012 (Panel Exhibit JPN-25-EN), internal p. 4; as referred to in China's responses to Panel questions after the second Panel meeting, para. 16). (emphasis added by China)

⁵⁶¹ SMI's Injury Questionnaire Response (question 8) (Panel Exhibits CHN-20-CH (BCI) and CHN-20-EN (BCI)).

⁵⁶² China's appellant's submission, para. 239; other appellant's submission, para. 145 (quoting SMI's Injury Questionnaire Response (Panel Exhibit CHN-20-EN (BCI)), p. 10 (emphasis added by China); and referring to China's second written submission to the Panel, paras. 149-150; and responses to Panel questions following the second Panel meeting, para. 18).

⁵⁶³ China's appellant's submission, para. 242; other appellant's submission, para. 148 (quoting Panel Reports, para. 7.185).

⁵⁶⁴ China's appellant's submission, para. 244; other appellant's submission, para. 150 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 226).

⁵⁶⁵ Panel Reports, para. 7.185.

Contrary price movements

5.268. The Panel found that "MOFCOM failed to account for record evidence that trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices."⁵⁶⁶ The Panel stated that this was particularly apparent in respect of domestic Grade C, "the price of which increased by 112.80% from 2009-2010, without any corresponding movement in prices for subject imports of Grades B and C, which actually fell over that period."⁵⁶⁷ The Panel also noted that the price of domestic Grade A "increased by 9.35% from 2010 to [the first half of] 2011, whereas the price of imported Grade B fell by 10.63% during that period".⁵⁶⁸ The Panel expressed concern, noting that "[a]n objective and impartial investigating authority would not have found price correlation without at least addressing, and explaining, such contrary price movements."⁵⁶⁹

5.269. China takes issue with the Panel's finding, arguing that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU "by finding that MOFCOM should have addressed contrary price movement to be able to find price correlation that it could rely on to assess the impact of imports of Grades B and C on the price of domestic Grade A sales".⁵⁷⁰

5.270. In particular, China asserts that the Panel erred "in law" in finding that the contrary price movements "precluded" MOFCOM from finding price correlation.⁵⁷¹ China further asserts that the fact that price movements may not be in line does not detract from the conclusion that they were influenced by one another.⁵⁷² Furthermore, China contends that the Panel ignored the nature of MOFCOM's finding of price correlation, which related to the effect of the prices of Grades B and C on the prices of domestic Grade A and was expressly linked to MOFCOM's assessment of the impact on the domestic industry by imports of each individual grade.⁵⁷³

5.271. We have examined China's arguments regarding the Panel's assessment of MOFCOM's finding of price correlation above. There, we disagreed with China to the extent it suggests that MOFCOM could simply assume price correlation between different grades of HP-SSST on the basis of assertions made by domestic applicants, and without any further discussion by MOFCOM that would be reflected in its Final Determination of whether such substitutability of lower- and higher-end HP-SSST actually exists. Moreover, contrary to what China suggests, the Panel did not find that MOFCOM was precluded from finding price correlation given the contrary price movements. Instead, the Panel found that "MOFCOM failed to account for record evidence that trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices."⁵⁷⁴ We therefore do not agree with China to the extent it argues that the Panel erred in its examination of this aspect of MOFCOM's analysis. Rather, as we see it, the contrary price movements that MOFCOM had determined to exist between import and domestic prices of HP-SSST would have called for some explanation as to why MOFCOM nonetheless considered that the prices of the three types of HP-SSST "to a certain extent correlated".

The possibility that Grade B and Grade C dumped imports declined in response to the decline in domestic Grade A prices

5.272. The Panel found that, in addition to not making a finding that the prices of imported Grades B and C had pushed down the prices of domestic Grade A, MOFCOM "never considered, and certainly failed to exclude, the equally logical possibility" that the opposite might be true, namely that "Grade B and C subject import prices declined in response to the decline in domestic

⁵⁶⁶ Panel Reports, para. 7.186 (referring to China's second written submission to the Panel, para. 155).

⁵⁶⁷ Panel Reports, para. 7.186.

⁵⁶⁸ Panel Reports, para. 7.186.

⁵⁶⁹ Panel Reports, para. 7.186.

⁵⁷⁰ China's appellant's submission, para. 252; other appellant's submission, para. 158.

⁵⁷¹ China's appellant's submission, para. 249; other appellant's submission, para. 155.

⁵⁷² China's appellant's submission, para. 249; other appellant's submission, para. 155.

⁵⁷³ China's appellant's submission, paras. 250-251; other appellant's submission, paras. 156-157.

⁵⁷⁴ Panel Reports, para. 7.186 (referring to China's second written submission to the Panel, para. 155).

Grade A prices in 2009 and 2010, in order to maintain the price differential between the various grades."⁵⁷⁵

5.273. According to China, this reasoning by the Panel distorts MOFCOM's finding and disregards the wording of MOFCOM's Final Determination, contrary to Article 11 of the DSU. While acknowledging that MOFCOM's reasoning might be brief, China argues that this does not imply that MOFCOM did not "explore this issue meaningfully".⁵⁷⁶ Taking into account that: (i) MOFCOM found price correlation on the basis of the applicants' arguments; (ii) "as a matter of logic", the low-end Grade A cannot substitute Grades B and C; and (iii) MOFCOM found price correlation in the sense that imported Grades B and C could have an impact on the price of domestic Grade A, China submits that it fails to see how an objective assessment of the facts could lead to a conclusion that MOFCOM did not find that the price correlation concerned the impact of the prices of imported Grades B and C on domestic Grade A prices.⁵⁷⁷

5.274. We agree with China that, "as a matter of logic", it would appear that lower-grade domestic products cannot substitute for higher-grade imported products, while the opposite could be true. Moreover, we note that, having found price undercutting for Grades B and C, MOFCOM examined the impact of dumped imports on China's domestic industry, which produces mainly Grade A. Contrary to what China seems to suggest, this does not mean, however, that MOFCOM "meaningfully" evaluated and explained whether, as argued by the petitioners, the prices of imported Grades B and C had pushed down the prices of domestic Grade A. We understand the Panel to have merely observed that, by not evaluating this issue, MOFCOM failed to exclude the possibility that imported Grade B and C prices declined in response to declines in domestic Grade A prices in 2009 and 2010.⁵⁷⁸ We see no error in this statement by the Panel, and do not consider that the Panel distorted MOFCOM's findings in making this statement.

