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CHINA — ANTI-DUMPING MEASURES ON STAINLESS STEEL PRODUCTS FROM JAPAN

REPORT OF THE PANEL

Addendum

BCI deleted, as indicated [[***]]

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS601/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 23 February 2022

Amended on 4 May 2023

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible, within 10 days of receiving the request.

(4) Parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If China considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written

submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. China shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Japan shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Japan should be numbered JPN 1, JPN 2, etc. Exhibits submitted by China should be numbered CHN 1, CHN 2, etc. If the last exhibit in connection with the first submission was numbered JPN 5, the first exhibit in connection with the next submission thus would be numbered JPN-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. If the Panel so decides, written questions should be sent at least 10 days before the meeting whenever possible. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 23 below.

c. In case the Panel decides, pursuant to paragraph 18, to hold a substantive meeting in a virtual format, the Panel shall send written questions, or a list of topics it intends to pursue in questioning orally during the meeting at least 10 days before the meeting in order to facilitate the discussions at the meeting. The Panel may ask different or additional questions at the meeting.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, these Working Procedures and any Additional Working Procedures of the Panel Concerning BCI, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party

takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

   i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

   ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

   iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

   iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that China shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

17. Each party shall be given the opportunity to comment on the responses to questions provided by the other party after the second substantive meeting, in accordance with the timetable adopted by the Panel.

18. If, because of the sanitary crisis related to COVID-19, the substantive meetings cannot be physically held in Geneva on the scheduled dates or either party indicates that travel to Geneva will not be possible for its delegation, the Panel may, depending on the circumstances, choose to modify the timetable and the working procedures after consulting the parties.

Third-party session

19. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

20. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks in advance of this session.

21. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, these Working Procedures and the Additional Working Procedures of the Panel Concerning BCI, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

(3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.

22. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO language.

23. The third party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

24. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties,

which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

25. Each party shall submit one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, its first and second oral statements, and may also include a summary of its responses to questions following the first and second substantive meetings and comments thereon following the second substantive meeting. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

26. Each party's integrated executive summary shall be limited to 20 pages.

27. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

28. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

Interim review

29. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

30. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

31. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Report

32. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

33. The following procedures regarding service of documents apply to all documents submitted by the parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes On-Line Registry Application (DORA) https://dora.wto.org by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties.

b. By 5:00 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a

format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format. If due to COVID-related circumstances, the DS Registry is unable to receive paper copies on the designated date, the paper copies shall be filed once the DS Registry communicates to the parties and third parties that it is able to receive such copies.

c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.

d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

e. If any party or third party is unable to meet the 5:00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5:30 p.m. on the due date established by the Panel. The total size of any email, including all attachments, shall not exceed 10 megabytes per email. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 10:30 a.m. the next working day on an electronic medium acceptable to the recipient. Due to COVID-related circumstances, the party or third party shall also contact the DS Registry by phone or email in advance of their visit so that appropriate arrangements for the receipt of such files can be made. The party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

Correction of clerical errors in submissions

34. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

Appeal Arbitration

35. The Panel takes note of the Agreed Procedures for Arbitration under Article 25 of the DSU in this dispute notified by the parties on 11 April 2023 (WT/DS601/6) and of the joint requests of the parties to the Panel formulated therein.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 23 February 2022

1. For the purpose of this proceeding, business confidential information ("BCI") is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI, information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the Ministry of Commerce of the People's Republic of China as confidential in the course of the anti-dumping proceeding at issue in this dispute.

2. No person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceeding at issue in this dispute, or an officer or employee of an association of such enterprises.

3. When third parties receive written submissions pursuant to the Panel's Working Procedures, the third parties shall receive a version of such written submissions and any exhibits with BCI redacted in accordance with these BCI procedures. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the substance of the information at issue. Written submissions and exhibits, and their BCI-redacted versions, shall be submitted at the same time.

4. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.

5. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. When a party or third party includes BCI in a submission, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. The specific information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The cover and/or first page of the document shall also identify all those pages in the document that contain BCI. BCI presented in the form of, or as part of, an exhibit shall be marked to indicate, in addition to the above, that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit JPN-1 (BCI)).

7. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

9. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 4.

10. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI, information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL FACILITATING ARBITRATION UNDER ARTICLE 25 OF THE DSU[1]

Adopted on 4 May 2023

Transmission of the Panel Report

1. After issuance of the final Panel Report to the parties and after receiving a request to suspend the Panel proceedings for purposes of facilitating an arbitration under the Agreed Procedures for Arbitration, the Panel shall transmit the final Panel Report in the three working languages of the WTO (the "Translated Report") to the parties, third parties and the pool of arbitrators, subject to the protection of business confidential information (BCI) in accordance with the Panel's adopted additional working procedures concerning BCI.[2, 3]

2. If the Translated Report is not yet available when the request for suspension is made, the Panel shall transmit immediately the original English language version of the final Panel Report (the "original final Panel Report") to the parties, third parties and pool of arbitrators. The Panel shall transmit the Translated Report in the other two official languages, as soon as the translations become available.

3. Once transmitted to the parties, third parties and the pool of arbitrators, the original final Panel Report and/or the Translated Report shall remain confidential.

Suspension of the panel proceedings

4. Once the Translated Report has been transmitted to the parties, third parties and the pool of arbitrators, the Panel shall grant the request to suspend the Panel proceedings and indicate when suspension takes effect.

Lifting of confidentiality and transmission of the confidential record

5. In the event of the filing of a Notice of Appeal, confidentiality of the Translated Report is thereby lifted such that the Notice of Appeal may include the Translated Report.

6. Upon the filing of a Notice of Appeal, the record of the Panel proceedings, including the parties' BCI submissions, exhibits and the confidential version of the original final Panel Report shall be transmitted to the appointed arbitrators and the secretariat staff assisting the arbitrators. This transmission shall take place through the WTO Disputes On-Line Registry Application (DORA).

7. The Panel shall consult with the third parties in relation to whether the third-party submissions, third-party oral statements and third-party responses to questions may be transmitted, as part of the Panel record, to the appointed arbitrators.

[1] See the parties' Agreed Procedures for Arbitration under Article 25 of the DSU (WT/DS601/6) ("Agreed Procedures for Arbitration"). Through the present Additional Working Procedures of the Panel, the Panel accedes to, and operationalizes the modalities of, the parties' joint requests formulated in paragraph 4 of the Agreed Procedures for Arbitration.

[2] Unless the parties indicate otherwise, the "pool of arbitrators" shall be understood to comprise all individuals identified in JOB/DSB/1/Add.12/Suppl.5, as validated in JOB/DSB/1/Add.12/Suppl.8.

[3] It is understood that transmission of the Translated Report shall not constitute circulation of the Panel Report within the meaning of Article 16 of the DSU.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the parties' request. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. Some of the footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this annex pertain to those in the Interim Report, but we have also indicated the footnote numbers in the Final Report where they differ from those in the Interim Report. The paragraph numbers in the Final Report remain unchanged.

2 JAPAN'S REQUEST CONCERNING THE REFERENCE TO BILLETS AND SLABS

2.1. Japan suggests we clarify in footnote 8 that throughout the panel proceedings, it used the term slabs instead of billets because, in its view, slabs is a more precise term to describe the semi-finished stainless steel productions in question.[1]

2.2. China submits that if we were to accept Japan's request, we should refer to China's position on this issue, which notes that MOFCOM used the term billets in the investigation, that the relevant HS codes refer to either billets or slabs, and the relevant HS codes describe the products in a manner that corresponds to MOFCOM's description of billets.[2]

2.3. We have added in footnote 8 a reference to the parties' divergent views on the use of terminologies, albeit not using the detailed text proposed by either of the parties.

3 CHINA'S REQUEST CONCERNING THE REFERENCE TO "PRODUCT CATEGORIES"

3.1. China requests that whenever we refer to billets (slabs), coils, and plates collectively, we use the word "shapes" and not "product categories".[3] China contends that the term "shapes" would be more in line with China's position that one product with different shapes, rather than different products, were at issue in this investigation.[4]

3.2. Japan opposes China's request on the ground that the reference to "product categories" is consistent with our observations and findings throughout the Interim Report, while the reference to "shapes" would be inaccurate and incomplete in light of the relevant discussion in the Interim Report.[5]

3.3. We do not find any reference to "shapes" in MOFCOM's final determination in relation to any reference to billets (slabs), coils, and plates, and do find some MOFCOM references to "product categories" (though MOFCOM's description is not consistent in this regard). We have accordingly decided to retain the references to "product categories" in our Report. In footnote 68 of the Report we have added a reference to China's position in this regard, and have also made it clear that the reference to product categories in our Report does not prejudge any of the substantive issues before us.

[1] Japan's request for interim review, para. 2.
[2] China's comments on Japan's request for interim review, para. 4.
[3] China's request for interim review, para. 3.
[4] China's request for interim review, para. 3.
[5] Japan's comments on China's request for interim review, para. 4.

4 JAPAN'S CLAIMS CONCERNING THE DEFINITION OF THE DOMESTIC INDUSTRY

4.1 Japan's specific request for review

4.1.1 Paragraph 7.3(c)

4.1. Japan requests us to make certain changes to paragraph 7.3(c) to reflect Japan's arguments more accurately and comprehensively.[6] In particular, Japan requests that we qualify our summary description of the third ground for its complaint against MOFCOM's definition of the domestic industry (i.e. that "MOFCOM failed to examine whether the defined domestic industry was representative") by adding the following text: "in light of the differences among billets (slabs), hot-rolled stainless steel plates, and hot-rolled stainless steel coils".[7]

4.2. China considers Japan's changes to be unnecessary.[8]

4.3. We note that paragraph 7.3(c) describes the third ground Japan has raised in support of its complaint against MOFCOM's definition of the domestic industry (i.e. that "MOFCOM failed to examine whether the defined domestic industry was representative") in the same way that paragraphs 7.3(a) and 7.3(b) describe the first and second grounds underlying Japan's complaint. Japan has advanced two reasons to explain why it considers MOFCOM failed to examine the representativeness of the defined domestic industry, and we have explored the merits of both of these lines of argument in our findings. First, we examined Japan's argument in its first written submission (and further elaborated in response to our questions) that the domestic industry defined by MOFCOM was unique and different compared to the rest of the producers in China[9]; second that there were significant differences between billets (slabs), coils, and plates.[10] We have described and explored the merits of both of these lines of argument in our findings. Accordingly, we do not find it appropriate to accept Japan's requested changes.

4.1.2 Paragraph 7.12 and footnotes 23 and 24

4.4. Japan requests us to modify a description of China's argument as well as the citation to paragraph 360 of China's second written submission in paragraph 7.12 of our Report where we address whether Japan is pursuing a claim challenging MOFCOM's definition of the domestic industry that it is outside our terms of reference.[11] Japan does so on the ground that paragraph 7.12 is focused on the relation between paragraphs 6(a) and 6(b) of the panel request, whereas the description and citations pertain to parts of China's second written submission where China was examining the relation between Japan's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement.[12]

4.5. China opposes Japan's request on the ground that in paragraph 360 of China's second written submission it was, in fact, referring to both the relation between paragraphs 6(a) and 6(b) of the panel request as well as the relation between Japan's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement.[13]

4.6. We agree with Japan that in paragraph 360 of its second written submission, China was referring to the relation between Japan's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement, as presented in Japan's panel request, and not the relation between paragraphs 6(a) and 6(b) of that panel request. To cite to China's submissions more accurately, we have replaced the reference to paragraph 360 of China's second written submission with other parts of that submission and also made some modifications to the description of China's argument.

[6] Japan's request for interim review, para. 3.
[7] Japan's request for interim review, para. 3.
[8] China's comments on Japan's request for interim review, para. 5.
[9] See, e.g. Japan's first written submission, paras. 486 and 489.
[10] See, e.g. Japan's first written submission, paras. 487-488; response to Panel question No. 4, paras. 14-17.
[11] Japan's request for interim review, paras. 5-6.
[12] Japan's request for interim review, paras. 5-6.
[13] China's comments on Japan's request for interim review, para. 6.

4.1.3 Paragraph 7.39

4.7. Japan suggests certain changes in this paragraph to reflect its argument more accurately and comprehensively.[14]

4.8. China opposes Japan's request, but nonetheless states that if we were to accept the changes proposed by Japan, we should also reflect certain additions proposed by China.[15]

4.9. In paragraph 7.39, we addressed China's argument that because of the limited external sales of billets (slabs), MOFCOM's decision to use those sales volumes as an indicator of production volume would only minimally affect the outcome in terms of the percentage share of the domestic industry in domestic production. In doing so, we noted China's statement that in the most recent time period (first quarter of 2018), the volume of external sales of billets by Chinese producers represented [[***]] of the production of steel billets.[16] However, we noted that given that the period of investigation used by MOFCOM in its analysis covered consecutive years from 2014 to the first quarter of 2018, the data from only the first quarter of 2018 was not adequately representative of the period MOFCOM used to make its assessment. We then set out that, in any case, nowhere in MOFCOM's final determination is there any discussion or analysis of this kind. In our view, it is clear that our statement on the lack of discussion or analysis refers to China's above statement.

4.10. Japan requests us to modify paragraph 7.39 by stating that nowhere in MOFCOM's final determination is there any discussion or analysis of this kind "other than a mere reference to 'external sales of a few stainless steel billets'".[17] However, we are not persuaded that such a reference in any way adds to the clarity or accuracy of our findings. We accordingly decline to make the changes proposed by Japan, and accordingly do not also find it necessary to make the changes requested by China.

4.2 China's specific request for review

4.11. China requests us to delete footnote 44 of the Interim Report, which contains a calculation and discussion based on information Japan presented in chart 52 in its first written submission.[18] In particular, China contends that the calculation wrongly suggests that in determining total domestic production, MOFCOM ignored the production of billets (slabs) by producers that did not have external sales of billets (slabs).[19] However, according to China, MOFCOM did, in fact, account for the production of billets (slabs) by such producers as (downstream) production of coils and plates.[20]

4.12. Japan opposes China's request. Japan contends that the calculation and discussion in footnote 44 accurately identifies the structural issue in MOFCOM's calculation method.[21] In this regard, challenging China's explanation, Japan contends that China does not explain to whom the external sales of billets (slabs) (that are used as an indicator of domestic production) are made, and states that if these external sales include any sales to other producers in China, those billets (slabs) will be double counted which would ultimately inflate the proportion of the domestic industry.[22]

4.13. We note that Japan's response to China's request emphasizes the potential double counting that may arise from the way MOFCOM accounted for external sales of billets (slabs) in its determination of total domestic production. Japan's submissions on this point, which we addressed in our Interim Report, do not directly speak to the factual accuracy of the calculation and related discussion in footnote 44. In the light of the explanations provided by China in its request for

[14] Japan's request for interim review, para. 8.
[15] China's comments on Japan's request for interim review, paras. 8-9.
[16] China's response to Panel question No. 42(a), para. 13.
[17] Japan's request for interim review, para. 8.
[18] China's request for interim review, para. 4.
[19] China's request for interim review, para. 6.
[20] China's request for interim review, para. 6.
[21] Japan's comments on China's request for interim review, para. 5.
[22] Japan's comments on China's request for interim review, para. 9.

interim review, we have decided to delete footnote 44, and have made certain corresponding changes in paragraph 7.35 of the Report as well.

5 JAPAN'S CLAIMS CONCERNING MOFCOM'S CUMULATION ANALYSIS

5.1 Japan's specific request for review

5.1.1 Paragraph 7.75

5.1. To reflect MOFCOM's findings more accurately, Japan requests us to modify paragraph 7.75 to note that MOFCOM acknowledged that there were many "grades and product categories (stainless steel slabs, coils and plates)" of the product concerned.[23]

5.2. China submits that while MOFCOM referred to the existence of many grades of billets (slabs), plates, and coils, it did not refer to "product categories".[24] Thus, China opposes the addition of any reference to product categories.[25]

5.3. To reflect MOFCOM's determination more accurately, we have added a reference to the existence of many grades of billets (slabs), coils, and plates, but not added any reference to "product categories".

5.1.2 Paragraph 7.76, section 7.2.3.1, and paragraph 7.79

5.4. Japan requests us to modify the description of its arguments challenging MOFCOM's cumulation analysis based on the difference in the "proportion" of billets (slabs), coils, and plates, as well as different grades of those products among the exports of the European Union, Indonesia, Japan, and Korea by adding a reference to the differences in the "proportion" as well as "volume" of exports from these sources.[26] Japan also requests us to add a reference in paragraph 7.79 to its argument that because of differences in the proportion, volume and grades of exports of billets (slabs), coils, and plates from the European Union, Indonesia, Japan, and Korea, it was questionable whether the exports from these sources were in competition with each other.[27]

5.5. China opposes Japan's request on the ground that our Report correctly and exhaustively describes Japan's arguments.[28]

5.6. We decline to reflect the additional references and arguments made by Japan in this paragraph because, in our view, our findings on Japan's claims concerning MOFCOM's cumulation analysis adequately address and reflect the relevant issues and arguments in the appropriate parts of our analysis.

5.1.3 Paragraph 7.80

5.7. Japan suggests certain changes in paragraph 7.80 to reflect its arguments more accurately. Specifically, Japan requests us to reflect certain arguments that are based on the differences in absolute volumes of imports of billets (slabs), coils, and plates from the European Union, Japan, Korea, and Indonesia.[29]

5.8. China opposes Japan's request. In particular, China disputes the facts relied on by Japan to make its arguments, and also considers that Japan's changes are not relevant to our analysis or our ensuing conclusion on this issue.[30]

[23] Japan's request for interim review, para. 12.
[24] China's comments on Japan's request for interim review, para. 10.
[25] China's comments on Japan's request for interim review, para. 11.
[26] Japan's request for interim review, paras. 13-15.
[27] Japan's request for interim review, para. 15.
[28] China's comments on Japan's request for interim review, paras. 12-13.
[29] Japan's request for interim review, para. 16.
[30] China's comments on Japan's request for interim review, paras. 14-15.

5.9. We decline to reflect the additional references and arguments made by Japan in this paragraph because in our view our findings on Japan's claims concerning MOFCOM's cumulation analysis adequately address the relevant issues and arguments to address these claims.

5.1.4 Paragraph 7.82 and footnote 103

5.10. Japan requests us to make certain corrections to ensure that the percentage share of each of the sources under investigation with respect to a grade correspond to the countries/regions in an alphabetic order.[31] Japan also requests us to add in footnote 103 references to submissions made by Japanese respondents to MOFCOM.[32]

5.11. China opposes Japan's request to make certain additions on the ground that the additions requested by Japan in footnote 103 are repetitive and unnecessary.[33]

5.12. We have made the corrections requested by Japan in paragraph 7.82. However, we do not consider the additions requested by Japan in footnote 103 are necessary, or otherwise add to the clarity of our Report. Thus, we decline to make the changes requested by Japan in footnote 103.

5.1.5 Footnote 105 to paragraph 7.85

5.13. Japan requests us to add explanations concerning submissions made by Japanese respondents in the underlying investigation, and also to clarify through an explanatory note whether the page numbers of the non-injury brief (Exhibit JPN-8.b (BCI)) referred to in our Report pertain to those indicated at the top-right corner or bottom of this document.[34]

5.14. China opposes Japan's request to make the additions in footnote 105.[35]

5.15. We consider that the additions in footnote 105 requested by Japan are unnecessary, and do not add to the clarity of our Report. We accordingly decline to make the changes requested by Japan. We also note that when referring to the page numbers of JPN-8.b we have consistently referred to the page number at the top of the document. Thus, we find it unnecessary to add an explanatory note on whether we are referring to the page number at the top or bottom of Exhibit JPN-8.b.

5.1.6 Paragraph 7.85 and footnote 107

5.16. Japan requests us to make certain changes in paragraph 7.85 and footnote 107 to reflect its arguments more accurately and comprehensively, in particular that MOFCOM failed to address the dominance of intra-group sales with regard to subject imports from Indonesia and Korea.[36]

5.17. China opposes Japan's request. In particular, China considers the additions requested by Japan to be unnecessary, opposes the reference to the word "dominance", which China does not accept, and disagrees that MOFCOM did not address the question of dominance of such intra-group sales.[37]

5.18. While we take note of the objections raised by China, we note that the additions requested by Japan pertain to its own arguments, and do not seek to modify our (or China's) views as set out in the Report. Thus, in the interest of comprehensiveness, we have decided to reflect the changes proposed by Japan in paragraph 7.85 and added the appropriate citations.

[31] Japan's request for interim review, para. 17.
[32] Japan's request for interim review, para. 17.
[33] China's comments on Japan's request for interim review, para. 16.
[34] Japan's request for interim review, para. 18.
[35] China's comments on Japan's request for interim review, para. 18.
[36] Japan's request for interim review, paras. 23-24.
[37] China's comments on Japan's request for interim review, para. 18.

5.1.7 Footnote 111 (footnote 112 of the Final Report) to paragraph 7.87

5.19. Japan requests us to make certain additions in footnote 111 to reflect MOFCOM's findings more accurately in the underlying investigation.[38]

5.20. China opposes Japan's request on the grounds that the additions it requests are unnecessary.[39]

5.21. In our view, the additions requested by Japan are unnecessary. We accordingly decline to make the changes proposed by Japan.

5.1.8 Paragraph 7.89

5.22. Japan requests us to delete a reference to its submission when setting out Japan's arguments regarding volume trends because that particular argument does not refer to volume trends.[40]

5.23. China does not comment on Japan's request.

5.24. We have made the changes requested by Japan.

5.1.9 Paragraph 7.90

5.25. Japan requests us to reflect certain additional arguments that it made, as well as to delete a submission made by China (which in its view does not directly refer to China's arguments about the issue under discussion, i.e. differences in the volume trends among the subject imports from each origin).[41]

5.26. China notes that paragraph 7.90 summarizes China's arguments, and considers it inappropriate to insert a reference to Japan's arguments in this paragraph.[42] China also considers the submission made by China that Japan suggests deleting to be a key point in China's defence and thus opposes its deletion.[43]

5.27. We note that Japan's arguments are part of the record, and we do not find it necessary to reflect these additional arguments in paragraph 7.90 of the Report. We are also not persuaded that we should, as requested by Japan, delete the references to China's submissions in this paragraph.

5.1.10 Paragraph 7.91

5.28. Japan requests us to add a citation to MOFCOM's final determination in a part of the paragraph where we refer to MOFCOM's finding.[44]

5.29. China considers the addition proposed by Japan to be unnecessary and objects to it.[45]

5.30. Considering Japan requests us to add a citation in the part where we were referring to MOFCOM's finding, in our view a citation to the relevant part of MOFCOM's finding adds to the clarity of our Report. We accordingly have added the citation requested by Japan.

[38] Japan's request for interim review, para. 20.
[39] China's comments on Japan's request for interim review, para. 19.
[40] Japan's request for interim review, paras. 21-22.
[41] Japan's request for interim review, paras. 23-24.
[42] China's comments on Japan's request for interim review, para. 20.
[43] China's comments on Japan's request for interim review, para. 20.
[44] Japan's request for interim review, para. 25.
[45] China's comments on Japan's request for interim review, para. 21.

5.1.11 Paragraph 7.94 and footnote 121 (footnote 122 of the Final Report)

5.31. Japan requests us to make a correction of an editorial nature in this paragraph, and cite a different paragraph number from its first written submission as the source of the argument set out in paragraph 7.94.[46]

5.32. China does not comment on Japan's request.

5.33. We have made the editorial correction requested by Japan. With regard to footnote 121, while we have added the reference to paragraph 280 of Japan's first written submission as requested by Japan, we have not deleted the reference to paragraph 278 of that submission (as also requested by Japan) because we intended to refer to that paragraph as well.

5.1.12 Paragraph 7.95

5.34. Japan requests us to reflect certain additional arguments that it made in these proceedings.[47]

5.35. China opposes Japan's request.[48]

5.36. We find it unnecessary to reflect Japan's additional arguments in paragraph 7.95 of the Report.

5.1.13 Paragraph 7.96

5.37. Japan requests certain modifications to reflect China's argument more comprehensively and accurately.[49]

5.38. China opposes Japan's request, noting that Japan does not support its request by citing any source.[50]

5.39. Considering Japan's request pertains to China's arguments, we find it unnecessary to make the change requested by Japan.

5.1.14 Paragraph 7.98

5.40. Japan requests certain changes in this paragraph to reflect its arguments more accurately.[51]

5.41. China opposes Japan's request, specifically the proposed use of terms such as "product categories" in Japan's request.[52]

5.42. We have made the changes requested by Japan to accurately reflect its arguments, albeit using language different from that proposed by Japan. With regard to China's objections to the use of the term product category, we refer to paragraphs 3.1-3.3 above where we addressed those concerns.

[46] Japan's request for interim review, para. 26.
[47] Japan's request for interim review, para. 27.
[48] China's comments on Japan's request for interim review, para. 22.
[49] Japan's request for interim review, para. 28.
[50] China's comments on Japan's request for interim review, para. 23.
[51] Japan's request for interim review, para. 29.
[52] China's comments on Japan's request for interim review, para. 24.

6 JAPAN'S CLAIM CONCERNING MOFCOM'S CONSIDERATION OF PRICE EFFECTS

6.1 Japan's specific requests for review

6.1.1 Footnotes 136, 137, and 138 (footnotes 137,138, and 139 of the Final Report) to paragraph 7.103

6.1. In respect of footnote 136, Japan requests us to cite to paragraphs 74 through 138 of its first written submission, rather than paragraph 74 alone. Japan asserts that paragraph 74 is only the introductory paragraph to the section of its first written submission that elaborates the ground referred to in paragraph 7.103(a) of the Report, and does not explicitly state that MOFCOM's findings were not based on an objective examination of positive evidence. Japan therefore requests us to cite to all paragraphs of that section (i.e. paragraphs 74-138). Alternatively, Japan requests us to include the concluding paragraph (i.e. paragraph 138) in the citation.[53]

6.2. In respect of footnote 137, Japan requests us to cite to paragraphs 139 through 187 of its first written submission, rather than paragraphs 139 through 141 alone. Japan asserts that paragraphs 139 through 141 merely introduce the section of its first written submission that elaborates the ground referred to in paragraph 7.103(b) of the Report. Japan therefore request us to cite to all paragraphs of that section (i.e. paragraphs 139 through 187). Alternatively, Japan requests us to include the concluding paragraphs (i.e. paragraphs 185-187) in the citation.[54]

6.3. In respect of footnote 138, Japan requests us to cite to paragraphs 188 through 216 of its first written submission, rather than paragraph 188 alone. Japan asserts that paragraph 188 only introduces the sections of its first written submission that elaborate the ground referred to in paragraph 7.103(c) of the Report. Japan therefore requests us to cite to all paragraphs of those section (i.e. paragraphs 139 through 187). Alternatively, Japan requests us to include the concluding paragraphs of those sections (i.e. paragraphs 204 and 216) in the citation.[55]

6.4. China does not comment on Japan's request.

6.5. We note that paragraphs 7.103(a) to 7.103(c) of the Report, to which footnotes 136, 137, and 138 are attached, do not seek to reproduce all of Japan's factual and legal arguments regarding the grounds underlying its claim identified in those paragraphs. We address those grounds in sections 7.3.3.2, 7.3.3.3, and 7.4.4.4 of the Report, identifying in more detail Japan's arguments as relevant. Therefore, we do not consider it necessary to cite to all the paragraphs of the sections of Japan's first written submission in which Japan elaborates those grounds. However, we have accepted Japan's request to include references to the concluding paragraphs of those sections in the relevant footnotes of the Report. Accordingly, we have added citations to paragraph 138, paragraphs 185-187, and paragraphs 204 and 216 of its first written submission to footnotes 136, 137, and 138 of the Interim Report respectively.

6.1.2 Footnote 140 (footnote 141 of the Final Report) to paragraph 7.104

6.6. Japan suggests that we modify the footnote to refer to paragraphs 103 and 104 of China's first written submission, rather than to paragraph 105.[56]

6.7. China does not comment on Japan's request.

6.8. We have added a reference to paragraph 104 of China's first written submission, while retaining the reference to paragraph 105. We do not consider it necessary to include a reference to paragraph 103 of China's first written submission in this footnote.

[53] Japan's request for interim review, para. 31.
[54] Japan's request for interim review, para. 32.
[55] Japan's request for interim review, para. 33.
[56] Japan's request for interim review, para. 34.

6.1.3 Paragraph 7.108

6.9. Japan requests us to add a footnote to paragraph 7.108 referring to certain findings of the Appellate Body in previous disputes "in order for the parties, the third parties, and the other Members to more accurately understand the Panel's findings in the context of previous findings by the Appellate Body".[57]

6.10. China disagrees with Japan, arguing that the references to the Appellate Body reports made by Japan are irrelevant to the issue that we address in paragraph 7.108 of our Report.[58]

6.11. In our view, the relevant findings can be fully understood from the existing text of this paragraph without the addition of the footnote that Japan requests us to add. We therefore decline Japan's request.

6.1.4 Footnote 147 (footnote 148 of the Final Report) to paragraph 7.110

6.12. Japan suggests that we change the citation to Japan's submission in this footnote to Japan's first written submission, paragraph 75.[59]

6.13. China does not comment on Japan's request.

6.14. We have accepted Japan's request and have modified the footnote accordingly.

6.1.5 Paragraphs 7.110, 7.114, and 7.115

6.15. Japan suggests that we change the following statement in the manner indicated below (Japan suggests deleting the struck-through text and adding the underlined text):

> However, when it comes to identifying the circumstances in which the prices of different product categories may or may not be comparable and, therefore, the factual conditions that would trigger an investigating authority's obligation to ~~make adjustments~~ <u>take appropriate steps</u> to ensure price comparability, the parties have expressed competing views.

