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CHINA – DEFINITIVE ANTI-DUMPING DUTIES ON X-RAY SECURITY INSPECTION EQUIPMENT FROM THE EUROPEAN UNION

Report of the Panel

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Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613

Short Title	Full Case Title and Citation
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179
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, 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, 2741
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865

Short Title	Full Case Title and Citation
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

I. INTRODUCTION

1.1 On 25 July 2011 the European Union requested consultations with the Government of the People's Republic of China ("China") pursuant to Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 17.3 of the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") with respect to the imposition of definitive anti-dumping duties on x-ray security inspection equipment from the EU, pursuant to Ministry of Commerce of the People's Republic of China ("MOFCOM"), Notice No. 1 (2011), including its annex[1]. The consultations were held on 19 September and 18 October 2011. The consultations failed to resolve the dispute.

1.2 On 8 December 2011, the European Union requested, pursuant to Article 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement that the Dispute Settlement Body (the "DSB") establish a Panel to examine this matter[2].

1.3 At its meeting on 20 January 2012, the DSB established a panel pursuant to the request of the European Union in document WT/DS425/2, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS425/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5 On 2 March 2012, the European Union requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.6 On 12 March 2012, the Director-General accordingly composed the Panel as follows:

Chairman: Mr Eduardo Pérez Motta

Members: Ms Andrea Marie Brown
Mr Gilles LeBlanc

1.7 Chile, India, Japan, Norway, Thailand and the United States reserved their rights to participate in the Panel proceedings as third parties.

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[1] WT/DS425/1.
[2] WT/DS425/2.

1.8 The Panel met with the parties on 29-30 May and 11-12 September 2012. It met with the third parties on 30 May 2012. The Panel issued its interim report to the parties on 28 November 2012. The Panel issued its final report to the parties on 18 January 2013.

II. FACTUAL ASPECTS

2.1 On 28 August 2009, the Chinese producer Nuctech Company Limited (Nuctech) filed an application with MOFCOM requesting the imposition of anti-dumping measures on imports of x-ray security inspection equipment originating in the European Union (Application)[3].

2.2 MOFCOM issued a Notice of Initiation of an anti-dumping investigation on 23 October 2009[4]. MOFCOM fixed a twelve-month Period of Investigation (POI) for dumping, running from 1 January 2008 to 31 December 2008. The POI for MOFCOM's injury investigation covered the period 1 January 2006 to 31 December 2008.

2.3 Two European Union exporters/producers - Smiths Heimann GmbH and Smiths Heimann SAS - registered to participate as respondents in MOFCOM's investigation. The European Commission also registered as a respondent. Only Smiths Heimann GmbH (Smiths) and the European Commission participated in MOFCOM's investigation.

2.4 On 16 November 2009, MOFCOM issued a dumping questionnaire. On the same date, MOFCOM's Bureau of Industrial Injury Investigation (BIII) issued a domestic manufacturers questionnaire, a domestic importers questionnaire, and a foreign manufacturers/exporters (injury) questionnaire.

2.5 Smiths filed its responses to the dumping[5] and injury[6] questionnaires on 30 December 2009. Nuctech submitted its response to the domestic manufacturers' questionnaire on 19 December 2009[7]. No other exporter, producer or importer filed any questionnaire responses.

2.6 On 9 June 2010, MOFCOM published a preliminary determination of dumping and injury, and imposed provisional anti-dumping duties on the subject products[8].

2.7 On 29 June 2010, Smiths submitted its comments on MOFCOM's preliminary determination[9,10]. The European Commission submitted its comments on 25 June 2010.

2.8 MOFCOM conducted an on-site verification of Smiths' questionnaire responses from 18 to 25 August 2010.

2.9 On 14 September 2010, MOFCOM disclosed the essential facts that it would use to make a final injury determination (Final Injury Disclosure)[11]. On 25 September 2010, Smiths submitted its comments on MOFCOM's Final Injury Disclosure[12].

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[3] Application, Exhibit EU-3.
[4] MOFCOM's Notice of Initiation, Exhibit EU-4.
[5] Smiths' Questionnaire Response (Dumping) Exhibit EU-6.
[6] Smiths' Questionnaire Response (Injury) Exhibit EU-7.
[7] Nuctech's Questionnaire Response, Exhibit EU-8.
[8] Preliminary Determination, Exhibit EU-12.
[9] Smiths' Response to Preliminary Determination (Dumping), Exhibit EU-13.
[10] Smiths' Response to Preliminary Determination (Injury), Exhibit EU-14.
[11] MOFCOM's Basis for Final Injury Disclosure Exhibit, EU-15.
[12] Smiths' Comments on Injury Disclosure, Exhibit EU-16.