5.275. China argues that, "to the extent that the Appellate Body considers that the Panel found that MOFCOM did not examine the fact that the sales and market share of Grade A increased as set out above, the Panel acted contrary to Article 11 of the DSU."⁵⁷⁹ In the alternative, China submits that, "to the extent that the Appellate Body considers that the Panel found that MOFCOM was obliged to examine the fact that the sales and market share of Grade A increased in more detail than MOFCOM did, the Panel erred in its interpretation and application of Articles 3.1 and 3.5."⁵⁸⁰ In addition, with respect to MOFCOM's assessment of "the decline in the absolute volume of those imports and the declining market share of Grade C imports and the fluctuating market share of Grade B imports", China argues that the Panel erred to the extent that it considered that MOFCOM did not take these factors into account.⁵⁸¹

5.276. Contrary to what China seems to suggest, the Panel did not find that MOFCOM "failed to take into account", or failed to examine "in sufficient detail", the increase in sales and market share of domestic Grade A, the negligible market share of dumped imports of Grade A, the decline in the absolute volume of those imports, the declining market share of Grade C imports, and the fluctuating market share of Grade B imports. Instead, the Panel considered that, in the absence of any examination or analysis provided by MOFCOM in its Final Determination, it remained "unclear how the market shares of imports of Grade B and C HP-SSST are relevant in assessing whether subject imports caused injury to a domestic industry producing primarily Grade A HP-SSST."⁵⁸² We see no error in the Panel's finding in this regard.

⁵⁷⁵ Panel Reports, para. 7.187 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 66).

⁵⁷⁶ China's appellant's submission, para. 257; other appellant's submission, para. 163.

⁵⁷⁷ China's appellant's submission, paras. 254-256; other appellant's submission, paras. 160-162.

⁵⁷⁸ Panel Reports, para. 7.187 (referring to MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal p. 66).

⁵⁷⁹ China's appellant's submission, para. 260; other appellant's submission, para. 166.

⁵⁸⁰ China's appellant's submission, para. 261; other appellant's submission, para. 167.

⁵⁸¹ See China's appellant's submission, paras. 262-263; and other appellant's submission, paras. 168-169.

⁵⁸² Panel Reports, para. 7.182.

5.5.3.1.4.4 Conclusion

5.277. For all these reasons, we uphold the Panel's findings, in paragraphs 7.188 and 7.205 of the Panel Reports, paragraph 8.1.a.iii of the Japan Panel Report, and paragraph 8.6.d.iii of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST.

5.5.3.1.5 MOFCOM's non-attribution analysis

5.5.3.1.5.1 The Panel's findings

5.278. Before the Panel, Japan and the European Union argued that MOFCOM failed properly to ensure that injury caused by two known "other factors" – namely: (i) the decline in apparent consumption; and (ii) the increase in domestic production capacity – was not attributed to the dumped imports. The complainants submitted that MOFCOM conducted its non-attribution analysis regarding these two factors with respect to all grades of HP-SSST taken together, without considering any possibility that these other factors may have influenced different segments of the market differently, despite record evidence before MOFCOM demonstrating that imported and domestic HP-SSST were concentrated in different segments of the market, and despite the absence of any cross-grade price effects of dumped imports of Grades B and C on the prices of domestic Grade A. The complainants also contended that MOFCOM's non-attribution analysis would necessarily be flawed if its initial determination of the causal link between dumped imports and material injury to the domestic industry itself were flawed.

5.279. The Panel observed that MOFCOM sought to comply with the non-attribution requirement contained in Article 3.5 of the Anti-Dumping Agreement by considering whether certain other factors broke the causal link between dumped imports and material injury to the domestic industry it had found, stating that such methodology provides an appropriate basis for ensuring non-attribution.⁵⁸³ Referring to previous jurisprudence by the Appellate Body, the Panel observed that, "before it becomes relevant or necessary for an investigating authority to separate and distinguish the injury caused by other factors from the injury caused by subject imports, the investigating authority must first properly establish that the dumped imports have caused material injury, and the 'nature and extent' of the injury caused by subject imports and the injury caused by the other factor(s)."⁵⁸⁴ Recalling its prior conclusion that MOFCOM had failed properly to establish the causal link between dumped imports and material injury to the domestic industry, the Panel held that "MOFCOM could not have meaningfully assessed whether or not injury caused by other factors was sufficient to break that wrongly-determined causal link."⁵⁸⁵ The Panel therefore considered that it was not necessary to address every aspect of the parties' non-attribution arguments in detail.⁵⁸⁶

5.280. In the light of the above, the Panel concluded that MOFCOM's examination of the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was "flawed and not objective".⁵⁸⁷ Consequently, the Panel held that MOFCOM's non-attribution analysis of these factors was insufficient, and that its determination was thus inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁵⁸⁸

5.5.3.1.5.2 Arguments on appeal

5.281. China argues on appeal that the Panel's findings relating to MOFCOM's non-attribution analysis relied entirely on MOFCOM's alleged failure to determine properly the causal link between dumped imports and material injury to the domestic industry.⁵⁸⁹ Referring to its contention that

⁵⁸³ Panel Reports, para. 7.200.

⁵⁸⁴ Panel Reports, para. 7.201 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 226).

⁵⁸⁵ Panel Reports, para. 7.201.

⁵⁸⁶ Panel Reports, para. 7.202.

⁵⁸⁷ Panel Reports, para. 7.204.

⁵⁸⁸ Panel Reports, para. 7.204.

⁵⁸⁹ China's appellant's submission, paras. 268-269; other appellant's submission, paras. 174-175.

the Panel's findings in relation to MOFCOM's determination of the causal link (including those made in respect of MOFCOM's finding of price correlation) should be reversed, China contends that the Panel's finding that MOFCOM's non-attribution analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement should, as a consequence, also be reversed.⁵⁹⁰

5.282. Japan and the European Union disagree with China that the Panel's non-attribution findings in paragraphs 7.200-7.204 of the Panel Reports are "entirely based" on the Panel's findings regarding MOFCOM's determination of causation.⁵⁹¹ Referring to paragraphs 7.202-7.203 of the Panel Reports, the complainants submit that the Panel independently addressed certain additional aspects of their non-attribution arguments, and that China presented no argument as to why these additional reasons do not support the Panel's conclusion that MOFCOM's non-attribution analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁵⁹² On this basis, the complainants contend that, even if the Appellate Body were to reverse the Panel's causation findings based on China's arguments in these appeals, it would have no basis to reverse the Panel's finding that MOFCOM's non-attribution analysis is inconsistent with Articles 3.1 and 3.5, due to the additional reasons provided by the Panel at paragraphs 7.202-7.203 of the Panel Reports.⁵⁹³