Japan explains that because making adjustments accounting for price differentials between product categories is just one possible method available to an investigating authority to ensure price comparability, mentioning only adjustments in the statement quoted above may be misleading, and the alternative language may better reflect our position.[60] Japan requests us to make the same change to the relevant portions of paragraphs 7.114 and 7.115.[61]

6.16. China disagrees with Japan's suggestion, arguing that the suggestion does not reflect the Panel's position more accurately.[62]

6.17. We have accepted Japan's suggestion. We agree with Japan that because making price adjustments is not the only way through which an investigating authority can ensure price comparability, the broader formulation suggested by Japan, namely "take appropriate steps" instead of "make adjustments", better reflects our position. We have modified paragraphs 7.110, 7.114, and 7.115 accordingly.

6.1.6 Paragraph 7.111

6.18. Japan suggests that we make the following change to better reflect China's position[63]:

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[57] Japan's request for interim review, para. 35.
[58] China's comments on Japan's request for interim review, para. 25.
[59] Japan's request for interim review, para. 36.
[60] Japan's request for interim review, paras. 37-38.
[61] Japan's request for interim review, paras. 46-47.
[62] China's comments on Japan's request for interim review, paras. 26 and 29.
[63] Japan's request for interim review, para. 39.

> China maintains that the obligation to ~~make adjustments to~~ ensure price comparability arises only when the following circumstances are present: (a) the investigation covers various product categories, which have price differences between them; (b) the price differences between product categories are significant; and (c) the baskets of the imported and the domestic like products being compared are not sufficiently similar in their product mix of different product categories.

6.19. China disagrees with Japan's suggestion and argues that the existing language correctly reflects China's position.[64]

6.20. We have modified the relevant part of paragraph 7.111 to reflect the language used by China at paragraph 62 of its second written submission.

6.1.7 Footnote 151 (footnote 152 of the Final Report) to paragraph 7.112

6.21. Japan suggests that we change footnote 151 to refer to paragraphs 21 through 26 of Japan's second written submission, rather than paragraph 21 alone. Japan asserts that paragraph 21 of its second written submission refers to only one panel report that Japan relies on in making the argument referred to paragraph 7.112 of the Report to which footnote 151 is attached, whereas Japan also supports that argument by referring to other panel reports in paragraphs 22 to 26 of its second written submission.[65]

6.22. China disagrees with Japan suggestion and consider the suggested change to be unnecessary.[66]

6.23. We have accepted Japan's request as paragraphs 21 through 26 of its second written submission pertain to the argument described in the statement in paragraph 7.112 of the Report to which footnote 151 is attached. We have modified the footnote accordingly.

6.1.8 Paragraph 7.112

6.24. Japan requests us to make the following change to this paragraph in order to better reflect its position (Japan suggests deleting the struck-through text and adding the underlined text)[67]:

> Moreover, Japan submits that even if the composition of the baskets of subject imports and of the domestic like products is similar, ~~an objective price effects analysis can only be performed by comparing similar product categories, and not by comparing baskets with similar proportions of different product categories~~ changes in the average prices may have been caused by changes in the product mix and not by actual movements in the price of each product. Therefore, for Japan, the text of the Anti-Dumping Agreement or findings of past panels do not require any of the three conditions referred to by China to exist for an investigating authority to be required to take steps to ensure price comparability ~~between various product categories~~.[68]

6.25. China does not comment on Japan's request.

6.26. We have accepted Japan's request and made the requested modifications.

[64] China's comments on Japan's request for interim review, para. 27.
[65] Japan's request for interim review, para. 41.
[66] China's comments on Japan's request for interim review, para. 28.
[67] Japan's request for interim review, paras. 43-45.
[68] Fns omitted.

6.1.9 Paragraph 7.116

6.27. Japan requests us to add a footnote to paragraph 7.116 referring to certain findings of previous panels "in order for the parties, the third parties, and the other Members to more accurately understand the Panel's findings in the context of findings by previous panels".[69]

6.28. China disagrees with Japan's suggestion, arguing that there is no indication that we were relying on the specific findings of the panels referred to by Japan in reaching the conclusions stated in paragraph 7.116.[70]

6.29. In our view, the relevant findings can be fully understood from the existing text of this paragraph without the addition of the footnote that Japan requests us to add. We therefore decline Japan's request.

6.1.10 Paragraph 7.117

6.30. Japan requests us to add a footnote to paragraph 7.117 referring to certain findings of the Appellate Body in *China – GOES* "in order for the parties, the third parties, and the other Members to more accurately understand the Panel's findings in the context of findings by the Appellate Body".[71]

6.31. China disagrees with Japan and considers that the reference to the Appellate Body findings that Japan points to would not be justified.[72]

6.32. We have modified paragraph 7.117 and have added a footnote expressing agreement with the finding in paragraph 200 of the Appellate Body report in *China – GOES*.

6.1.11 Footnote 157 (footnote 159 of the Final Report) to paragraph 7.117

6.33. Japan suggests the following changes to that, in Japan's view, would more accurately reflect China's arguments and would support our reasoning as to why China's reliance on the relevant Appellate Body findings is inapposite (Japan suggests deleting the struck-through text and adding the underlined text)[73]:

> Footnote 157: China asserts, relying on certain findings of the Appellate Body Reports in past cases such as *EU – Fatty Alcohols (Indonesia)*, *US – Hot-Rolled Steel*, and *US – Zeroing (EC)*, that Article 2.4 of the Anti-Dumping Agreement requires an investigating authority only to make allowances ~~only~~ in respect of differences in characteristics of compared transactions that have an impact on prices of the transactions. For China, the same principle must apply to Article 3.2 of the Anti-Dumping Agreement also. (China's response to Panel question No. 21, paras. 112-113 (referring to Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.22; *US – Hot-Rolled Steel*, para. 177; and *US – Zeroing (EC)*, para. 156)). We consider that the findings of the Appellate Body that China refers to were aimed at ensuring, pursuant to Article 2.4 of the Anti-Dumping Agreement, a "fair comparison" between the *export price* and the *normal value* of transactions involving the same product from the same producer, without any indication of price comparability between the imported and domestic like products. Also, none of these findings were ~~not~~ made in the context of a situation involving product categories that may not be in a competitive relationship, and hence their price may not be comparable. Thus, we consider China's reliance on the relevant findings of the Appellate Body to be inapposite to its assertion that the same principle must apply to Article 3.2 of the Anti-Dumping Agreement.

6.34. China disagrees with Japan's description of Appellate Body findings in the additional text that Japan proposes. China also observes that the Panel does not address in this footnote the

[69] Japan's request for interim review, para. 48.
[70] China's comments on Japan's request for interim review, para. 30.
[71] Japan's request for interim review, para. 49.
[72] China's comments on Japan's request for interim review, para. 31.
[73] Japan's request for interim review, para. 50.

relationship between the concepts of "price comparability" in Articles 2.4 and 3.2 of the Anti-Dumping Agreement but only finds that the Appellate Body's findings referred to by China were not made in the context of a situation involving product categories that may not be in a competitive relationship. According to China, this makes the additional text proposed by Japan irrelevant to the point made by the Panel in the footnote.[74]

6.35. We have modified the footnote to account for China's reference to the Appellate Body reports in *US – Hot-Rolled Steel* and *US – Zeroing (EC)* in support of its argument referred to in this footnote. However, we do not consider it necessary to include in the footnote the additional text proposed by Japan, given that the text proposed by Japan goes beyond the reasoning based on which we consider China's reliance on the relevant findings of the Appellate Body to be inapposite.

6.1.12 Footnote 161 (footnote 163 of the Final Report) to paragraph 7.119

6.36. Japan requests us to add certain text to this footnote referring to certain findings of previous panels "in order for the parties, the third parties, and the other Members to accurately understand the Panel's findings in the context of the panel's previous findings".[75]

6.37. China disagrees with Japan's suggestion, arguing that there is no indication that we were relying on the specific findings of the panels referred to by Japan in reaching the conclusions stated in footnote 161.[76]

6.38. In our view, the relevant findings can be fully understood from the existing text of this footnote without the addition of the text that Japan requests us to add. We therefore decline Japan's request.

6.1.13 Paragraph 7.121

6.39. Japan suggests that we make the following change to paragraph 7.121 (Japan suggests deleting the struck-through text and adding the underlined text)[77]:

> Thus, China's reliance on *China – Autos (US)* to support its submission that non-price differences should be considered to affect price comparability only when they are shown to affect relative prices is ~~not well~~ <u>un</u>founded.

6.40. China disagrees with Japan's suggestion.[78]

6.41. We have accepted Japan's suggestion.

6.1.14 Footnote 163 (footnote 165 of the Final Report) to paragraph 7.122

6.42. Japan requests us to add certain text to this footnote referring to certain findings of the panel in *China – X-Ray Equipment* "in order for the parties, the third parties, and the other Members to more accurately understand the Panel's findings in the context of the panel's previous findings".[79]

6.43. China disagrees with Japan's suggestion and asserts that the reference to the panel will not be justified.[80]

6.44. We do not consider it necessary to add the reference to the findings of the panel in *China – X-Ray Equipment* identified by Japan. In our view, the relevant findings can be fully understood from the existing text of this footnote without the addition of the text that Japan requests us to add. We therefore decline Japan's request.

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[74] Chinas comment on Japan's request for interim review, para. 33.
[75] Japan's request for interim review, para. 51.
[76] China's comments on Japan's request for interim review, para. 34.
[77] Japan's request for interim review, para. 52.
[78] China's comments on Japan's request for interim review, para. 35.
[79] Japan's request for interim review, para. 54.
[80] China's comments on Japan's request for interim review, para. 36.

6.1.15 Paragraph 7.125

6.45. Japan suggests that we make the following change to paragraph 7.125 (Japan suggests deleting the struck-through text and adding the underlined text).[81]:

> We share Japan's view that, in the above scenario, a finding of price depression could not be deemed as a result of an objective examination since observed changes in the average unit values of the products under investigation as a whole could be the result of changes in the product mix, rather than changes in prices.[fn1] In our view, the panel of *China – Broiler Products* paid attention to the same structural issue, in the context of price undercutting, stating that "the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from 'price undercutting' and *not merely from differences in the composition of the two baskets being compared*".[fn2] China's reliance on *China – Broiler Products* is misplaced. Contrary to China's assertion, the panel in *China – Broiler Products* did not find that the obligation to ensure price comparability will only arise if there are significant differences in the product mix between domestic and imported products. Rather~~, in stating that "the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar"~~, the panel was addressing what an investigating authority must do to undertake an objective consideration of price effects in one particular set of circumstances, namely, where (a) the products under investigation are not homogenous; (b) various product categories command significantly different prices; and (c) the authority performs a price comparison based on a basket of products or sales transactions. …
>
> New footnote 1: Panel Report, *China – X-Ray Equipment*, para. 7.85.
>
> New footnote 2: Panel Report, *China – Broiler Products*, para. 7.483. (emphasis added)

6.46. China disagrees with Japan's suggestion, asserting that while in paragraph 7.125, the Panel was only addressing China's reliance on *China – Broiler Products*, the first sentence of Japan's suggested text relates to Japan's arguments set out in the last sentence of the preceding paragraph.[82]

6.47. We agree with China that the first sentence of Japan's suggested text relates to Japan's argument set out in the preceding paragraph, and not to our view concerning China's reliance on *China – Broiler Products*. We consider though that expressing our agreement at the beginning of paragraph 7.125 with the argument of Japan that is set out in paragraph 7.124 will clarify our analysis of the issue at hand. Therefore, we have modified paragraph 7.125 to note our agreement with Japan's argument described in paragraph 7.124. However, we do not consider it necessary to refer to the panels' findings in *China – X-Ray Equipment* and *China – Broiler Products* in the manner suggested by Japan.

6.1.16 Paragraph 7.127 and footnote 169 (footnote 171 of the Final Report)

6.48. Japan requests us to reflect more accurately one of its arguments referred to in paragraph 7.127. Japan also requests us to limit the references in footnote 169 to paragraphs 88 and 89 of its first written submission, while deleting the reference to paragraph 90.[83]

6.49. China disagrees with Japan's suggestion, asserting that Japan's argument has been correctly described in this paragraph.[84]

6.50. We have accepted Japan's request. Accordingly, we have modified footnote 169 and the relevant statement in paragraph 7.127.

[81] Japan's request for interim review, para. 55.
[82] China's comments on Japan's request for interim review, para. 37.
[83] Japan's request for interim review, paras. 56-58.
[84] China's comments on Japan's request for interim review, para. 38.

6.1.17 Footnote 181 (footnote 183 of the Final Report) to paragraph 7.135

6.51. Japan requests us to replace the citation to paragraph 453 of its second written submission with paragraph 121 of its first written submission.[85]

6.52. China does not comment on Japan's request.

6.53. We have accepted Japan's request.

6.1.18 Footnote 183 (footnote 185 of the Final Report) to paragraph 7.135

6.54. Japan requests us to indicate in the footnote that China refers to MOFCOM's findings on page 12 of the final determination in making the argument in paragraph 16 of its opening statement at the second meeting of the Panel to which this footnote refers.[86]

6.55. China does not comment on Japan's request.

6.56. We have accepted Japan's request.

6.1.19 Footnote 186 (footnote 188 of the Final Report) to paragraph 7.137

6.57. Japan requests us to qualify the reference to paragraph 7 of its closing statement at the second meeting with "See also", on the ground that this portion of its argument "is relevant to the impermissible nature of the *ex post* rationalizations presented by China [but] does not directly address the issue of MOFCOM's finding of 'reasonable difference' in prices among the product categories".[87]

6.58. China does not comment on Japan's request.

6.59. We have accepted Japan's request.

6.1.20 Footnote 195 (footnote 197 of the Final Report) to paragraph 7.142

6.60. Japan requested us to add "emphasis added" at the end of the citation in this footnote.[88]

6.61. China does not comment on Japan's request.

6.62. We have accepted Japan's request.

6.1.21 Paragraph 7.143

6.63. Japan requested us to add language to this paragraph to the effect we need not address Japan's argument concerning MOFCOM's alleged failure to perform an objective examination of positive evidence in relation to attachment 9 to the application and annexes 17 and 34 to the non-injury brief, given our prior findings that MOFCOM's finding of "reasonable price differences" was not reasonably and adequately explained. Japan explains that this addition will avoid the misunderstanding that Japan requested us to review MOFCOM's selection of certain information as best information available in the framework of Article 6.8 and Annex II of the Anti-Dumping Agreement.[89]

6.64. China disagrees with Japan's suggestion. China asserts that Japan's suggestion would distort the Panel's findings, as the Panel did not review Japan's arguments concerning attachment 9 to the application and annexes 17 and 34 to the non-injury brief not because it found doing so to

[85] Japan's request for interim review, para. 59.
[86] Japan's request for interim review, para. 60.
[87] Japan's request for interim review, paras. 61-62.
[88] Japan's request for interim review, para. 63.
[89] Japan's request for interim review, paras. 64-65.

be unnecessary, but because it did not consider this information to be within its terms of reference.[90]

6.65. We have modified paragraph 7.143 to address Japan's concern that the finding in our Interim Report could be misunderstood to suggest that Japan advanced a claim under Article 6.8 and Annex II of the Anti-Dumping Agreement against MOFCOM's selection of certain information as best information available.

6.1.22 Footnote 215 (footnote 217 of the Final Report) to paragraph 7.151

6.66. Japan suggests that we indicate in this footnote that Japan's first written submission quotes the non-injury brief.[91]

6.67. China does not comment on Japan's request.

6.68. We have accepted Japan's request.

6.1.23 Footnote 223 (footnote 225 of the Final Report) to paragraph 7.154 and footnote 224 (footnote 229 of the Final Report) to paragraph 7.155

6.69. Japan suggests that we indicate in the citation in these footnotes the page numbers of the exhibits to which we refer.[92]

6.70. China does not comment on Japan's request.

6.71. We have accepted Japan's request.

6.1.24 Paragraph 7.158

6.72. Japan requests us to add certain language to make it clear that the non-injury brief at issue in this paragraph was the one submitted by the Japanese respondents, and not the other non-injury briefs before MOFCOM.[93]

6.73. China does not comment on Japan's request.

6.74. We have accepted Japan's suggestion.

6.1.25 Paragraph 7.167

6.75. Japan suggests that we make the following additions to this paragraph (Japan's suggested additions are underlined)[94]:

> … Accordingly, in our view, China's reliance on the Appellate Body's findings in Korea – Pneumatic Valves is misplaced. The Appellate Body's statements that "[the investigating authority] relied on the price differentials" and "to the extent an investigating authority relies on price comparisons" were made in response to Korea's allegation that there is no obligation to ensure price comparability when making a finding of price depression or suppression[fn], and do not prescribe different degrees of relevance of the issue of price comparability depending on whether a price effects analysis is based on a comparison of price trends or of prices.[248] …
>
> New footnote: Appellate Body Report, Korea – Pneumatic Valves (Japan), paras. 5.242 and 5.247.

[90] China's comments on Japan's request for interim review, para. 40.
[91] Japan's request for interim review, para. 66.
[92] Japan's request for interim review, para. 67.
[93] Japan's request for interim review, para. 68.
[94] Japan's request for interim review, para. 69.

6.76. China disagrees with Japan's suggestion, stating that it is unnecessary to make the changes that Japan suggests and that Japan's suggested changes are not a part of our reasoning.[95]

6.77. We agree with China that the changes sought by Japan are unnecessary. In our view, our statements in respect of China's reliance on the Appellate Body report in *Korea – Pneumatic Valves* are already clear, and we do not consider that adding the quotes from that report that Japan would have us insert will add value to our analysis.

6.1.26 Footnote 252 (footnote 254 of the Final Report) to paragraph 7.170

6.78. Japan requests us to add a reference to paragraphs 174-176 of its first written submission to this footnote.[96]

6.79. China does not comment on Japan's request.

6.80. We consider that the existing reference to Japan's submissions is adequate to identify the source of Japan's argument and we need not include the additional citations requested by Japan.

6.1.27 Paragraph 7.171

6.81. Japan requests us to make the following changes as, in Japan's view, these changes will summarize Japan's arguments more accurately and will contribute to clarifying our findings:

> Based on the foregoing analysis, we find that Japan has established that ~~MOFCOM's finding that there was no issue of price comparability between product categories~~ MOFCOM's price comparison between subject imports and the domestic like products, both of which were undistinguished by product categories, was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement for the following reasons:
>
> a. to the extent that MOFCOM's finding was based on China's view that the obligation to ~~make adjustments to~~ ensure price comparability arises only when there are significant price differences between products categories, MOFCOM proceeded on a misconceived understanding of the notion of price comparability; …

6.82. Japan asserts that it did not contend that MOFCOM found that "there was no issue of price comparability between product categories", nor did MOFCOM make this finding. Japan states that "MOFCOM simply declined to accept the comments from the interested parties on the need to conduct price effects analysis for each of the three product categories". According to Japan, the suggested changes will reflect Japan's argument against MOFCOM's determination on this issue more accurately. Japan also contends that removing the phrase "make adjustments to" from paragraph 7.171(a) will reflect China's argument more accurately.[97]

6.83. China disagrees with Japan's suggested changes to paragraph 7.171. China contends that MOFCOM did conclude that there was no issue of price comparability between the three product categories, and agrees with our formulation. China also disagrees with Japan's suggestion regarding the deletion of the phrase "make adjustments to", and asserts that our formulation correctly reflects China's position.[98]

6.84. We have modified paragraph 7.171 to make our findings clearer. We have made conforming changes to paragraphs 7.177 and 8.1(d) of the Final Report. We have also modified paragraph 7.171(a) to reflect the formulation used by China at paragraph 62 of its second written submission in which China describes the circumstances in which, in China's view, "the obligation to ensure price comparability is triggered".

[95] China's comments on Japan's request for interim review, para. 44.
[96] Japan's request for interim review, para. 70.
[97] Japan's request for interim review, paras. 71-73 (referring to MOFCOM's final determination, (Exhibit JPN-5.b), pp. 43-44).
[98] China's comments on Japan's request for interim review, para. 45.

6.1.28 Paragraph 7.172 and footnotes 254 and 255 (footnotes 256 and 257 of the Final Report)

6.85. Japan requests us to make certain additions to our summary of Japan's arguments contained in paragraphs 7.172(b) and 7.172(d), and to include certain additional citations in the footnotes attached to these paragraphs.[99]

6.86. China does not consider it necessary to add more detail to the summary of Japan's arguments, and recalls that the executive summaries of the parties' arguments attached to the Final Report allow parties to summarize their arguments in more details than the summary provided by the Panel. China also asserts that were we to accept Japan's additions, we should also reflect China's position on each of those issues.[100]

6.87. We have rephrased paragraphs 7.172(b) and 7.172(d)and have modified certain footnotes to more accurately reflect Japan's submissions. However, as we do not see this rephrasing as substantially altering or expanding our summary of Japan's arguments, we do not see the need to add China's position on each of Japan's allegations. We also recall that apart from finding that MOFCOM's flawed finding with respect to the price comparability of the three product categories tainted its series-specific price effects analyses, we do not make additional findings on Japan's arguments against MOFCOM's series-specific price effects analyses

6.1.29 Paragraph 7.175

6.88. Japan requests us to make certain additions to our summary of Japan's arguments contained in this paragraph, and to include certain additional citations in the footnotes attached to this paragraph.[101]

6.89. China does not consider it necessary to add more detail to the summary of Japan's arguments, and recalls that the executive summaries of the parties' arguments attached to the Final Report allow parties to summarize their arguments in more details than the summary provided by the Panel.[102]

6.90. We consider that the existing language of this paragraph already reflects the elements referred to in Japan's suggested textual edits (namely Japan's allegation that MOFCOM improperly failed to explain its overall conclusion of price depression in light of the alleged divergence in the prices of the subject imports and the domestic like products and the allegedly "consistently higher" prices of subject imports). We therefore do not consider it necessary to make the edits suggested by Japan.

6.1.30 Footnote 256 (footnote 260 of the Final Report) to paragraph 7.175

6.91. Japan requests us to add citations to certain additional paragraph of its first written submission in this footnote.[103]

6.92. China does not comment on Japan's request.

6.93. We consider that the existing citations are sufficient to reflect Japan's arguments.

6.1.31 Paragraph 7.177

6.94. Japan asserts that the existing language of this paragraph could be read as suggesting that we have accepted China's argument that MOFCOM did not find price depression based on a comparison of weighted average prices of the subject imports and domestic like products as a

[99] Japan's request for interim review, para. 74.
[100] China's comments on Japan's request for interim review, paras. 46-47.
[101] Japan's request for interim review, para. 75.
[102] China's comments on Japan's request for interim review, para. 48.
[103] Japan's request for interim review, para. 76.

whole, but based on its series-specific price effects analyses. To preclude this confusion, Japan suggests some modifications to the text of this paragraph.[104]

6.95. China comments that Japan's proposed changes are unnecessary as the contents of the paragraph are clear and create no risk of confusion.[105]

6.96. We have added a footnote to this paragraph to address Japan's concern.

6.2 China's specific requests for review

6.2.1 Paragraph 7.101

6.97. China requests us to invert the order of existing paragraphs 7.101(a) and 7.101(b), to reflect that MOFCOM first assessed the prices effects by series of grade and then considered weighted average prices.[106]

6.98. Japan disagrees with China's request, asserting that our description of these points is neutral and does not imply that one paragraph takes priority over the other.[107]

6.99. We agree with Japan that our description of these points is neutral and does not imply that one paragraph takes priority over the other. However, we have accepted China's request to invert the order in which paragraphs are listed.

6.2.2 Paragraph 7.127

6.100. China requests us to make certain edits to accurately reflect China's position.[108]

6.101. Japan does not comment on China's request.

6.102. We have modified this paragraph in the manner requested by China.

6.2.3 Paragraph 7.133

6.103. China requests us to include additional text in this paragraph reflecting " the fact that unlike these previous cases, in the present case MOFCOM took additional actions to ensure price comparability between the products at issue".[109]

6.104. Japan requests us to reject China's request, stating that the Panel did not make the findings that China's suggested text reflect, and that China's suggested text is contrary to the Panel's findings.[110]

6.105. We do not consider it necessary or appropriate to make findings comparing MOFCOM's "efforts" to ensure price comparability in this case with those in previous cases. Further, in our view, making the findings that China requests us to make does not contribute to the resolution of the issue at hand – i.e. whether by relying on an examination of price and non-price differences between product categories in the context of its analysis of the interested parties' views on product scope, MOFCOM properly established that it was not required to take specific steps to ensure price comparability between product categories. Therefore, we do not accept China's request.

[104] Japan's request for interim review, para. 77.
[105] China's comments on Japan's request for interim review, para. 49.
[106] China's request for interim review, paras. 9-10.
[107] Japan's comments on China's request for interim review, para. 13.
[108] China's request for interim review, para. 12.
[109] China's request for interim review, para. 13.
[110] Japan's comments on China's request for interim review, paras. 16-17.

7 JAPAN'S CLAIM CONCERNING MOFCOM'S EXAMINATION OF THE IMPACT OF THE SUBJECT IMPORTS ON THE STATE OF THE DOMESTIC INDUSTRY

7.1 Japan's specific requests for review

7.1.1 Paragraph 7.184

7.1. Japan requests us to include certain language "to more completely ground this discussion of the legal standard in the relevant Appellate Body decisions". The requested language is Japan's characterization of the Appellate Body report in *China – GOES*, paragraph 149.[111]

7.2. China disagrees with Japan's suggested addition, asserting that it does not seem to China that the Panel grounded its discussion of the legal standard in the Appellate Body report referred to by Japan.[112]

7.3. We do not include Japan's suggested language as, in our view, the existing discussion of Articles 3.1 and 3.4 in this section is adequate.

7.1.2 Footnote 268 (footnote 273 of the Final Report) to paragraph 7.185

7.4. Japan requests us to expand the reference to its second written submission in this footnote to include paragraphs 199 to 205, rather than paragraph 205 alone.[113]

7.5. China does not comment on Japan's request.

7.6. We have accepted Japan's request.

7.1.3 Footnote 272 (footnote 277 of the Final Report) paragraph 7.185

7.7. Japan requests us to make an editorial correction to a quote from its submissions.[114]

7.8. China does not comment on Japan's request.

7.9. We have made the requested correction.

7.1.4 Paragraph 7.186

7.10. Japan requests us to attach a citation to MOFCOM's final determination to a statement in this paragraph. Japan also requests us to add some language to our analysis in the paragraph.[115]

7.11. China considers it unnecessary to include the additional language suggested by Japan.[116]

7.12. We have added the citation to MOFCOM's final determination requested by Japan. As regards the additional analytical language suggested by Japan, we agree with China that it is not necessary to make this addition. We also note that Japan does not explain why this addition would be necessary.

7.1.5 Paragraph 7.193

7.13. Japan requests us to include some additional language and citations to accurately and more completely reflect Japan's arguments.[117]

7.14. China does not comment on Japan's request.

[111] Japan's request for interim review, para. 79.
[112] China's comments on Japan's request for interim review, para. 50.
[113] Japan's request for interim review, para. 80.
[114] Japan's request for interim review, para. 81.
[115] Japan's request for interim review, para. 82.
[116] China's comments on Japan's request for interim review, para. 51.
[117] Japan's request for interim review, para. 83.

7.15. We have accepted Japan's request.

7.1.6 Footnote 287 (footnote 295 of the Final Report) to paragraph 7.194

7.16. Japan suggests that we add a reference to paragraph 218 of its first written submission to this footnote.[118]

7.17. China does not comment on Japan's request.

7.18. We have accepted Japan's request.

7.1.7 Paragraph 7.194

7.19. Japan requests us to add a citation to Japan's second written submission to one of the statements in this paragraph.[119]

7.20. China does not comment on Japan's request.

7.21. We do not consider it necessary to add the requested citation as the source of Japan's arguments is clear from the citations already contained in this paragraph.

7.1.8 Paragraph 7.211

7.22. Japan requests us to ensure that this paragraph clarifies that Japan has argued that "failing to substantiate the calculation method behind apparent domestic production amounts to a failure to provide a meaningful basis for an injury determination".[120]

7.23. China disagrees with Japan's suggestion, stating that the suggestion does not correctly reflect the argument put forward by Japan.[121]

7.24. The full paragraph containing Japan's assertion with respect to MOFCOM's alleged failure to provide a "meaningful basis" for its injury determination appears in Japan's comments on China's response to one of our questions after the second substantive meeting. This paragraph provides as follows:

> In its Final Determination, MOFCOM merely mentioned that it performed an evaluation of the market share of the domestic industry "including the captive use". In addition to the mere reference, MOFCOM provided no evidence or data substantiating the details or mathematical implications of such an "inclu[sion]", and did not disclose or even allude to the above complex calculation formula. It thus failed to provide a "meaningful basis" for its injury determination.[122]

7.25. We do not understand from this paragraph that Japan is arguing that "failing to substantiate the calculation method behind *apparent domestic consumption* certainly amounts to a failure to provide a meaningful basis for an injury determination".[123] Rather, we understand Japan's submission to be focused on the MOFCOM's determination of *the domestic industry's market share*. We agree with China that Japan's suggested addition does not correctly reflect the arguments put forward by Japan. We therefore reject Japan's request.

