WORLD TRADE ORGANIZATION

WT/DS454/AB/R
WT/DS460/AB/R

14 October 2015

(15-5372)

Page: 1/107

Original: English

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

AB-2015-4

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

AB-2015-5

Reports of the Appellate Body

Note:

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

TABLE OF CONTENTS

PANEL EXHIBITS CITED IN THESE REPORTS

Exhibit	Abbreviation (if any)	Description
CHN-5-EN (BCI) EU-10 (BCI)	SMST's Dumping Questionnaire Response	Excerpts of the narrative of SMST's response to MOFCOM's dumping questionnaire of 21 November 2011
CHN-10-CH (BCI) CHN-10-EN (BCI) EU-14 (BCI)	SMST's Supplemental Dumping Questionnaire Response	Excerpts of the narrative of SMST's response to MOFCOM's supplemental dumping questionnaire of 20 February 2012
CHN-11-EN	MOFCOM's Verification Notification to SMST	Notification from MOFCOM to SMST concerning relevant issues for the on-site verification of 3 May 2012
CHN-12-EN (BCI)	MOFCOM's Preliminary Dumping Disclosure to SMST	Letter dated 9 May 2012 from MOFCOM to SMST concerning Disclosure of Basic Facts relied upon in the Dumping Part of the

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

CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation

Short Title	Full Case Title and Citation
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, circulated to WTO Members 13 February 2015 [appeal in progress]
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths,*

Short Title	Full Case Title and Citation
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *Thailand – Anti-Dum Countervail Du La-1e.06Twm[(ade1(ties o fo*

Short Title	Full Case Title and Citation

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

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

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

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

1.3. On 27 September 2013, after consultation with the parties, the Panel[16] adopted additional working procedures concerning business confidential information (BCI Procedures). Following a request for a preliminary ruling by the European Union, the Panel introduced modifications to the BCI Procedures on 22 May 2014.[17]

1.4. China's measures at issue in these disputes are set forth in the Preliminary Determination[18] and the Final Determination[19] of the Ministry of Commerce of the People's Republic of China (MOFCOM), including any annexes and amendments thereto.[20] MOFCOM identified the scope of the products under investigation as imports of certain HP-SSST from the European Union and Japan.[21] HP-SSST is mainly used in the manufacture of pressurized components such as superheaters and reheaters of supercritical and ultra-supercritical boilers.[22] MOFCOM found that there are three main types or grades of HP-SSST, which the Panel referred to as Grade A, Grade B, and Grade C, respectively.[23]

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

1.6. The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 13 February 2015.[25] In the Japan Panel Report, the Panel concluded that MOFCOM's determination of injury is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, for the following reasons:

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

15

b. MOFCOM failed to evaluate properly the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

c. MOFCOM improperly relied on the market share of subject imports, and on its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and

d. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[26]

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

a. MOFCOM failed to consider whether Grade C subject imports had any price undercutting

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

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

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

a. China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an amount for administrative, selling and general (SG&A) costs for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product[36]; consequently, the Panel did not consider it necessary to rule on the European Union's claims that China acted inconsistently with Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement[37];

b. China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because MOFCOM failed to address SMST's request for an adjustment to ensure a fair comparison between the export price and the normal value for Grade C HP-SSST[38];

c. China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement because MOFCOM rejected SMST's request for rectification only on the basis that it was not provided prior to the verification visit[39]; and

d. MOFCOM's determination of injury is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because:

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

   ii. MOFCOM failed to evaluate properly the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

   iii. MOFCOM improperly relied on the market share of subject imports, and on its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and

   iv. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[40]

[33] Japan Panel Report, para. 8.2.b. The Panel made additional findings of inconsistency under Articles 7.4, 12.2, and 12.2.2 of the Anti-Dumping Agreement (Japan Panel Report, paras. 8.1.e, 8.1.f, 8.2.d, and 8.3), and consequential findings of inconsistency under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 (Japan Panel Report, para. 8.1.g). None of these findings have been appealed.
[34] EU Panel Report, para. 8.9, as amended in document WT/DS454/R/Corr.1, WT/DS460/R/Corr.1.
[35] EU Panel Report, para. 8.9.
[36] EU Panel Report, para. 8.6.a.
[37] EU Panel Report, para. 8.8.
[38] EU Panel Report, para. 8.6.b.
[39] EU Panel Report, para. 8.6.c.
[40] EU Panel Report, para. 8.6.d.