5.5.3.1.5.3 Analysis

5.283. Article 3.5 of the Anti-Dumping Agreement provides that an investigating authority must, in its analysis, "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and must ensure that "the injuries caused by these other factors [are not] attributed to the dumped imports."⁵⁹⁴ Article 3.5 therefore requires an assessment that involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".⁵⁹⁵ Further, if the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, "the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors" and they "would have no rational basis to conclude that the dumped imports are indeed causing the injury".⁵⁹⁶

5.284. We have upheld the Panel's findings that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry. As we understand it, China's claims on appeal concerning the Panel's non-attribution analysis are purely consequential in the sense that they rely on China's arguments made in the context of challenging the Panel's finding regarding MOFCOM's causation determination. We have rejected those arguments above, and therefore we also reject China's appeal insofar as it relates to the Panel's findings regarding MOFCOM's non-attribution analysis.

5.285. In any event, we do not agree with China that the Panel's findings concerning MOFCOM's non-attribution analysis relied entirely on MOFCOM's alleged failure to determine properly the causal link between dumped imports and material injury to the domestic industry. Instead, the Panel also found that "MOFCOM's analyses of the injurious effects of both the decline in apparent consumption and the increase in domestic production capacity failed to address the fact that subject imports were comprised almost exclusively of Grades B and C, while the domestic industry's operations were focused on Grade A" and that "[t]hose analyses also failed to account

⁵⁹⁰ China's appellant's submission, para. 270; other appellant's submission, para. 176.

⁵⁹¹ Japan's appellee's submission, para. 44 (quoting China's other appellant's submission, para. 175); European Union's appellee's submission, para. 263 (quoting China's appellant's submission, para. 269).

⁵⁹² Japan's appellee's submission, paras. 44-46; European Union's appellee's submission, paras. 263-265.

⁵⁹³ Japan's appellee's submission, para. 46; European Union's appellee's submission, para. 265.

⁵⁹⁴ See Appellate Body Report, *China – GOES*, para. 151. Pursuant to the fourth sentence of Article 3.5, these other factors include the volume and prices of imports not sold at dumped or subsidized 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. (Ibid., fn 241 to para. 151)

⁵⁹⁵ Appellate Body Report, *China – GOES*, para. 151 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 223).

⁵⁹⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

for the fact that MOFCOM had not established that subject imports of Grades B and C had injurious price effects on domestic Grade A."⁵⁹⁷

5.286. In the light of the foregoing, we uphold the Panel's findings, in paragraphs 7.204 and 7.205 of the Panel Reports, paragraph 8.1.a.iv of the Japan Panel Report, and paragraph 8.6.d.iv of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports.

5.5.3.1.6 Additional "independent" claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

5.287. We now turn to the question of whether Japan and the European Union advanced independent claims under Article 3.5 of the Anti-Dumping Agreement, concerning MOFCOM's reliance on its Article 3.2 price effects and Article 3.4 impact analyses, or whether such claims were merely consequential, as found by the Panel. Having set out the Panel's findings and the parties' arguments before the Panel, we provide a summary of the claims and arguments on appeal, followed by an analysis of the complainants' claims on appeal.

5.5.3.1.6.1 The Panel's findings

5.288. The Panel summarized what it referred to as the complainants "consequential claims" under Article 3.5 of the Anti-Dumping Agreement as follows:

The complainants have made consequential Article 3.5 claims based on alleged inconsistencies in MOFCOM's Article 3.2 price effects and Article 3.4 impact analyses. The complainants recall their claims that MOFCOM's price effects and impact analyses are respectively inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement. They submit that, as a consequence, MOFCOM's reliance on those price effects and impact analyses to determine causation is inconsistent with Article 3.5 of the Anti-Dumping Agreement.⁵⁹⁸

5.289. Having recalled its prior findings that certain aspects of MOFCOM's price effects analysis are inconsistent with Article 3.2, and that one aspect of its impact analysis is inconsistent with Article 3.4 of the Anti-Dumping Agreement, the Panel found that MOFCOM's subsequent reliance on the WTO-inconsistent aspects of its price effects and impact analyses in determining that dumped imports caused material injury to the domestic industry undermined MOFCOM's causation analysis, and rendered MOFCOM's causation determination inconsistent with Article 3.5 of the Anti-Dumping Agreement.⁵⁹⁹

5.290. The Panel emphasized, however, that it "had not upheld all aspects" of the complainants' claims under Articles 3.2 and 3.4, and that those aspects of the complainants' claims under Articles 3.2 and 3.4 that it had rejected "[could not] form the basis for any consequential Article 3.5 claims".⁶⁰⁰ While the Panel was of the view that many of the issues raised by the complainants in the context of their Article 3.2 and Article 3.4 claims *could* have formed "the basis for independent claims" under Article 3.5, it considered that the complainants had neither identified any relevant independent Article 3.5 claims in their written submissions, nor identified arguments explaining how alleged flaws in MOFCOM's price effects and impact analyses resulted in independent violations of Article 3.5 as distinct from violations of Article 3.2 or 3.4.⁶⁰¹ Accordingly, the Panel found that the complainants "ha[d] not advanced any independent Article 3.5 claims, other than those concerning MOFCOM's reliance on market shares, and MOFCOM's non-attribution analysis, concerning MOFCOM's price effects and impact analyses."⁶⁰²

⁵⁹⁷ Panel Reports, para. 7.202.

⁵⁹⁸ Panel Reports, para. 7.189. (fns omitted)

⁵⁹⁹ Panel Reports, para. 7.191.

⁶⁰⁰ Panel Reports, para. 7.192.

⁶⁰¹ Panel Reports, para. 7.192.

⁶⁰² Panel Reports, para. 7.192.