7.1.9 Paragraph 7.221

7.26. Japan requests us to add a statement in this paragraph to the effect that Japan argued before us that "while MOFCOM noted the overall positive trends with respect to such indices over

[118] Japan's request for interim review, para. 84.
[119] Japan's request for interim review, para. 85.
[120] Japan's request for interim review, para. 86.
[121] China's comments on Japan's request for interim review, para. 52.
[122] Japan's comments on China's response to Panel question No. 49, para. 63. (fns omitted)
[123] Emphasis added.

the POI in its analysis, it based its finding, i.e. conclusive observation on such indices" exclusively on a comparison between the first quarter of 2018 with those for the first quarter of 2017.[124]

7.27. China disagrees with Japan's suggestion, stating that the suggestion does not correctly reflect the argument put forward by Japan.[125]

7.28. We note that our description of Japan's argument in this paragraph reflects Japan's own formulation in paragraph 357 of its first written submission. The additional language that Japan would have us add does not appear in Japan's first written submission. We therefore reject Japan's request.

7.1.10 Paragraph 7.222

7.29. Japan requests us to add the underlined text to this paragraph:

> China also argues that to the extent that MOFCOM's evaluation did focus on the most recent period, Japan has failed to explain why such focus would be unreasonable.[331] In response, Japan argues that "China failed to provide a compelling explanation as to why MOFCOM concluded that the economic factors showing negative trends supported an affirmative injury determination in light of the fact that several factors exhibited positive trends" [fn1], as MOFCOM and China indeed noted, but ignored when drawing conclusions about the indicators being considered.[fn2]
>
> New footnote 1: Japan's second written submission, para. 225.
>
> New footnote 2: Japan's first written submission, para. 360; second written submission, para. 224.

According to Japan, the addition of the underlined text would reflect that Japan argued before us that while MOFCOM did note positive trends in pre-tax profits and return on investment, it concluded that these indicators worsened based only on a comparison between the figures for the first quarter of 2018 and those for the first quarter of 2017.[126]

7.30. China disagrees with Japan's suggestion.[127]

7.31. We note that the text that Japan wishes us to add (underlined in the quote in paragraph 7.29 above) does not reflect the argument that while MOFCOM noted positive trends in pre-tax profits and return on investment, it concluded that these indicators worsened based only on a comparison between the figures for the first quarter of 2018 and those for the first quarter of 2017. The argument presented in the underlined text relates to *two different sets* of economic factors: one showing negative trends, and the other showing positive trends. That argument does not suggest that MOFCOM did not adequately consider the positive trends *within certain economic factors* (namely pre-tax profits and return on investment) but based its conclusion only on a comparison of trends pertaining to those particular factors between the first quarters of 2017 and 2018.

7.32. We also note that Japan's argument in paragraph 360 of its first written submission that MOFCOM "failed to provide a compelling explanation as to why the economic factors showing negative trends supported an affirmative injury determination in light of the fact that several factors exhibited positive trend" (which is akin to the text that Japan wished us to add) was not connected to its argument concerning pre-tax profits and return on investment. Rather, the argument in paragraph 360 Japan's first written submission was connected to MOFCOM's finding quoted below:

> The Investigating Authority considered that the determination of whether domestic industry was subject to material injury should not be based solely on certain indices of

[124] Japan's request for interim review, para. 87.
[125] China's comments on Japan's request for interim review, para. 53.
[126] Japan's request for interim review, para. 88.
[127] China's comments on Japan's request for interim review, para. 54.

> the domestic industry, but all economic indices and the impact of other factors in the domestic industry should be considered. The Investigating Authority comprehensively considered the changes in all indices and found that the domestic industry suffered from material injury.[128]

We understood Japan's assertions in paragraph 225 of its second written submission that MOFCOM improperly "concluded that the economic factors showing negative trends supported an affirmative injury determination in light of the fact that several factors exhibited positive trends" to also be related to MOFCOM's finding quoted above, rather than to MOFCOM's findings specifically in respect of pre-tax profits and return on investment.

7.33. Therefore, in our view, Japan's comments on the Interim Report conflate Japan's submissions regarding MOFCOM's findings on pre-tax profits and return on investment specifically, with its submissions regarding MOFCOM's more general finding that material injury existed even though certain factors showed positive trends. Thus, we reject Japan's request.

7.1.11 Paragraph 7.226

7.34. Japan requests us to make the following changes to this paragraph (Japan suggests that we delete the struck-through text and add the underlined text)[129]:

> Japan argues that MOFCOM <u>noted several factors presenting positive trends, but</u> failed to explain in its impact analysis why economic factors showing negative trends supported an affirmative injury determination ~~when several other factors exhibited positive trends~~, <u>other than simply mentioning "all economic indices and the impact of other factors" without referring to any specific evidence.[fn]</u> In Japan's view, this failure rendered MOFCOM's impact analysis inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[340]
>
> <u>New footnote: MOFCOM's final determination (Exhibit JPN-5.b), p. 50.</u>

7.35. China disagrees with Japan's suggestion, stating that the suggestion does not correctly reflect the argument put forward by Japan.[130]

7.36. We consider that the existing language in the paragraph clearly reflects Japan's argument. Japan's suggested edits do not alter the substance of the existing language. We therefore reject Japan's request.

8 JAPAN'S CLAIM CONCERNING MOFCOM'S CAUSATION ANALYSIS

8.1 Japan's specific request for review

8.1.1 Footnotes 349-351 (footnotes 357-359 of the Final Report) to paragraph 7.232

8.1. Japan requests us to cite to all the paragraphs of the three sections of its arguments that are summarized in paragraphs 7.232(a), 7.232(b), and 7.232(c) in the footnotes attached to those paragraphs. Alternatively, Japan requests us to include the introductory and concluding paragraphs of each of the three sections in the footnotes attached to paragraphs 7.232(a), 7.232(b), and 7.232(c).[131]

8.2. China does not comment on Japan's request.

8.3. We have included citation to the introductory and concluding paragraphs of the relevant sections of Japan's first written submission as requested by Japan.

[128] MOFCOM's final determination (Exhibit JPN-5.b), p. 50.
[129] Japan's request for interim review, para. 89.
[130] China's comments on Japan's request for interim review, para. 55.
[131] Japan's request for interim review, paras. 90-93.

8.1.2 Paragraph 7.239 and footnotes 355-357 (footnotes 363-365 of the Final Report) thereto

8.4. Japan requests us to make certain edits to this paragraph and to the footnotes attached thereto to that, in Japan's view, would summarize its arguments more accurately and completely.[132]

8.5. China disagrees with Japan's suggestions. For China, our views in this part are clear and unambiguous, and the content that Japan seeks to add would be unnecessary and repetitive. China notes that Japan's arguments would be reflected in the executive summary of its arguments attached to the Report.[133]

8.6. We have made some editorial adjustments to this paragraph and have modified certain footnotes, as appropriate.

8.1.3 Footnote 362 (footnote 370 of the Final Report) to paragraph 7.241

8.7. Japan requests us to include references to some additional paragraphs of Japan's first written submission to this footnote.[134]

8.8. China does not comment on Japan's request.

8.9. We consider that the existing citation is adequate for the purposes of the paragraph.

8.1.4 Footnote 364 (footnote 372 of the Final Report) to paragraph 7.242

8.10. Japan requests us to include reference to one additional paragraphs of Japan's first written submission to this footnote.[135]

8.11. China does not comment on Japan's request.

8.12. We consider that the existing citation is adequate for the purposes of the paragraph.

8.1.5 Footnote 385 (footnote 393 of the Final Report) to paragraph 7.253

8.13. Japan requests us to include "emphasis added" at the end of this footnote.[136]

8.14. China does not comment on Japan's request.

8.15. We have accepted Japan's request.

8.1.6 Footnote 386 (footnote 394 of the Final Report) to paragraph 7.253

8.16. Japan suggests that we make a formatting edit in relation to the indentation of the content of this footnote.[137]

8.17. China does not comment on Japan's request.

8.18. We have made the required formatting change.

[132] Japan's request for interim review, paras. 94-97.
[133] China's comments on Japan's request for interim review, para. 56.
[134] Japan's request for interim review, para. 99.
[135] Japan's request for interim review, para. 100.
[136] Japan's request for interim review, para. 102.
[137] Japan's request for interim review, para. 104.

8.1.7 Paragraph 7.259

8.19. Japan requests us to add a citation to this paragraph indicating that the information concerning Gansu Jiu referred to in this paragraph was presented by China in its response to a Panel question.[138]

8.20. China considers the addition of the footnote to be unnecessary.[139]

8.21. We have added the footnote requested by Japan.

8.2 China's specific requests for review

8.2.1 Paragraph 7.249 and footnote 379 (footnote 387 of the Final Report)

8.22. China requests us to revise the text in paragraph 7.249 and footnote 379 to indicate that China was not in a position to furnish the information in "Section IV of the confidential questionnaires lodged by the domestic producers" because "the domestic producers did not agree to sharing this business confidential information in the present proceedings".[140]

8.23. Japan disagrees with China's request, asserting that China did not indicate before the Panel that the reason it could not provide the information concerned was the domestic producers' refusal to provide it and that there is no evidence proving that this was in fact the case.[141]

8.24. We agree with Japan. Accordingly, we do not consider it necessary to revise paragraph 7.249 and footnote 379.

9 JAPAN'S CLAIMS CONCERNING CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION

9.1 Paragraph 7.267

9.1. Japan requests us to modify paragraph 7.267 of our Report to reflect an argument that it made in paragraph 506 of its first written submission.[142] In particular, Japan requests that our Report reflect its view that the domestic industry's application did not show good cause because "the business activities listed in the application contained only broad descriptions, such as 'importers under investigation' and 'start production of products under investigation in Indonesia', none of which are confidential by nature".[143]

9.2. China opposes Japan's request on the ground that the additions requested by Japan are unnecessary and repetitive, and can be reflected in its executive summary.[144]

9.3. We note that in paragraph 506 of its first written submission, Japan's main argument was that although, in general, business activities, such as the relation of a domestic producer with an exporter or importer, or that it is itself an importer of the alleged dumped product, might be confidential information deserving of protection, the domestic industry's application did not contain the kind of detailed information that might be deserving of confidential treatment. In support of this argument, Japan referred to what it considered to be broad descriptions in the application. While we noted and addressed this argument as part of our analysis in paragraphs 7.276 and 7.277 of our Report, we have nonetheless made certain modifications in paragraph 7.267 to reflect Japan's main argument in this regard.

[138] Japan's request for interim review, para. 106.
[139] China's comments on Japan's request for interim review, para. 57.
[140] China's request for interim review, paras. 14-15.
[141] Japan's comments on Chinas request for interim review, paras. 20-23.
[142] Japan's request for interim review, para. 108.
[143] Japan's request for interim review, para. 108.
[144] China's comments on Japan's request for interim review, para. 58.

9.2 Paragraph 7.276

9.4. Japan requested several changes in paragraph 7.276 of our Report.

a. In reference to our statement noting Japan's agreement that business activities of a company, specifically whether it is related to exporters or importers, or is in itself an importer "may" constitute confidential information deserving of protection, Japan contends that it was merely expressing its acceptance that similar types of facts could be confidential under other circumstances.[145] Japan requests certain changes to reflect this contention.

b. Japan requests that we note, in the part of the paragraph where we noted Japan's contention that the domestic industry's application did not contain the kind of detailed information that might be deserving of confidential treatment, that Japan's contention is based on its view that the application contained only broad descriptions "importers under investigation" and "start production of products under investigation in Indonesia", none of which are confidential by nature.[146]

c. Japan requests us to reflect its argument disclosing the names of companies would have allowed interested parties to understand critical matters such as the scope of the industry as calculated by MOFCOM.[147]

9.5. China opposes Japan's request in paragraph 9.4(a) above on the ground that the formulation used in the Report more appropriately reflected Japan's position.[148] China finds the other additions to be unnecessary.[149]

9.6. Regarding the first request, the Report, in our view, accurately reflects Japan's argument. In particular, in its first written submission Japan contended that although business activities, that is a producer's relation with the exporter or importer, or that a producer is itself an importer "might be confidential information deserving of protection", the application did not contain the kind of detailed information that might be deserving of confidential treatment. We consider that our statement noting Japan's agreement that the business activities of a company, specifically whether it is related to exporters or importers, or is itself an importer of the alleged dumped product "may" constitute confidential information deserving of protection, accurately reflects Japan's argument set out above. We thus decline to make the change proposed by Japan.

9.7. With regard to the second request, the additions proposed by Japan expand on the basis for Japan's main argument, i.e. the domestic industry's application did not contain the kind of detailed information that might be deserving of confidential treatment. We have decided to thus make the change proposed by Japan.

9.8. As regards the third request, we note that whether or not the information in question was necessary to address critical matters does not directly bear on the question on whether there was good cause for confidential treatment of the information in question under Article 6.5. Instead, a panel must assess as part of a claim under Article 6.5.1 whether the non-confidential summary of such a confidential information is in "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". Considering a panel is not required to address each and every argument made by a party, and the change proposed by Japan does not directly bear on our enquiry under Article 6.5, we do not find it necessary to reflect it in our Report.

9.3 Paragraph 7.277

9.9. Japan suggests we delete certain parts of this paragraph, which suggest that Japan agrees that the description of the business activities of the companies "in this case can constitute confidential information".[150]

[145] Japan's request for interim review, para. 109.
[146] Japan's request for interim review, para. 109.
[147] Japan's request for interim review, para. 109.
[148] China's comments on Japan's request for interim review, para. 61.
[149] China's comments on Japan's request for interim review, para. 62.
[150] Japan's request for interim review, para. 110.

9.10. China opposes Japan's request by contending that the Report replicates almost verbatim Japan's position, as expressed in paragraph 506 of its first written submission, and thus it does not see why the deletions requested by Japan should be made.[151]

9.11. In paragraph 506 of its first written submission, Japan stated that although "in general, business activities 'related to the exporters or importers or are themselves importers of the allegedly dumped product' might be confidential information deserving of protection, the Application does not contain the kind of detailed information that might be deserving of confidential treatment".[152] We consider our description in paragraph 7.277 accurately reflect Japan's position. We thus decline to make the changes requested by Japan.

9.4 Japan's claims under Article 6.5.1 of the Anti-Dumping Agreement

9.4.1 Paragraphs 7.279 and 7.284

9.12. Japan suggests that we add a footnote in paragraph 7.279 to reflect Japan's argument regarding the meaning of "sufficient" under Article 6.5.1 of the Anti-Dumping Agreement.[153] Japan also suggests that we make certain changes in paragraph 7.284 to accurately reflect the findings of past DSB reports.[154]

9.13. China does not comment on Japan's request on paragraph 7.279. China opposes the additions proposed by Japan in paragraph 7.284 on the ground that there is no indication that we intended to make such specific addition in our Report.[155]

9.14. We set out the legal standard that we would apply in reviewing Japan's claims under Article 6.5.1 after taking into account the parties' understanding of the obligations under Article 6.5.1. We do not find it necessary to add a footnote in paragraph 7.279 to reflect the argument made by Japan regarding this legal standard. We thus find it unnecessary to make the change requested by Japan and accordingly decline to do so.

9.15. With regard to the additions requested by Japan based on past DSB reports, we note that in paragraph 7.284 we observed that with respect to the sufficiency of the non-confidential summary, Article 6.5.1 requires that the non-confidential summary be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. The findings of past DSB reports that Japan requests we add to paragraph 7.284 essentially paraphrases the obligations under Article 6.5.1 in this regard. Nonetheless, for the sake of completeness and reflecting the findings of past DSB reports in their context, we have made the changes requested by Japan in paragraph 7.284.

10 JAPAN'S CLAIMS CONCERNING THE DISCLOSURE OF THE ESSENTIAL FACTS UNDER CONSIDERATION WHICH FORMED THE BASIS FOR MOFCOM'S DECISION TO APPLY DEFINITIVE MEASURES

10.1 Paragraph 7.321 (section 7.7.3.2 – Definition of the product under consideration)

10.1. Japan suggests we reflect in paragraph 7.321 its submission that interested parties made multiple challenges to MOFCOM's treatment of billets (slabs), coils, and plates as one product in the proceedings before MOFCOM.[156]

10.2. China does not comment on Japan's request.

10.3. We note that arguments made by Japan are already part of the record, and we do not consider it necessary to reflect these arguments in our Report. We accordingly decline to make the additional details requested by Japan.

[151] China's comments on Japan's request for interim review, para. 63.
[152] Fn omitted.
[153] Japan's request for interim review, para. 111.
[154] Japan's request for interim review, para. 112.
[155] China's comments on Japan's request for interim review, para. 64.
[156] Japan's request for interim review, para. 117.

10.2 Paragraph 7.326

10.4. Japan requests us to add a reference to its submission, relying on previous DSB reports, that Article 6.9 requires an investigating authority to disclose the facts in such a manner that an interested party can clearly understand what data the investigating authority has used, and how those data were used.[157]

10.5. China does not comment on Japan's request.

10.6. We have made the changes requested by Japan, albeit using language different from those proposed by Japan.

10.3 Paragraph 7.334

10.7. Japan requests certain changes in paragraph 7.334 to properly reflect its argument in relation to the disclosure of the state of the domestic industry. Specifically, Japan objects to the statement that it did not contest China's assertion that when the correct data is used to calculate domestic apparent consumption there is no discrepancy or error of the type alluded by Japan in its submission. Instead, Japan refers to the parts of Japan's second written submission where it submits that it contests this assertion.[158]

10.8. China opposes Japan's request, and contends that at the very least we should add a reference to the fact that contrary to Japan's submission, China provided to us evidence corroborating its explanation as to how the figures for apparent domestic consumption and total domestic production set out in the final determination could be reconciled.[159]

10.9. We have inserted a new footnote (footnote 505 of the Final Report) in paragraph 7.334 that reflects the additional arguments that Japan requested us to reflect in our Final Report. However, we note that China provided in its response to our questions after the second meeting explanations and data showing that one could derive the apparent consumption figures provided in the final determination by adding to the production output of the domestic industry, the production volume of excluded producers along with the import volume (and excluded export volume).[160] Japan did not object to these explanations and data in its comments on China's response to Panel questions after the second meeting. Thus, in the footnote that we have added to paragraph 7.334, we have also noted the absence of Japan's comments in this regard. Having made these additions, and considering Japan's comments, we do not find necessary to retain the reference to Japan's disagreement with regard to China's assertion that when the correct data set is used there is no discrepancy of the type alluded to by Japan in relation to the domestic apparent consumption.

10.4 Paragraph 7.335

10.10. In this paragraph we noted China's explanation, relying on record evidence, that to calculate the domestic industry's market share, MOFCOM used the domestic industry's sales volume plus domestic captive consumption in the numerator and the total apparent consumption in the denominator. Japan requests us to note its argument in paragraph 413 of its second written submission that the relevant parts of MOFCOM's disclosure do not explain that market share was calculated this way.[161]

10.11. China does not comment on Japan's request.

10.12. We note that the focus of paragraph 413 of Japan's second written submission is whether MOFCOM's disclosure document directly or indirectly explained that the market share was calculated "this way", i.e. through a numerator that included external sales volume of billets (slabs) plus "the domestic captive use".[162] In making our findings in paragraph 7.335, we noted

[157] Japan's request for interim review, para. 118.
[158] Japan's request for interim review, para. 121.
[159] China's comments on Japan's request for interim review, para. 65.
[160] China's response to Panel question No. 48, paras. 88-91.
[161] Japan's request for interim review, para. 122.
[162] Japan's second written submission, para. 413. For instance, Japan stated that "[m]ost importantly, China explains that the numerator of the market share is calculated by domestic external sales volume of

that in the injury analysis contained in MOFCOM's disclosure, MOFCOM stated that "[i]f the captive use [of domestic companies] was excluded, the market share of the commodity volume was still gradually diminished since 2017". We then set out our view that this disclosure would have made it reasonably clear to the interested parties that the market share figures used as part of the injury analysis included data on captive consumption. Considering our findings are based on our review of MOFCOM's disclosure document, in our view, those findings should be understood to address and reject Japan's arguments in paragraph 413 of its second written submission. We do not find it necessary to repeat Japan's arguments in making our findings, and note that these arguments are in any case part of the Panel record.

10.5 Paragraph 7.340

10.13. Japan requests us to reflect certain arguments it made in the context of MOFCOM's disclosure concerning its impact analysis.[163]

10.14. China opposes Japan's request on the ground that in paragraph 7.340 the Report summarizes China's arguments (and does not present Japan's arguments, or our analysis) and it is inappropriate to add Japan's argument in this paragraph.[164]

10.15. We agree with China that paragraph 7.340 refers to China's arguments, and do not consider it appropriate or necessary to modify this paragraph to refer to the arguments alluded by Japan.

10.6 Paragraphs 7.358, 7.359, and 7.363

10.16. Japan requests certain minor changes in these paragraphs in the interest of accuracy and clarity, or to include citations to its own submissions.[165]

10.17. China does not comment on Japan's request.

10.18. Considering the changes add to the accuracy and clarity of our Report, or add citations to Japan's submissions, we have decided to make the changes requested by Japan.

10.7 Paragraph 7.370

10.19. Japan requests us to include additional references to its arguments focusing on why in the particular circumstances of this case, MOFCOM should have provided, as part of its disclosure of the essential facts under consideration, (a) a clear explanation of the meaning of the term "commodity volume" of stainless steel slabs; and (b) figures for the commodity volume of stainless steel slabs and production volume of coils and plates.[166] In particular, Japan requests us to refer to certain parts of its response to our question as to the basis of Japan's disagreement with China's view that the "total product data" for billets (slabs), coils, and plates were the essential facts under consideration, and not the individual data for billets (slabs), coils and plates.[167] Japan also requests us to reflect its understanding of when facts may be considered essential under Article 6.9.[168]

10.20. China does not comment on Japan's request.

10.21. We note that in paragraphs 7.290 to 7.291 of our Report, we set out our understanding of the investigating authority's disclosure obligations under Article 6.9 of the Anti-Dumping Agreement. In particular, (a) we set out our understanding of when a particular fact is "essential"; and (b) we stated that essential facts must be disclosed in a coherent way so as to permit an

stainless steel billets plus *the domestic captive use*". (emphasis original; fn omitted). It went on to state how MOFCOM's disclosure did not directly or indirectly explain that the market share was "calculated this way". (Japan's second written submission, para. 413).

[163] Japan's request for interim review, para. 123.
[164] China's comments on Japan's request for interim review, para. 66.
[165] Japan's request for interim review, paras. 124-126.
[166] Japan's request for interim review, para. 127.
[167] Japan's request for interim review, para. 127.
[168] Japan's request for interim review, para. 127.

interested party to understand the basis for the decision to apply definitive measures. We explained that we would apply this understanding in reviewing Japan's claims under Article 6.9, including those addressed in paragraph 7.370. Thus, we do not find it necessary to reflect in paragraph 7.370 Japan's understanding of when facts may be considered essential under Article 6.9.

10.22. Moreover, in making our findings we reflected on whether the particular fact in question was essential, and whether it was disclosed in a coherent way. In particular, in paragraph 7.367 we found that an interested party would be able to understand from certain statements in MOFCOM's disclosure that MOFCOM used the phrase "commodity volume" to refer to the sales volume of billets (slabs). Thus, we found that MOFCOM properly disclosed the essential facts in this regard under Article 6.9, and the question of whether MOFCOM was required to disclose an explanation of the meaning of the phrase "commodity volume" does not arise.

10.23. With regard to the figures for the commodity volume of stainless steel slabs and production volume of coils and plates, we found that separate and distinct data sets pertaining to the sales volume of stainless steel slabs and the production volume of coils and plates did not comprise essential facts under Article 6.9, and set out the basis for our finding in paragraph 7.370. We are not persuaded that it is necessary to modify our analysis in paragraph 7.370 to add a reference to Japan's arguments, which in any case form part of the Panel record.

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ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan has established, in its first and second written submissions, opening and closing statements at the first and second substantive meetings, and responses to questions from the Panel to the parties, that the imposition of anti-dumping duties on imports of certain stainless steel products originating from Japan by the Ministry of Commerce ("MOFCOM") of the People's Republic of China ("China") is inconsistent with China's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

2. In this case, it is particularly noteworthy that an extremely large variety of products were included in the basket of imports subject to the investigation ("Subject Imports") and, consequently, in the basket of domestic like products. The Subject Imports included at least three product categories, which also varied in terms of chemical compositions and countries (regions) of origin. Japan is not challenging the breadth of the product scope and origins, in and of itself. Rather, the central issue is that, despite this situation, proper distinctions among and assessments of this variety of products were absent from MOFCOM's analysis, as set forth in its final determination ("Final Determination").

II. MOFCOM'S PRICE EFFECTS ANALYSIS WAS INCONSISTENT WITH ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

3. Japan claims that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it failed to involve an objective examination based on positive evidence. This inconsistency is manifested in the following flaws.

A. Failure to Ensure Price Comparability in Terms of Distinct Product Categories

4. MOFCOM's price effects findings in the Final Determination were inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as MOFCOM's analysis did not ensure price comparability between the basket of the Subject Imports and the basket of domestic like products in terms of the product categories contained therein. As the Appellate Body and past panels have found, to the extent an investigating authority's price effects findings rely on price comparisons, comparability between the prices of the basket of imported products and the prices of the basket of domestic products needs to be ensured, in the sense that (i) prices are compared at the same level of trade, and (ii) the products being compared are sufficiently similar.

5. As the Appellate Body found in *China – GOES*, the requirement to ensure price comparability is part of the requirement that a determination of injury involve an "objective examination" and be based on "positive evidence" under Article 3.1 of the Anti-Dumping Agreement. This requirement "must be met by every investigating authority in every injury determination"[1], including when a price effects analysis relies on comparisons of price trends instead of prices, and regardless of the type of price effect(s) being considered.[2] This is because non-comparability of prices or price trends "would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices"[3], and would not preclude the possibility that "observed changes in the average unit values could be the result of changes in the product mix, rather than genuine changes in prices".[4]

[1] Appellate Body Report, *China – GOES*, para. 201 (quoting Appellate Body Report, *EC – Bed Linen* (*Article 21.5 – India*) para. 109).
[2] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.242.
[3] Appellate Body Report, *China – GOES*, para. 200.
[4] Panel Report, *China – X-Ray Equipment*, para. 7.85.

6. In accordance with the findings made by past panels, the differences among products that are relevant to price comparability include not only price differences, but also other non-price differences that affect substitutability, and thus competitive relationships, among the products under investigation from a customer's perspective.[5] If subject imports and domestic like products are not substitutable, subject imports cannot have any effect on the prices of domestic like products. This is because a customer would not switch from a domestic product to an imported product which is not substitutable, even if the latter were less expensive, and domestic producers therefore would have no incentive to decrease their prices to compete with the subject imports.

7. In the underlying investigation, MOFCOM's definition of the product scope, and thus the variety of products included in the basket of the Subject Imports and the basket of domestic like products, was extremely broad, and encompassed, at a minimum, stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates. Abundant evidence, which was available to MOFCOM during the investigation, showed that the three product categories differ significantly in terms of physical characteristics, production processes, uses, customers, distribution channels, and prices, among other factors. However, MOFCOM's price effects analysis in the Final Determination did not make any distinction among product categories, which was inconsistent with the requirement to conduct an objective examination. In fact, the Final Determination does not address the aforementioned differences among products in the section on price effects analysis, and only refers to the differences very briefly, and in a manner that does not involve any objective examination of the substitutability among the three product categories, in the section describing the product scope of the investigation. In particular, when describing the product scope of the investigation, MOFCOM focused on the "final usages" of the three product categories. However, this does not confirm the existence of substitutability among these product categories. At issue is the substitutability of the products that fall into different product categories at the point of purchase, rather than similarities in what those products might eventually be turned into and then used for after further manufacturing.

8. Moreover, the only reference in the Final Determination to price differences among the products under investigation is MOFCOM's finding that the three product categories showed "reasonable differences" in prices among them. This finding is again, only included in the description of the scope of the products under investigation. Even in this section, the Final Determination does not provide detailed explanation as to what "reasonable" differences mean, or any supporting evidence for the finding of "reasonable differences". Nor does the Final Determination connect that finding with the price effects analysis. In reaching such finding, MOFCOM disregarded abundant evidence that showed significant price differences among the three product categories, without giving any reasoned explanation as to why it did so. While China alleges that MOFCOM considered the China Customs data of the Subject Imports from the Republic of Indonesia ("Indonesia") as the basis for its finding of "reasonable differences" in price, that allegation is unsupported by the Final Determination. Japan also notes that the relevant data included only data corresponding to *two* of the three product categories.

9. In an attempt to justify the defects in MOFCOM's price effects findings, China argues that products' differences relevant to price comparability are limited to "significant" differences "in price". However, the focus on "significant" differences is not supported by the text of Articles 3.1 and 3.2 of the Anti-Dumping Agreement or by any findings made by past panels or the Appellate Body. China also refers to Article 2.4 of the Anti-Dumping Agreement as a contextual basis for this focus on price differences, as that provision requires allowances be made only for differences that impact prices even in "a more stringent dumping context". However, price adjustments under Article 2.4 of the Anti-Dumping Agreement made in the context of a dumping determination cannot be juxtaposed with price comparisons conducted in the context of price effects analysis, given the differences in the purposes of price comparisons made in these two contexts.