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

a. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and

b. MOFCOM failed to undertake a segmented analysis and to weigh properly the positive and negative injury factors when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[41]

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

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

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

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

a. the methodology used to calculate the margins of dumping for SMST and Tubacex; and

b. import prices, domestic prices, and price comparisons considered by MOFCOM in its determination of injury.[46]

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

a. the data underlying MOFCOM's determination of dumping in respect of SMST and Tubacex; and

b. the determination and the calculation of the dumping margins for all EU companies other than SMST and Tubacex.[47]

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

[41] EU Panel Report, para. 8.7.b.
[42] EU Panel Report, para. 8.7.a.
[43] EU Panel Report, para. 8.7.c.
[44] EU Panel Report, para. 8.6.e.
[45] EU Panel Report, para. 8.6.f.
[46] EU Panel Report, para. 8.6.g.
[47] EU Panel Report, para. 8.7.d. The Panel made additional findings of inconsistency under Articles 7.4, 12.2, and 12.2.2 of the Anti-Dumping Agreement (EU Panel Report, paras. 8.6.h, 8.6.i, 8.7.e, and 8.8), and consequential findings of inconsistency under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 (EU Panel Report, para. 8.6.j). None of these findings have been appealed.

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

1.22. On 20 May 2015, Japan notified the Dispute Settlement Body (DSB) of its intention to appeal[50] certain issues of law covered in the Japan Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission.[51] On 26 May 2015, China notified the DSB of its intention to appeal[52] certain issues of law covered in

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

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

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

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

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

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[65] The Notices of Appeal and

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the United States, as third participant, are reflected in the executive summary of its written submission provided to the Appellate Body[66], contained in Annex C of the Addendum to these Reports, WT/DS454/AB/R/Add.1, WT/DS460/AB/R/Add.1.

4 ISSUES RAISED IN THESE APPEALS

4.1. The following issues are raised in these appeals:

a. with respect to the Panel's findings regarding Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement:

   i. whether the Panel erred in finding that the European Union's panel request, as it relates to Articles 2.2.1 and 2.2.2, complies with the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly and, consequently, in finding that the European Union's claims under these provisions were within the Panel's terms of reference (raised in DS460 by China);

   ii. whether the Panel erred in its interpretation and application of Article 2.2.2 in finding that China failed to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product (raised in DS460 by China); and

   iii. whether, in reaching its finding under Article 2.2.2, the Panel acted inconsistently with its obligations under Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement (raised in DS460 by China);

b. whether the Panel erred in finding that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification of certain information only on the basis that it was not provided prior to verification (raised in DS460 by the European Union);

c. with respect to the Panel's finding that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement:

   i. whether the Panel erred in its interpretation and application of Article 6.5 in finding that China acted inconsistently with that provision because MOFCOM permitted the full text of the reports in appendix V and appendix VEiled s isth 75(GUME)4.4( )6.bmit 4nixb.hers'

   b.

   i

ii. whether the Appellate Body can complete the legal analysis and find that China acted inconsistently with Article 6.9 because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex (raised in DS460 by the European Union);

e. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement:

i. whether the Panel erred in its interpretation of Article 3.2 in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may consider simply whether dumped imports sell at lower prices than comparable domestic products (raised in DS454 by Japan and in DS460 by the European Union);

ii. whether the Panel erred by rejecting Japan's and the European Union's claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices (raised in DS454 by Japan and in DS460 by the European Union);

iii. whether the Appellate Body can complete the legal analysis and find that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports from Japan, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 (raised in DS454 by Japan and in DS460 by the European Union); and

iv. whether the Panel erred by rejecting the European Union's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by improperly extending its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole, including domestic Grade A (raised in DS460 by the European Union);

f. with respect to the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement:

i. whether the Panel erred in finding that Japan's claim, that MOFCOM failed to examine whether dumped imports provided explanatory force for the state of the domestic industry, fell outside the Panel's terms of reference (raised in DS454 by Japan); and

ii.

iii. whether the Panel erred in finding that MOFCOM improperly relied on the market share of dumped imports in determining a causal link between dumped imports and injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST (raised in DS454 and DS460 by China);

iv. whether the Panel erred in finding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the

5 ANALYSIS OF THE APPELLATE BODY

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

5.1. We begin with China's claims as they relate to the Panel's assessment of MOFCOM's determination of dumping for SMST, one of the EU companies that were investigated. We recall, in

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

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

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

5.7. Citing Appellate Body jurisprudence, the Panel recalled that, "when 'a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to

75

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

5.13. In assessing whether a panel request is "sufficiently precise" to comply with Article 6.2, panels must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".[89] While submissions and statements made during the course of the panel

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

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

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

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

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

5.1.1.3.1 Article 2.2.1 of the Anti-Dumping Agreement

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

---

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

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

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

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

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

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

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

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

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus [SG&A] costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value *only if* the authorities determine that *such* sales *are made within an extended period of time in substantial quantities* and are at prices which do not provide for the recovery of all costs within a reasonable period of time.[112]