5.5.3.1.6.2 Arguments on appeal

5.291. On appeal, Japan and the European Union take issue with the Panel's findings in paragraph 7.192 of the Panel Reports, submitting that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, by failing to examine the complainants' claims of independent violations of Articles 3.1 and 3.5 of the Anti-Dumping Agreement arising from MOFCOM's price effects and impact analyses.⁶⁰³ The complainants further request us to complete the legal analysis and evaluate on the basis of the Panel's factual findings and undisputed facts on the record whether independent violations of Articles 3.1 and 3.5 arise in those instances where the complainants' claims under Articles 3.2 and 3.4 were rejected by the Panel or the Appellate Body.⁶⁰⁴ More specifically, Japan requests us to find that China violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because: (i) MOFCOM improperly found that imports of Grade C had explanatory force for price undercutting effects on domestic Grade C; (ii) MOFCOM improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole; (iii) MOFCOM improperly found the domestic industry as a whole to be impacted by dumped imports despite finding no price effects with respect to Grade A; and (iv) MOFCOM failed to examine whether dumped imports had explanatory force for the state of the domestic industry.⁶⁰⁵

5.292. In response, China submits that the Panel correctly concluded that the complainants did not raise independent claims under Article 3.5 (other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis). China further argues that the Panel did not fail to make an objective assessment of the matter before it, as required by Article 11 of the DSU, and requests us to reject the complainants' appeals.⁶⁰⁶

5.5.3.1.6.3 Analysis

5.293. In order to determine whether the Panel erred in finding that "the complainants have not advanced any independent claims under Article 3.5 of the Anti-Dumping Agreement, other than those concerning MOFCOM's reliance on market shares, and MOFCOM's non-attribution analysis, concerning MOFCOM's price effects and impact analyses", we begin by reviewing the language found in the complainants' panel requests.⁶⁰⁷

5.294. As noted above, after claiming the inconsistency of China's price effects and impact analyses under, respectively, Articles 3.1 and 3.2 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement, Japan stated in paragraph 1(c) of its panel request that:

China's demonstration of the alleged causal relationship between the imports under investigation and the alleged injury to the domestic industry was not based on an objective examination of all relevant evidence before the authorities. In particular, China determined that the allegedly dumped imports are causing injury despite an absence of a significant increase in the volume of dumped imports, and based on its flawed price effects and impact analyses. Accordingly, China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

5.295. In paragraph 5 of its panel request, after claiming the inconsistency of China's price effects and impact analyses under, respectively, Articles 3.1 and 3.2 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the European Union specified its relevant claims under Articles 3.1 and 3.5 as follows:

⁶⁰³ Japan's appellant's submission, paras. 82 and 84; European Union's other appellant's submission, paras. 165 and 167.

⁶⁰⁴ Japan's appellant's submission, para. 104; European Union's other appellant's submission, para. 178.

⁶⁰⁵ Japan's appellant's submission, para. 104 (referring to Japan's comments on the Interim Reports, para. 61).

⁶⁰⁶ China's appellee's submission, para. 318.

⁶⁰⁷ Panel Reports, para. 7.192.

Articles 3.1 and 3.5 of the Anti-Dumping Agreement because China failed to conduct an objective examination, based on positive evidence, of the causal relationship between the imports under investigation and the alleged injury to the domestic industry. China determined that the allegedly dumped imports are causing injury despite an absence of a significant increase in the volume of dumped imports, based on improper price effects analyses and based on flawed impact analyses, including improper evaluation of or failure to consider relevant economic factors and indices having a bearing on the state of the domestic industry.

5.296. In the light of this language in the complainants' panel requests, we understand the complainants to have sought to challenge MOFCOM's causation analysis on several grounds, *including* on the basis of alleged flaws in MOFCOM's price effects and impact analyses. While the complainants raised many of the same arguments in support of their claims under Article 3.5 as they did in support of their claims under Articles 3.2 and 3.4 of the Anti-Dumping Agreement⁶⁰⁸, we see no error in the Panel's finding that the complainants had not claimed, before the Panel, that MOFCOM's price effects and impact analyses, taken alone, resulted in *independent* violations of Article 3.5 of the Anti-Dumping Agreement. We therefore uphold the Panel's finding, in paragraph 7.192 of the Panel Reports, that the complainants had not advanced independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

5.297. Having said that, we understand the *key contention* underlying the complainants' overall claims under Article 3.5 to relate to MOFCOM's failure to conduct *a cross-grade price analysis*. In particular, we understand the complainants to have claimed that MOFCOM did not address or explain how the volume and price effects of imports of Grade B and Grade C HP-SSST were relevant in assessing whether such imports (of Grades B and C) caused material injury to the domestic industry producing primarily Grade A HP-SSST. The complainants raised the same overall concern in the context of their claims under Articles 3.2 and 3.4 of the Anti-Dumping Agreement, arguing, *inter alia*, that: (i) MOFCOM improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole; (ii) MOFCOM improperly found the domestic industry as a whole to be impacted by dumped imports despite its finding that there was no price undercutting with respect to Grade A; and (iii) MOFCOM failed properly to examine whether the dumped imports (consisting primarily of Grades B and C) had explanatory force for the state of the domestic industry (producing primarily Grade A HP-SSST).⁶⁰⁹ While the Panel did not find that the concerns expressed by the complainants were the subject of "independent claims" under Article 3.5, the Panel observed in the context of its Article 3.5 analysis, *inter alia*, that "MOFCOM made no finding of cross-grade price effects, whereby price undercutting by subject imports of Grades B and C might be shown to affect the price of domestic sales of Grade A"⁶¹⁰, and found that the flaws in MOFCOM's analysis of the market share of dumped imports rendered its causation determination inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.⁶¹¹ We have agreed with the Panel's reasoning in this regard.

5.5.3.2 Conclusions

5.298. In sum, we find that the Panel did not act inconsistently with Article 6.2 of the DSU by addressing Japan's claims under Article 3.5 of the Anti-Dumping Agreement regarding "MOFCOM's reliance on the market share of subject imports", in paragraphs 7.180-7.188 of the Japan Panel Report. We also find that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or making the case for the complainants. We uphold the Panel's findings, in paragraphs 7.188 and 7.205 of the Panel Reports, paragraph 8.1.a.iii of the Japan Panel Report, and paragraph 8.6.d.iii of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of the dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C

⁶⁰⁸ See Japan's first written submission to the Panel, paras. 186-209; and European Union's first written submission to the Panel, paras. 277-299. See also Japan's second written submission to the Panel, para. 56; and European Union's second written submission to the Panel, para. 176.

⁶⁰⁹ Japan's comments on the Interim Reports, para. 61.

⁶¹⁰ Panel Reports, para. 7.182.