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[5] Panel Report, *China – Broiler Products*, fn 737 to para. 7.483 ("An authority only needs to make an adjustment where the difference *in physical or other characteristics* of the products *affects their competitive relationship*".). (emphasis added)

10. China also argues that the Panel is prevented from examining Japan's arguments based on Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by alleging that Japan essentially challenges the manner in which MOFCOM used facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement. However, MOFCOM's use of facts available in the Final Determination was not even related to price comparability among the three product categories, but related only to the classification of the Subject Imports into each series of stainless steel grades and to the volumes and prices of the Subject Imports from Indonesia and the European Union. Japan takes no position as to whether MOFCOM's use of facts available was consistent with the Anti-Dumping Agreement. The issue here is that MOFCOM's analysis did not comply with the requirement to involve an "objective examination" based on "positive evidence".

11. As the foregoing shows, MOFCOM's price effects analysis fell short of explaining whether the three product categories were substitutable and thus had competitive relationships with each other despite their significant differences, and whether and how the alleged movements in the prices of the Subject Imports and domestic like products were not results of changes in the product mix, rather than genuine changes in price. For the reasons described in this section, MOFCOM's price effects analysis, which made no distinctions among the three product categories, did not involve an objective examination based on positive evidence that could provide a meaningful basis to examine the existence of price effects, and therefore was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

B. Failure to Ensure Price Comparability in Terms of Different Series of Grades and Failure to Perform Series-Specific Analyses That Involved an Objective Examination Based on Positive Evidence

12. China acknowledges that the differences in the various series of stainless steel grades impact price comparability, and, although the Final Determination is unclear in this respect, China maintains that MOFCOM's price effects analysis was made solely on a series-by-series basis. However, MOFCOM's series-specific price effects analyses failed to substantiate any explanatory force of the Subject Imports in each series of grades for the alleged effects on the prices of the domestic like products in the corresponding series, due to the following flaws.

13. First, MOFCOM did not differentiate between the three product categories when attempting to conduct series-specific price effects analyses. Thus, those analyses failed to ensure price comparability between each basket of series-specific Subject Imports and the basket of domestic like products in the corresponding series.

14. Second, the data on which MOFCOM relied to analyse price effects for each series of grades was inconsistent, which indicates that the classification of the Subject Imports into each series of grades was inaccurate. Data with such a fundamental defect cannot substantiate any explanatory force of the Subject Imports for the alleged price effects, and analysis based thereon cannot constitute an objective examination based on positive evidence.

15. Third, MOFCOM's series-specific analyses did not contain clear price effects findings for each series of grades. MOFCOM only made some specific findings of price effects with regard to the 300 series and the "other series", concerning which the Final Determination ambiguously states that the Subject Imports had "adverse effects" on the prices of the domestic like products. The Final Determination does not even clarify which of the three types of price effects MOFCOM found, and MOFCOM did not make any specific findings of price effects with regard to the 400 series or the 200 series. China alleges in this Panel proceeding that MOFCOM properly "consider[ed]" the alleged price effects for each series of stainless steel grades, but that allegation is unsupported by the Final Determination and is an *ex post* rationalization.

16. Fourth, MOFCOM's series-specific analyses did not provide any reasoned explanation as to how the findings of "adverse" price effects were not undermined by the divergence between the price trends of the Subject Imports and those of the domestic like products, and by the

consistent overselling by the Subject Imports, both of which were shown in the data that was available before MOFCOM during the underlying investigation.

17. Given the foregoing flaws, MOFCOM's series-specific analyses could not have provided positive evidence for an overall finding of an alleged price depressing effect of the Subject Imports. The unreasonableness of MOFCOM's series-specific price effects analyses leads to the more plausible reading of the Final Determination that MOFCOM's price effects finding was ultimately based on an analysis of the weighted average prices of the Subject Imports as a whole and those of the domestic like products as a whole, meaning that MOFCOM failed to ensure price comparability in terms of the various series of stainless steel grades. Thus, MOFCOM's price effects analysis was also inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in this regard.

18. Even assuming, *arguendo*, that MOFCOM's overall finding of a price depressing effect of the Subject Imports was based on series-specific analyses, those analyses contained significant flaws as explained above, and cannot be considered to have involved an objective examination based on positive evidence. Thus, MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

C. Failure to Conduct an Objective Examination Based on Positive Evidence of Price Trends

19. Japan also points out the lack of proper assessment of the price trends of the Subject Imports and domestic like products in MOFCOM's price effects analysis, which constitutes a failure to involve an objective examination based on positive evidence in the context of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

20. First, a finding of a price depressing effect necessarily involves a finding that the prices of domestic like products have decreased, since that is the meaning of the word "depressed". However, MOFCOM concluded that the prices of domestic like products were depressed, even though it expressly acknowledged that those prices showed an overall *rising trend* during the period of investigation ("POI"), and offered no reasoned explanation to support this conclusion.

21. Second, a finding of price depression also must include an examination of the explanatory force of subject imports for the alleged price effects. This examination should not stop at merely referring to observed price trends; instead, it should involve an examination of the manner in which price trends in imported and domestic products interact and a reasoned explanation of the role of the subject imports in the alleged price effects. Even though a finding of non-parallel price trends does not foreclose a conclusion that the subject imports had a price depressing effect, such a conclusion does require a well-reasoned explanation, because divergent price trends tend to undermine the existence of interactions between the import prices and domestic prices. In the case at hand, the price trends of the Subject Imports and the domestic like products were obviously divergent, both on an aggregated basis and on a series-by-series basis. However, despite China's *ex post* rationalizations in this proceeding, MOFCOM did not provide any reasoned explanation as to how the largely divergent price trends of the Subject Imports and domestic like products interacted with each other.

D. Failure to Provide a Reasoned Explanation as to How the Fact That the Subject Imports Consistently Oversold the Domestic Like Products Did Not Undermine MOFCOM's Finding of Price Depression

22. Finally, Japan submits that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it did not involve an objective examination based on positive evidence due to the failure to provide any reasoned explanation as to how the consistent overselling by the Subject Imports did not undermine MOFCOM's finding of price depression.

23. Under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, a price effects analysis must involve an objective examination based on positive evidence, which in turn requires a

well-reasoned explanation as to how subject imports may have explanatory force for the alleged price effects on domestic like products. Accordingly, a finding of price depressing effects that is made when the subject imports oversell the domestic like products requires a well-reasoned explanation as to how that overselling does not undermine a finding of price depression. This is because, while overselling by subject imports may not preclude the possibility that subject imports had price depressing effects, overselling does tend to undermine that conclusion.

24. In the case at hand, based on the data presented in the Final Determination, there is no doubt that the Subject Imports consistently oversold the domestic like products during the whole POI, both when comparing the prices of the Subject Imports and those of the domestic like products on an aggregated basis and on a series-by-series basis, except for an isolated, limited instance for the 300 series. However, MOFCOM merely mentioned that limited instance, but did not provide any reasoned explanation as to (i) how the Subject Imports could have any explanatory force for the alleged price depression despite the aforementioned overselling, or (ii) how an isolated, limited instance of underselling in one series of grades, which was observed only during one quarter of a year out of a POI that is four and a quarter years long, may support a general finding of price depressing effects of the Subject Imports as a whole.

25. The only attempt at an explanation to address the consistent overselling by the Subject Imports contained in the Final Determination is a passing reference to a "brand effect" allegedly possessed by the Subject Imports. However, the Final Determination provides no explanation as to what this alleged "brand effect" encompasses or how it would or did materialize, nor does the Final Determination point to any evidence in support of its existence. Although China refers to certain evidence available to MOFCOM during the underlying investigation, that evidence actually shows that any brand effect that might have existed was possessed by the domestic like products, not the Subject Imports. This confirms that, in this regard as well, MOFCOM's analysis did not involve an objective examination based on positive evidence.

III. MOFCOM'S CUMULATIVE ASSESSMENT WAS INCONSISTENT WITH ARTICLES 3.1 AND 3.3 OF THE ANTI-DUMPING AGREEMENT

A. Legal Standards Under Articles 3.1 and 3.3 of Anti-Dumping Agreement

26. Japan claims that MOFCOM's determination that cumulative assessment was appropriate was not based on positive evidence and did not involve an objective examination, and that MOFCOM's cumulative assessment therefore was inconsistent with Articles 3.1 and 3.3 of the Anti-Dumping Agreement.

27. Under Articles 3.1 and 3.3 of the Anti-Dumping Agreement, investigating authorities must determine, through an objective examination based on positive evidence, whether cumulative assessment "is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product". According to the panel in *EC – Tube or Pipe Fittings*, for cumulative assessment to be "appropriate", "cumulation must be suitable or fitting in the particular circumstances of a given case".[6] The Appellate Body in *EC – Tube or Pipe Fittings* pointed out that cumulation is provided for in Article 3.3 of the Anti-Dumping Agreement to deal with a situation where "imports from [countries with low or declining import volume] could not *individually* be identified as causing injury", using "an exclusively country-specific analysis", and "the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury".[7]

28. Article VI of the GATT 1994 defines dumping as "products of *one country*"[8] being sold below normal value, which indicates that anti-dumping duties may be imposed only on imports from those individual countries that are in fact causing material injury to the domestic industry. In other words, a causal link between subject imports and material injury must be

[6] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.241.
[7] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.
[8] Emphasis added.

found on an *individual*, country-by-country basis. Article 3.3 of the Anti-Dumping Agreement is not an exception, and should not be understood to allow the imposition of anti-dumping duties on imports from a country, if that country's imports do not cause material injury to the domestic industry. An imposition of anti-dumping duties under such circumstances would be contrary to Article VI of the GATT 1994. Thus, an "appropriate" cumulative assessment should refer to a situation where cumulative assessment, performed in a manner that involves an objective examination based on positive evidence, can determine that subject imports from each source have caused material injury to the domestic industry, even without country-specific analysis.

29. Accordingly, Japan understands that the "conditions of competition" render cumulative assessment "appropriate" where the subject imports from each source compete with each other, and where the subject imports from one source therefore can substitute for the subject imports from other sources. Under those circumstances, even if dumped imports from all but one of the subject countries ceased to exist as a result of anti-dumping duties, their market position may be taken over by dumped imports from that one remaining subject country rather than by the domestic like products. The status of the domestic industry then, would not improve unless anti-dumping duties also are imposed on imports from the remaining subject country. Japan understands that this should be the exact situation where, as the Appellate Body described, "an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from [two or more] countries and the injury suffered by the domestic industry", "even though they are in fact causing injury".[9] Under those circumstances, even without conducting country-specific analysis, a proper cumulative assessment could provide positive evidence about the causal relationship between the subject imports from each source and material injury.

30. Thus, for an investigating authority to determine that cumulative assessment is "appropriate", by means of an objective examination based on positive evidence, the authority should perform a careful assessment of the facts and evidence that are relevant to the "conditions of competition", from the perspective of whether the subject imports from each source compete with each other, and whether imports from one source can substitute for lower levels of imports from other sources. As the panel in *EC – Tube or Pipe Fittings* confirmed, there are no rigid categories of factors to be examined. Instead, facts and evidence before the investigating authorities that are relevant to the competitive overlaps and substitutability among the subject imports in the relevant case should be considered to assess whether cumulative assessment is "appropriate" in light of the "conditions of competition", in a manner consistent with Articles 3.1 and 3.3 of the Anti-Dumping Agreement. When this kind of careful assessment of relevant factors is performed, cumulative assessment may provide positive evidence for a causal link between the material injury and the subject imports from each source, even "without country-specific analysis".

31. Despite China's allegations, Japan is not arguing that a country-specific injury assessment is a necessary prerequisite for, or a requisite part of, cumulative assessment. What Japan is arguing is that an investigating authority's assessment of "conditions of competition" to determine whether cumulative assessment is "appropriate" must not ignore the factors that are relevant to discerning the existence or lack of competitive overlaps and substitutability. Such factors include, for example, physical characteristics, uses, price levels, and distribution channels of the subject imports.

B. MOFCOM's Determination That Cumulative Assessment Was Appropriate Did Not Involve an Objective Examination Based on Positive Evidence

32. In the investigation at issue, MOFCOM determined that cumulative assessment under Article 3.3 of the Anti-Dumping Agreement was "appropriate", alleging that there was a competitive relationship among the Subject Imports and between the Subject Imports and the domestic like products. However, that determination was not based on positive evidence and did not involve an objective examination, as MOFCOM did not identify factual circumstances in which the Subject Imports competed with each other and with the domestic like products, such that the Subject Imports from any source could substitute for the Subject Imports from any other source.

[9] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.

33. Indeed, the evidence available to MOFCOM indicated that the Subject Imports were comprised of different product categories in different series of grades, in varying volumes and proportions, with divergent and independent price levels, and that the Subject Imports from each source focused on different product categories and series of grades, and had different distribution channels and customers. Specifically, Japan has explained that most of the Subject Imports of stainless steel slabs from Indonesia and most of the Subject Imports from the Republic of Korea ("Korea") were traded as intra-group sales, while the Subject Imports from Japan and the European Union were more market-focused.

34. The Final Determination alleges, without substantiation, that a general similarity exists among the Subject Imports in terms of "physical and chemical characteristics, product usage, raw material, production technology" as well as "customer group, and the domestic downstream users". The Final Determination then acknowledges, without offering further explanation, that "there were many grades of the stainless steel billet and hot-rolled stainless steel plate (coil)", and that "the volume and price change trend of the imports from four countries (regions) were different" but makes only conclusory statements that "it was normal to have a certain difference on different specifications and models", "[a] cumulative assessment does not require completely identical competitive conditions of different countries (regions)", and that "the differences in the volume and price change trends could not refute a competitive relationship". These statements, which do not identify positive evidence supporting the conclusions, cannot amount to "a reasoned finding that cumulation is appropriate on the basis of the particular circumstances" as required by the panel in *EC – Tube or Pipe Fittings*.[10]

35. During this proceeding, China asserts that some alleged "overlap" existed among the Subject Imports from the four jurisdictions, and that this overlap was examined. However, most of the observations that China makes about the conditions of competition are *ex post* explanations, which do not appear and are not discussed in the Final Determination. The only "overlap" mentioned in the Final Determination is that "all of the dumped imports … included 300-series products". However, "300-series products" actually comprise different product categories – stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates. Among them, the Final Determination does not find any competitive relationship in a way that establishes that they can mutually make up for each other. Further, there is no specific product category for which the Final Determination finds the Subject Imports from all four sources were competing with each other. It is impossible to find that any portion of the Subject Imports from each source compete with, and could substitute for, each other, even for the "300-series products", considering the evidence that suggests the opposite.

36. China also alleges that MOFCOM assessed the conditions of competition "keeping in mind the existence of intra-group sales" concerning the Subject Imports from Korea and Indonesia. Intra-group sales are made based on a company group's business choices, and the prices of intra-group sales normally are determined based on each business group's tax considerations as "transfer prices", and not through the interaction of open market forces. Thus, purchasers in intra-group sales are very unlikely to replace those transactions with goods purchased from other, unaffiliated, sellers by comparing market prices. However, MOFCOM did not even refer to these characteristics of intra-group sales from Korea and Indonesia in its Final Determination. The Final Determination states only that "the companies in the EU, Japan and Korea and Indonesia sold the dumped imports to the domestic market by direct sale, distribution and other manners", and thus, "all manufacturers or dealers had the same or similar pricing strategies; the dumped imports had the same customer group, and the domestic downstream users could freely purchase and use the dumped imports originating in the EU, Japan, Korea and Indonesia". The Final Determination is silent on *whether* and *how* MOFCOM considered the existence of intra-group sales. Such conclusory statements do not constitute the required assessment of the "conditions of competition".

37. For these reasons, MOFCOM's determination that cumulative assessment was appropriate, without careful analysis of the conditions of competition and how the factual circumstances of the case made cumulation appropriate, cannot be considered to have involved an

[10] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.239.

objective examination based on positive evidence, and thus, the cumulative assessment was inconsistent with Articles 3.1 and 3.3 of the Anti-Dumping Agreement.

38. Further, Japan claims that, as a consequence of MOFCOM's cumulative assessment being inconsistent with Article 3.3 of the Anti-Dumping Agreement, MOFCOM's analyses of the alleged effects of the Subject Imports on the prices of domestic like products, the impact of the Subject Imports on the domestic industry, and causation also were inconsistent with Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.

IV. MOFCOM'S IMPACT ANALYSIS WAS INCONSISTENT WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

39. Japan also claims that MOFCOM's analysis of the state of the domestic industry was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, at a minimum, investigating authorities must conduct an objective examination based on positive evidence of all the factors listed in Article 3.4 of the Anti-Dumping Agreement. The investigating authorities' assessment in this examination must provide a meaningful basis for examination of the explanatory force of subject imports for the state of the domestic industry, considering both negative and positive trends. However, MOFCOM's analysis of the impact on the domestic industry did not meet this requirement for the following three reasons.

40. First, MOFCOM's analysis addressed only certain deteriorating movements in the individual factors, and did not consider contradicting evidence. In particular, MOFCOM's analysis focused on negative trends in domestic sales prices and volumes in 2015, but provided no reasoned explanation as to how MOFCOM found the existence of injury, considering the facts that (i) there were positive trends in sales prices and volumes during 2016 and 2017 and over the entire POI, and (ii) the volume of the Subject Imports decreased during 2015 and then significantly increased only after 2017. With regard to price trends, while the Final Determination only references the overall weighted average prices of domestic like products, even if a series-specific analysis were to be conducted, the Final Determination provides no reasoned explanation as to how the positive trends in the prices of the 400 and other series of domestic like products impacted the explanatory force of the Subject Imports for the movement in the prices of domestic like products, and thus, the state of the domestic industry. Also, MOFCOM's assessment of the market share of domestic like products was disconnected from the evolution of the market share of the Subject Imports, and inconsistent with the fact that the Subject Imports consistently oversold the domestic like products. For these reasons, MOFCOM's analysis did not provide a meaningful basis for examination of the explanatory force of the Subject Imports for the state of the domestic industry.

41. Second, the calculation and assessment of some injury factors in the Final Determination, such as domestic apparent consumption, total domestic production, volume of Subject Imports, and market shares of the domestic like products and the Subject Imports, were unclear and inconsistent, as it includes contradictory data for these factors. For example, the figures representing the domestic apparent consumption, as well as the domestic industry's market share, were inconsistent with other data contained in the Final Determination and based on inconsistent and unsubstantiated calculation methods. China's attempted rebuttals only confirm concerns on whether the factors considered by MOFCOM were examined objectively and could provide any positive evidence for the examination of the state of the domestic industry.

42. Third, MOFCOM's analysis focused excessively on negative trends in certain factors without due consideration for the fluctuations therein, and MOFCOM did not provide any reasoned explanation as to how it concluded that overall material injury existed despite the identification of positive trends. This was the case for capacity utilization, ending inventory, pre-tax profit, market share, and return on investment.

V. MOFCOM'S CAUSATION ANALYSIS WAS INCONSISTENT WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

43. Japan makes three independent claims concerning MOFCOM's causation analysis, which relate to the requirements set forth in the first, second, and third sentences of Article 3.5 of the Anti-Dumping Agreement, respectively, and which also are based on the requirement that investigating authorities conduct an objective examination based on positive evidence under Article 3.1 of the Anti-Dumping Agreement.

44. First, Japan claims that, as a consequence of the fact that MOFCOM's analyses of price effects and impact on the domestic industry were inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement, respectively, MOFCOM's causation analysis also was inconsistent with Article 3.1 and the first sentence of Article 3.5 of the Anti-Dumping Agreement. Under the first sentence of Article 3.5 of the Anti-Dumping Agreement, investigating authorities must demonstrate that subject imports are, "through the effects of dumping, *as set forth in paragraphs 2 and 4*, causing injury".[11] Japan has demonstrated that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and that MOFCOM's analysis of the impact of the Subject Imports on the domestic industry was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. MOFCOM's causation analysis relied on those flawed price effects and impact analyses, and thereby failed to ascertain that the Subject Imports were causing any injury through an objective examination based on positive evidence.

45. The second claim, which is separate and independent from the first claim, is that MOFCOM's causation analysis was inconsistent with Article 3.1 and the second sentence of Article 3.5 of the Anti-Dumping Agreement. The second sentence of Article 3.5 of the Anti-Dumping Agreement requires investigating authorities to demonstrate a causal relationship between subject imports and the alleged injury to the domestic industry "based on an examination of *all relevant evidence* before the authorities".[12] "[A]ll relevant evidence" necessarily includes "the volume of subject imports and their price effects listed under Article[] 3.2 … [of the Anti-Dumping Agreement], as well as all relevant economic factors concerning the state of the domestic industry listed in Article[] 3.4 … [of the Anti-Dumping Agreement]".[13] However, the demonstration of causation also covers "a broader scope than the scope of the elements considered in relation to price depression and suppression under Article[] 3.2"[14] and "the examination under Article[] 3.4".[15] Thus, a claim under the second sentence of Article 3.5 of the Anti-Dumping Agreement may touch upon any issues that cast doubt on "the link between subject imports, on the one hand, and each of economic factors listed in Article[] 3.4 … on the other hand", as those issues could provide "relevant evidence" for the causation analysis pursuant to Article 3.5 of the Anti-Dumping Agreement.[16]

46. MOFCOM's causation analysis failed to constitute an objective examination based on positive evidence because it failed to comply with the requirement to examine all relevant evidence. First, MOFCOM's causation analysis did not examine the link between the Subject Imports and the alleged injury to the domestic industry on a product-specific basis or on a series-specific basis, even though, given the factual circumstances of this case (i.e. the lack of substitutability, and thus competitive relationships, among the distinct product categories and among the different series of stainless steel grades), a demonstration of causation cannot constitute an objective examination based on positive evidence without such sectorial examinations. Specifically, although (i) MOFCOM's price effects analysis failed to examine individual segments of the Subject Imports and the corresponding domestic like products, and (ii) MOFCOM's impact analysis did not involve a sectorial injury assessment, individually examining the commercial flow and state of sales in China, and the impacts on the domestic industry, specifying the period and product segments in which the alleged price effects were found, MOFCOM also did not engage in any sectorial examination in its causation analysis. Second, MOFCOM's causation analysis did not properly consider the low market share of the

[11] Emphasis added.
[12] Emphasis added.
[13] Appellate Body Report, *China – GOES*, para. 147.
[14] Appellate Body Report, *China – GOES*, para. 147.
[15] Appellate Body Report, *China – GOES*, para. 150.
[16] Appellate Body Report, *China – GOES*, para. 148.

Subject Imports over the POI, which casts serious doubts on the alleged "significant squeeze on the market space of domestic like products" by the Subject Imports. Finally, MOFCOM's causation analysis did not properly address the fact that the Subject Imports consistently oversold the domestic like products throughout the POI, which casts serious doubts on the existence of any causal relationship between the Subject Imports and the alleged injury to the domestic industry.

47. The third claim is that MOFCOM's non-attribution analysis was inconsistent with Article 3.1 and the third sentence of Article 3.5 of the Anti-Dumping Agreement. According to the third sentence of Article 3.5 of the Anti-Dumping Agreement, investigating authorities must "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and ensure that "the injuries caused by these other factors must not be attributed to the dumped imports". The factors become *known* when they "come within the scope of knowledge" of the investigating authority, for example, when interested parties have "substantiated the existence of such a factor" and pointed out an impact on the domestic industry caused by that factor during the anti-dumping proceedings.[17] When other factors are known, investigating authorities must "separat[e] and distinguish[] the injurious effects of the other factors from the injurious effects of the dumped imports".[18]

48. During the underlying investigation, interested parties substantiated both a decrease and an increase in the world market price of nickel, as well as the effect of more stringent environmental standards in China, and pointed out the impact of these three factors on the domestic industry. However, even though all of these circumstances were factors other than the Subject Imports, were known to MOFCOM, and were impacting the state of the domestic industry, MOFCOM's causation analysis failed to separate and distinguish the effects of any of these factors. In the present proceeding, China refers to various statements in the Final Determination in an attempt to show that MOFCOM separated and distinguished the effects of these other factors, but those are merely superficial, conclusory statements alleging that those factors could not refute the causal link between the Subject Imports and the alleged injury to the domestic industry, or that they did not impact the state of the domestic industry. China has failed to submit any evidence showing data that was available to MOFCOM during the underlying investigation and used by MOFCOM to arrive at the aforementioned conclusions.

VI. MOFCOM'S DEFINITION OF THE DOMESTIC INDUSTRY WAS INCONSISTENT WITH ARTICLES 4.1 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

49. Japan claims that MOFCOM's definition of the domestic industry was inconsistent with Articles 4.1 and 3.1 of the Anti-Dumping Agreement. This claim is based on three different arguments, which address three different aspects of MOFCOM's flawed definition of the domestic industry, all of which ultimately relate to the same core issue: MOFCOM's definition of the domestic industry introduced a material risk of distortion in the injury analysis.

50. Pursuant to Article 4.1 of the Anti-Dumping Agreement, the term "domestic industry" could be defined as "those … whose collective output of the products constitutes a major proportion of the total domestic production of those products". The Appellate Body read the "major proportion" requirement as "having both quantitative and qualitative connotations"[19], and found that an investigating authority shall ensure that the defined domestic industry "substantially reflects the total production of the producers as a whole" and "must not act so as to give rise to a material risk of distortion", to ensure the accuracy of an injury analysis.[20] The Appellate Body further stated, in connection with the concept of "material risk of distortion", the "process of the domestic industry definition may be inconsistent with Articles 4.1 and 3.1 not only when distortion actually occurs, but also when the process in

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[17] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.433. See also Panel Reports, *China – Autos (US)*, para. 7.323; *Thailand – H-Beams*, para. 7.273; and *EU – Footwear (China)*, para. 7.484. See also, *a contrario*, Panel Report, *China – X-Ray Equipment*, para. 7.267.

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

[19] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302.

[20] Appellate Body Report, *EC – Fasteners (China)*, paras. 412 and 414.

question *risks or is susceptible to lead to distortion*".[21] Accordingly, when the domestic industry is defined in a manner that introduces a material *risk* of distortion in an injury analysis, that definition of the domestic industry is inconsistent with both Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

51. In the investigation at issue, failures in MOFCOM's definition of the domestic industry introduced a material risk of distortion in at least the three following aspects. First, MOFCOM's calculation method, which used the external sales volume of stainless steel slabs plus the production volume of hot-rolled stainless steel coils and hot-rolled stainless steel plates as an indicator to calculate the proportion of the domestic industry, gave rise to structural risks of overestimating the domestic industry's representativeness of the total domestic production. In particular, Japan has pointed out that if the defined domestic industry had a higher proportion of external sales compared to those domestic companies not included in the domestic industry, MOFCOM's calculation method could overestimate the proportion of the domestic industry. As such, MOFCOM's calculation method is structurally biased toward inclusion of those domestic producers who have a higher proportion of external sales of stainless steel slabs, who also are more exposed to direct competition from the Subject Imports, and thus are more susceptible to the alleged injurious effects of the Subject Imports.

52. China's allegation that the example Japan relies on in its first written submission to present the existence of a risk of overestimation is "artificial and hypothetical" is inapposite, because the relevant question is not whether overestimation actually occurred, but whether there was a *risk* of overestimation. As such, the example included in Japan's first written submission, which is "a simplified example", effectively demonstrated the existence of the *risk* of overestimation.

53. China further alleges that the impact of the MOFCOM's calculation method is "negligible" or "very low". In response, Japan has clarified that there is no information in the Final Determination by which to conclude that the distortion introduced by MOFCOM's calculation method was negligible. Furthermore, Japan has stressed that it takes issue with the *structural risk* of overestimation, rather than the numerical accuracy or impact of the calculation method. Notably, in previous cases the Appellate Body has found it unnecessary to analyse the numerical impact of the method of defining the domestic industry when reaching a finding of inconsistency with Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

54. Second, MOFCOM disregarded the potential uniqueness of the domestic industry in terms of the production proportions of stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates. In particular, based on the specific evidence that MOFCOM had from the very beginning of the proceeding, MOFCOM must have been able to understand the possibility that the domestic industry's production ratio of the three product categories differed from the production ratios for total domestic production. However, MOFCOM's definition of the domestic industry simply assumed that the alleged effects and impacts of the Subject Imports were suffered evenly by all domestic like products without providing any reasoned explanation for this assumption. MOFCOM's failure to consider the potential risk of overrepresentation of a particular product category, and the representativeness of the defined domestic industry in terms of the proportion of the three product categories, means that MOFCOM failed to ensure that the definition of the domestic industry did not give rise to a material risk of distortion in the injury analysis.

55. Third, the proportion allegedly represented by the domestic industry is far higher than, and not reconcilable with, the market share figures for the domestic industry in the Final Determination. Specifically, the proportion of total domestic production allegedly represented by the domestic industry was two or three times as large as the figures for the domestic industry's market share contained in the Final Determination (the calculation method of which is not explained anywhere in the Final Determination) and the market share of the domestic industry, calculated as the domestic sales of the domestic industry over the domestic apparent consumption. The high discrepancy between these figures, which was not explained in the Final Determination, indicates that the producers comprising the domestic industry have some unique business characteristics that affect either the

[21] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.321. (emphasis added)

production volume or the domestic sales. Thus, MOFCOM's definition of the domestic industry introduced a material risk of distortion in the injury analysis.