2.10 On 28 December 2010, MOFCOM disclosed the essential facts that it would use to make a final determination of dumping (Final Dumping Disclosure)[13]. On 7 January 2011, Smiths filed its comments on the Final Dumping Disclosure[14]. The European Commission filed its comments on 6 January 2011.

2.11 On 23 January 2011, MOFCOM published its final determination of dumping and injury (Final Determination)[15]. The Final Determination provides for the imposition of a 33.5% anti-dumping duty on imports of x-ray scanners produced by Smiths. The Final Determination also imposes a residual rate of 71.8% on imports of x-ray scanners from other sources in the European Union.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THE EUROPEAN UNION

3.1 In its written submissions, the European Union requests the Panel to find that the measure at issue in this dispute is inconsistent with the following provisions of the Anti-Dumping Agreement:

(a) Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because MOFCOM failed to make an objective examination on the basis of positive evidence of the price effects of dumped imports;

(b) Articles 3.1 and 3.4 of the Anti-Dumping Agreement, since MOFCOM:

- failed to base its evaluation of the relevant factors and indices having a bearing on the state of the domestic industry on positive evidence and thus failed to make an objective examination of the impact of dumped imports on the Chinese industry;
- failed to examine all relevant factors listed in Article 3.4 of the Anti-Dumping Agreement, in particular, the magnitude of the margin of dumping; and
- failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the state of the Chinese industry.

(c) Articles 3.1 and 3.5 of the Anti-Dumping Agreement, since MOFCOM:

- failed properly to examine the causal relationship between dumped imports and injury; and
- failed to examine the relevance of other known factors in its non-attribution analysis.

(d) Articles 6.5.1, 6.4 and 6.2 of the Anti-Dumping Agreement because MOFCOM:

- failed to ensure with respect to certain confidential information submitted by the applicant in the Application and its annexes, and the investigation questionnaire and its annexes, that non-confidential summaries of confidential information were

[13] MOFCOM's Dumping Disclosure to Smiths (BCI), Exhibit EU-17 and MOFCOM's Dumping Disclosure to the European Commission, Exhibit EU-18.
[14] Smiths' Comments on the Dumping Disclosure, Exhibit EU-19.
[15] Final Determination, Exhibit EU-2.

sufficiently detailed to enable a reasonable understanding of the substance of the information submitted; and

- failed to require a statement of reasons explaining exceptional circumstances why summarization was not possible with respect to a statement by the Chinese Public Security Bureau of Civil Aviation Administration (Public Security Bureau).

(e) Articles 6.9, 6.4 and 6.2 of the Anti-Dumping Agreement because MOFCOM:

- failed to provide interested parties with information about the essential facts under consideration for the determination of injury;
- failed to provide interested parties with information about the essential facts under consideration for the determination of normal value and export price;
- failed to provide interested parties with information about the essential facts under consideration for the calculation of the dumping margin for the cooperating producer; and
- failed to provide interested parties with information about the essential facts under consideration for the calculation of the residual duty.

(f) Article 12.2.2 of the Anti-Dumping Agreement because:

- neither in the public notice of the imposition of definitive measures, nor in a separate report, MOFCOM set forth sufficiently detailed explanations for the methodology used in the establishment of the normal value; together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected;
- neither in the public notice of the imposition of definitive measures, nor in a separate report, MOFCOM set forth sufficiently detailed explanations for all the considerations relevant to the injury determinations; together with references to the matters of fact and law and reasons which led to arguments being accepted or rejected; and
- neither in the public notice of the imposition of definitive measures, nor in a separate report, MOFCOM made available the calculations and data used to calculate the margins for Smiths, as well as the calculations and underlying data on which it relied to determine the residual duty.

3.2 The European Union requests the Panel to recommend that the DSB request China to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

B. CHINA

3.3 China requests the Panel to reject the European Union's claims in their entirety.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions, oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and

their oral statements or executive summaries thereof, are attached as addenda to this Report in Annexes A, C, E and F (see List of Annexes, pages vii and viii).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The third parties were invited to make written submissions and oral statements to the Panel. Japan and Norway made both written submissions and oral statements. Chile made only an oral statement, while the United States made only a written submission to the Panel. India and Thailand did not make any written or oral representations to the Panel. The third parties' written submissions and oral statements, or executive summaries thereof, are attached as addenda to this Report in Annexes B and D (see List of Annexes, pages vii and viii).

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 28 November 2012, the Panel submitted its Interim Report to the parties. On 12 December 2012, China submitted written requests for review of precise aspects of the Interim Report. The European Union did not submit any request for review of its own, but submitted comments on China's requests on 21 December 2012.