⁶¹¹ Panel Reports, paras. 7.188 and 7.205.

imports might be shown to affect the price of domestic Grade A HP-SSST. We also uphold the Panel's findings, in paragraphs 7.204 and 7.205 of the Panel Reports, paragraph 8.1.a.iv of the Japan Panel Report, and paragraph 8.6.d.iv of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed properly to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports. Finally, we find that the Panel did not act inconsistently with Article 11 of the DSU in concluding, in paragraph 7.192 of the Panel Reports, that the complainants had not advanced independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

5.6 Additional working procedures concerning BCI

5.299. We now turn to address the European Union's claim that the Panel erred in its interpretation and application of Articles 17.7 and 6.5 of the Anti-Dumping Agreement and Article 18.2 of the DSU, when ruling on certain preliminary issues raised by the European Union regarding the additional working procedures adopted by the Panel to protect business confidential information (BCI).⁶¹² We start by setting out the relevant findings by the Panel and the context in which the Panel made these findings.

5.6.1 The Panel's findings

5.300. Following consultations with the parties, on 27 September 2013, the Panel adopted additional working procedures concerning BCI (BCI Procedures).⁶¹³ Paragraphs 1 and 2 of the BCI Procedures originally provided:

(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.⁶¹⁴

5.301. The European Union objected to two aspects of the BCI Procedures adopted by the Panel.⁶¹⁵ First, the European Union took issue with the language in paragraph 1, quoted above, according to which BCI, in the WTO panel proceedings, "shall include information that was previously submitted to ... MOFCOM[] as BCI in the anti-dumping investigation at issue in these disputes."⁶¹⁶ The European Union argued that the effect of this language was to delegate, in absolute terms, to non-WTO entities or persons (i.e. the parties involved in a domestic anti-dumping investigation) the issue of whether or not certain information should be granted additional protection in the context of WTO dispute settlement.⁶¹⁷ Disagreeing with this proposition, the European Union claimed that it is for *WTO Members* to request, or not, additional protection for information that they submit in the context of WTO panel proceedings, and for *WTO panels* to rule on such requests. The European Union observed, in this regard, that a WTO Member may indicate to a panel, for example, that certain information that was previously treated as confidential by an investigating authority is no longer sensitive, or, conversely, that information submitted by another WTO Member to a panel should be designated as confidential.⁶¹⁸

⁶¹² Panel Reports, para. 1.10. No request for BCI procedures was made in these appellate proceedings.

⁶¹³ Panel Reports, para. 1.10.

⁶¹⁴ Panel Reports, para. 7.10. (emphasis original)

⁶¹⁵ Japan did not challenge separately the BCI Procedures adopted by the Panel. However, in response to the Panel's questioning, Japan indicated that it generally agreed with the European Union's request to modify paragraphs 1 and 2 of the BCI Procedures. (Panel Reports, para. 7.14; Japan's response to Panel question No.1)

⁶¹⁶ Panel Reports, para. 7.18. (emphasis original)

⁶¹⁷ See Panel Reports, para. 7.12.

⁶¹⁸ European Union's first written submission to the Panel, paras. 56-57.

5.302. The European Union also objected to the language in paragraph 2 of the Panel's BCI Procedures, whereby a WTO Member providing information to the panel that had been previously submitted to the authority in the underlying anti-dumping investigation as confidential was required to obtain and provide to the panel evidence of prior written authorization from the entity that had originally submitted that information to the domestic investigating authority. The European Union argued that such a requirement would mean that a particular firm, or submitting entity involved in a domestic anti-dumping proceeding, could "simply withhold the authorization and effectively limit the information that may be submitted in WTO dispute settlement".⁶¹⁹ The European Union submitted that Article 17.7 of the Anti-Dumping Agreement makes clear that a Member is not required to obtain authorization before providing confidential information to WTO panels.⁶²⁰

5.303. China responded that the aspects of the Panel's BCI Procedures challenged by the European Union added to, rather than detracted from, the protection provided by the DSU, and that the additional protection provided by the Panel for information previously submitted to MOFCOM as BCI was in consonance with the confidentiality requirements in Article 6.5 of the Anti-Dumping Agreement. China further submitted that "an authorizing letter is a necessary instrument to ensure compliance by the investigating authority with its obligations under Article 6.5 of the Anti-Dumping Agreement"⁶²¹, and that it is not uncommon to require the presentation of such a letter in WTO dispute settlement proceedings concerning trade remedies.

5.304. The Panel agreed with the European Union that the original wording of the first paragraph of the BCI Procedures suggested that BCI designation is determined by the entity submitting the information to MOFCOM. The Panel therefore amended paragraph 1 of the BCI Procedures to read, in relevant part, that "BCI shall include information that was previously *treated* by ... MOFCOM ... as BCI in the anti-dumping investigation at issue in these disputes."⁶²² However, insofar as the European Union had argued that the designation of BCI should not depend on the investigating authority's determination to treat information as confidential in the underlying anti-dumping proceedings, the Panel considered that the procedures it had adopted did not detract from the ability of WTO Members to designate information as confidential under Article 18.2 of the DSU. The Panel considered that, even though the designation of confidential information in anti-dumping proceedings under Article 6.5 of the Anti-Dumping Agreement is distinct from the designation of BCI for purposes of DSU proceedings, as contemplated in Article 18.2 of the DSU, these designations are "closely related".⁶²³ According to the Panel, this relationship finds support in the text of Article 17.7 of the Anti-Dumping Agreement⁶²⁴, which, as a special or additional rule and procedure in Appendix 2 to the DSU, prevails over the DSU to the extent that there is a difference between these two sets of provisions.⁶²⁵ The Panel further stated that it understood the term "confidential information" in Article 17.7 to refer to "the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5" and subsequently provided to a dispute settlement panel pursuant to Article 17.7.⁶²⁶ The Panel considered, therefore, that "Article 17.7 envisages that confidential information on the investigating authority's record – obtained from a 'person, body or authority' – may be provided to a panel, and imposes on the panel a non-disclosure obligation similar to that imposed on the

⁶¹⁹ Panel Reports, para. 7.13.

⁶²⁰ Panel Reports, para. 7.13 and fn 33 thereto.

⁶²¹ Panel Reports, para. 7.15 (quoting China's response to Panel question No. 3, para. 13).

⁶²² Panel Reports, para. 7.18. (emphasis added by the Panel) The Panel noted that China did not oppose this amendment. (Ibid., fn 46 to para. 7.18 (referring to China's response to Panel question No.1, paras. 3-5))

⁶²³ Panel Reports, para. 7.20.

⁶²⁴ Article 17.7 of the Anti-Dumping Agreement provides:

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.

⁶²⁵ Panel Reports, para. 7.21 (referring to Article 1.2 and Appendix 2 to the DSU; and Appellate Body Report, *Guatemala – Cement I*, para. 66).