56. China attempts to account for the discrepancy by referencing (i) the difference between the production volume and the sales volume or (ii) the exclusion of some producers from the calculation. However, even if such a huge discrepancy may be explained to a certain degree by China's allegations (which in any event are not explained in the Final Determination), serious concerns remain as to whether the producers included in the defined domestic industry genuinely represented a major proportion of the total production, both in qualitative and quantitative terms.

57. Lastly, China's allegation that Japan's claim and arguments regarding MOFCOM's definition of the domestic industry is outside the Panel's terms of reference cannot be sustained because the allegation relies on an inaccurate reading of Japan's request for the establishment of a panel ("Japan's Panel Request"). The arguments Japan has developed throughout the proceedings are based on a claim contained in item (b) of paragraph 6 of Japan's Panel Request, which rests on Articles 4.1 and 3.1 of the Anti-Dumping Agreement, interpreted together, and is different from a different, separate claim contained in item (a) of paragraph 6 of Japan's Panel Request.

VII. MOFCOM'S TREATMENT OF CONFIDENTIAL INFORMATION WAS INCONSISTENT WITH ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT

58. Japan also claims that MOFCOM failed to comply with various procedural provisions of the Anti-Dumping Agreement, and thereby harmed the interested parties' due process rights. First, MOFCOM's treatment of the names of certain companies as confidential was inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. Under these provisions, investigating authorities must ensure that (i) good cause is shown for confidential treatment; and (ii) the submitting parties provide a summary of the confidential information in sufficient detail to permit a reasonable understanding of that information, or a statement of the reasons why such summarization was not possible.

59. In the case at issue, MOFCOM did not ensure either (i) or (ii) above when it treated the names of companies excluded from the domestic industry in the Application as confidential. MOFCOM failed to ensure that good cause was shown for the confidential treatment of the companies' names. The Applicant made generic statements that company names were "trade secrets", without providing any explanation or evidence showing why there was good cause to treat those names (which by their nature are not trade secrets) as confidential. At the same time, sufficient information was available at the time of the Application to determine that no good cause had been shown and that the information at issue was not confidential. Japan also has explained that the fact that the company names at issue eventually were disclosed is not relevant to the assessment that MOFCOM should have conducted at the time confidential treatment was requested, as the due process rights of the Japanese Respondents actually were harmed by the improper treatment of the information as confidential at the time that MOFCOM received the Application, and belated disclosure did not remedy that harm.

60. MOFCOM also failed to ensure that non-confidential summaries (or an explanation of the exceptional circumstances that prevented summarization) were furnished. This is proven by the total absence of any such summaries or explanations in the underlying investigation record. The descriptor "[Enterprise Name]", with which the relevant company names were replaced, does not constitute a proper summary of the information, as it does not allow any understanding of the substance of the nondisclosed information (i.e. which companies were excluded). If MOFCOM considered such a summary to be impossible, MOFCOM should have required the Applicant to identify the exceptional circumstances responsible for that situation and to provide a statement explaining the reasons why summarization was not possible. MOFCOM failed to do so.

VIII. MOFCOM'S DISCLOSURE OF ESSENTIAL FACTS WAS INCONSISTENT WITH ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

61. Article 6.9 of the Anti-Dumping Agreement requires that investigating authorities disclose "the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures", the disclosure of which "ensure[s] the ability of interested parties to defend their interests".[22] Japan claims that MOFCOM failed to comply with the disclosure obligations under Article 6.9 of the Anti-Dumping Agreement because it failed to disclose the essential facts underlying (i) its definition of the products under investigation, (ii) its analysis of price effects, (iii) its use of cumulative assessment, (iv) its analysis of the state of the domestic industry, (v) its analysis of alleged causation, and (vi) its definition of the domestic industry. In response to this claim, China insisted that the documents dated 5 July 2019 that MOFCOM issued for the disclosure of essential facts did disclose the essential facts under consideration, or that certain facts are outside the disclosure obligations under Article 6.9 of the Anti-Dumping Agreement.

62. Japan disagrees with China's assertions, corrects China's erroneous interpretation of the obligations under Article 6.9 of the Anti-Dumping Agreement, and further reveals that China's alleged disclosure in fact does not meet the necessary standards for disclosure under Article 6.9 of the Anti-Dumping Agreement. Japan's rebuttal regarding the necessary standards for disclosure of the essential facts points out that (i) whether a fact qualifies as "essential" is not determined solely in connection with the findings directly required to satisfy the substantive obligations as set out by the specific provisions in the Anti-Dumping Agreement but also in light of "*the factual circumstances of each case, including the arguments and evidence submitted by the interested parties*"[23], (ii) the right or ability of the interested parties to defend their interests includes not only the right or ability to make arguments based on specific rules but also, more broadly, the right or ability to "comment on the completeness and correctness of the *facts* being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those *facts*"[24], (iii) "essential facts" include not only those facts that support the decision ultimately reached by the investigating authorities, but also those facts that are *necessary to the process of analysis and decision-making* by the investigating authorities[25], and (iv) the investigating authorities are required to make disclosures that allow the interested parties to understand which specific facts were selected as the basis of the investigating authorities' final determination, rather than simply disclosing some or all of the facts that merely are or were known to the investigating authorities.[26]

IX. THE DISCLOSURES IN MOFCOM'S PUBLIC NOTICE WERE INCONSISTENT WITH ARTICLES 12.2 AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

63. Finally, Japan claims that MOFCOM failed to fulfil the disclosure obligations in Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, pursuant to which investigating authorities must disclose, in their public notices, the findings and conclusions reached on all material issues of fact and law, in sufficient detail, and all relevant information on the matters of fact and law and all reasons which led to the imposition of final measures. According to past panels, "material" issues are those "that must necessarily be resolved in order for the investigating authorities to be able to reach their determination"[27], and the disclosure of those issues must be made in sufficient detail to ensure that the reasons for reaching the relevant conclusions can be understood by the public, including interested parties.[28]

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

[23] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130; *Russia – Commercial Vehicles*, para. 5.178; and Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.203. (emphasis added)

[24] Appellate Body Report, *China – GOES*, fn 390 to para. 240 (quoting Panel Report, *EC – Salmon (Norway)* para. 7.805). (emphasis added)

[25] Panel Reports, *EC – Salmon (Norway)*, para. 7.807; *Ukraine – Ammonium Nitrate*, para. 7.203.

[26] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133; Panel Report, *Guatemala – Cement II*, para. 8.229.

[27] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.

[28] Panel Report, *China – X-Ray Equipment*, para. 7.459.

64. Japan claims that MOFCOM did not properly disclose information relating to (i) its definition of the products under investigation, (ii) its analysis of price effects, (iii) its use of cumulative assessment, (iv) its analysis of the state of the domestic industry, (v) its analysis of causation, and (vi) its definition of the domestic industry. All of these matters were material and led to the imposition of the final measure.

X. CONCLUSION

65. As a consequence of the inconsistencies with the Anti-Dumping Agreement described above, China's anti-dumping measures on the Subject Imports from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement, and MOFCOM's determination to levy the anti-dumping duties at issue is inconsistent with Article Vl:6(a) of the GATT 1994. Japan requests the Panel to find that China's measures are inconsistent with the provisions of the Anti-Dumping Agreement discussed in sections II through IX above, as well as these two provisions. Japan also requests that the Panel recommend, pursuant to Article 19.1 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes, that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. The People's Republic of China ("China") has shown, in its first and second written submissions, opening and closing statements at the first and second substantive meetings, and responses to questions from the Panel to the parties after the first and second substantive meetings, that all of Japan's claims that the imposition by China's Ministry of Commerce ("MOFCOM") of anti-dumping duties on imports of certain stainless steel products originating from Japan would allegedly be inconsistent with China's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994") are groundless and without merit. Indeed, China has established that the measures at issue are fully in line with China's WTO obligations.

II. ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

A. MOFCOM's use of the best information available

2. At the outset, it is clear from the kind of claims and arguments that Japan has put forward that Japan in essence challenges MOFCOM's use of the best information available to reach certain conclusions in its price effects determination. However, Japan has not raised a claim challenging the resort by MOFCOM to the facts available, or the type of information that MOFCOM decided to rely on as the "best information" available, under Article 6.8 and Annex II of the Anti-Dumping Agreement. Therefore, Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as developed in this case, must fail.

3. It is undisputed that MOFCOM relied on the best information available, pursuant to Article 6.8 and Annex II of the Anti-Dumping Agreement, for its price effects assessment. This was explicitly stated in the Final Determination.[1] This has also been acknowledged by Japan.[2] Japan's claims relating to MOFCOM's price effects determination in essence challenge MOFCOM's use of facts available. Japan focuses on the amount, type and/or quality of the evidence that MOFCOM used to reach its conclusions.

4. With respect to price comparability, MOFCOM applied facts available because exporting producers failed to cooperate. Specifically, as a result of the failure to cooperate, MOFCOM simply did not have the relevant information on the classification between billets, coils and plates. Therefore, as facts available, MOFCOM relied on the classification only by steel grade.[3] Japan failed to claim, let alone demonstrate, that MOFCOM's conclusions on facts available and the impossibility to distinguish by shape as a result of the lack of cooperation were inconsistent with Article 6.8 and/or Annex II of the Anti-Dumping Agreement. As a result, any arguments presented by Japan about the distinction by shape are entirely irrelevant to MOFCOM's determinations. However, even if assuming for the sake of argument that there would have been reasons to take into account that distinction (*quod non*), MOFCOM found that it was precluded from doing so and applied Article 6.8 of the Anti-Dumping Agreement. That remains unchallenged, and thus inevitably implies that MOFCOM was entitled pursuant to Article 6.8 to disregard, for its price comparison, any alleged differences between billets, coils and plates and to rely instead on the distinction by steel grade. For this reason alone, Japan's entire claim on this point fails.

5. With respect to the series-specific analyses of price effects, the severe lack of cooperation also precluded MOFCOM from having accurate series-specific information on volume and prices, forcing MOFCOM to make findings based on Article 6.8 of the Anti-Dumping Agreement. the lack

[1] Final Determination (Exhibit JPN-5.b), p. 44.
[2] See, for instance, Japan's responses to the Panel's questions, para. 76.
[3] Final Determination (Exhibit JPN-5.b), pp. 43-44.

of cooperation implied that MOFCOM only obtained limited series-specific volume and price information with respect to Japan and Korea (given that only one exporting producer fully cooperated, some provided partial information, and most exporting producers did not cooperate at all). For the EU and Indonesia, not a single exporting producer cooperated, depriving MOFCOM from any series-specific price and volume data at all.

6. Japan's claims in relation to these series-specific analyses of price effects take issue exactly with the approach adopted by MOFCOM to deal with the non-cooperation. Specifically, as regards MOFCOM's assessment of the price effects per series of steel grade, Japan takes issue with MOFCOM's findings of adverse price effects being "based only on partial, and partly inaccurate, evidence".[4] These are manifestly issues that can only be addressed under Article 6.8 and Annex II of the Anti-Dumping Agreement. MOFCOM's reliance on the best information available in this respect is undisputed and this goes to the heart of the sufficiency or accuracy of the data that MOFCOM's price effects analyses were based on. Given that this data was what MOFCOM considered to be the "best information available", it is inapposite for Japan to argue that this data was "partial", "inaccurate", or "arbitrarily selected" without a claim challenging the use of this data under Article 6.8 and Annex II of the Anti-Dumping Agreement. Obviously, data relied on pursuant to Article 6.8 is not the "first-best" information that MOFCOM could have used. MOFCOM correctly considered this to be the "second-best" information, or "reasonable replacements" for the missing information.[5] To the extent that Japan disagrees with that, Japan should have evidently raised such concerns under Article 6.8 and Annex II of the Anti-Dumping Agreement.

7. China considers that Japan's claims pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement must fail, given the absence of any claims under Article 6.8 and Annex II in Japan's panel request (and Japan's submissions).

B. MOFCOM did not fail to ensure price comparability

8. In line with the relevant requirements, and having detected that there were possible comparability issues in this investigation with respect to various models of the product at issue, MOFCOM took several steps to ensure compliance with its price comparability obligations. This process eventually led MOFCOM to determine that there was a comparability issue with respect to different models based on the series of steel grade. Accordingly, MOFCOM conducted its price effects assessment separately for each of the relevant series of steel grade: the 300-series, the 400-series, other series and the 200-series.

9. As regards the division of the product into different models based on the shape (billets, coils and plates), MOFCOM also sought, but was not able to obtain, relevant information from the interested parties regarding the different prices thereof. Thus, as stated in the Final Determination, MOFCOM "could not obtain the relevant information of classification of the stainless steel billet and hot-rolled stainless steel plate (coil)".[6] It was thus also precluded from making its price comparisons for the price effects analysis distinguishing by shape. This could have been the end of MOFCOM's analysis. In addition to that finding, MOFCOM nevertheless also made an effort to obtain insights in the possible impact of the shape on price comparability. Based on the best information available, MOFCOM concluded that the differences between these product models were "reasonable" and did not give rise to a price comparability issue that needed to be addressed.

10. China has established that MOFCOM clearly did not intend to leave any price comparability issue unaddressed, but made significant efforts to obtain from interested parties the information that would allow it to conduct its price effects analysis objectively, including by differentiating between different models of the product at issue, if appropriate. The severe lack of cooperation by interested parties and the resulting limited, incomplete or inconclusive information about the price variation between certain models at issue, led MOFCOM to rely on best information available. This lack of necessary information, and the fact that MOFCOM had to rely on the best information available to overcome this, is crucial when evaluating MOFCOM's compliance with its obligations under Articles 3.1 and 3.2. Indeed, the need to take steps to ensure price

[4] Japan's first written submission, para. 141.
[5] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.
[6] Final Determination (Exhibit JPN-5.b), p.44.

comparability "necessarily depends on the factual circumstances of the case and the evidence before the authority".[7]

11. MOFCOM's concluded that there was a price comparability issue with respect to the different series of steel grade, and this was supported by MOFCOM's assessment of the totality of the evidence before it, including the comments put forward by interested parties as well as MOFCOM's own assessment of the main characteristics of the product under investigation, and different models thereof. Contrary to the impression that Japan has tried to create throughout this dispute, alleging that MOFCOM disregarded the differences between various models of the product at issue, MOFCOM in fact made a detailed assessment of these differences, for instance at page 12 of the Final Determination. MOFCOM's assessment therein revealed that the stainless steel billets, hot-rolled coils and hot-rolled plates at issue were steel products with the same basic physical and chemical characteristics, which are defined by the metal content thereof, and similar usages and customer groups. MOFCOM also took note of the interested parties' comments, according to which the product under investigation could be divided into different series of steel grade, distinguished by the content of important alloy elements (such as chromium and nickel) added. According to the parties' comments, there were significant price differences between these series of products, mainly owed to differences in terms of the presence of nickel and/or manganese.[8] On this basis, MOFCOM concluded that the metal composition of the product under investigation is the most important factor in determining its price and use. The evidence before MOFCOM revealed that different models exist in the industry depending on the content of key ingredients such as nickel and chromium, and that there were significant price differences in the market between those models. MOFCOM therefore classified the product under investigation into 300-series, 400-series 200-series, and other series for the purposes of its price comparison.

12. MOFCOM further verified the foregoing by collecting additional information by exporting producers on their prices of the product at issue by series.[9] The data reported by the exporting producers in response to MOFCOM's request confirmed MOFCOM's conclusion that the product at issue was divided into various series of steel grade that had significant price differences between them. MOFCOM used this information, and corresponding data collected from the domestic industry, to assess the price effects of the dumped imports separately for each of the relevant series of steel grade.

13. Having determined that a price comparability issue existed with respect to the different series of steel grade, and in order to carry out its price effects consideration in an objective manner, MOFCOM considered the price effects individually for each of the relevant series.[10] This mean that, for each of the series, MOFCOM assessed the adverse effects of the dumped imports of the series concerned on the prices of the domestic like products *of the same series*. MOFCOM's assessment in this manner ensured compliance with its obligations as described above, as it guaranteed that the prices being compared were "comparable" and that MOFCOM's ultimate conclusions on the existence of adverse price effects were not affected by any differences in the product mix of the products being compared.

14. By contrast, MOFCOM concluded that there was no such price comparability issue with respect to different models based on shape (i.e. billets, coils and plates), as was claimed by some interested parties. Indeed, in the Final Determination, MOFCOM made a detailed assessment of the differences that existed between billets, coils and plates but concluded that these did not lead to a "substantial difference" in terms of their basic characteristics and that, in line with this, the mere shape difference did not lead to significant price differences.[11]

15. Thus, contrary to the picture that Japan tries to create, MOFCOM did address the differences that interested parties claimed to exist between billets, coils and plates for instance in terms of their physical and chemical characteristics, end uses and customer groups. MOFCOM's assessment revealed that billets, coils and plates were steel products with the same basic

[7] Panel Report, *China – Broiler Products,* para. 7.479.
[8] See, for instance, Japanese Respondents, Non-Injury Defense in the Stainless Steel Anti-Dumping Investigation (Non-Injury Brief), (Exhibit JPN-8.b (BCI)), pp. 13-18.
[9] See MOFCOM's Request for additional information (Exhibit CHN-1.b).
[10] Final Determination (Exhibit JPN-5.b), pp. 41-42, summarizing the more extensive considerations by series on pages 36-40.
[11] Final Determination, (Exhibit JPN-5.b), p. 12.

physical and chemical characteristics, as well as similar usages and customer groups. According to MOFCOM's assessment, the only difference between these models in terms of their "physical form" (i.e. their shape) could not "disprove the fact that they had the same basic characteristics". MOFCOM also examined the price differences between billets, coils and plates and found that these were "reasonable", thus not giving rise to any price comparability issue. Accordingly, in line with its obligations to ensure price comparability, MOFCOM examined the differences that existed between billets, coils and plates in order to determine whether these impacted price comparability. MOFCOM concluded that there were no significant differences between these models, as "the physical and chemical characteristics and technical indices of hot-rolled stainless steel plate/coil depended on the physical and chemical characteristics of the stainless steel billet in the steelmaking process", so "there was *no substantial difference* in the basic internal characteristics". As such, "the difference in physical form" could not "disprove the fact that they had the same basic characteristics." Also, "[t]he final trading market and usage of stainless steel billet and hot-rolled stainless steel plate (coil) are consistent" and "[t]heir final usage and customer group have similarity".

16. All these considerations led MOFCOM to reasonably conclude that these product models did not have differences between them that were likely to lead to a lack of price comparability. MOFCOM further confirmed this by examining the price differences between the models and determining that these were "reasonable", based on the best information available.

17. In this respect, MOFCOM considered that the best information available in this case was the China Customs Data.[12] However, MOFCOM could not rely on this import data from <u>all</u> sources to determine whether there were significant price differences between billets, coils and plates, as this data did not concern products of the same series of steel grade. To overcome this difficulty, MOFCOM examined whether it could rely on some of this data belonging to the same series of steel grade. MOFCOM observed that "Indonesia's exports to China mainly comprised of 300-series products".[13] Thus, the import data from Indonesia could accurately reflect any differences that existed between billets, coils and plates. This data revealed only very minor price differences between billets, coils, and plates. MOFCOM also took into account the other evidence and information before it, especially the conclusions it reached in the dumping context and its findings on the basic characteristics of all shapes, and qualified the price differences as insignificant and thus "reasonable" in the sense that they would not impact the price comparability.

18. In any event, the issue of price comparability does not have the same importance in cases such as the one at issue, which entailed a comparison of price trends of the imported and domestic products, as compared to a scenario where an authority relies primarily on direct price comparisons between imports and domestic products.

19. Consequently, MOFCOM's price effects analysis was fully in line with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

C. MOFCOM's findings on price trends and adverse price effects

20. Japan's issues with MOFCOM's adverse effects findings are based on Japan's erroneous allegation that MOFCOM in this investigation relied on the weighted average prices of the product as a whole, without distinguishing between the different series of steel grade, for its findings. The allegation that MOFCOM relied on weighted average prices is a complete and undue misrepresentation of MOFCOM's findings, which were explicitly and unambiguously based on price comparisons between products of the same series of steel grade.[14] Moreover, MOFCOM's considerations and findings varied for each of the relevant series, based on the facts of the case,

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[12] Final Determination, (Exhibit JPN-5.b), p. 37.

[13] Final Determination (Exhibit JPN-5.b), p. 37.

[14] See, for instance, Final Determination (Exhibit JPN-5.b), pp. 36-37: "[T]he Investigating Authority noted that stainless steel billets and hot-rolled stainless steel plates (coils) can be divided into specifications of 200-series, 300-series, 400-series and other series according to different metal contents. These specifications compete with each other in the Chinese market and show certain price differences. […] [T]he Investigating Authority made price comparisons between dumped imports and domestic like products *according to different specifications*. […] Therefore, the Investigating Authority adjusted the exchange rates, customs duties and customs clearance fees of the 300-series, 400-series and other-series products that were actually exported to China, and then *compared with domestic like products of the same specifications in China*". (emphasis added)

and in addition to price depression also entailed findings of price suppression and price undercutting, as set out in the Final Determination.

21. For the 300-series, MOFCOM found that there were adverse price effects, in particular price depression and price undercutting, on the prices of the domestic like products. The considerations that led MOFCOM to this conclusion are explicitly laid down in the Final Determination.[15] MOFCOM objectively concluded that there was price depression for the 300-series, given its observations about the overall decline of domestic prices in the period considered as well as, importantly, in the most recent period. This was based on an objective examination, as price depression refers to a situation where "prices in the importing country *decline*".[16]

22. With respect to the 400-series, MOFCOM's finding of price suppression follows clearly from MOFCOM's examination of the price evolution of the 400-series dumped imports and domestic products. MOFCOM considered that there was price suppression for the 400-series, as it explained that, affected by the increase in dumped imports of that series, domestic prices did not increase as they should have, also in light of the development in their costs.[17] China recalls that price suppression involves a situation where dumped imports "prevent price increases, which otherwise would have occurred".[18] Also, as noted by the panel in *China – GOES*, "an authority is entitled to find price suppression whenever prices have not been able to match increases in costs".[19] In the case at hand, MOFCOM explained that while the prices of the 400-series domestic products generally showed an upward trend, they were "affected" by the presence of dumped imports of the same series in that they were just able to match the increase in their costs during the POI, despite the "favorable market conditions" of steady growth in demand and positive industrial policies.[20]

23. As regards the price effects of the other series, as set out at pages 39-40 of the Final Determination, MOFCOM found an overall decrease in the prices of the other series domestic products. These findings by MOFCOM of an overall decrease in domestic prices during the period considered, including in the most recent period, and MOFCOM's references to a "decline" of prices and the fact that domestic producers were "forced to lower their prices" clearly correspond to a price depression finding.

24. Finally, as regards the 200-series, MOFCOM addressed the price effects on domestic products of the 200-series. MOFCOM had no information concerning the dumped imports in that series, due to the non-cooperation by the exporting producers. In the absence of "accurate information on the volume and price of dumped imports"[21] of the 200-series, MOFCOM could not make a price effects consideration of this series by reliance on the specific import prices for this series, as it did for the other series. MOFCOM, however, did not leave the 200-series unaddressed but evaluated the price evolution of the domestic like product. This was in line with the obligation to make an objective examination which, as has been observed by the Appellate Body, requires an investigating authority to consider price effects for the "entire range of goods making up the domestic like product".[22] In particular, the Appellate Body clarified in that case that, in its view, while an investigating authority is not required to establish the existence of price effects for each of the product types under investigation, it should, in order to make an objective examination, take into account the presence or, where relevant, absence of price effects for all types making up the domestic like product. Accordingly, MOFCOM in this case examined the price evolution of the domestic like product and found that the price trend of the 200-series domestic like product was similar to that of the 400-series, 300-series and other series of domestic like product.[23] Having made this analysis, and having previously found that the dumped imports of the 300-, 400- and the other series all had adverse price effects on the respective like products of the same series, MOFCOM concluded that these adverse effects also had an impact on the prices of the 200-series. Again, the basis for this conclusion was the best information available, specifically, as

[15] Final Determination (Exhibit JPN-5.b), pp. 37-38, 41-42.
[16] Panel Report, *EC – Fasteners (China)*, fn 650 to para. 7.321.
[17] MOFCOM's Final Determination, (Exhibit JPN-5.b), pp. 41-42.
[18] See, for instance, Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.295.
[19] Panel Report, *China – GOES*, para. 7.546.
[20] Final Determination (Exhibit JPN-5.b), p. 49.
[21] Final Determination, (Exhibit JPN-5.b), p. 37.
[22] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180.
[23] Final Determination, (Exhibit JPN-5.b), p. 40.

MOFCOM explained, the correlation in prices that MOFCOM found between the domestic 200-series and the other series of domestic products.[24]

25. As regards MOFCOM's consideration of the volume trends, China has shown that MOFCOM had to rely on best information available. Despite some inconsistencies in this data, MOFCOM determined that there was "no better information available to be used in the particular circumstances"[25] and if Japan wished to challenge MOFCOM's conclusion in this respect, it should have raised a claim of violation of Article 6.8 and Annex II of the Anti-Dumping Agreement. China also showed that MOFCOM relied primarily on, first, a comparison of price trends of the domestic like product with the price trends of the imported products and, second, the trends in the volumes of imported products. Indeed, MOFCOM in the Final Determination set out very clearly both "how MOFCOM considered the import volume" of each series in its price effects analysis and "whether and how import volumes and prices interacted".

D. MOFCOM's consideration of the overselling by the dumped imports

26. Importantly, the overselling does not concern the 300-series, as explained above. For the 300-series, MOFCOM observed that the price difference between the dumped imports and the domestic products narrowed significantly over the relevant period.[26] In other words, for the 300-series, there was a continuous narrowing of the overselling that over time turned into undercutting. The undercutting observed by MOFCOM was the culmination a trend that was ongoing throughout the relevant period. Moreover, the significance of this undercutting was augmented by the fact that the 300-series imports simultaneously increased their volume and market share, to an extent that, by the end of the POI, those imports were as relevant in terms of volume as the domestic like products.

27. Moreover, the existence of overselling (that is, the absence of undercutting) by imports does not as such undermine a conclusion that those imports have nonetheless depressed or suppressed domestic prices. This follows from a plain reading of Article 3.2, which provides that an investigating authority should consider "whether there has been a significant price undercutting […] ***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". The language of Article 3.2 therefore clearly implies that price depression and suppression are not predicated on a finding of price undercutting. The foregoing has also been confirmed in several previous disputes.[27]

28. China has set out in detail MOFCOM's price effects consideration per series of steel grade, including all factors and evidence that MOFCOM took into account, and has shown that this was fully in line with the requirements of Articles 3.1 and 3.2. This analysis was made with MOFCOM having taken into account the existence of overselling by the dumped imports, given that MOFCOM series-specific consideration always started with an assessment of the price levels of the imports and the domestic products throughout the whole period of investigation. Through this assessment, MOFCOM obviously took into account the instances were import prices were higher than domestic prices and explicitly referred to this overselling itself, stating for instance that "the price of 400-series dumped imports was consistently higher than that of 400-series domestic like products"[28] and that during the period considered "the price of the domestic like products was consistently lower than that of dumped imports".[29] Evidently, MOFCOM in this case clearly did

[24] Final Determination, (Exhibit JPN-5.b), p. 42.

[25] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166, referring to the applicable standard for an investigating authority to determine what constitutes the "best information available" for the purposes of Article 6.8 and Annex II of the Anti-Dumping Agreement.

[26] Final Determination (Exhibit JPN-5.b), p. 41.

[27] See, for instance, Panel Report, *China – Cellulose Pulp*, para. 7.86: "price depression is not contingent on the existence of price undercutting, and may be found in a situation where the prices of dumped imports is higher than the price of the domestic like product". See also Panel Report, *China – Autos (US)*, para. 7.274; Appellate Body Report in *China – GOES*, para. 137.

[28] Final Determination (Exhibit JPN-5.b), p. 41.

[29] Final Determination (Exhibit JPN-5.b), p. 43.

provide a "well-reasoned explanation"[30] of "how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by the dumped imports".[31]

29. As MOFCOM explained, domestic products and imports competed with each other in the domestic market and price was an important factor which affected the products' sales. MOFCOM also referred in this context to the "brand effect" owned by the dumped imports. In light of this brand effect, domestic products competed with the dumped imports by keeping their prices lower than the import prices, and maintaining this price differential was essential to the domestic industry's ability to make sales ("price was an important factor which affected the product sales"). Accordingly, as the price of dumped imports of specific series declined over the relevant period, this had "an obviously adverse effect on the price of domestic like products", which had to follow suit to maintain the necessary price deferential with the dumped imports.[32]

30. Of note, in previous WTO disputes, it has been recognised that it is precisely in such situations "where imports command a price premium over the domestically produced product"[33] that it is most common for an investigating authority to find adverse effects, even though the prices of the imports are higher. This is because, in such circumstances, "when dumped import prices decline, prices for the domestic product may well follow suit, or increase at a slower pace, or to a lesser extent, to maintain the price differential necessary for the domestic industry to make sales".[34]

III. ARTICLES 3.1 AND 3.3 OF THE ANTI-DUMPING AGREEMENT

31. China has shown that most of Japan's claims challenging MOFCOM's cumulative analysis are, in essence, based on the incorrect legal premise that MOFCOM should have analyzed the evolution of the volumes and prices of the dumped imports on a country-by-country basis, and should have ascertained whether the dumped imports from the individual jurisdictions were "in fact" causing injury to the domestic industry. In any event, it is clear that its interpretation of the conditions allowing for a cumulative assessment would impose obligations on investigating authorities in addition to those required under Article 3.3. of the Anti-Dumping Agreement. China's position is that this provision, and in particular the second condition thereof, requires nothing more than for investigating authorities to determine whether a cumulative assessment is appropriate in light of the conditions of competition.