6.2 Before turning to the substantive issues raised by China's requests, we note that China makes numerous requests that the Panel's summaries of China's arguments be more detailed. In general, the European Union does not provide specific comments on these requests. The European Union's position is that the Panel's summaries of arguments are adequate and do not require the extensive amendments requested by China. The European Union expresses a concern that acceding to China's requests may upset the balance between the presentation of the arguments of each party. However, the European Union ultimately defers to the Panel's judgment regarding whether to accommodate China's requests. As each of China's requested amendments to the summaries is indeed based upon its submissions during the course of the Panel proceedings, we see no harm in accommodating China's requests. Although the European Union notes that acceding to China's requests may upset the balance between the presentation of each party's arguments, we do not think that the amendments are substantial enough to make this a concern.

6.3 China also makes numerous requests that certain sections of the Panel's evaluation, as opposed to the summaries of the parties' arguments, be supplemented with China's arguments as presented during the course of the proceedings. In general, the European Union objects to these requests, on the basis that the additions are too detailed and are unnecessary. However, if the Panel is inclined to accede to China's requests, the European Union asks that the additions be made to the summaries of China's arguments, rather than to the Panel's evaluation. Given that each of China's requests is based upon its submissions, the Panel has accommodated the requests. However, the Panel has made the additions to China's summaries of arguments, rather than to the Panel's evaluation. This is because the Panel does not consider the additions necessary to its own reasoning, but is prepared to add further detail to the summaries of China's arguments. Where the requested additions were already included in the summaries of China's arguments, the Panel has not accommodated the request.

6.4 China identified certain information in the Interim Report and in an Annex to the Interim Report which disclosed confidential information. The Panel has removed this information from the Final Report and from the relevant Annex.

6.5 China also identified several typographical errors in the Interim Report, which we have corrected. We are grateful for China's assistance in this regard.

6.6 We now turn to the substantive issues raised by China's requests. As explained below, the Panel has modified aspects of its findings in light of the parties' comments where it considered appropriate. Due to these changes, the numbering of certain paragraphs and footnotes in the Final Report has changed from the Interim Report. Unless otherwise specified, the text below refers to the paragraph and footnote numbers in the Interim Report.

B. PRICE EFFECTS OF DUMPED IMPORTS: ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

1. Paragraph 7.39

6.7 China requests this paragraph be modified to reflect that Smiths' failure to raise the differences between "low-energy" and "high-energy" scanners in the context of the price analysis relates to why the average unit value methodology was reasonable.

6.8 The European Union contends that the addition requested by China is unnecessary. However, if the Panel agrees to include it, it should be preceded by "According to China...", to clarify that it represents part of China's argument, rather than the Panel's reasoning.

6.9 Given that the amendment requested by China, as supplemented by the European Union, does not alter the substance of the Panel's reasoning and is an accurate reflection of China's position, we have acceded to China's request. However, given that the Panel summarises the arguments of China on this point in paragraph 7.38 of the Final Report, we have made the addition to the end of this paragraph, rather than in the middle of the Panel's reasoning in paragraph 7.40 of the Final Report.

2. Paragraph 7.69

6.10 China requests that paragraph 7.69 be modified to list the energy levels of the subject products produced by Smiths Heimann GmbH, rather than simply stating that all scanners had an energy level of 300 KeV or less. China contends that this will "more precisely reflect the facts".

6.11 The European Union does not comment on this request.

6.12 Although the Panel does not consider that the amendment requested by China is necessary to its reasoning, we do not perceive a problem in adding the level of precision requested by China. Consequently, the Panel has added the detail in footnote 82 of the Final Report.

3. Paragraphs 7.80-7.83

6.13 China requests that the Panel exclude the images of the scanners included within the Interim Report. In China's view, the images are unnecessary and suggest that all scanners produced by Nuctech are similar to those in the images, when in fact the Panel acknowledged elsewhere that "the low-energy market sector represent[ed] a significant part of Nuctech's activities throughout the POI".

6.14 The European Union objects to China's request. According to the European Union, the images are very useful in illustrating the differences in physical characteristics and uses among the various products covered by the investigation. China has not advanced a convincing reason for removing the images. The Interim Report makes clear that the models are merely examples and it does not suggest that Nuctech sold only high-energy models.

6.15 The Panel rejects China's request. The images constitute an important part of our analysis. Further, our reasoning clearly indicates that Nuctech produced both "high" and "low-energy" scanners and the use of the images does not suggest otherwise.