⁶²⁶ Panel Reports, para. 7.21.

authority by the last sentence of Article 6.5."⁶²⁷ Based on this reasoning, the Panel declined to modify further paragraph 1 of the BCI Procedures in the manner proposed by the European Union.

5.305. With regard to paragraph 2 of the original BCI Procedures, the Panel found that the *provision* of confidential information to the Panel did not amount to its *disclosure* to the public, and rejected, on this basis, China's argument that WTO Members must provide an authorizing letter from the entity that submitted the confidential information in the underlying anti-dumping proceedings before they can "provide" such information to a WTO panel in the context of a dispute under the Anti-Dumping Agreement.⁶²⁸ The Panel therefore accepted the European Union's request to delete paragraph 2 of the BCI procedures, which set out a requirement for parties to provide an authorizing letter from the entity that submitted confidential information in the underlying proceedings, when submitting such information to the Panel. The Panel communicated the amended BCI Procedures to the parties on 22 May 2014.⁶²⁹

5.6.2 Arguments

5.306. Although the Panel agreed to make certain amendments to its original BCI Procedures, on appeal, the European Union submits that the Panel nonetheless erred in its interpretation and application of Articles 6.5 and 17.7 of the Anti-Dumping Agreement.⁶³⁰ The European Union considers, in particular, that the Panel delegated, "in absolute terms", to MOFCOM the power to decide what information will be granted additional protection in the context of WTO dispute settlement proceedings "without any possibility of review by the Panel".⁶³¹ In doing so, the Panel effectively found that designation of information as confidential by an investigating authority in the context of municipal anti-dumping proceedings pursuant to Article 6.5 is *determinative* of designation pursuant to Article 17.7 in the context of WTO panel proceedings.⁶³² The European Union submits, in this regard, that the principles articulated by the panel and the Appellate Body in *EC and certain member States – Large Civil Aircraft*, according to which the question of designation is to be settled by the WTO adjudicator, are grounded in the provisions of the DSU and "do not vary according to the particular covered agreement that is under consideration".⁶³³ The European Union also maintains that, contrary to the Panel's suggestion that there may be a difference between Article 17.7 of the Anti-Dumping Agreement and Article 18.2 of the DSU such that the special or additional rule in Article 17.7 prevails, the phrase "person, body or authority" in Article 17.7 of the Anti-Dumping Agreement and the term "Member" in Article 18.2 of the DSU do not mean that there is a difference or conflict between these provisions. For the European Union, "[t]hese terms are simply consistent with the fact that, pursuant to Article 13.1 of the DSU, a panel has the authority to seek information or technical advice from any individual or body which it deems appropriate."⁶³⁴ The European Union further contends that the Panel acted inconsistently with Article 11 of the DSU insofar as it foreclosed, through the adoption of the BCI Procedures, "the possibility for the Panel to make an objective assessment of a relevant matter, within the meaning of that provision."⁶³⁵

⁶²⁷ Panel Reports, para. 7.21. (fn omitted) The Panel further considered that, since a panel's review is limited to the investigating authority's record, in practice, the designation of information under Article 18.2 of the DSU should generally not arise in a case brought under the Anti-Dumping Agreement, because this issue is already addressed by Articles 6.5 and 17.7 of the Anti-Dumping Agreement. (Ibid.)

⁶²⁸ Panel Reports, para. 7.28. See also para. 7.27 (referring to China's response to Panel question No. 4, paras. 25-30).

⁶²⁹ Panel Reports, para. 1.10. The amended Additional Working Procedures of the Panels Concerning Business Confidential Information can be found in Annex A-2 of the Addendum to the Panel Reports.

⁶³⁰ In particular, the European Union takes issue with the Panel's statement that "the phrase 'confidential information' in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7." (European Union's Notice of Other Appeal, fn 2 to para. 1)

⁶³¹ European Union's other appellant's submission, para. 40. See also para. 35 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 7-11 and 13).

⁶³² European Union's other appellant's submission, paras. 41 and 43.

⁶³³ European Union's other appellant's submission, para. 57.

⁶³⁴ European Union's other appellant's submission, para. 55.

⁶³⁵ European Union's other appellant's submission, para. 59. The European Union also submits that it sought certain specific rulings on designation from the Panel, which the Panel did not give. (Ibid.)

5.307. The European Union also objects to the Panel's analysis of the requirement set out in paragraph 2 of the Panel's original BCI Procedures regarding the requirement that a WTO Member provide an authorizing letter from the entity that submitted confidential information in the underlying anti-dumping proceedings when submitting such information to the panel.⁶³⁶ Even though the Panel deleted this requirement from its original BCI Procedures, the European Union submits that the Panel's reasoning effectively implies that, in order for a WTO Member to designate information previously found to be confidential within the meaning of Article 6.5 as *non-confidential*, within the meaning of Article 17.7, a prior written authorizing letter would be necessary.⁶³⁷

5.308. China responds that the term "confidential information" under Article 17.7 of the Anti-Dumping Agreement "refers to information submitted as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement"⁶³⁸, and that, regardless of whether or not "good cause" is shown within the meaning of Article 6.5, an investigating authority may not disclose any information provided on a confidential basis by a party to an investigation without its authorization.⁶³⁹ Therefore, in China's view, "as a matter of WTO law" and "regardless of whether or not this is confirmed in a panel's BCI Procedures", information submitted as confidential to an investigating authority should be designated as confidential before the panel examining the underlying anti-dumping proceedings, and should not be disclosed without "specific permission or formal authorization" from the party that submitted such information in the underlying anti-dumping proceedings.⁶⁴⁰

5.309. China further submits that the BCI Procedures did not preclude the possibility to have a review of the question of designation by a WTO adjudicator on the basis of objective criteria.⁶⁴¹ China observes that a WTO adjudicator can review whether it is *information* that is designated as confidential, rather than arguments, claims, or reasoning, and whether *additional protection* is warranted for that information. China, however, does not consider that the question of "*designation* of information as confidential is subject to review by a WTO adjudicator"⁶⁴², in particular, given the absence of a reference to a showing of "good cause" in either Article 17.7 of the Anti-Dumping Agreement, or Articles 18.2 and 13.1 of the DSU. China also argues that the balance between competing interests in the context of designation of information is struck by: (i) the ability to *designate* information as confidential; and (ii) the obligation to provide a non-confidential summary of such information.