32. The Appellate Body has clearly explained in paragraph 116 of its report in *EC – Tube or Pipe Fittings* that there are circumstances where imports from certain sources may not individually cause injury, while they are "in fact" causing injury because of their combined impact with imports from other sources. Consequently, it is evident that cumulation is appropriate when imports from two countries are cumulatively, but not individually, causing injury to the domestic industry. China notes that the entire Section VI.B.3 of Japan's first written submission, where Japan sets out why MOFCOM's cumulative assessment was allegedly inconsistent with Articles 3.1 and 3.3, presupposes that MOFCOM should have engaged in the kind of country-specific analysis that Japan, in essence, advocates for. Given the erroneous legal standard that Japan relies on for its claims, China submits that these should be dismissed solely for this reason. MOFCOM was not under any obligation to perform an independent analysis of the prices or volumes of each jurisdiction in order to determine whether cumulation was appropriate in the light of the conditions of competition. In any event, even the country-by-country data put forward by Japan supports, rather than calls into question, MOFCOM's conclusion that the dumped imports from the four jurisdictions were in competition with each other.

33. Importantly, China has shown that MOFCOM's findings were fully in line with Article 3.3 of the Anti-Dumping Agreement. MOFCOM assessed the competitive conditions between i) the imported products, and ii) the imported products and the domestic like products. MOFCOM considered a wide range of elements that could affect the competitive conditions of the dumped imports and the domestic like products, and determined that, in the light of the competitive

[30] Japan's opening statement during the first substantive meeting, para. 31.
[31] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.332.
[32] Final Determination (Exhibit JPN-5.b), p. 43.
[33] Panel Report, *Russia – Commercial Vehicles*, para. 7.77.
[34] Panel Report, *Russia – Commercial Vehicles*, para. 7.77. (footnote omitted)

conditions, a cumulative assessment was appropriate.[35] MOFCOM's analysis revealed that, even though there were certain differences in the specifications and models between the imports of different origins, such differences could not refute the appropriateness of a cumulative assessment. MOFCOM correctly noted, in this respect, that a cumulative assessment does not require completely identical competitive conditions and the facts of the case before MOFCOM did show that imports from the different jurisdictions were, in fact, competing with each other.

34. China also points out that the text of Article 3.3 of the Anti-Dumping Agreement refers to no requirement of substitutability. Article 3.3 provides that investigating authorities may cumulatively assess imports if they determine that such cumulative assessment "is appropriate in light of the conditions of competition". The phrase "conditions of competition" in Article 3.3 is not accompanied by any sort of qualifier (for example, "identical" or "similar"). According to the panel in *EC – Tube or Pipe Fittings*, "[t]he term is unqualified".[36] Indeed, "the provision contains no express indicators by which to assess the 'conditions of competition', much less any fixed rules dictating precisely and exhaustively the relative percentages or levels of such indicators that must be present".[37] There is nothing to suggest that there should be a strong degree of competition, let alone substitutability, for cumulation to be appropriate. This would be akin to creating additional obligations under Article 3.3, which, as China has previously highlighted, has been explicitly rejected by the Appellate Body.[38]

35. Moreover, and importantly, in assessing the conditions of competition it is recognised that "[t]here is an element of flexibility, in that there are no predetermined rigid factors, indices, levels or requirements."[39] This flexibility results in an investigating authority having a certain degree of discretion in determining whether cumulation is appropriate.[40]

IV. ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

36. Regarding the allegation that MOFCOM would have failed to use reliable data, Japan relies on alleged discrepancies between different sets of data, all related to the apparent domestic consumption (and resulting market shares). However, Japan fails to consider in this regard that the "total national production output" referred to in the Final Determination has been calculated by excluding three domestic producers: excluding "Baosteel, Tsingshan and Pohang". When the production of these three producers is included, the figures on apparent domestic consumption as presented in the Final Determination can thus perfectly be reconciled with the figures representing the total national production and the volume of the dumped imports, contrary to what Japan claims. In addition, Japan ignores the methodology that MOFCOM adopted to calculate the market share of the domestic industry, which included in the domestic sales volume used as numerator the captive sales by the domestic industry. This approach was followed by MOFCOM at the request of interested parties, as explained in the Final Determination.[41]

37. Thus, the sales volume used to calculate the domestic industry's market share was not the same non-captive sales volume assessed as an injury indicator. However, as MOFCOM explained, even having excluded the captive sales, MOFCOM would have reached the same conclusion, namely that the domestic industry's market share was in decline since 2017. This means that, even if it is assumed that MOFCOM's methodology led to a discrepancy, *quod non*, Japan failed to demonstrate that the alleged discrepancy had any consequence on MOFCOM's injury analysis and conclusions, thus leading to a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As was clarified in a previous dispute[42], a mere discrepancy in the injury data used by an investigating authority does not necessarily mean that the data does not constitute positive evidence or that an evaluation based on such data is not objective. Rather, to lead to a violation

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[35] Final Determination (Exhibit JPN-5.b), p. 31.
[36] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.242.
[37] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.242-7.267. See also Panel Report, *EC – Footwear (China)*, para. 7.402.
[38] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 117.
[39] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.240.
[40] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.241.
[41] Final Determination, (Exhibit JPN-5.b) pp. 49-50.
[42] Panel Report, *Russia – Commercial Vehicles*, paras. 7.115-7.116.

of Article 3.4, it must be demonstrated that such discrepancy "was so meaningful as to bring into question the reasonableness or objectivity" of the authority's evaluation.[43]

38. Regarding the allegation that MOFCOM focused on deteriorating movements in individual factors and failed to examine positive trends, China considers it important to recall that an investigating authority's impact assessment under Article 3.4 of the Anti-Dumping Agreement is not a "checklist" exercise, whereby the authority, in order to conclude that the domestic industry has been negatively impacted, is required to find that every individual indicator has deteriorated, and that this deterioration coincided with a surge in the volume of imports. Rather, an authority's assessment should be a holistic exercise, which is based on the factors that are relevant in each specific case, and provides a reasoned conclusion, in line with the requirements of Article 3.1 of the Anti-Dumping Agreement. The foregoing has been recognized in several previous disputes. For instance, the panel in *EC – Bed Linen (Article 21.5 – India)* stressed that "there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury".[44] An investigating authority thus can conclude that some of the factors listed in Article 3.4 are not relevant in a specific investigation, or do not indicate injury. This finding does not preclude the authority from concluding that the domestic industry is injured, as long as the authority's determination contains sufficient explanations and supporting evidence as to how such injury has materialized.

39. Japan in this dispute has nitpicked every single instance where a development or trend during the POI appeared to be not fully in line with MOFCOM's overall finding that the industry was negatively impacted by the presence of the dumped imports. However, China has shown that all the issues raised by Japan concern minor developments within an overall analysis which revealed that there was indeed material injury caused by the dumped imports. Contrary to the impression that Japan tries to create, MOFCOM in this case considered of all relevant factors and developments and focused particularly on those that it considered most relevant for this specific case – while acknowledging, and ensuring that it sufficiently addressed, certain positive trends in specific time periods.

40. China has also shown that MOFCOM objectively assessed the domestic industry's market share in relation to the development of the market share of the dumped imports. Indeed, MOFCOM established that the market share of the dumped imports increased significantly during the relevant period, and reached an all-time high of 10.44% by the end of that period. This was accompanied by a decrease in the domestic industry's market share in the end of the POI. It is, thus, irrelevant that the imports' market share was "below 4%" in the beginning of the relevant period – if anything, this serves to highlight the significance of the market share gain that the dumped imports managed to achieve during such a small period.

41. In addition, China has shown that MOFCOM did not fail to objectively evaluate certain individual factors and their impact on the state of the domestic industry.

V. ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

42. Japan has raised certain purely consequential claims related to MOFCOM's analyses of price effects, use of cumulative assessment, and examination of the impact of the dumped imports on the domestic industry.[45] Japan argues that the alleged defects in each of these analyses render MOFCOM's causation analysis also inconsistent with Article 3.1 of the Anti-Dumping Agreement and the first sentence of Article 3.5 of the Anti-Dumping Agreement. China has shown that MOFCOM acted fully in line with its relevant obligations, and these consequential claims must therefore fail.

43. Regarding MOFCOM's alleged failure to base its causation analysis on an examination of all relevant evidence, as required by Article 3.1 and the second sentence of Article 3.5 of the Anti-Dumping Agreement, Japan has put forward a variety of arguments, which in essence mainly repeat the claims that Japan put forward in relation to MOFCOM's price effects and impact analysis. In China's view, most of the arguments that Japan has raised under this "second" claim are mere repetitions of previous claims and/or purely consequential. China has demonstrated that

[43] Panel Report, *Russia – Commercial Vehicles*, para. 7.115.
[44] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.163.
[45] Japan first written submission, paras. 387-394.

MOFCOM's price effects and impact analysis were fully in line with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement and MOFCOM was not required to duplicate these analyses in its assessment of causation. In any event, China has shown that MOFCOM's causation analysis in this respect was fully in line with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

44. Regarding MOFCOM's non-attribution analysis, China has shown that MOFCOM did address the price of nickel as other factor in its non-attribution analysis.[46] The reason that MOFCOM focused on the increase, rather than the decrease, in the price of nickel was because this was the way in which the interested parties had presented their claims. This is obvious, for instance, when looking at the Japanese Respondents' Comments on the Preliminary Determination, where the section dealing with the cost of nickel is entitled "The impact of *rising* raw material costs on the profitability of stainless steel producers".[47] Similarly, the Non-Injury brief submitted by the Japanese respondents also refers to "The impact of *rising* cost of raw materials on the *profitability* of stainless steel producer".[48] In both instances, the Japanese respondents focused on the fact that "Chinese domestic stainless steel producers faced a serious shortage of raw materials and *rising costs*" which "which in turn affects the *profitability* of stainless steel producers".

45. In addition, MOFCOM did not find that the increase of the price of nickel caused any injury to the domestic industry in the present case, and it was therefore not required to carry out a non-attribution analysis. Indeed, MOFCOM concluded that "[i]n the context of sustained and steady growth in domestic market demand, the price fluctuations of raw materials should be reasonably passed through to the price changes of domestic like products".[49] The fact that the cost of raw materials could not be passed to the downstream industry was due to the fact that the prices of the dumped imports kept decreasing, as MOFCOM explained.[50] On this basis, MOFCOM concluded that the "rise in raw material prices could not refute the causal link between the dumped imports and the material injury of domestic industry".[51] In other words, MOFCOM found the increase of the price of nickel did not cause any injury to the domestic industry.

46. Finally, China has shown that MOFCOM did not fail to appropriately separate and distinguish the injurious effects of stricter environmental protection regulations from the effects of the dumped imports. Specifically, MOFCOM found in the Final Determination that "the total period expenses of the five domestic production companies *including environmental protection expenses* did not increase significantly during the injury POI".[52] Therefore, MOFCOM's conclusion was that the environmental protection expenses did not increase and, thus, could not have caused injury to the domestic industry.

VI. ARTICLES 4.1 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

A. Japan's claim is no longer before the Panel

47. China considers that Japan's claim regarding MOFCOM's alleged failure to define the domestic industry is no longer before the Panel, to the extent it has ever even been within the Panel's terms of reference. Indeed, Japan's entire claim under Articles 4.1 and 3.1 of the Anti-Dumping Agreement is no longer before the Panel, and its claim under Article 3.1 is entirely consequential to its claim under Article 4.1.

48. China has explained in detail that Japan's entire claim regarding MOFCOM's definition of the domestic industry is outside the Panel's terms of reference, as it is clear that Japan's claim in the panel request is that China violated Article 4.1 of the Anti-Dumping Agreement because MOFCOM, in defining the domestic industry, *relied on the sales volume of billets instead of the production volume of billets*. However, in its first written submission, Japan acknowledges that applying the methodology to which it referred in its panel request, i.e. relying on the production volume of billets when calculating the total domestic production, was correctly considered as inappropriate by MOFCOM as this would lead to double counting. Japan even states explicitly that "substituting

[46] Final Determination (Exhibit JPN-5.b), pp. 52-53.
[47] Japanese Respondents' Comments on the Preliminary Determination (Exhibit JPN-17.B), p. 21.
[48] Non-Injury Brief (Exhibit JPN-8.b (BCI)), p. 56. (emphasis added)
[49] Final Determination (Exhibit JPN-5.b), p. 53.
[50] Final Determination (Exhibit JPN-5.b), p. 53.
[51] Final Determination (Exhibit JPN-5.b), p. 53.
[52] Final Determination (Exhibit JPN-5.b), p. 53. (emphasis added)

the sales volume of stainless steel slabs for the production volume of stainless steel slabs cannot solve the problem of double-counting".[53] Japan then goes on to develop an entirely different claim.

49. Since China's first written submission, however, there has been another key development that now leaves no doubt that Japan's claim regarding MOFCOM's definition of the domestic industry is, in any event, not even before the Panel anymore. Indeed, in its response to China's request for preliminary ruling, Japan expressly withdrew its claim as outlined in paragraph 6(a) of its panel request.[54] As a result, the only "claim" that remains is the claim that it outlined in paragraph 6(b) of its panel request. The fact that Japan dropped this claim must have meaning. China considers that it is clear that Japan's claim outlined in paragraph 6(b) of its panel request is entirely consequential to its claim under paragraph 6(a) of its panel request.

50. Indeed, it is clear from the plain reading of the language used that Japan presented a primary claim (6(a)) pursuant to Article 4.1 that "MOFCOM used the sales volume, instead of the production volume, of stainless steel slabs when defining the domestic industry" and "did not define the domestic industry as domestic producers whose output of the products constitutes a major proportion of the total domestic production of those product". Moreover, it presented a consequential claim (6(b)) that, because MOFCOM improperly defined the domestic industry (as per 6(a)), it as a result violated Article 3.1 because it "failed to base its determination on positive evidence and conduct an objective examination of the facts with respect to the domestic industry producing the like products".

51. Japan now tries to claim that the phrase "because China improperly defined the domestic industry" in 6(b) is an independent claim under Article 4.1 in its own right. However, reading it that way would deprive the claim contained in 6(a) of all its meaning. Indeed, the phrase "because China improperly defined the domestic industry" in 6(b) is nothing more than a summary of its claim in 6(a). 6(b) is, and was always meant to be, a consequential claim to 6(a), that Article 3.1 was violated because of the violation of Article 4.1 as described in 6(a).

52. China submits that it is clear that 6(b) is entirely consequential to 6(a). Without 6(a), 6(b) can simply no longer stand. Since Japan has expressly withdrawn its claim under 6(a), and 6(b) cannot stand by itself, being entirely consequential, China submits that Japan's claim regarding MOFCOM's definition of the domestic industry is no longer before the Panel – at all.

53. In any event, China submits that it is evident that Japan's claim pursuant to Article 3.1 is entirely consequential to its claim pursuant to Article 4.1. First and foremost, China refers to the above, from which it is clear that 6(b) is entirely consequential to 6(a). Japan's claim under Article 3.1 being contained in 6(b), it is itself entirely consequential to 6(b). Irrespective thereof, China submits that Japan's claim under Article 3.1 is in any event still consequential to its claim under Article 4.1. This follows from the language used in Japan's panel request, which speaks for itself. Indeed, Japan claims that "China improperly defined the domestic industry" (Article 4.1) and, "as a result", "failed to base its determination on positive evidence and conduct an objective examination of the facts" (Article 3.1). In other words, Japan argues that China violated Article 3.1 "as a result" of its alleged violation of Article 4.1. The text is thus unambiguous about how it is because of China's alleged failure to properly define the domestic industry (Article 4.1), that China allegedly failed to base its determination on positive evidence and conduct an objective examination of the facts (Article 3.1). There is therefore no other way to read Japan's panel request other than concluding that its claim under Article 3.1 is consequential to its claim under Article 4.1. Any other interpretation would go against the clear text of Japan's panel request.

54. This is also supported by the overall context of Japan's panel request. The language of paragraph 6 of Japan's panel request is very different from other paragraphs of Japan's panel request (paragraphs 1 to 4). The chapeau of the latter paragraphs clearly identifies Article 3.1, whereas the chapeau of paragraph 6 does not refer to Article 3.1. Claim 6(b) then specifies that it is made "in conjunction with Article 3.1" and uses the "as a result" language. Japan has also not put forward any independently developed or coherent arguments under Article 3.1 in its first written submission, having based all its arguments on Article 4.1.

[53] Japan first written submission, para. 470.
[54] Japan's Response to China's Request for Preliminary Ruling, para. 18.

B. MOFCOM's definition of the domestic industry was fully in line with China's WTO obligations

55. Japan's claim has evolved substantially during the course of these proceedings. Initially Japan claimed that MOFCOM should have added up the production volume of billets, and plates and coils[55], which would inevitably have led to double-counting. Japan then started arguing that MOFCOM had, in fact, correctly identified "the problem of double-counting when the production volume of stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates is simply totalled"[56], which was in direct contradiction to its claim as originally described in its panel request. However, Japan then argues that "substituting the sales volume of stainless steel slabs for the production volume of stainless steel slabs cannot solve the problem of double-counting".[57]

56. In other words, Japan first took issue with MOFCOM's attempt to address double counting, considering that there would not have been any double-counting at all when adding up the production volume of billets, and plates and coils. Then, Japan performs a U-turn, entirely transforming its claim, arguing that MOFCOM was right to address double-counting, but did not do so sufficiently! Moreover, in its opening statement of the first substantive meeting, Japan states that "MOFCOM's calculation method, which relied on the external sales volume of stainless steel slabs instead of the production volume thereof" may have resulted in a "considerable discrepancy".[58] In other words, Japan again seems to suggest that MOFCOM should have relied on the production volume of billets, even though it clearly acknowledged in its first written submission that this would have caused double-counting.[59] It appears that Japan is still not clear about the exact claim it would like to present, let alone about the approach it considers that MOFCOM should have adopted.

57. The foregoing has significantly impacted China's ability to defend itself, as up to today Japan is ambiguous about its exact concerns and continues contradicting itself. Only for this reason, China submits that Japan has failed to make a *prima facie* case.

58. In any event, in the specific context of the present case, there is no basis to objectively consider that MOFCOM did not sufficiently address the double-counting issue. It was MOFCOM, as an objective and diligent investigating authority, that identified the double-counting issue, as it was clear that the billets that were captively used were turned into plates and coils.[60] Clearly, simply relying on what Japan has been arguing, i.e. the adding up of the production volume of billets, and plates and coils, would inevitably have led to double-counting. MOFCOM verified this on its own motion and took steps to address the double-counting resulting from the reliance on all production volumes. This approach was the most logical and least distortive, as it addressed the double-counting issue to the most reasonable extent possible.

59. China recalls that "the Appellate Body has confirmed that the use of "a major proportion" within the meaning of Article 4.1 provides an investigating authority with flexibility to define the domestic industry in the light of what is reasonable and practically possible".[61]

60. MOFCOM could not rely on the billets that it knew were transformed into coils and plates, i.e. those captively used. Since MOFCOM had no information on the record as to what happened with the billets that were sold externally, i.e. those not captively used, it had no choice but to take those into account, as the starting point for the identification of the domestic industry pursuant to Article 4.1 is the "like product".[62] In case the investigating authority decides to rely on the second methodology, namely whether a group of producers represents a "major

[55] Japan's panel request, WT/DS601/2, para. 6(a).
[56] Japan first written submission, para. 470.
[57] Japan first written submission, para. 470.
[58] Japan's opening statement at the first substantive meeting, para. 55.
[59] Japan first written submission, para. 470.
[60] Preliminary Determination (Exhibit JPN-7.b), p. 25; Final Determination (Exhibit JPN-7.b), p. 28.
[61] Panel Report, *China - Broiler Products*, para. 7.416 (footnote omitted), referring to Appellate Body Report, *EC – Fasteners (China)*, paras. 412-415.
[62] Panel Report, *EC – Salmon (Norway)*, paras. 7.64, 7.108, & 7.110.

proportion" of total domestic output, this must be determined in relation to the production of the like product by the domestic producers as a whole.[63]

61. Importantly, the like product definition, and product scope, remain uncontested. MOFCOM could not have taken further action with respect to the sales volume of billets, as it had no evidence on the record as to what happened to the billets that were sold externally. If anything, this would have resulted in MOFCOM not having made an objective examination based on positive evidence, and introducing a material risk of distortion.

62. Japan has entirely failed to put forward any credible arguments or evidence that relying on sales volumes of billets rather than their production volume does not address the problem of double counting, or would result in the introduction of a material risk of distortion. China has also shown that there is no evidence that would show that the domestic industry is unique, as also agreed by Japan.[64] This is because no such evidence exists, given that the domestic industry is simply not unique when compared to the total production. What we are talking about here are simple products - billets, and plates and coils.

63. In any event, it is clear that, irrespective of the potential impact of external sales of billets as per MOFCOM's approach, this would be negligible, if anything. Indeed, these are minute volumes. At the same time, we have a finding by MOFCOM that the Applicant and the Supporters represented 65.18%-81.37% of total domestic output of the like product for the purpose of the definition of the domestic industry.[65] Of note, the Applicant and the Supporters accounted for all of the domestic producers that came forward and registered during the investigation within the specified time limit.[66] Moreover, the notice of initiation was published on MOFCOM's website and invited interested parties to come forward and register for the purpose of participating in the investigation within a specified time limit.[67]

64. This means that, whatever the impact of MOFCOM's approach, it is mathematically certain that the Applicant and the Supporters would in any event have represented well over 50% of total domestic output of the like product for the purpose of the definition of the domestic industry. In this respect, China recalls that, regarding the quantitative aspect, "a major" proportion should consist of a relatively high proportion of total domestic production.[68] However, Article 4.1 does not stipulate a specific proportion for evaluating whether a certain percentage constitutes "a major proportion".[69] For instance, Article 4.1 does not require an investigating authority to define the "domestic industry" in terms of domestic producers representing the majority, or over 50%, of total domestic production.[70]

65. Consequently, while it should be important, serious, or significant, it may be less than 50% of total domestic production of the like product.[71] Indeed, the Appellate Body has confirmed that it must merely "encompass producers whose collective output represents a *relatively* high proportion that substantially reflects the total domestic production".[72]

66. On the basis of the above, it is evident that MOFCOM's definition of the domestic industry was fully in line with China's WTO obligations. Nothing that Japan has put forward can call this into question in any way. Indeed, to this day, Japan has failed to show that MOFCOM did not define the domestic industry as domestic producers whose output of the like products constitutes a major proportion of the total domestic production of those products, despite the fact that MOFCOM included all domestic producers that came forward and registered in the case within the

[63] Panel Report, *China - Broiler Products*, para. 7.420. See also Appellate Body Report, *EC – Fasteners (China)*, para. 412; Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.40.
[64] Japan's responses to the Panel's questions, para. 18.
[65] Final Determination (Exhibit JPN-5.b), p. 29.
[66] Final Determination (Exhibit JPN-5.b), p. 3.
[67] See, for instance, Final Determination (Exhibit JPN-5.b), p. 2.
[68] Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.40. See also Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.13.
[69] Appellate Body Report, *EC – Fasteners (China)*, para. 411; Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.12.
[70] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.
[71] See also Panel Report, *Russia – Commercial Vehicles*, para. 7.11; Panel Report, *EC – Fasteners (China)*, para. 7.226.
[72] Appellate Body Report, *EC – Fasteners (China)*, para. 419. (emphasis added)

specified time limits, and properly included and excluded all relevant producers for the purpose of the assessment of the representativity.

67. At the very least, the Panel cannot but conclude that MOFCOM's "evaluation was unbiased and objective" and that "the establishment of the facts was proper" in accordance with Article 17.6 of the Anti-Dumping Agreement.

VII. ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT

68. Japan's arguments in these proceedings have exclusively focused on one specific item that was treated as confidential. Specifically, Japan has only put forward written and oral submissions on the confidential treatment granted by MOFCOM to the names of certain domestic producers of the product at issue that were excluded from the definition of the domestic industry in the Application.

69. China has shown that MOFCOM ensured that there was good cause for treating those company names as confidential. In this respect, China highlights the systemic concerns flowing from Japan's suggestion that the interested party submitting confidential information *itself* should have an interest not to disclose confidential information, beyond the fact that that information is worthy of protection simply because of its confidential nature. Such an interpretation contradicts the entire rationale behind Article 6.5 of the Anti-Dumping Agreement, which strikes a balance between the rights of defence and the need to protect confidential information. The protection of confidential information is of primordial importance in anti-dumping investigations, which involve a great deal of confidential and sensitive information. The balance struck by Article 6.5 should not depend on whether the interested party that submits confidential information *itself* has an interest in the protection of that confidential information.

70. In addition, China has shown why revealing the names of the companies would have revealed confidential information in this case. Indeed, this would have taken place where the company name would be disclosed in connection to a specific activity or other attribute of that company that is "commercially sensitive" and "not typically disclosed in the normal course of business".[73] In those instances, revealing also the company names would reveal trade secrets of that company. For instance, in *EU – Footwear (China)*, the reason why certain company names were kept confidential was to avoid revealing that those companies were complainants or supporters of the complaint, which could have given rise to commercial retaliation in that case.[74] In the present case, the information that the Applicant wished to keep confidential was the fact that these companies which were excluded from the domestic industry were respectively "related to exporter or importer" or were themselves an importer of the product at issue.[75] There was therefore sufficient good cause for MOFCOM to treat the company names as confidential.

71. Moreover, China has shown that MOFCOM did not fail to ensure that that non-confidential summaries (or an explanation of the exceptional circumstances why summarization was not possible) were furnished. Importantly, Japan has not elaborated on any reasons why it considers the non-confidential summary that was provided by the Applicant to not have been sufficient. Importantly, the Applicant did provide a summary which was in sufficient detail to enable the parties to understand the essence of the underlying information and be able to defend their interests. Indeed, the Applicant stated in footnotes 4 to 7 of the Application that the information that was redacted was "names of companies excluded from domestic industries". This summary of the redacted information was given in reference to what the Applicant had already explained, namely that certain companies were excluded due to them being "importers of products under investigation" or having "started production of products under investigation in Indonesia."[76] China submits that this summary was sufficient to comply with the requirements of Article 6.5.1 of the Anti-Dumping Agreement and Japan has so far not argued anything to the contrary.

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[73] Appellate Body Report, *EC – Fasteners (China)*, para. 536.

[74] Panel Report, *EU – Footwear (China)*, paras. 7.662, 7.669, 7.673, and 7.685

[75] See Application (Exhibit JPN-6.b), pp. 15-16, where the Applicant explains that, in the Application, "if domestic producer is related to exporter or importer or if it itself is an importer of the products under investigation, it may be excluded from the domestic industry". Thereafter, in footnotes 4-7, the Applicant states that the information deducted includes "names of companies excluded from domestic industries. It involves the trade secrets of enterprises, and is applied for confidentiality."

[76] Application, (Exhibit JPN-6.b), p. 16.

VIII. ARTICLES 6.9, 12.2 AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

72. The seventh and eighth claims of violation put forward by Japan concern MOFCOM's disclosure and public notice obligations under Articles 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. Japan alleges that MOFCOM failed to properly disclose to the interested parties the essential facts which formed the basis for its decision to apply definitive measures, in violation of Article 6.9 of the Anti-Dumping Agreement. Japan also claims that MOFCOM allegedly failed to provide in the Final Determination its findings and conclusions on all issues of fact and law that it considered material in sufficient detail and the reasons that led to the imposition of definitive measures, in violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

73. China disagrees with Japan's assertions, and considers that MOFCOM acted in line with the obligations incumbent on investigating authorities concerning disclosure and public notice. Indeed, MOFCOM provided sufficient disclosure of the "essential facts", in a manner which permitted interested parties to understand MOFCOM's factual basis and defend their interests. Similarly, MOFCOM provided a sufficient explanation of its findings and conclusions on "material" issues in a manner that these could be clearly discerned and understood by the public and the interested parties. The foregoing relates to all of the issues that have been raised by Japan.

IX. CONCLUSION

74. For the reasons set forth in its submissions, China requests that the Panel rejects the claims of Japan in their entirety and finds that MOFCOM's determinations in the underlying investigation were fully consistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. These proceedings initiated by Japan raise important questions of legal interpretation and proper application of key provisions in the Anti-Dumping Agreement.

2. Australia's submissions have focussed on key provisions relating to an investigating authority's definition of a domestic industry (Article 4.1), determination of injury (Articles 3.1, 3.2, 3.4 and 3.5), treatment of confidential information (Article 6.5), disclosure of essential facts (Article 6.9) and explanations in public notices (Article 12.2). In particular, Australia has:

(i) observed that an investigating authority bears the responsibility for ensuring that a broadly defined product under investigation does not introduce a material risk of distortion in terms of how the domestic industry is defined and in its injury analysis;

(ii) outlined that flaws in an investigating authority's definition of the domestic industry necessarily give rise to a material risk of distortion in its injury analysis;

(iii) outlined the importance of an investigating authority undertaking its injury analysis in a manner that is objective and based on positive evidence; and

(iv) emphasised that compliance with due process obligations is an essential element of ensuring anti-dumping duties are applied consistently with the requirements set out in the Anti-Dumping Agreement.

II. DOMESTIC INDUSTRY

3. Australia recalls that the definition of "domestic industry" is a "keystone" of an anti-dumping investigation.[1] It sets the scope of the investigation and lays the foundation for the injury and causation analyses required under Article 3 of the Anti-Dumping Agreement.