5.22. Under Article 2.2.1, investigating authorities may treat below-cost sales of the like product as not being "in the ordinary course of trade" by reason of price, and may disregard such sales in determining normal value "only if" the authorities determine that such sales were: (i) made within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time. While an investigating authority

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

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

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

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

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

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

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

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

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

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

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

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

5.42. In response, the European Union argues that "the way forward for China is clear", and that "China can ensure that the measure taken to comply complies with Article 2.2.2, by ensuring that the amounts for [SG&A] are based on actual data pertaining to production and sales in the ordinary course of trade by SMST"[144]

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

5.47. The European Union responds that the facts on the Panel record demonstrate that MOFCOM accepted SMST's request "not to use in the constructed normal value calculations the COP in table 6-3 for Grade B sales in the European Union, because such COP was abnormally high due to the inclusion of the two free samples."[154] The European Union maintains that "the only pertinent particularity of the transactions" is that "the COP was abnormally high due to the two free samples."[155] The European Union argues that the Panel was, therefore, "correct to state that it was undisputed that SMST requested MOFCOM, and MOFC

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

> [t]he December 2010 production costs for [Grade B was] abnormally high and should not be used in BOFT's cost or constructed value calculations. This production relates to the zero price samples discussed above with respect to question 9, Item 6 of Section 4. These were test orders in very small quantities. This led to abnormally high per-unit raw material costs because, despite the small production quantity, an entire hollow had to be used for each order.[165]

5.51. MOFCOM responded that:

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

5.52. Regardless of what MOFCOM meant when it referred to a "certain particularity of the transactions of [Grade B] in the EU", and whether MOFCOM considered that the COP was distorted or not due to the inclusion of the two free samples, MOFCOM was required, *in its determination*, to *explain why* it determined an amount for SG&A costs "based on the application of coefficients to data *that had already been excluded for the purpose of constructing normal value*".[167] In the absence of such an explanation provided by MOFCOM in its written report, we fail to see how the Panel could have found China to have acted consistently with its obligations under Article 2.2.2 of the Anti-Dumping Agreement. We do not consider that the Panel erred in finding that "an unbiased

provided by the investigating authority in its written determination.[173] Contrary to what China suggests, it was for MOFCOM to explain why it considered that the relevant coefficients had

5.1.2.3 Conclusion

5.59. In the light of the above, we uphold the Panel's finding, in paragraphs 7.66 and 8.6.a of the EU Panel Report, that China acted inconsistently

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

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

5.67. The Panel noted that, in a communication sent to SMST prior to the on-the-spot investigation, MOFCOM had requested SMST to prepare certain documents relating to, *inter alia*, Table 6-5 ("Profitability"), which summarized the information concerning SG&A costs contained in Tables 6-6 ("Detailed Chart of Allocation of Administrative Expenses") and 6-8 ("Detailed Chart of Allocation of Financial Expenses") supplied by SMST as annexes to its initial dumping questionnaire response.[191] The Panel considered, therefore, that there was "a clear and direct connection" between the information that SMST sought to correct in Tables 6-6 and 6-8 and the information expressly requested by MOFCOM relating to Table 6-5.[192] Recalling that, under paragraph 7 of Annex I, "the main purpose of the on-the-spot investigation is to verify information", the Panel considered "that an investigating authority would normally welcome the rectification of information in these circumstances".[193] The Panel found that, by first requesting SMST to prepare documents relating to Table 6-5, but then rejecting potentially relevant information "on the *sole ground* that SMST did not raise this matter before the verification started", MOFCOM acted contrary to the main purpose of the on-the-spot investigation.[194] Having said this, the Panel agreed with China that Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement do not contain an *obligation* for an investigating authority "to accept *all*

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

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

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

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

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

[223] EU Panel Report, para. 7.102.

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

5.82. China claims that the Panel erred in its interpretation and application of Article 6.5 of the

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

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

5.89. The Panel next turned to examine whether MOFCOM's statement was sufficient to demonstrate that MOFCOM objectively assessed the petitioners' showing of "good cause" with regard to both the names of the third party institutes and the full text of appendix V and the appendix to the petitioners' supplemental evidence of 29 March 2012. The Panel found that, while the petitioners' requests referred to both the names of the institutes and the full text of the reports, when accepting the petitioners' requests for confidential treatment, "MOFCOM limited its statement to address only 'the legitimacy of the petitioners' application to treat the *name* of the