5.6.3 Analysis

5.310. As a preliminary matter, we note China's argument that it may not be necessary for us to examine the issues raised by the European Union on appeal as such examination would not contribute to the prompt and satisfactory settlement of this dispute.⁶⁴³ Article 17.12 of the DSU stipulates that the Appellate Body shall address each of the issues of law and legal interpretations raised during the appellate proceedings. As we see it, the Panel's analysis of the meaning and scope of Articles 6.5 and 17.7 of the Anti-Dumping Agreement and Article 18.2 of the DSU are clearly issues of law, which, if properly raised on appeal, we are required to address. We consider the Panel's finding that "the phrase 'confidential information' in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7"⁶⁴⁴ – to be a core element of the Panel's interpretation of Articles 6.5

⁶³⁶ European Union's other appellant's submission, para. 61 (referring to Panel Reports, paras. 7.21 and 7.26-7.29, particularly the finding that "the phrase 'confidential information' in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7"; and the interpretation of the terms "person, body or authority").

⁶³⁷ European Union's other appellant's submission, para. 67 (referring to Panel Reports, fn 50 to para. 7.21).

⁶³⁸ China's appellee's submission, para. 367.

⁶³⁹ China's appellee's submission, para. 369.

⁶⁴⁰ China's appellee's submission, para. 371.

⁶⁴¹ China's appellee's submission, para. 374 (referring to European Union's other appellant's submission, para. 42).

⁶⁴² China's appellee's submission, para. 374. (emphasis original)

⁶⁴³ China's appellee's submission, paras. 361-362.

⁶⁴⁴ Panel Reports, para. 7.21.

and 17.7 of the Anti-Dumping Agreement. As such, it is a "legal interpretation developed by the Panel" in the sense of Article 17.6 of the DSU and, therefore, can be subject to appellate review.

5.311. Turning to our analysis of the issues raised by the European Union on appeal, we recall the general rule in Article 18.2 of the DSU that provides, *inter alia*, that written submissions to the Appellate Body "shall be treated as confidential". We further note that, under Article 12.1 of the DSU, WTO panels are required to follow the Working Procedures in Appendix 3 to the DSU, unless they decide otherwise "after consulting the parties to the dispute". Panels may decide that additional procedures are appropriate in a given case and adopt, for example, procedures providing for additional protection of sensitive business information in order to allow a participant to present its arguments and evidence without undue risk of disclosure of such information. In determining the scope and content of such procedures, the panel must consider the effect they may have on the exercise by the panel of its adjudicative duties under the DSU and other covered agreements, the parties' rights to due process, the rights of the third parties, and the rights and systemic interests of other WTO Members.⁶⁴⁵ Any additional procedures adopted by a panel to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the relevant provisions of the DSU and other covered agreements (including the Anti-Dumping Agreement).⁶⁴⁶ The obligation rests upon the panel to adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential. In addition, where necessary, a panel must draw appropriate inferences from a party's failure to provide requested information to the panel.

5.312. Having said that, we note that the framework for the treatment of confidential information in municipal anti-dumping proceedings is set out in Articles 6.5, 6.5.1, and 6.5.2 of the Anti-Dumping Agreement.⁶⁴⁷ In the context of such domestic proceedings, it is for the *investigating authorities* to assess objectively whether a *submitting party* has adequately substantiated a request to treat certain information as "confidential" within the meaning of Article 6.5. If the investigating authority determines that an interested party has made a proper showing of "good cause", the information at issue "shall not be disclosed without specific permission of the party submitting it". Footnote 17 to Article 6.5 further clarifies that "Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required."

5.313. A different set of rules regulates confidential treatment of information provided *by a WTO Member to a panel or the Appellate Body* in the *context of WTO dispute settlement proceedings*. As noted, Article 18.2 of the DSU specifically provides that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute." Parties to a dispute are free to disclose statements of their own positions to the public, but "shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential".⁶⁴⁸

5.314. Article 13.1 of the DSU further provides that "[a] panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate". WTO Members "should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate". Confidential information that is provided to a panel under Article 13.1 "shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information". These provisions apply generally in WTO dispute settlement proceedings.

⁶⁴⁵ See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 8-9.

⁶⁴⁶ See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9.

⁶⁴⁷ See section 5.3 of these Reports.

⁶⁴⁸ Article 18.2 of the DSU.

5.315. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body observed that the confidentiality requirements in Articles 17.10 and 18.2 of the DSU, as well as in paragraph VII:1 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes⁶⁴⁹, are set out "at a level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information."⁶⁵⁰ Whether a panel would consider that there is a need to adopt, based on the authority it enjoys under Article 12 of the DSU, special procedures for the additional protection of BCI, will therefore vary from case to case. Nevertheless, it is important to distinguish between the general layer of confidentiality that applies in WTO dispute settlement proceedings, as foreseen in Articles 18.2 and 13.1 of the DSU, and the additional layer of protection of sensitive business information that a panel may choose to adopt, usually at the request of a party. In the context of WTO disputes brought under the Anti-Dumping Agreement, Article 17.7 of that Agreement stipulates that "[c]onfidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information."⁶⁵¹ Thus, while Article 6.5 of the Anti-Dumping Agreement regulates the issue of designation of information in domestic anti-dumping duty proceedings, Article 17.7 deals with the issue of confidentiality in an anti-dumping proceeding before a WTO panel.

5.316. As we see it, in its reasoning, the Panel conflated: (i) the confidentiality obligations under the Anti-Dumping Agreement setting the framework for confidential treatment of information that is applicable in the context of *domestic* anti-dumping proceedings; and (ii) the confidentiality obligations applicable in *WTO* dispute settlement proceedings. In addition, the Panel also conflated: (i) confidentiality requirements generally applicable in WTO proceedings or in anti-dumping proceedings as foreseen in the above-mentioned provisions of the DSU and the Anti-Dumping Agreement; and (ii) the additional layer of protection of sensitive business information provided under special procedures adopted by a panel for the purposes of a particular dispute.⁶⁵² Contrary to what the Panel appears to have suggested, whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel.

5.317. For these reasons, we declare moot and of no legal effect the Panel's findings and legal reasoning developed in paragraphs 7.21-7.25 and 7.27-7.29 of the EU Panel Report. We do not consider it necessary to make further findings on this matter in order to resolve the present dispute.