4. An investigating authority has an obligation under Article 4.1 of the Anti-Dumping Agreement to define the domestic industry in a way that ensures the definition is reflective of "domestic producers as a whole of the like products" or those whose collective output "constitutes a major proportion of the total domestic production" of the like products.[2]

5. Australia recalls jurisprudence emphasising that "an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry" and that "an investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry".[3]

6. Australia submits that if an investigating authority does not properly define "domestic industry" in accordance with Article 4.1 of the Anti-Dumping Agreement, and in an objective manner and based on positive evidence, there will necessarily be a material risk of distortion in its subsequent injury analysis.

[1] Panel report, *EC – Tube or Pipe Fittings*, para. 7.397.
[2] Article 4.1 Anti-Dumping Agreement.
[3] Appellate Body report, *EC – Fasteners (China)*, paras. 413–416.

III. INJURY

7. Article 3.1 of the Anti-Dumping Agreement requires that an injury determination involve an "objective examination" and be based on "positive evidence".[4] Australia observes that "Article 3.1 of the Anti-Dumping Agreement 'is an overarching provision that sets forth a Member's fundamental, substantive obligation' with respect to the injury determination, and 'informs the more detailed obligations in succeeding paragraphs [of Article 3]'".[5]

A. PRICE COMPARABILITY

8. Australia recalls the jurisprudence establishing that the Anti-Dumping Agreement requires an investigating authority to ensure that it is comparing "like with like" for the purposes of its price effects analysis.[6] This is on the basis that "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."[7] Accordingly, price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence.[8]

9. Australia submits that China's interpretation that only significant differences in price will trigger the price comparability obligation does not reflect the totality of circumstances in which price comparability must be considered. The requirement to ensure price comparability where there are significant differences in the physical characteristics or uses of product types was confirmed in China - X-Ray Equipment.[9] Therefore, Australia submits that where there are differences in the physical characteristics and uses of the product under investigation, including as a result of a broadly defined product under investigation, an investigating authority must take these differences into account to ensure price comparability.[10]

10. Australia considers that an investigating authority's failure to ensure price comparability brings into question whether an investigating authority's price effects analysis was undertaken in an objective manner and was based on positive evidence, as required under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

B. IMPACT ANALYSIS

11. Article 3.4 of the Anti-Dumping Agreement requires an investigating authority to evaluate "all relevant economic factors and indices" that have a bearing on the state of the domestic industry concerned in examining injury, including consideration of the 15 prescribed factors.[11]

12. Australia submits that, consistent with the requirements of Article 3.1 of the Anti-Dumping Agreement, an investigating authority must explain "in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 led to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury".[12]

13. Where there are positive movements in a number of factors, Australia submits that a panel should also consider whether an investigating authority provided "a compelling explanation of why

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[4] Article 3.1 Anti-Dumping Agreement.

[5] Appellate Body report, *China – GOES*, para. 126, citing Appellate Body Report, *Thailand – H-Beams*, para. 106.

[6] Panel report, *China – Autos (US)*, para. 7.277. See also Appellate Body report, *China – GOES*, para. 200, Panel report, *China – X-Ray Equipment*, para. 7.65 and Panel report, *China – Broiler Products*, para. 7.483.

[7] Appellate Body report, *China – GOES*, para. 200.

[8] Panel report, *Korea – Pneumatic Valves (Japan)*, para. 7.266. See also panel reports, *China – X-Ray Equipment*, para. 7.68; *Pakistan – BOPP Film (UAE)*, para. 7.309; *China – Autos (US)*, para. 7.277.

[9] Panel report, *China – X-Ray Equipment*, paras. 7.68, 7.85 and 7.92. See also Panel Reports *China – Autos (US)* paras. 7.256 and 7.277; *China – Broiler Products*, paras. 7.476 – 7.479; *Pakistan – BOPP Film (UAE)*, paras. 7.309 – 7.310.

[10] Panel report, *China – X-Ray Equipment*, para. 7.85.

[11] Appellate Body reports, *EC – Tube or Pipe Fittings*, para. 156; *Thailand – H-Beams,* para. 128.

[12] Panel report, *Korea – Certain Paper*, para. 7.272.

and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".[13]

C. NON-ATTRIBUTION

14. The third sentence of Article 3.5 of the Anti-Dumping Agreement includes a "non-attribution" requirement, which requires an investigating authority to examine any "known factors" other than the dumped imports which at the same time are injuring the domestic industry. Australia's view is that where interested parties have made the investigating authority aware of factors that may be causing injury to the domestic industry, those factors are "known factors".[14] In the case at issue in these proceedings, the "known factors" were fluctuations in nickel prices, and the effects of stricter environmental standards.

15. Once these "known factors" have been identified, an investigating authority is required to separate and distinguish the injurious effects of those known factors from the injurious effects of the dumped imports.[15] Australia submits that an investigating authority has an obligation to provide a satisfactory explanation of the nature and extent of the injurious effects of those known factors, as distinguished from the injurious effects of the alleged dumping.[16]

IV. DUE PROCESS

16. Australia considers that the due process obligations in Articles 6 and 12 of the Anti-Dumping Agreement are critically important.

A. TREATMENT OF CONFIDENTIAL INFORMATION

17. Australia submits that the role of a panel assessing an allegation of a breach of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement is not to undertake a de novo review of the evidence on record to determine whether "good cause" to treat information as confidential was objectively demonstrated, or if a summary or claim that summarization was not possible was objectively adequate.[17] Instead, the panel should assess whether it is discernible from an investigating authority's final determination or any supporting documents (and in light of the nature of the information at issue, and the reasons given by the submitting party in its request for confidentiality) that it met the standard required by Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.[18]

B. DISCLOSURE OF ESSENTIAL FACTS

18. Australia observes that Article 6.9 of the Anti-Dumping Agreement has been interpreted to require an investigating authority to "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."[19] Australia submits that this requirement is critical to ensuring the provision of procedural fairness to all interested parties.

19. Australia submits that the determination of which facts are "essential" will depend 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.[20]

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[13] Panel report, *Thailand – H-Beams,* para. 7.249.

[14] Panel report, *EU – Footwear (China)*, para. 7.484. See also Panel report, *Thailand – H-Beams*, para. 7.273.

[15] Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 223.

[16] Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 226.

[17] See, for example, Appellate Body reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97, *Korea – Pneumatic Valves (Japan)*, para. 5.221 and *Russia – Commercial Vehicles*, para. 5.102.

[18] Appellate Body report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

[19] Appellate Body report, *China – GOES*, para. 240. See also Appellate Body report *Russia – Commercial Vehicles,* para. 5.177.

[20] Appellate Body reports, *Russia – Commercial Vehicles,* para. 5.220, *China – HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.130.

C. PUBLIC NOTICE

20. Australia notes that the purpose of Article 12.2 of the Anti-Dumping Agreement requires any public notice (or separate report) to set out in "sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".[21]Australia submits that the purpose of Article 12.2 of the Anti-Dumping Agreement is to provide transparency of the authority's decision-making at crucial points of the investigation.[22] Australia agrees with the Appellate Body's observation that parties affected by the imposition of anti-dumping duties "are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties".[23]

V. CONCLUSION

21. Australia's submissions outline Australia's understanding of the obligations contained in key provisions of the Anti-Dumping Agreement.

22. Australia acknowledges that an investigating authority has discretion in defining the scope of the product under investigation in an anti-dumping investigation. However, even where the product under investigation is broadly defined, an investigating authority has a responsibility to ensure its injury determination is objective and is based on positive evidence. A broad product scope has implications for the injury determination, including how the investigating authority assesses price comparability and conducts its price effects analysis.

Australia emphasises again the importance of the due process obligations in Articles 6 and 12 of the Anti-Dumping Agreement, including to allow interested parties the opportunity to defend their interests during an anti-dumping investigation, or to seek review of an anti-dumping measure through domestic avenues or WTO dispute settlement.

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[21] Article 12.2, Anti-Dumping Agreement.
[22] Panel report, *Mexico – Corn Syrup*, para. 7.104.
[23] Appellate Body report, *China – GOES*, para. 258.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. With respect to the question of whether a domestic industry defined consistently with Article 4.1 of the Anti-Dumping Agreement may nonetheless be inconsistent with Article 3.1 of the Anti-Dumping Agreement, Brazil understands that, since Article 4.1 provides the definition of "domestic industry", it is relevant for the application of other provisions in the Agreement, for example Article 3.1, regarding the determination of injury. Articles 4.1 and 3.1, however, refer to different moments of an anti-dumping investigation, as the definition of "domestic industry" by an authority precedes the determination of injury and therefore should not be conditioned by the possible results of the latter.[1]

2. In previous disputes, the Appellate Body found that a violation of Article 4.1 would also entail an inconsistency with Article 3.1.[2] This reading is appropriate, since Article 4.1 sets out detailed requirements for the definition of the "domestic industry", and this definition is itself essential to the correct application of Article 3. The interplay between both provisions indicates that a misconstruction of the definition of the "domestic industry", against the requirements of Article 4.1, may lead to significant distortions of the whole investigation, particularly the determination of injury under Article 3.

3. Conversely, the suggestion that a definition of the "domestic industry" consistent with Article 4.1 could be in breach of Article 3.1 does not seem to find textual basis in the Agreement. Such a reading would amount to introducing, in Brazil's view, an additional test regarding the definition of "domestic industry", beyond the specific and detailed requirements already present in Article 4.1.

4. Regarding the question of whether the resort to best information available by an investigating authority for a particular aspect of its determination ipso facto precludes a challenge to that aspect of the determination under a provision of the Anti-Dumping Agreement other than Article 6.8 and Annex II thereof, Brazil notes that Article 6 of the Anti-Dumping Agreement provides the overall framework regarding the use of evidence throughout an investigation, so as to guarantee the procedural rights of the parties. Article 6.8 and Annex II, in particular, set out rules on the resort to facts available by an authority in circumstances where "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation".

5. Brazil understands that there is no textual basis in the Agreement to suggest that, when an authority resorts to facts available in a determination, all other possible challenges to aspects of that determination are precluded in the absence of a specific claim of breach of Article 6.8 and Annex II.

6. Moreover, in Brazil's view, even if there was a claim under Article 6.8 and Annex II and a panel concluded that an investigating authority correctly resorted to the "best information available" in a determination, nothing would prevent that panel from finding that such determination could be the result of breaches of other provisions in the Agreement.

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[1] Appellate Body Report, *Russia – Commercial Vehicles,* para. 5.34.
[2] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China),* para. 5.321; Appellate Body Report, *Russia – Commercial Vehicles,* paras. 5.21-5.22.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. Canada addresses the Ministry of Commerce of the People's Republic of China's (MOFCOM) price effects analysis in the Final Determination at issue with respect to the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and its non-attribution analysis with respect to the requirements of Articles 3.1 and 3.5.

I. PRICE EFFECTS

2. An investigating authority's price effects analysis is subject to Article 3.1, which requires an injury determination to be based on positive evidence and an objective examination.[1] While no particular methodology is prescribed for examining the price effects of subject imports, a consideration of price effects must be based on positive evidence and an objective examination.[2]

3. Article 3.2 provides that investigating authorities shall consider, inter alia, whether the effect of subject imports is to depress or suppress prices to a significant degree. The Appellate Body has clarified that an investigating authority must consider whether the subject imports have explanatory force for the significant price depression or suppression of domestic prices.[3]

4. Canada disagrees with China's position that Japan's Article 3.1 and 3.2 claims should necessarily be dismissed because MOFCOM's price effects findings were based on facts available and Japan made no claims under Article 6.8 and Annex II.[4] A price effects analysis conducted using best information available may be challenged under Articles 3.1 and 3.2 on the basis that the analysis of those facts or the methodology employed by the authority does not accord with the obligation to conduct an objective examination based on positive evidence, or meet the requirements of a price effects analysis.[5] The Panel should determine to what extent MOFCOM relied on best information available and to what extent Japan's claim relates to breaches of Articles 3.1 and 3.2 with respect to MOFCOM's interpretation and analysis of the evidence, and its price effects analysis, rather than whether it complied with Article 6.8.[6]

5. Canada observes that certain analysis and language used in the Final Determination appears to suggest that MOFCOM conducted price comparisons, price trend analyses, and made price effects findings with respect to the subject imports as a whole and the domestic products as a whole.[7] If the Panel concludes that MOFCOM did make certain comparisons and findings on this basis, the Panel should carefully assess the implications with respect to both MOFCOM's obligation to ensure price comparability and with respect to its overall price effects analysis.

1. Price Comparability

6. Ensuring price comparability is both necessary to comply with Article 3.1 and to ensure that subject imports have explanatory force for a price effect under Article 3.2.[8] The obligation to

[1] Appellate Body Reports, *China – GOES,* paras. 125 and 126; *Thailand – H-Beams*, para. 106.
[2] See e.g. Panel Report, *China – X-Ray Equipment*, paras. 7.41 and 7.42 (citing Appellate Body Reports, *EC – Bed Linen (Article 21.5 - India)*, para. 113; *China – GOES*, para. 200).
[3] Appellate Body Report, *China – GOES*, para. 136.
[4] China's first written submission (BCI-Redacted Version), para. 118.
[5] Resort to best information available by an authority for an aspect of its determination should not preclude a challenge to that aspect under provisions other than Article 6.8 and Annex II. It would undermine the other important obligations of the Agreement if the use of best information available could insulate the authority from challenges under those provisions simply because a Member has not also challenged that authority's resort to best information available.
[6] See e.g. Canada's responses Panel questions to the third parties, paras. 12-14; Panel Report, *China – Broiler Products*, para. 7.174.
[7] See e.g. Canada's third party submission, paras. 27, 28, and 39; MOFCOM, Final Determination, (Exhibit JPN-5.b), pp. 43 and 44; and Japan's first written submission, paras. 151 and 152.
[8] The Appellate Body has stated that, if prices are not comparable, "this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices" and the failure to ensure price comparability would be inconsistent with Article 3.1. See Appellate Body Report, *China - GOES*, para. 200.

ensure price comparability applies to the consideration of price effects in general, including with respect to price depression.[9] An authority must take particular care if it was put on notice concerning the existence of price comparability issues during the investigation. If an authority performs a price comparison on the basis of baskets of products, it must ensure that the groups of products "compared on both sides of the equation are sufficiently similar" so that any observed price differential results from a price effect rather than from differences in the composition of the two baskets being compared.[10] An authority must carefully ensure price comparability, including by taking product mix differences into account, when relying on comparisons of average unit values and assessing related trends.[11]

7. Canada expresses concern regarding China's articulation of the relevant legal standard and with respect to whether MOFCOM adequately ensured price comparability. Contrary to what China appears to suggest, price comparability is relevant to a price trends analysis.[12] China also appears to argue that the obligation to ensure price comparability arises only if the investigation covers various product types that have significant price differences between them and if the imported and domestic products are not sufficiently similar in terms of the mix of different product types.[13] China omits relevant considerations. In particular, the obligation to ensure price comparability applies more broadly (for example, with respect to significant differences in physical characteristics and uses) and might, in certain circumstances, require an authority to take into account differences between product types even if the price differences between those products are less than "significant".

8. Panels have found that "significantly different prices" between products or product types being compared must be taken into account.[14] Indeed, the existence of significant price differences between product types makes the need to ensure price comparability particularly acute, as product mix issues may undermine the price effects analysis.[15] While Article 3.2 does not reference the term "significant" with respect to price comparability, what constitutes a "significant" (e.g. important or consequential) price difference that must be taken into account may be fact-specific, may vary depending on circumstances, may involve consideration of quantitative and qualitative factors, and will depend on the totality of the evidence.[16]

9. However, an authority should not ignore differences other than "significant price differences".[17] The obligation to take steps to ensure price comparability arises if there are significant differences in physical characteristics and uses between products or product types, and an authority should also take into account product substitutability.[18] Failure to consider and take such differences into account is inconsistent with an objective examination of positive evidence.[19] These criteria are relevant to a consideration of whether the groups of products being compared are "sufficiently similar" and to the related question of whether the products are actually in a competitive relationship.[20] Comparing the prices of non-competing products or product types may

[9] Panel Reports, *China – Autos (US)*, para. 7.277; *China – X-Ray Equipment*, para. 7.68; Canada's third party submission, para. 9.

[10] Panel Report, *China – Broiler Products*, para. 7.483.

[11] See e.g. Panel Reports, *China – Autos (US)*, paras. 7.282, 7.283 and fn. 431 to para. 7.270; *China – X-Ray Equipment*, paras. 7.30, 7.85 and 7.88; and *China – Broiler Products*, para. 7.494(ii).

[12] See e.g. Panel Report, *China – Autos (US)*, para. 7.282; Canada's third party submission, para. 25; China's first written submission (BCI-Redacted Version), paras. 226 and 228.

[13] China's first written submission (BCI-Redacted Version), para. 184, see also para. 196 ("the only product differences that matter" are those "which significantly affect" prices).

[14] Panel Reports, *China – Broiler Products*, paras. 7.483 and 7.490; *China – X-Ray Equipment*, para. 7.92. Price comparisons may have to occur at the level of product models or adjustments made.

[15] See e.g. Canada's third-party submission, paras. 10 and 11; Canada's third-party statement, paras. 10 and 14; Canada's responses to Panel questions to the third parties, para. 3; Panel Report, *China – Broiler Products*, paras. 7.483, 7.490, and 7.493.

[16] See Canada's responses to Panel questions to the third parties, paras. 7-11; see also Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161 for a relevant definition of the term "significant".

[17] See e.g. Canada's third-party submission, paras. 12 and 22; Canada's third-party statement, paras. 12 and 13; Canada's responses to Panel questions to the third parties, paras. 4-6. There may be cases where the facts relating to the physical characteristics and uses of differentiated products indicate that price differences may be relevant for price comparability even if they are not considered "significant".

[18] Panel Report, *China – X-Ray Equipment*, para. 7.92, see also paras. 7.85, 7.88, and 7.51.

[19] See e.g. Panel Report, *China – X-Ray Equipment*, paras. 7.85 and 7.88.

[20] See Canada's responses to Panel questions to the third parties, paras. 5 and 6.

not give rise to a meaningful price effects analysis that is relevant to the question of causation.[21] In light of specific facts or circumstances, it is possible that differences between product types may need to be taken into account when considering comparability even if prices do not differ in a "significant" manner because the prices in question may not actually interact with one another.[22]

10. An investigating authority should also consider if there are variations in the proportions of differentiated products within either or both baskets over time. The panel in China – X-Ray Equipment found that if an investigating authority compares prices over time in a basket containing non-homogenous product types, it must ensure price comparability by considering any changes in the proportion of the product types making up the basket each year.[23] Failure to do so means that any changes, such as a decline in average unit values, may actually be the result of changes in product mix, rather than a genuine change in price.[24] Analysing price trends in a such a basket, without taking into account product mix changes each year, is not "an objective examination of positive evidence".[25] Logically, the need to take into account varying proportions of product types in a basket over time would apply equally when an authority compares prices and assesses price trends as between baskets of non-homogeneous products. If the product mix between the two baskets varies, there is a "high risk" that differences in average unit values may reflect variations in product mix, rather than actual differences in pricing.[26]

11. In this dispute, the Panel should examine Japan's argument that MOFCOM's price effects analysis was flawed because it failed to ensure price comparability when comparing weighted average prices for baskets of the subject imports and the domestic like products as a whole.[27] The Panel should carefully assess Japan's position that these baskets contained products, and series of products, with significantly differing prices, physical characteristics, and uses[28], and that MOFCOM failed to take into account that any price changes or trends could be the result of changes in product mix and composition of the baskets being compared rather than genuine changes in prices.[29] The Panel should explore whether MOFCOM adequately ensured price comparability and took into account, on the basis of positive evidence and an objective examination, all of the product differences relevant for determining price comparability (including price, physical characteristics, and uses).

12. With respect to price, Japan argues that MOFCOM was faced with evidence that there were "significant differences in the price levels and price trends" with regard to stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates.[30] In light of that evidence, the Panel should assess if MOFCOM's conclusion that there were only "reasonable"[31] price differences among the three products was based on positive evidence and an objective examination, and whether MOFCOM appropriately took these differences into account.

13. Canada also considers that MOFCOM was on notice that the baskets of subject imports and domestic like products contained non-homogenous products due to the differing physical characteristics and uses among the three products.[32] According to Japan, interested parties informed MOFCOM, and provided evidence demonstrating, that the three products were non-substitutable.[33] Japan argues that the differences between the three products, and series of products, demonstrate that they do not compete with one another, thus undermining price comparability.[34] The Panel should assess if MOFCOM ought to have more carefully considered whether significant differences identified in the evidence affected the competitive relationship between the products and series in the baskets that MOFCOM compared. The Panel should

[21] See e.g. Panel Report, *China – X-Ray Equipment*, para. 7.50.
[22] Canada's responses to Panel questions to the third parties, paras. 1-2 and 4-6.
[23] See e.g. Panel Report, *China – X-Ray Equipment*, paras. 7.57 and 7.88.
[24] Panel Report, *China – X-Ray Equipment*, para. 7.57.
[25] Panel Report, *China – X-Ray Equipment*, paras. 7.88 and 7.57.
[26] See e.g. Panel Report, *China – Broiler Products*, para. 7.490.
[27] See e.g. Japan's first written submission, paras. 65-66, 89, 135, and 152-158.
[28] See e.g., Japan's first written submission, paras 90-110, 122-125, 128, 134, 144, 156, 157, and 158-169; Canada's third-party submission, paras. 17 and 18; Canada's third-party statement, para. 13.
[29] See e.g. Japan's first written submission, paras. 89, 156, 172, and 183.
[30] See e.g. Japan's first written submission, para. 122.
[31] MOFCOM, Final Determination, (Exhibit JPN-5.b), p. 12.
[32] See Canada's third party submission, paras. 17, 18 and 29; Canada's third-party statement, para. 13; Japan's first written submission, paras. 90-110, 128, 144, 156, and 158-168.
[33] See e.g. Japan's first written submission, para. 91 and following.
[34] See e.g. Japan's first written submission, paras. 134, 158, and 169.

examine if MOFCOM appropriately considered and explained how the prices of potentially non-competing products in its baskets interacted such that the subject imports adversely affected domestic like products.[35]

14. Finally, the Panel should assess if MOFCOM properly considered whether the groups of products compared were sufficiently similar and if there were differing proportions of the three products, and the various series of these products, in either or both baskets over time.[36] The Panel should also assess if MOFCOM ought to have considered changing proportions in product mix for the purposes of its series-based analyses, as Japan argues that each series contained the three different products.[37]

2. Price Depression

15. An investigating authority is required to consider whether subject imports have explanatory force for the occurrence of significant price depression and may not disregard contrary evidence.[38] The Panel should consider Japan's argument that MOFCOM failed to explain how a finding of price depression is consistent with the fact that the prices of domestic like products "generally rose" during the period of investigation.[39] Moreover, if the Panel determines that MOFCOM's price effects analysis was, at least in part, based on findings relating to the products as a whole[40], the Panel should consider if MOFCOM adequately explained, based on positive evidence, its finding of price depression given that the Final Determination points to an "overall rising trend"[41] of domestic prices.[42] The Panel should also carefully examine MOFCOM's various series-based analyses and whether MOFCOM was required to better explain how the "overall rising trend" of domestic prices interacted with these analyses.

16. An investigating authority must take divergent price trends into account, and explain why it nonetheless considers that the subject imports affect the price of domestic like products.[43] The Panel should assess Japan's arguments concerning diverging trends both for the product as a whole[44] and, for example, within the 300-series.[45] The Panel should examine whether MOFCOM carefully considered any divergent price trends and explained, on the basis of positive evidence and an objective examination, the explanatory force of the subject imports for price depression in light of such trends.[46] Even if the Panel finds that certain series-based trends did not diverge but were instead similar[47], the Panel should assess whether MOFCOM provided "sufficient reasoning" "as to what explanatory force" those trends "had for the depression or suppression of domestic prices".[48]

17. The Appellate Body has confirmed that an investigating authority must provide "an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling" by subject imports.[49] The Panel should assess Japan's argument that there was consistent overselling both at the product as a whole level and among the different series, with the exception of the 300-series at the very end of the period.[50] An investigating authority must pay particular attention to the issue of overselling if it was raised by

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[35] Canada's third party statement, para. 13.

[36] See e.g. Japan's first written submission, paras. 89 and 172.

[37] Japan's first written submission, para. 183.

[38] See e.g. Appellate Body Report, *China – GOES*, para. 154. The Panel should also assess China's argument that MOFCOM found "price suppression" with respect to the 400-series and, for example, whether any such finding and analysis conforms with Articles 3.1 and 3.2. See e.g. Canada's third party submission, para. 53.

[39] Japan's first written submission, para. 188; Canada's third party submission, para. 35.

[40] See e.g. Canada's third party submission, para. 39.

[41] MOFCOM, Final Determination, (Exhibit JPN-5.b), p. 36.

[42] See e.g. Canada's third party submission, para. 42.

[43] See e.g. Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.295.

[44] Japan's first written submission, paras. 198 (citing MOFCOM, Final Determination, (Exhibit JPN-5.b), p. 36), and 199.

[45] Japan's first written submission, para. 180. See also Canada's third party submission, para. 49.

[46] See e.g. Canada's third party submission, para. 43.

[47] See e.g. China's first written submission (BCI-Redacted Version), paras. 326-329.

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

[49] Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.332. Failure to do so is inconsistent with Articles 3.1 and 3.2, see para. 5.334.

[50] Japan's first written submission, paras. 209-210.

the interested parties with reference to evidence.[51] The Panel should assess whether MOFCOM explained and analysed, on the basis of positive evidence and an objective examination, how its finding of price depression accords with the overselling.[52]

18. With respect to MOFCOM's series-based analyses more generally, Canada considers that the Panel should carefully assess whether MOFCOM's finding that these analyses demonstrated that the subject imports had an adverse effect on the price of the domestic like products as a whole[53] accords with the requirements of Articles 3.1. and 3.2.[54]

II. NON-ATTRIBUTION

19. Canada is concerned with MOFCOM's analysis of known factors raised by the interested parties.[55] Article 3.5 requires an investigating authority to examine all known factors, other than the subject imports, causing injury to the domestic industry at the same time as the subject imports.[56] The authority must ensure that injuries caused to the domestic industry by other known factors are not attributed to the subject imports[57], by "appropriately assess[ing] the injurious effects" of those other known factors.[58] The authority must "separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors", and provide "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects" of the subject imports.[59] This exercise must occur before the authority can conclude that there is a causal link between subject imports and injury caused to domestic industry.[60] Injurious effects of the subject imports and the other known factors cannot remain "lumped together" and "indistinguishable".[61] A non-attribution analysis must comply with the overarching obligation established in Article 3.1 that an injury determination must be conducted on the basis of positive evidence and an objective examination.[62]

20. The Panel should, for example, assess if MOFCOM objectively examined any injury arising from rising nickel prices, or if it simply attributed injury to the subject imports, relying on unsubstantiated statements. MOFCOM was required do more than fall back on an assertion that increased nickel prices do not refute the causal link.[63] The Panel should carefully assess whether MOFCOM's determination fulfilled the requirements of a non-attribution analysis.

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[51] See e.g. Panel Reports, *China – Cellulose Pulp*, paras. 7.85 and 7.86; *China – Autos (US)*, paras. 7.271 and 7.273. See Japan's first written submission, para. 208.

[52] See e.g. Canada's third party submission, paras. 44 and 45.

[53] See e.g. MOFCOM, Final Determination, (Exhibit JPN-5.b), p. 42; China's first written submission (BCI-Redacted Version), para. 260.

[54] Canada's third-party statement, para. 21.

[55] See Japan's first written submission, para. 424; Canada's third-party statement, paras. 60-65.

[56] Appellate Body Report, *US – Hot Rolled Steel*, para. 222. Once such an "'other factor' becomes 'known' to the investigating authority, it is for the investigating authority to investigate", see Panel Report, *China – GOES*, para. 7.636.

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

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

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

[60] Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.172; *US – Hot-Rolled Steel*, para. 223; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283; and *EC – Tube or Pipe Fittings*, para. 190.

[61] Appellate Body Report, *US – Hot Rolled Steel*, para. 228.

[62] See e.g. Appellate Body Report, *Thailand – H-Beams*, para. 106.

[63] See e.g. Panel Report, *China – Cellulose Pulp*, para. 7.192.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

Mr Chairman, Members of the Panel, ladies and gentlemen,

1. The European Union thanks the Panel for the opportunity to submit this oral statement.

2. Before we enter into the subject matter of this case, we wish to raise a point of order. We note that the Russian Federation participates in these proceedings as a third party. The EU does not intend to engage with the Russian Federation in the context of these proceedings.

3. Like previous speakers, we wish to express the EU and its Member States' full solidarity with Ukraine and the Ukrainian people. The EU condemns in the strongest possible terms Russia's unprovoked and unjustified act of aggression against Ukraine, which grossly violates international law and the UN Charter, and undermines international security and stability. The EU demands that Russia immediately cease its military actions, withdraw all its troops from the entire territory of Ukraine and fully respect Ukraine's territorial integrity, sovereignty and independence within its internationally recognised borders and abide by UN General Assembly resolution titled "Aggression against Ukraine" supported by 141 states at the 11th emergency special session. The EU resolutely supports Ukraine's inherent right of self-defence and the Ukrainian armed forces' efforts to defend Ukraine's territorial integrity and population in accordance with Article 51 of the UN Charter. At all times Russia must respect its obligations under international law, including international humanitarian and human rights law, including with respect to the protection of civilians, women and children. Russia also needs to stop its disinformation campaign and cyber-attacks.