4. Paragraph 7.85

6.16 China notes the Panel's reliance upon the statement in the Final Determination that "[a]lthough X-Ray scanners of a high energy level are usually used to inspect large objects, while X-Ray scanners of a low energy level are used to inspect small objects, these are only variations adopted in accordance with different product designs and market elections". According to China, the Panel has taken the statement out of context. This is because MOFCOM made it as a part of the product scope determination, rather than as a part of the injury determination. Further, MOFCOM also stated that "high-energy scanners can also be used to inspect small objects". Consequently, China argues that the observations made by MOFCOM do not acknowledge differences between "high-energy" and "low-energy" scanners.

6.17 The European Union objects to China's request. The European Union argues that the Interim Report clearly states the context in which MOFCOM's observations were made.

6.18 We do not consider it necessary to make any changes to our reasoning in paragraph 7.85 (paragraph 7.86 of the Final Report). The paragraph already provides that MOFCOM made the observations "in the context of considering the scope of the product under investigation". Further, the Panel acknowledges and addresses MOFCOM's observation that "high-energy scanners can be used to detect small objects" in paragraph 7.88 of the Final Report.

5. Paragraph 7.87

6.19 In stating that the use of "high-energy" scanners to inspect small objects appears to be a theoretical possibility rather than a reflection of "market elections", China argues that the Panel has not taken into account the evidence presented by it to establish that there are scanners with an energy level above 300 KeV that are designed to inspect small objects.

6.20 The European Union recalls that it has addressed China's arguments in this regard in its submissions to the Panel during the proceedings.

6.21 The Panel has amended the wording used in paragraph 7.88 of the Final Report, and added footnote 106, in order to clarify that it has indeed taken into consideration the evidence furnished by China relating to the uses of certain "high-energy" scanners.

6. Paragraph 7.89

6.22 China argues that the Panel relied upon Smiths' assertion about the price differences between "high-energy" and "low-energy" scanners without addressing China's submission that the assertion was not supported by any evidence.

6.23 The European Union recalls that it addressed China's argument in this regard in its submissions during the course of the Panel proceedings.

6.24 The Panel has decided to add footnote 112 to paragraph 7.90 of the Final Report in order to clarify its findings regarding Smiths' submissions on the price differences between "high-energy" and "low-energy" scanners.

C. THE STATE OF THE DOMESTIC INDUSTRY: ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

1. Paragraph 7.142

6.25 China argues that paragraph 7.142 does not accurately reflect its arguments. According to China, it clarified during the second meeting with the Panel that Nuctech, rather than MOFCOM, adjusted the data originally provided during the verification process, in order to exclude exports. China requests an amendment to the paragraph to reflect this.

6.26 The European Union submits that the current text is clear and accurate. If the Panel nevertheless agrees with China's suggestion, the European Union requests that the amendment be prefaced with "China contends ...".

6.27 We note that China changed its position, between its first submission and the second meeting with the Panel, regarding whether MOFCOM or Nuctech modified the data to account for exports. In its findings, the Panel has accepted China's revised position, namely that Nuctech itself revised the data. The Panel has amended the summary of China's arguments in paragraph 7.144 of the Final Report to reflect this.

2. Paragraph 7.198

6.28 China argues that the Panel's finding in this paragraph, namely that MOFCOM assessed the industry's actual profit level by reference to the expected level of profit, is wrong as a matter of fact. According to China, MOFCOM only examined the actual profit level. It found that the domestic industry was making losses and *a contrario* did not make a profit. Further, according to China, in the context of Article 3.4 of the Anti-Dumping Agreement, an investigating authority is required only to examine the "state" of the domestic industry. Therefore, contrary to the findings of the Panel, MOFCOM was not required to provide an explanation regarding why it expected the domestic industry to be profitable. Finally, China submits that in the Final Determination MOFCOM examined the profit indicator at length.

6.29 The European Union objects to China's comments. The European Union argues that paragraph 7.198 does not address the level of profit in a vacuum, but in its proper context, which should be measured by a proper counterfactual of the expected profit level. Further, the European Union contends that during the course of the Panel proceedings, China systematically failed to address the European Union's allegation about the "expected level" of profits. Therefore, China's attempt to rebut the Panel's finding at the interim review stage of proceedings should be rejected as a matter of due process.

6.30 In the Panel's view, it is clear from the Final Determination that MOFCOM did consider the "expected profit" in assessing the state of the domestic industry. The Panel has added footnote 216 to paragraph 7.200 of the Final Report in order to clarify the basis for its view that MOFCOM's analysis of profit was not restricted merely to the absolute levels of profit obtained by the domestic industry, but was also conducted by reference to expected profit levels. The Panel does not consider it necessary to further amend its reasoning in the light of the China's comments.