⁶⁴⁹ The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are directly incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

⁶⁵⁰ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

⁶⁵¹ We note that Article 17.7 is a special or additional rule that prevails to the extent that there is a difference between the rules and procedures in the DSU (such as Articles 13 and 18 thereof) and Article 17.7 of the Anti-Dumping Agreement. (See Article 1.2 and Appendix 2 to the DSU)

⁶⁵² We note, in particular, the Panel's finding that "the phrase 'confidential information' in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5." (Panel Reports, para. 7.21) The Panel's conflation of the two regimes for the protection of confidential information is also reflected in its statement that "the European Union has not explained how another type of 'disagreement about designation' under the BCI Procedures could occur when information was *properly* treated as confidential in the underlying anti-dumping proceedings." (Panel Reports, fn 52 to para. 7.22 (emphasis original))

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS454/AB/R

6.1. In the appeal of the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R and Add.1 (Japan Panel Report), for the reasons set out in this Report:

- a. with respect to the Panel's findings under Article 6.5 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel did not err in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement;
 - ii. finds that the Panel did not act inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and, consequently,
 - iii. upholds the Panel's findings, in paragraphs 7.290, 7.297-7.303, and 8.1.b. of the Japan Panel Report, that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the reports contained in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without objectively assessing the petitioners' showing of "good cause";
- b. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel erred in its interpretation of Article 3.2 of the Anti-Dumping Agreement in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may simply consider whether dumped imports sell at lower prices than comparable domestic products;
 - ii. reverses the Panel's findings, in paragraphs 7.130, 7.144, and 8.2.a.i of the Japan Panel Report, rejecting Japan's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices; and
 - iii. completes the legal analysis and finds that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
- c. with respect to the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that Japan's argument, that MOFCOM failed to examine whether dumped imports provided explanatory force for the state of the domestic industry, did not constitute a separate claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and consequently declares moot and of no legal effect the Panel's findings in paragraphs 6.29-6.31 and footnote 274 of the Japan Panel Report; and
 - ii. finds that the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the extent it found that the results of the inquiries under Article 3.2 are not relevant to the impact analysis under Article 3.4; and consequently reverses the Panel's findings in paragraphs 7.170 and 8.2.a.ii of the Japan Panel Report;

- d. with respect to the Panel's findings under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Appellate Body:
- i. finds that the Panel did not act inconsistently with Article 6.2 of the DSU by addressing Japan's claims under Article 3.5 of the Anti-Dumping Agreement regarding "MOFCOM's reliance on the market share of subject imports", in paragraphs 7.180-7.188 of the Japan Panel Report;
 - ii. finds that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or making the case for Japan;
 - iii. upholds the Panel's findings, in paragraphs 7.188, 7.205, and 8.1.a.iii of the Japan Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the prices of domestic Grade A HP-SSST;
 - iv. upholds the Panel's finding, in paragraphs 7.204, 7.205, and 8.1.a.iv of the Japan Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports; and
 - v. finds that the Panel did not act inconsistently with Article 11 of the DSU, in concluding, in paragraph 7.192 of the Japan Panel Report, that Japan had not advanced independent Article 3.5 claims – other than those regarding MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

6.2. The Appellate Body recommends that the DSB request China to bring its measures found in this Report, and in the Japan Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 25th day of September 2015 by:

Peter Van den Bossche
Presiding Member

Thomas Graham
Member

Ricardo Ramírez-Hernández
Member

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS460/AB/R

6.1. In the appeal of the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R and Add.1 (EU Panel Report), for the reasons set out in this Report:

- a. with respect to the Panel's findings under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement, the Appellate Body:
 - i. upholds the Panel's findings, in paragraphs 7.49 and 7.51 of the EU Panel Report, that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the European Union's claims under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement; and that these claims were thus within the Panel's terms of reference;
 - ii. finds that the Panel did not err in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement;
 - iii. finds that the Panel did not act inconsistently with Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and consequently
 - iv. upholds the Panel's finding, in paragraphs 7.66 and 8.6.a. of the EU Panel Report, that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product;
- b. with respect to the Panel's findings under Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement, the Appellate Body upholds the Panel's finding, in paragraphs 7.101 and 8.6.c. of the EU Panel Report, that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification;
- c. with respect to the Panel's findings under Article 6.5 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel did not err in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement;
 - ii. finds that the Panel did not act inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and consequently
 - iii. upholds the Panel's finding, in paragraphs 7.290, 7.297-7.303, and 8.6.e. of the EU Panel Report, that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the reports contained in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without objectively assessing the petitioners' showing of "good cause";
- d. with respect to the Panel's findings under Article 6.9 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement; and consequently reverses the Panel's findings, in paragraphs 7.235, 7.236, and 8.7.d.i. of the EU Panel Report, rejecting the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex; and

- ii. completes the legal analysis and finds that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex;
- e. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and in connection with MOFCOM's price effects analysis, the Appellate Body:
 - i. finds that the Panel erred in its interpretation of Article 3.2 of the Anti-Dumping Agreement in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may simply consider whether dumped imports sell at lower prices than comparable domestic products;
 - ii. reverses the Panel's findings, in paragraphs 7.130, 7.144, and 8.7.b.i. of the EU Panel Report, rejecting the European Union's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices;
 - iii. completes the legal analysis and finds that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and
 - iv. reverses the Panel's findings, in paragraphs 7.143, 7.144, and 8.7.b.i. of the EU Panel Report; and finds instead that MOFCOM's assessment of whether there had been a significant price undercutting by the dumped imports, as compared with the prices of the domestic like product, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
- f. with respect to the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and in connection with MOFCOM's impact analysis, the Appellate Body finds that the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the extent it found that the results of the inquiries under Article 3.2 are not relevant to the impact analysis under Article 3.4; and consequently reverses the Panel's findings in paragraphs 7.170 and 8.7.b.ii of the EU Panel Report;
- g. with respect to the Panel's finding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or, making the case for the European Union;
 - ii. upholds the Panel's findings, in paragraphs 7.188, 7.205, and 8.6.d.iii of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST;
 - iii. upholds the Panel's finding, in paragraphs 7.204, 7.205, and 8.6.d.iv of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports; and

- iv. finds that the Panel did not act inconsistently with Article 11 of the DSU, in concluding, in paragraph 7.192 of the EU Panel Report, that the European Union had not advanced independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses; and
- h. with respect to the Panel's designation of business confidential information (BCI) and its adoption of BCI Procedures, the Appellate Body declares moot and of no legal effect the Panel's findings and legal reasoning developed in paragraphs 7.21-7.25 and 7.27-7.29 of the EU Panel Report, and does not find it necessary to make further findings on this matter in order to resolve the present dispute.
- 6.2. The Appellate Body recommends that the DSB request China to bring its measures found in this Report, and in the EU Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 25th day of September 2015 by:

Peter Van den Bossche
Presiding Member

Thomas Graham
Member

Ricardo Ramírez-Hernández
Member