5.3.2 Assessment of the Panel's analysis

5.92. On appeal, China argues that the Panel erred in construing Article 6.5 of the Anti-Dumping

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

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

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

5.100. Therefore, we see no error in the Panel's finding that, in the absence of *any evidence*

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

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

5.102. We do not consider that the Panel would have complied with the applicable standard of review if, in the absence of any evidence of an objective assessment by MOFCOM of the "good cause" alleged, it had engaged in a *de novo*

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

5.110. China also argues that the Panel's approach under Article 6.5 in the present disputes contradicts the approach adopted by the Appellate Body in *EC – Fasteners (China)* in its analysis of the claims under Article 6.5.1 of the Anti-Dumping Agreement. In *EC Fasteners (China)*, the

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

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

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

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

5.4.1 The Panel's findings

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

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

5.123. The Panel started its analysis of the complainants' claims by referring to WTO jurisprudence establishing that "the basic data underlying an investigating authority's dumping determination constitute 'essential facts' within the meaning of Article 6.9."[297] Moreover, the Panel noted that, in *China – Broiler Products*, the panel found that "a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the respondent."[298] On this basis, the Panel found that Article 6.9 does not require investigating authorities to "prepare disclosures containing the

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

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

5.128. Turning to China's contention that the European Union ought to have brought this claim under Article 11 of the DSU, we recall the Appellate Body's finding that allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU, whereas "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is … a legal characterization issue" and is, therefore, a legal question.[315] As we understand it, the European Union's key contention is that the Panel erred in determining that MOFCOM adequately disclosed the "essential facts" underlying its dumping determinations as required under Article 6.9. Although there are aspects of the Panel's analysis that concern the facts that were before MOFCOM, we understand the European Union's appeal to focus on the manner in

Article[] 6.9 … do[es] not require the disclosure of *all* the facts that are before an authority but, instead, those that are "essential"; a word that carries a connotation of significant, important, or salient. In considering which facts are "essential", the following question arises: essential for what purpose? The context provided by the

5.135. This brings us to the question of whether we can complete the legal analysis by ruling on the European Union's claim that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex.[330] Having reviewed MOFCOM's Preliminary and Final Dumping Disclosures[331], we consider that MOFCOM did not disclose the essential facts underlying its dumping determinations so as to permit the companies concerned to understand clearly what data MOFCOM had used, and how that data had been used to determine the margins of dumping for SMST and Tubacex. Accordingly, we find that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the data underlying its determination of dumping concerning SMST and Tubacex.

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

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

5.5 MOFCOM's injury determination

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

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

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

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

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

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

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

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

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

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

[342] Panel Reports, paras. 7.105 and 7.118.

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

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

5.5.1.1.1 The Panel's findings

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

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

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

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

---

[347] Japan's appellant's submission, para. 2; European Union's other appellant's submission, para. 109.
[348] European Union's other appellant's submission, para. 134.
[349] Panel Reports, paras. 7.105 and 7.118.
[350] Panel Reports, para. 7.117.
[351] Panel Reports, para. 7.124 (quoting Appellate Body Report, *China – GOES*, para. 137).
[352] Panel Reports, para. 7.126.
[353] Panel Reports, para. 7.126.
[354] Panel Reports, paras. 7.127-7.128 (referring to Japan's second written submission to the Panel, para. 21; and Oxford English Dictionary online, definition of "undercut", available at: <http://www.oed.com/view/Entry/211547>, accessed 30 January 2014).
[355] Panel Reports, para. 7.128.
[356] In this regard, the Panel noted that Article 6.3(c) Jof the SCM Agreement refers separately to price price suppression, and "lost sales". In the Panel's view, this provision strongly enomenon of lost sales is distinct from price undercutting. (See Panel Reports,

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

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

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

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

5.5.1.2 Whether MOFCOM was required to ma

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

5.5.1.2.2 Arguments on appeal

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

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

5.5.1.2.3 Analysis

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

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

---

[406] Panel Reports, para. 7.142 and fn 273 thereto.
[407] European Union's other appellant's submission, para. 138.
[408] European Union's other appellant's submission, para. 138 (referring to Panel Reports, para. 7.138).
[409] China's appellee's submission, para. 197 (quoting Panel Reports, para. 7.137).
[410] China's appellee's submission, para. 207.
[411] MOFCOM's Final Determination (Panel Exhibits JPN-2-EN and EU-30), internal pp. 23-28. In MOFCOM's Final Determination, Grade A corresponds to TP347HFG, Grade B corresponds to S30432, and Grade C corresponds to TP310HNbN. We note that MOFCOM's definition of the domestic like product was not the subject of a claim by the complainants before the Panel.
[412] Panel Reports, para. 7.137.
[413] Panel Reports, para. 7.137.
[414] Panel Reports, para. 7.141.
[415] Appellate Body Report, *China – GOES*, paras. 149 and 154.
[416] Panel Reports, para. 7.142.