4. As to the case, it raises interesting legal questions, brought about by what the European Union understands to have been a fairly broad definition of the product under investigation in the first place, consisting of a basket containing heterogeneous product types. It is clear that under Articles 2.1 and 2.6 of the Anti-Dumping Agreement, investigating authorities have broad latitude to define the product under investigation, and in particular there is no requirement of internal homogeneity of the product under investigation. However, it is equally clear that choices regarding the scope of the product under investigation, and its composition, can have consequences on how comparisons (both in the dumping and in the injury determinations) have to be carried out.

5. More specifically, as regards the price effects analysis, in this case the assessment of price depression, the European Union considers that an investigating authority can only establish that imports have the effect of depressing prices of the domestic like product if the two compete. In case of heterogeneous product baskets containing non-interchangeable product types belonging to different market segments, significant differences in the prices and market shares of these product types must be taken into account. Otherwise, if in the presence of such heterogeneous product baskets, price trends are compared simply at the level of the whole basket, differences may reflect differences in the product mix, as opposed to differences in pricing (as previous speakers have also flagged), in which case the subject imports do not have explanatory force for price trends in domestic like product.[1] Indeed, as the European Union has already explained in its written submission and as Canada also rightly points out[2], these principles are fully relevant not only for a static comparison of absolute values, but also for the trends-based analysis in the case of price depression.

6. The European Union concurs with other third parties[3], that while Article 3.2 of the Anti-Dumping Agreement does not prescribe a particular methodology for the comparison underlying the price effects analysis, significant differences between product baskets may well require the investigating authority to perform the price comparison at the level of product types. As Canada rightly pointed out, this becomes particularly acute where, like

[1] See also US's TPS, para. 7.
[2] Canada's TPS, para. 25.
[3] Australia's TPS, paras. 18-19; Canada's TPS, paras. 9-10 ; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu' TPS, para. 15.

here, the investigating authority had been put on notice concerning the existence of price comparability issues during the investigation.[4]

7. Regarding Article 3.3 of the Anti-Dumping Agreement, the European Union agrees with the United States[5] that while Members have discretion under Article 3.3 to assess whether cumulation is appropriate in light of the conditions of competition among imports and between imports and the domestic like product, that assessment must bear a reasonable relationship to the inquiry into whether the various products compete in the domestic market of the importing Member. The phrase "conditions of competition" in Article 3.3 is not accompanied by any sort of qualifier but presupposes the existence of some competition. Products with non-parallel volume or price trends may also be competing in certain circumstances.[6] Yet, significant differences between products in terms of volumes and prices may cast doubts over the existence of competition between them.[7]

8. Finally, the European Union also agrees with Australia's submission on the crucial importance of due process rights[8], without which interested parties cannot meaningfully participate in the investigation, in particular with a view to ensuring that the investigating authority actually meets the substantive obligations incumbent on it under the Anti-Dumping Agreement. The European Union also concurs with the United States that an investigating authority's failure to provide relevant information should not be left out of sight when a Panel considers whether a complainant has met its burden of proof in dispute settlement proceedings.[9]

9. The European Union hopes that its written and oral submissions in this case are helpful to the Panel and we thank the Panel again for the opportunity to submit these comments.

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[4] Canada's TPS, paras. 9, 22.
[5] US's TPS, para. 14.
[6] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.253, 7.259.
[7] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.260.
[8] Australia's TPS, paras. 34 ff.
[9] US's TPS, para. 9.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINESE TAIPEI

CHINESE TAIPEI THIRD PARTY SUBMISSION

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu welcomes the opportunity to present its views as a third party in the dispute concerning China's measures imposing anti-dumping duties on stainless steel billets (or slabs according to Japan's explanation), hot-rolled coils, and hot-rolled plates from Japan.

2. In this written submission, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu will not address all of the issues upon which there is disagreement between the Parties to the dispute. Rather, we will confine ourselves to briefly discuss some of the issues raised: namely Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping agreement.

II. ARTICLE 3.1 OF THE ANTI-DUMPING AGREEMENT REQUIRES THAT THE INVESTIGATING AUTHORITIES TO CONDUCT OBJECTIVE EXAMINATION BASED ON POSITIVE EVIDENCE

3. At the outset, it should be noted that an affirmative determination of injury to the domestic industry is a fundamental precondition for the imposition of anti-dumping measures, along with a determination of the causal link between the dumped imports and injury.

4. Article 3.1 of the Anti-Dumping Agreement requires that a determination of injury to the domestic industry "[b]e 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. The Appellate Body referred to Article 3.1 as an "overarching provision" that sets forth a Member's fundamental, substantive obligations with respect to the determination of injury.[1] The Appellate body also held that the concept of "positive evidence" relates to the quality of the evidence that authorities may rely on in making a determination and focuses on the facts underpinning and justifying the injury determination. The word "positive" means that the evidence must be of an affirmative, objective, and verifiable character, and that it must be credible.[2]

6. The concept of "objective examination" aims at a different aspect of the investigating authorities' determination as it is concerned with the investigation process itself. The word "objective", which qualifies the word "examination", indicates essentially that "examination" process must conform to the principles of good faith and fundamental fairness.[3] In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.[4] If an examination is to be "objective", the identification, investigation, and evaluation of the relevant factors must be even-handed. Investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, because of the fact-finding or evaluation process, they will determine that the domestic industry is injured.[5]

7. In this dispute, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu holds the view that the foregoing requirements as set forth by the WTO jurisprudence under Article 3.1 of the Anti-Dumping Agreement should be well maintained when examining the more detailed obligations in succeeding paragraphs under Article 3 of the Anti-Dumping Agreement. In doing so, this panel should examine whether MOFCOM provided a reasoned and adequate explanation as to

[1] Appellate Body Reports, *Thailand – H-Beams*, para. 106; *China – GOES*, para. 126; and *China – HP-SSST (Japan)/China – HP-SST (EU)*, para. 5.137.
[2] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 192; *China – HP-SSST (Japan)/China – HP-SST (EU)*, para. 5.138.
[3] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[4] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 193; *China – HP-SSST (Japan)/China – HP-SST (EU)*, para. 5.138.
[5] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

how the evidence on the record supported its factual findings and how those factual findings supported the overall determinations, in the light of other plausible alternative explanations.

III. Article 3.2 of the Anti-Dumping Agreement Requires that the Investigating Authorities to Proper Consider the Effect of Dumped Imports on the Price of Like Domestic Products

8. Article 3.2, first sentence, of the Anti-Dumping Agreement requires the investigating authorities "[t]o consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". Article 3.2, second sentence, of the Anti-Dumping Agreement requires the investigating authorities "[t]o 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". That is, the investigating authorities must consider whether there has been a significant increase in dumped imports, and that they must examine the effect of dumped imports on prices resulting from price undercutting, price depression, or price suppression.[6]

9. According to Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, Articles 3.1 and 3.2 do not prescribe a methodology that must be followed by the investigating authorities in conducting the price effect analysis. Consequently, an investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Nonetheless, within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, the investigating authority must ensure that its determinations are based on "positive evidence". Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.[7]

10. This methodology is also reflected in *China – GOES* when the Appellate Body interpreted the use of the word "consider" in Article 3.2, where the Appellate Body said the word "consider" obliges a decision-maker to "take something into account" in reaching a decision. More specifically, the word "consider" does "[n]ot impose an obligation on an investigating authority to make a definitive determination on the volume of subject imports and the effect of such imports on domestic prices. Nonetheless, an authority's consideration of the volume of subject imports and their price effects is also subject to the overarching principles that it be based on positive evidence and involve an objective examination".[8]

11. While an examination of whether there is a price difference 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.[9] Likewise, it is not sufficient for an investigating authority to confine its consideration to what is happening to domestice prices for the purposes of considering significant price depression or suppresion. Rather, an investigating authority is required to examine domestic prices in conjunction with dumped imports in order to understand whether dumped imports have "explantory force for the occurrence of" significant depression or suppression of domestic prices.[10]

12. According to the Appellate Body, this interpretation is reinforced by the very concepts of price depression and price suppression. With regard to price depression, it explained that price depression refers to a situation in which prices are pushed down, or reduced by something. By definition, an examination of price depression calls for more than a simple observation of a price decline and also encompasses an analysis of what is pushing down the prices.[11] The concept of both price depression and price suppression implicate an analysis concerning the question of what brings about such price phenomena.[12]

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[6] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 111.
[7] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.
[8] Appellate Body Report, *China – GOES (2012)*, para. 130-1.
[9] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SST (EU)*, para. 5.159-5.163..
[10] Appellate Body Report, *China – GOES*, para. 138.
[11] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.100 and 5.103.
[12] Appellate Body Report, *China – GOES*, para. 141.

13. Furthermore, the Appellate Body in Korea – Pneumatic Valves (Japan) noted that while an investigating authority has some discretion in how it chooses to assess price effects under Article 3.2, "a failure to ensure price comparability" would not be consistent with the requirement under Article 3.1 that "a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, inter alia, the effect of subject imports on the prices of domestic like products. If subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices".[13] Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like products, this undermines its finding of price effects under Article 3.2, to the extent that it relies on such price comparisons.

14. Meanwhile, the Panel elaborated in *China – X-Ray Equipment* that "[i]f two products being analysed in an undercutting analysis are not comparable, for example in the sense that they do not compete with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question".[14] The Panel also noted that Article 3.2 "does not mandate a specific methodology by which to ensure price comparability", such that an investigating authority has "multiple options in determining how to proceed".[15]

15. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu is of the view that the methodology used by MOFCOM in its price effects analysis should be examined in light of the legal obligations of Article 3.2 set by the foregoing precedents. Specifically, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Japan's claim that when comparing the prices of the subject import and domestic prices to establish the existence of price depression, it is necessary for MOFCOM to ensure that the prices it is using for the comparison are properly comparable. If there are considerable differences among the products, these factors shall be taken into account, for example using carefully defined product categories for the collection of price information. If prices of the products which lack comparability are compared, the outcome of this comparison should not be considered as being based on an objective, unbiased analysis.

16. In the meantime, this Panel should also examine whether MOFCOM has conducted 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. On Japan's claim regarding several occurence such as divergent price trends, increasing price trends, consistnet higher price and overselling, this Panel should carefully rule if MOFCOM disregarded evidence suggesting that the prices of subject imports have no, or only a limited effect on domestice prices.

IV. ARTICLE 3.4 OF THE ANTI-DUMPING AGREEMENT REQUIRES THAT THE EXAMINATION OF THE DUMPED Imports ON THE INDUSTRY CONCERNED MUST INCLUDE AN EVALUATION OF ALL RELEVANT ECONOMIC FACTORS

17. Article 3.4 of the Anti-Dumping Agreement plays an important role in setting out how an investigating authority must determine injury. Article 3.4 states that "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". Article 3.4 then lists the relevant economic factors or indicators that must be evaluated. It explicitly states that this list is not exhaustive. It also stresses that one or several of these factors will not necessarily give decisive guidance as to the existence of injury to the domestic industry or lack thereof.

18. While not exhaustive, it is widely accepted that the list of factors in Article 3.4 is a mandatory minimum, and that investigating authorities must therefore collect and analyse data relating to each of these individual enumerated factors.[16] In addition, investigating authorities must also collect and analyse data relating to any other relevant factors that may have a bearing on the state of a domestic industry in a particular case.[17] An objective examination in accordance with Article 3.1 would require the investigating authorities to evaluate each of the factors and to assess the relevance of each factor and the weight to be attributed to it in the injury assessment.

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[13] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.242.
[14] Panel Report, *China – X-Ray Equipment*, para. 7.50.
[15] Panel Report, *China – X-Ray Equipment*, para. 7.51.
[16] Appellate Body Report, *Thailand – H Beans*, para. 125.
[17] Panel Report, *Thailand – H Beans*, para. 7.225; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 195.

19. In light of the foregoing legal standards, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu believes that the following questions are relevant for this Panel to determine if MOFCOM has satisfied the requirements under Article 3.4 in this dispute: (1) whether MOFCOM's analysis under Article 3.4 was based on a thorough evaluation of the state of the industry, including evaluation of each of the listed factors in the description of the state of the industry; (2) whether MOFCOM's analysis explained in a satisfactory way why the evaluation of the factors set out under Article 3.4 leads to the determination of the impact of dumped imports on domestic industry, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of the impact of dumped imports on domestic industry.

20. If MOFCOM's analysis was based on selective and inconsistent use of information pertaining to the domestic industry, or if MOFCOM collected and relied upon partial data for its analysis without proper explanation, MOFCOM did not ensure a proper evaluation of the state of the domestic industry as whole, and does not, therefore, satisfy the requirements of objective examination of the impact of the subject imports on the domestic industry in accordance with Article 3.1 and Article 3.4 of the Anti-Dumping Agreement.

V. ARTICLE 3.5 OF THE ANTI-DUMPING AGREEMENT REQUIRES THAT THE INVESTIGATING AUTHORITIES TO ESTABLISH A CLEAR CAUSAL RELATIONSHIP BETWEEN DUMPED IMPORTS AND INJURY TO THE DOMESTIC INDUSTRY

21. Article 3.5 of the Anti-Dumping Agreement requires the demonstration of a causal link between the dumped imports and the injury to the domestic industry. Article 3.5 also contains a "non-attribution" requirement. According to this requirement, investigating authorities must examine any known factors other than the dumped imports that are injuring the domestic industry at the same time and they must not attribute the injury caused by these other factors to the dumped imports. The dumped imports need not to be the sole cause of the injury to the domestic industry, but the Anti-Dumping Agreement requires that the dumped imports be a genuine and substantial cause of material injury and that other causes of injury not be attributed to the dumped imports.

22. As the Appellate Body in *US – Hot-Rolled Steel* stated: "[P]rovided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury".[18] Moreover, based on the Appellate Body analysis in *Korea – Pneumatic Valves (Japan)*, the Panel's task under Article 3.5 was only "to review whether the investigating authority properly linked the outcomes of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry".[19]

23. In the present dispute, if the investigating authority's analysis of causal relationship was based on a price effects analysis that was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and an impact analysis that was inconsistent Articles 3.1 and 3.4 of the Anti-Dumping Agreement, it can hardly "properly" link the outcomes of its analyses conducted pursuant to Articles 3.2 and 3.4 to a definitive determination under the first sentence of Article 3.5 of the Anti-Dumping Agreement.

24. On the other hand, with respect to the "non-attribution" requirement of Article 3.5 of the Anti-Dumping Agreement, the Appellate Body in *US – Hot-Rolled Steel* clarified the requirement as follows: "The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. 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. Thus, in the absence of such separation

[18] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224 and 226.
[19] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.203 and 5.280.

and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties".[20]

25. Based on the aforementioned interpretation of the legal obligation under Article 3.5 of the Anti-Dumping Agreement, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu is of the opinion that if this Panel continues to examine the consistency of MOFCOM's injury analysis with Article 3.5 of the Anti-Dumping Agreement, the following issues are relevant in this dispute: (1) Did MOFCOM make an appropriate assessment of the injury caused to the domestic industry simultaneously by the other known factors? (2) Did MOFCOM separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other simultaneously known factors?

26. Article 3.5 sets forth no limits or guidelines as to the methodology an investigating authority may use for purposes of a non-attribution analysis. Nevertheless, according to the panel in *US – Coated Paper*, "[i]t does not suffice for an investigating authority merely to 'check the box'. An investigating authority must do more than simply list other known factors, and then dismiss their role with bare qualitative assertions, such as 'the factor did not contribute in any significant way to the injury … [A]n investigating authority must make a better effort to quantify the impact of other known factors, preferably using elementary economic constructs or models. However, an adequately reasoned explanation of the qualitative effects of other factors based on the evidence before it will suffice".[21]

27. In interpreting the "non-attribution" requirement of Article 3.5, the Appellate Body in *US – Hot-Rolled Steel* recognised that the different causal factors operating on a domestic industry may interact, and their effects may well be interrelated, such that they produce a combined effect on the domestic industry. Therefore, it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although not easy, this is the function of the "non-attribution" requirement.

28. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu believes that the aforementioned approach should be applied to this dispute in examining whether MOFCOM has met the legal obligation under Article 3.5 of the Anti-Dumping Agreement. This Panel should review whether MOFCOM's explanation of the causal mechanism by which the dumped imports caused injury to the domestic industry was reasoned and adequate based on the aforementioned approach.

VI. Conclusion

29. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu appreciates the opportunity to submit its views in connection with the WTO jurisprudence on the proper interpretation of the relevant provisions of the Anti-Dumping Agreement, and respectfully requests the Panel to take account of the considerations set out above when evaluating the claims set forth in this dispute, and reserves the right to elaborate our arguments further in an oral statement.

ORAL STATEMENT OF CHINESE TAIPEI

Mr. Chairman and Members of the Panel:

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu appreciates this opportunity to present its views to the Panel as a third party in this dispute. Today the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu would like to briefly provide an overview of the key issues included in the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission.

Objective Examination based on Positive Evidence

2. First of all, it should be noted that an affirmative determination of injury to the domestic industry is a fundamental precondition for the imposition of anti-dumping measures, along with a determination of the causal link between the dumped imports and injury.

[20] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[21] Panel Report, *US – Coated Paper (Indonesia)*, paras. 7.209-7.210.

3. In light of Article 3.1 of the Anti-Dumping Agreement as an "overarching provision" that sets forth a Member's fundamental, substantive obligations with respect to the determination of injury, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu believes this panel should examine whether MOFCOM provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings supported the overall determinations, in the light of other plausible alternative explanations.

Price Effect

4. Turning to Article 3.2 of the Anti-Dumping Agreement, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Japan's claim that it is necessary for MOFCOM to ensure that the prices it is using for the comparison are properly comparable. If there are considerable differences among the products, these factors shall be taken into account, for example using carefully defined product categories for the collection of price information. If prices of the products which lack comparability are compared, the outcome of this comparison should not be considered as being based on an objective and unbiased analysis.

5. Furthermore, to satisfy its obligation under Article 3.2, an examination of price depression calls for more than a simple observation of a price decline and also encompasses an analysis of what is pushing down the prices. This Panel should also examine whether MOFCOM has conducted 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. On Japan's claim regarding several occurence such as divergent price trends, increasing price trends, consistnet higher price and overselling, this Panel should carefully rule if MOFCOM disregarded evidence suggesting that the prices of subject imports have no, or only a limited effect on domestice prices.

Impact of the Dumped Imports on the Domestic Industry

6. With respect to Article 3.4 of the Anti-Dumping Agreement, the Appellate Body in *Thailand – H Beans* and *US – Hot-Rolled Steel* laid out clearly that an objective examination of the impact of the dumped imports on the domestic industry would require the investigating authorities to evaluate each of the factors, including the list of factors in Article 3.4 and any other relevant factors that may have a bearing on the state of a domestic industry in a particular case, and to assess the relevance of each factor and the weight to be attributed to it in the injury assessment.

7. If MOFCOM's analysis was based on selective and inconsistent use of information pertaining to the domestic industry, or if MOFCOM collected and relied upon partial data for its analysis without proper explanation, MOFCOM did not ensure a proper evaluation of the state of the domestic industry as whole, and does not, therefore, satisfy the requirements of objective examination of the impact of the subject imports on the domestic industry in accordance with Article 3.1 and Article 3.4 of the Anti-Dumping Agreement.

Causal Relationship between the Dumped Imports and the Injury to the Domestic Industry

8. Regarding Article 3.5 of the Anti-Dumping Agreement that requires the demonstration of a causal link between the dumped imports and the injury to the domestic industry, the dumped imports need not to be the sole cause of the injury to the domestic industry, but the dumped imports must be a genuine and substantial cause of material injury and that other causes of injury not be attributed to the dumped imports.

9. In the present dispute, if the investigating authority's analysis of causal relationship was based on a wrongful price effects analysis and a wrongful impact analysis, it cannot properly link the outcomes of its analyses to a definitive determination under the first sentence of Article 3.5 of the Anti-Dumping Agreement. On the other hand, if this Panel continues to examine the consistency of MOFCOM's injury analysis with Article 3.5 of the Anti-Dumping Agreement, it should be examined whether MOFCOM separated and distinguished the injurious effects of the dumped imports from the injurious effects of those other known factors, and thus made an adequately reasoned explanation of the causal mechanism by which the dumped imports caused injury to the domestic industry.

10. Again, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu would like to extend its appreciation to the Panel for this opportunity to present its views on these issues. Thank you.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

1. Article 3.2 of the AD Agreement directs an authority to examine whether subject imports significantly depressed the prices of like domestic products. It does not impose specific obligations on how an authority must conduct a price depression analysis, nor prescribe a particular methodology or set of factors that must apply in any such analysis. However, Article 3.1 does provide that a determination of injury "shall be based on positive evidence and involve an objective examination of ... the effect of the dumped imports on prices in the domestic market for like products".

2. In addition, Articles 3.1 and 3.2 of the AD Agreement require the authority to ensure comparability between the domestic and subject imported products for which prices are being examined by making adjustments where required to reflect any material differences. The objective of such adjustments is to ensure that whatever price differentials arise from a comparison of domestic and imported goods result from price effects, and not merely from differences in the products or transactions being compared, absent the necessary adjustments to control and adjust for relevant differences in product characteristics.

3. Thus, the question before the Panel regarding Japan's challenge to MOFCOM's price effects analysis, particularly with respect to price comparability, is whether a reasonable, unbiased authority, looking at the same evidentiary record, could have reached the same conclusions as MOFCOM.

4. Article 3.3 of the AD Agreement Specifies the prerequisites for cumulation. Given these specified textual prerequisites for cumulation, there is no basis to impose other, unmentioned prerequisites.

5. Article 3.4 of the AD Agreement provides that "[t]he examination of the impact of 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" and enumerates certain factors that an authority must include in its evaluation. Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

6. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.

7. In other words, in examining the relationship between subject imports and the state of the domestic industry pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends. However, Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. The Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. In making this assessment, the Panel must determine whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did here.

8. Finally, the second sentence of Article 3.5 requires an authority to examine "all relevant evidence" before it both to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped imports were also causing injury. The third sentence of Article 3.5 requires an authority to examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry" to ensure that "the injuries caused by these other factors must not be attributed to the dumped imports". A non-attribution analysis is therefore necessary if (i) there are one or more known factors other than the dumped imports that (ii) are injuring the domestic industry (iii) at the same time.

9. While an authority is under no express requirement to "seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation", an authority's findings and analysis under Article 3.5 must comply with the "positive evidence" and "objective examination" requirements of Article 3.1.

II. CLAIMS RELATING TO THE DEFINITION OF THE DOMESTIC INDUSTRY

10. Article 4.1 must be read in conjunction with Article 3.1. Article 4.1 of the AD Agreement provides that, with certain defined exceptions, "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".

11. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products", i.e., all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a "major proportion" of the total domestic production of those products.

12. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Thus, Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence". The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

13. The plain language of Articles 3.1 and 4.1 of the AD Agreement should guide the Panel's analysis. First, the Panel should consider whether the authority, consistent with Article 4.1 of the AD Agreement, defined the domestic industry as "domestic producers as a whole", or instead defined the domestic industry as those producers whose production constitutes a "major proportion" of total domestic production of the like product. The Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority's material injury analysis.

14. Accordingly, the Panel is to evaluate whether the authority's definition of the domestic industry introduces a distortion to the analysis. The Panel's analysis on risk of distortion should thus begin with consideration of the domestic production captured by MOFCOM's definition of the domestic industry.

15. Even if MOFCOM's definition were to meet the "major proportion" of domestic production standard of Article 4.1, the Panel should assess whether MOFCOM's definition of the domestic industry was biased or designed to favor the interest of any group of interested parties in the investigation, inconsistent with Article 3.1 of the AD Agreement. In other words, the Panel must

determine whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did regarding the definition of the domestic industry.

III. CLAIMS RELATING TO THE CONDUCT OF THE INVESTIGATIONS

16. Article 6 of the AD Agreement balances the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests. Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information be summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

17. Based on the above, the Panel should first determine if the investigating authority appropriately designated information as confidential. The Panel should then determine whether the investigating authority ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information.

18. Article 6.9 of the AD Agreement requires that the investigating authority disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties.

19. The meaning of "essential facts" is informed by the description that these facts "form the basis for the decision whether to apply definitive measures" and by the requirement that they be disclosed "in sufficient time for the parties to defend their interests". Without a full disclosure of the essential facts under consideration in the underlying determinations, it would not be possible for a party to identify whether an investigating authority's determination contains errors or even 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.

20. Based on the language of Article 6.9, it stands to reason that "only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests would be essential facts under Article 6.9". A panel must assess, in the specific context of each investigation, whether a particular calculation or methodology constitutes an "essential fact", for which disclosure is required under Article 6.9.

IV. CLAIMS RELATING TO THE PUBLIC NOTICES AND EXPLANATION OF DETERMINATIONS

21. Articles 12.2 and 12.2.2 of the AD Agreement require authorities to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" by the investigating authority, and "all relevant information on the matters of fact and law" leading to the imposition of definitive measures. These provisions require an authority to disclose the facts, law, and reasons that led to the imposition of anti-dumping duties, so as to enable interested parties to, among other things, "pursue judicial review of a final determination".

22. The Panel, in evaluating Japan's Article 12.2 and 12.2.2 claims, should assess whether MOFCOM has set forth its pertinent findings and conclusions, as well all relevant information on matters of fact and law leading to the imposition of definitive measures, "in sufficient detail".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

23. Article 4.1 must be read in conjunction with Article 3.1. Article 4.1 of the AD Agreement provides that, with certain defined exceptions, "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".

24. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products", i.e., all domestic producers, or (2) a subset

of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products.

25. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Article 3.1 sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence". The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

26. Articles 3.1 and 3.2 of the Anti-Dumping Agreement as requiring the authority to ensure comparability between the domestic and subject imported products for which prices are being compared and to make adjustments where required to reflect any material differences. The objective of such adjustments is to ensure that whatever price differentials arise from a comparison of domestic and imported goods result from price effects, and not merely from differences in the products or transactions being compared.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

27. Response on Question 1: Article 3.1 of the AD Agreement sets forth two overarching obligations. The first obligation is that the injury determination must be based on "positive evidence". The second obligation is that the injury determination must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.

28. By its terms, Article 3.1 indicates that these obligations extend to every aspect of an investigating authority's injury analysis. Article 3.1 thus requires an investigating authority to ensure that any material injury determination be based on "positive evidence" and involve an "objective examination" – including with respect to assessing the impact on domestic producers.

29. To assess the impact on domestic producers, an investigating authority must take into account which domestic producers it refers to in its definition of the term "domestic industry" under Article 4.1 of the AD Agreement – and must do so on the basis of positive evidence and through an objective examination.

30. Response on Question 2: The plain text of Article 3.3 of the AD Agreement specifies the prerequisites for cumulation. These are the only specified textual prerequisites for cumulation, and there is no basis to impose other, unmentioned prerequisites, such as the proposed requirement to foreclose the possibility that the alleged injury to the domestic industry was being caused only by subject imports from some of the sources under investigation.

31. Response on Question 3: The text of Article 3.2 does not require an investigating authority to use any particular type of price undercutting analysis. Nor does it address price comparability, let alone adjustments for "significant" price differences. However, the analytical methodology an authority uses must conform with the "positive evidence" and "objective examination" standards specified in Article 3.1.

32. Response on Question 4: MOFCOM's resort to facts available with respect to one aspect of its price effects analysis does not require Japan to raise a claim under Article 6.8 of the AD Agreement or preclude claims under other provisions of the AD Agreement.

33. Japan is not challenging China's use of Customs data as facts available to replace missing questionnaire data. As explained in its first written submission, Japan is challenging MOFCOM's failure to ensure price comparability, which is properly challenged under Articles 3.1 and 3.2 of the AD Agreement.

34. Response on Question 5: One of the prerequisites in Article 3.3 of the AD Agreement to cumulate imports is that an investigating authority must determine that such an assessment is "appropriate in light of the conditions of competition". Article 3.3 does not identify any specific conditions of competition that must exist for an appropriateness determination to be warranted.

35. Thus, it is incorrect that an investigating authority may "only" find cumulation to be appropriate where imports from different sources under investigation are substitutable.

36. Response on Question 6: Before an investigating authority determines whether to exercise its discretion to cumulate imports, it must first define the domestic product or products like the imported products identified in an application.

37. There are no additional substantive provisions to those set out in Article 2.6 relating to the definition of the "like product" in a particular investigation. Accordingly, an investigating authority must determine which domestic product is "alike in all respects, or ... has characteristics closely resembling those of the product under consideration". The determination of the investigating authorities regarding the "like product" must be based on positive evidence and an objective examination of the relevant facts; in those circumstances, the determination is consistent with the AD Agreement.

38. The hypothetical posed by the Panel appears to presume that the investigating authority determined that there was a single domestic like product consisting of both Model A and Model B, and one domestic industry producing both models. In that case, the authority could cumulate subject imports from all sources so long as the requirements of Article 3.3 were met.

39. As the United States indicated above in its response to question 2, an investigating authority may cumulate imports under Article 3.3 of the AD Agreement only if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate "in light of the conditions of competition both between the imported products and between the imported products and the like domestic product".

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