5.181. In its investigation, MOFCOM observed that, during the POI, the dumped imports and domestic sales were concentrated in different segments of the HP-SSST market.[417] On the one hand, the majority of Chinese domestic HP-SSST production related to Grade A.[418] As such, the majority of domestic sales was of Grade A. The market share held by Grade A dumped imports in 2008 was only 1.45%.[419] There were no Grade A dumped imports thereafter. On the other hand, during the POI, the dumped imports of Grades B and C each held a market share of around 90% of its respective market segment.[420] We further recall that Japan argued before the Panel, and China did not dispute, that Grade B is approximat

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

5.183. Japan and the European Union claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in rejecting their claims that

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

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

5.5.2.2.1 The Panel's findings

5.195. Before the Panel, Japan and the European Union submitted that MOFCOM's impact analysis was at odds with, and did not follow from, its volume and price effects analyses. The complainants asserted that, having found no significant increase in volume whatsoever and price effects with

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

5.204. While the second sentence of Article 3.2 requires an investigating authority to consider the effect of the dumped imports on *prices*, the focus of Article 3.4 is on the state of the *domestic industry*.[448] The Appellate Body has clarified that it would be compatible with Article 3.4 for

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

5.207. As noted, Article 3.4 requires the evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry. These factors include actual and potential decline in

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

5.211. Having said this, we note that Article 3.4 does not merely require an examination of the
867 state of the domestic industry, but contemplates that an investigating authordumpeF(s).y "s mu5(9s).4(e)5.85

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

5.5.3.1.3 Whether the Panel made the case for the complainants

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

5.235. Referring to their first and second written submissions to the Panel and opening statements at the first and second meetings of the Panel, the complainants submit that they made a *prima facie* case regarding MOFCOM's reliance on the market share of dumped imports, factoring in the same aspects of MOFCOM's price effects and impact analyses that the Panel considered in its assessment of the matter at paragraphs 7.181 to 7.188 of the Panel Reports.[503] The complainants submit that they presented "evidence *and* legal argument" to establish that MOFCOM's failure to consider the market share of dumped imports in the context of all relevant evidence, including

products."[511] The complainants further referred to alleged flaws in MOFCOM's (i) volume analysis,

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

5.5.3.1.4.1 Article 11 of the DSU

5.243. In previous disputes, the Appellate Body has noted that a panel is required to "consider all

50% in 2010.[526] China states that it fails to see how any objective assessment of the quoted paragraph can lead to a conclusion that MOFCOM relied on a remaining high market share of 50%, but did not account for the declining market share of imports.[527] China also argues that the expression "remained high at around 50%" in itself shows that MOFCOM took into account the evolution of the market share, contrary to what the Panel suggested.[528]

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

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

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

5.5.3.1.4.3 MOFCOM's finding of price correlation

5.251. China also takes issue with several aspects of the Panel's assessment of MOFCOM's finding of price correlation, asserting that this finding was sufficient to demonstrate cross-grade price effects and, consequently, to satisfy MOFCOM's obligation to assess "how the 90% market shares

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

5.253. Japan the European Union contend that MOFCOM's finding of cross-grade price effects was based solely on assertions made by the petitioners, without any proper evaluation or analysis of

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

> The Panel acknowledges MOFCOM's reference to the Applicants' argument that "[a] large margin decrease of the prices of [Grade C] and [Grade B] products, both high-end products, will certainly drive down the price of [Grade A] products, so that a certain price difference among the three can be maintained" before concluding that "[Grade A] products belong to the same category of products as [Grade C] and [Grade B] products; that the price changes of the three are to a certain extent correlated with one another; that while assessing the impact on the domestic industry

5.264. Additionally, China argues that there was evidence on the record of actual substitution,

Contrary price movements

5.268. The Panel found that "MOFCOM failed to account for record evidence that trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices."[566] The Panel stated that this was particularly apparent in respect of domestic Grade C, "the price of which increased by 112.80% from 2009-2010, without any corresponding movement in prices for subject imports of Grades B and C, which actually fell over that period."[567] The Panel also noted that the price of domestic Grade A "increased by 9.35% from 2010 to [the first half of] 2011, whereas the price of imported Grade B fell by 10.63% during that period".[568] The Panel expressed concern, noting that "[a]n objective and impartial investigating authority would not have found price correlation without at least addressing, and explaining, such contrary price movements."[569]

5.269. China takes issue with the Panel's finding, arguing that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU "by finding that MOFCOM should have addressed contrary price movement to

567798

Grade A prices in 2009 and 2010, in order to maintain the price differential between the various grades."[575]

5.273. According to China, this reasoning by the Panel distorts MOFCOM's finding and disregards the wording of MOFCOM's Final Determination, contrary to Article 11 of the DSU. While acknowledging that MOFCOM's reasoning might be brief, China argues that this does not imply that MOFCOM did not "explore this issue meaningfully".[576] Taking into account that: (i) MOFCOM found price correlation on the basis of the applicants' arguments; (ii) "as a matter of logic", the low-end Grade A cannot substitute Grades B and C; and (iii) MOFCOM found price correlation in the sense that imported Grades B and C could have an impact on the price of domestic Grade A,

5.5.3.1.4.4 Conclusion

5.277. For all these reasons, we uphold the Panel's findings, in paragraphs 7.188 and 7.205 of the Panel Reports, paragraph 8.1.a.iii of the Japan Panel Report, and paragraph 8.6.d.iii of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST.

5.5.3.1.5 MOFCOM's non-attribution analysis

5.5.3.1.5.1 The Panel's findings

5.278. Before the Panel, Japan and the European Union argued that MOFCOM failed properly to ensure that injury caused by two known "other factors" – namely: (i) the decline in apparent consumption; and (ii) the increase in domestic production capacity – was not attributed to the dumped imports. The complainants submitted that MOFCOM conducted its non-attribution analysis regarding these two factors with respect to all grades of HP-SSST taken together, without considering any possibility that these other factors may have influenced different segments of the market differently, despite record evidence before MOFCOM demonstrating that imported and domestic HP-SSST were concentrated in different segments of the market, and despite the absence of any cross-grade price effects of dumped imports of Grades B and C on the prices of domestic Grade A. The complainants also contended that MOFCOM's non-attribution analysis would necessarily be flawed if its initial determination of the causal link between dumped imports and material injury to the domestic industry itself were flawed.

5.279. The Panel observed that MOFCOM sought to comply with the non-attribution requirement contained in Article 3.5 of the Anti-Dumping Agreement by considering whether certain other factors broke the causal link between dumped imports and material injury to the domestic industry it had found, stating that such methodology provides an appropriate basis for ensuring non-attribution.[583] Referring to previous jurisprudence by the Appellate Body, the Panel observed that, "before it becomes relevant or necessary for an investigating authority to separate and distinguish the injury caused by other factors from the injury caused by subRbrok2(n)-1.1(jur)6.8(aph)400gna

the Panel's findings in relation to MOFCOM's determination of the causal link (including those made in respect of MOFCOM's finding of price correlation) should be reversed, China contends that the Panel's finding that MOFCOM's non-attribution analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement should, as a consequence, also be reversed.[590]

5.282. Japan and the European Union disagree with China that the Panel's non-attribution findings in paragraphs 7.200-7.204 of the Panel Reports are "entirely based" on the Panel's findings regarding MOFCOM's determination of causation.[591] Referring to paragraphs 7.202-7.203 of the Panel Reports, the complainants submit that the Panel independently addressed certain additional aspects of their non-attribution arguments, and that China presented no argument as to why these additional reasons do not support the Panel's conclusion that MOFCOM's non-attribution analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[592]

5.5.3.1.6.2 Arguments on appeal

5.291. On appeal, Japan and the European Union take issue with the Panel's findings in paragraph 7.192 of the Panel Reports, submitting that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, by failing to examine the complainants' claims of independent violations of Articles 3.1 and 3.5 of the Anti-Dumping Agreement arising from MOFCOM's price effects and impact analyses.[603] The complainants further request us to complete the legal analysis and evaluate on the basis of the Panel's factual findings and undisputed facts on the record whether independent violations of Articles 3.1 and 3.5 arise in those instances where the complainants' claims under Articles 3.2 and 3.4 were rejected by the Panel or the Appellate Body.[604] More specifically, Japan requests us to find that China violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because: (i) MOFCOM improperly found that imports of Grade C had explanatory force for price undercutting effects on domestic Grade C; (ii)

> Articles 3.1 and 3.5 of the Anti-Dumping Agreement because China failed to conduct an objective examination, based on positive evidence, of the causal relationship between the imports under investigation and the alleged injury to the domestic industry. China determined that the allegedly dumped imports are causing injury despite an absence of a significant increase in the volume of dumped imports, based on improper price effects analyses and based on flawed impact analyses, including improper evaluation of or failure to consider relevant economic factors and indices having a bearing on the state of the domestic industry.

5.296. In the light of this language in theht angmpage in

imports might be shown to affect the price of domestic Grade A HP-SSST. We also uphold the Panel's findings, in paragraphs 7.204 and 7.205 of the Panel Reports, paragraph 8.1.a.iv of the Japan Panel Report, and paragraph 8.6.d.iv of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed properly to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports. Finally, we find that the Panel did not act inconsistently with Article 11 of the DSU in concluding, in paragraph 7.192 of the Panel Reports, that the complainants had not advanced independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

5.6 Additional working procedures concerning BCI

5.299. We now turn to address the European Union's claim that the Panel erred in its interpretation and application of Articles 17.7 and 6.5 of the Anti-Dumping Agreement and Article 18.2 of the DSU, when ruling on certain preliminary issues raised by the European Union regarding the additional working procedures adopted by the Panel to protect business confidential information (BCI).[612] We start by setting out the relevant findings by the Panel and the context in which the Panel made these findings.

5.6.1 The Panel's findings

5.300. Following consultations with the parties, on 27 September 2013, the Panel adopted additional working procedures concerning BCI (BCI Procedures).[613] Paragraphs 1 and 2 of the BCI Procedures originally provided:

> (1) These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panels. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which could seriously prejudice an essential interest of the person or entity that supplied the information to the Party. *In this regard, BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping investigation at issue in these disputes*. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.
>
> (2) *The first time that a party submits to the Panels BCI as defined above from an entity that submitted that information in the anti-dumping investigation at issue in these disputes, the party shall also provide, with a copy to the other parties, an authorizing letter from the entity*. That letter shall authorize China, the European Union and Japan to submit in these disputes, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation at issue.[614]

5.301. The European Union objected to two aspects of the BCI Procedures adopted by the Panel.[615] First, the European Union took issue with the language in paragraph 1, quoted above,

5.302. The European Union also objected to the language in paragraph 2 of the Panel's BCI Procedures, whereby a WTO Member providing information to the panel that had been previously submitted to the authority in the underlying anti-dumping investigation as confidential was required to obtain and provide to the panel evidence of prior written authorization from the entity that had originally submitted that information to the domestic investigating authority. The European Union argued that such a requirement would mean that a particular firm, or submitting entity involved in a domestic anti-dumping proceeding, could "simply withhold the authorization and effectively limit the information that may be submitted in WTO dispute settlement".[619] The European Union submitted that Article 17.7 of the Anti-Dumping Agreement makes clear that a Member is not required to obtain authorization before providing confidential information to WTO panels.[620]

5.303. China responded that the aspects of the Panel's BCI Procedures challenged by the European Union added to, rather than detracted from, the protection provided by the DSU, and that the additional protection provided by the Panel for information previously submitted to MOFCOM as BCI was in consonance with the confidentiality requirements in Article 6.5 of the Anti-Dumping Agreement. China further submitted that "an authorizing letter is a necessary instrument to ensure compliance by the investigating authority with its obligations under Article 6.5 of the Anti-Dumping Agreement"[621], and that it is not uncommon to require the presentation of such a letter in WTO dispute settlement proceedings concerning trade remedies.

5.304. The Panel agreed with the European Union that the original wording of the first paragraph of the BCI Procedures suggested that BCI designation is determined by the entity submitting the information to MOFCOM. The Panel therefore amended paragraph 1 of the BCI Procedures to read, in relevant part, that "BCI shall include information that was previously *treated* by … MOFCOM … as BCI in the anti-dumping investigation at issue in these disputes."[622] However, insofar as the European Union had argued that the designation of BCI should not depend on the investigating authority's determination to treat information as confidential in the underlying anti-dumping proceedings, the Panel considered that the procedures it had adopted did not detract from the ability of WTO Members to designate information as confidential under Article 18.2 of the DSU. The Panel considered that, even though the designation of confidential information in anti-dumping proceedings under Article 6.5 of the Anti-Dumping Agreement is distinct from the designation of BCI for purposes of DSU proceedings, as contemplated in Article 18.2 of the DSU, these designations are "closely related".[623] According to the Panel, this relationship finds support in the text of Article 17.7 of the Anti-Dumping Agreement[624], which, as a special or additional rule and procedure in Appendix 2 to the DSU, prevails over the DSU to the extent that there is a difference between these two sets of provisions.[625] The Panel further stated that it understood the term "confidential information" in Article 17.7 to refer to "the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5" and subsequently provided to a dispute settlement panel pursuant to Article 17.7.[626] The Panel considered, therefore, that "Article 17.7 envisages that confidential information on the investigating authority's record – obtained from a 'person, body or authority' – may be provided to a panel, and imposes on the panel a non-disclosure obligation similar to that imposed on the

[619] Panel Reports, para. 7.13.
[620] Panel Reports, para. 7.13 and fn 33 thereto.
[621] Panel Reports, para. 7.15 (quoting China's response to Panel question No. 3, para. 13).
[622] Panel Reports, para. 7.18. (emphasis added by the Panel) The Panel noted that China did not oppose this amendment. (Ibid., fn 46 to para. 7.18 (referring to China's response to Panel question No.1, paras. 3-5))
[623] Panel Reports, para. 7.20.
[624] Article 17.7 of the Anti-Dumping Agreement provides:
> Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

[625] Panel Reports, para. 7.21 (referring to Article 1.2 and Appendix 2 to the DSU; and Appellate Body Report, *Guatemala – Cement I*, para. 66).
[626] Panel Reports, para. 7.21.

authority by the last sentence of Article 6.5."[627] Based on this reasoning, the Panel declined to modify further paragraph 1 of the BCI Procedures in the manner proposed by the European Union.

5.305. With regard to paragraph 2 of the original BCI Procedures, the Panel found that the *provision* of confidential information to the Panel did not amount to its *disclosure* to the public, and rejected, on this basis, China's argument that WTO Members must provide an authorizing letter from the entity that submitted the confidential information in the underlying anti-dumping proceedings before they can "provide" such information to a WTO panel in the context of a dispute under the Anti-Dumping Agreement.[628] The Panel therefore accepted the European Union's request

5.315. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body observed that the confidentiality requirements in Articles 17.10 and 18.2 of the DSU, as well as in paragraph VII:1 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes[649], are set out "at a level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information."[650] Whether a panel would consider that there is a need to adopt, based on the authority it enjoys under Article 12 of the DSU, special procedures for the additional protection of BCI, will therefore vary from case to case. Nevertheless, it is important to distinguish between the general layer of confidentiality that applies in WTO dispute settlement proceedings, as foreseen in Articles 18.2 and 13.1 of the DSU, and the additional layer of protection of sensitive business information that a panel may choose to adopt, usually at the request of a party. In the context of WTO disputes brought under the Anti-Dumping Agreement, Article 17.7 of that Agreement stipulates that "[c]onfidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information."[651]

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS454/AB/R

6.1. In the appeal of the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R and Add.1 (Japan Panel Report), for the reasons set out in this Report:

a. with respect to the Panel's findings under Article 6.5 of the Anti-Dumping Agreement, the Appellate Body:

   i. finds that the Panel did not err in its interpretation and application of Article 6.5 of

d. with respect to the Panel's findings under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Appellate Body:

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

ii. finds that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or making the case for Japan;

iii. upholds the Panel's findings, in paragraphs 7.188, 7.205, and 8.1.a.iii of the Japan Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the prices of domestic Grade A HP-SSST;

iv. upholds the Panel's finding, in paragraphs 7.204, 7.205, and 8.1.a.iv of the Japan Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports; and

v. finds that the Panel did not act inconsistently with Article 11 of the DSU, in concluding, in paragraph 7.192 of the Japan Panel Report, that Japan had not advanced independent Article 3.5 claims – other than those regarding MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

6.2. The Appellate Body recommends that the DSB request China to bring its measures found in

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS460/AB/R

6.1. In the appeal of the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R and Add.1 (EU Panel Report), for the reasons set out in this Report:

a. with respect to the Panel's findings under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement, the Appellate Body:

i. upholds the Panel's findings, in paragraphs 7.49 and 7.51 of the EU Panel Report, that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the European Union's claims under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement; and that these claims were thus within the Panel's terms of reference;

ii. finds that the Panel did not err in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement;

iii. finds that the Panel did not act inconsistently with Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and consequently

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

b. with respect to the Panel's findings under Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement, the Appellate Body upholds the Panel's finding, in paragraphs 7.101 and 8.2(e)1.9n5sca. oprodue EU Panep(ati)-4t6(n)5.1(0691 Tw[(th act i)-6.3(n.2(a ac

ii. completes the legal analysis and finds that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex;

e. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and in connection with MOFCOM's price effects analysis, the Appellate Body:

i. finds that the Panel erred in its interpretation of Article 3.2 of the Anti-Dumping Agreement in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may simply consider whether dumped imports sell at lower prices than comparable domestic products;

ii. reverses the Panel's findings, in paragraphs 7.130, 7.144, and 8.7.b.i. of the

iv. finds that the Panel did not act inconsistently with Article 11 of the DSU, in concluding, in paragraph 7.192 of the EU Panel Report, that the European Union had not advanced independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses; and

h. with respect to the Panel's designation of business confidential information (BCI) and its adoption of BCI Procedures, the Appellate Body declares moot and of no legal effect the Panel's findings and legal reasoning developed in paragraphs 7.21-7.25 and 7.27-7.29 of the EU Panel Report, and does not find it necessary to make further findings on this matter in order to resolve the present dispute.

6.2. The Appellate Body recommends that the DSB request China to bring its measures found in