D. CAUSATION: ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

1. Paragraphs 7.239-7.244

6.31 China argues that the Panel has not addressed its arguments summarised at paragraphs 7.231 and 7.232 of the Final Report. China requests the Panel to address them.

6.32 The European Union does not comment on this request.

6.33 The Panel notes that the arguments referred to by China relate to the debate between the parties about whether there was a correlation between subject imports and domestic prices, and the relevance of this for the causation analysis. Having reached the conclusion that MOFCOM's causation analysis was not adequate on the basis of other arguments made by the parties, the Panel in the Interim Report did not proceed explicitly to address the arguments regarding correlation. The Panel is prepared to accommodate China's request, in order to make explicit its views regarding the correlation arguments. Consequently, the Panel has added paragraphs 7.246-7.247 to the Final Report.

2. Paragraph 7.269

6.34 In concluding that MOFCOM did not address Smiths' arguments concerning "product quality" and "technology factors", China submits that the Panel did not consider findings by MOFCOM in this regard on page 16 of the Final Determination.

6.35 The European Union objects to China's comment. According to the European Union, MOFCOM's conclusions about "physical characteristics" and "technological features" in the context of the likeness analysis on page 16 of the Final Determination are not connected with the proper analysis MOFCOM should have conducted on page 32 of the Final Determination when specifically examining other known factors as a part of the non-attribution analysis.

6.36 The Panel considers it appropriate to add footnote 281 to paragraph 7.279 of the Final Report in order explicitly to address China's comment and to clarify its reasoning in this regard.

E. MOFCOM'S TREATMENT OF NON-CONFIDENTIAL SUMMARIES: ARTICLES 6.5.1, 6.2 AND 6.4

1. Paragraph 7.346

6.37 China objects to the Panel's statement that a reply of "yes" or "no" will not necessarily reveal confidential information. China asserts that the Panel effectively takes issue with MOFCOM's initial decision to treat the relevant information as confidential. China suggests that this issue was not before the Panel, since there was no claim by the EU concerning the designation of the relevant information as confidential. Furthermore, China contends that Nuctech considered that the reply to question 19 was not confidential, and therefore that the non-confidential version could reflect the reply ticked in the confidential version as well.

6.38 The European Union asks the Panel to reject China's remarks. According to the European Union, the Panel does not take issue with whether or not the relevant information can properly be regarded as confidential. According to the European Union, the Panel rightly explains that there is a violation of Article 6.5.1 because there is no summary of the substantive content of the relevant confidential information, nor any evidence that MOFCOM applied the Article 6.5.1 exceptional circumstances mechanism. The Panel then addressed China's argument that summarization should always be considered impossible in the case of "yes" or "no" answers.

6.39 We are not persuaded by China's arguments. Having found that there was no evidence of any application by MOFCOM of the Article 6.5.1 exceptional circumstances mechanism, we then merely addressed China's argument that a "yes"/"no" answer cannot be summarized because such summary would necessarily reveal confidential information. However, we have amended paragraph 7.350 of the Final Report to clarify that the main reason for rejecting China's argument is MOFCOM's failure to invoke the Article 6.5.1 exceptional circumstances mechanism.

F. DISCLOSURE OF ESSENTIAL FACTS

1. Paragraphs 7.412 and 7.414, and footnote 375

6.40 China contends that the Panel failed to reflect China's argument that the European Union extended the scope of its claim from an alleged lack of disclosure of the calculations of the dumping margin, normal value and export price to an alleged lack of disclosure of the (underlying) price and adjustments data. China proposes a number of changes to the Panel's description of China's position at paragraphs 7.412 and 7.414, and footnote 375. The European Union denies that it has extended the scope of its claim of violation. According to the European Union, China is confusing the claim with arguments advanced during the course of the Panel proceedings. The European Union contends that its original claim, as set forth in its request for establishment of a Panel, concerned the disclosure of both the calculations and the underlying data.

6.41 While we have amended paragraph 7.416 and footnote 379 of the Final Report to avoid any risk of misrepresenting China's position, we disagree with China's assertion that the European Union improperly extended the scope of its claim. We have clarified footnote 379 of the Final Report to avoid any uncertainty.

6.42 We have also amended paragraph 7.418 of the Final Report, to avoid any risk of misrepresenting China's reliance on the *Argentina – Poultry Anti-Dumping Duties* case.

G. PUBLIC NOTICE

1. Paragraph 7.457 and footnote 406

6.43 China asks the Panel to amend its findings to prevent any inconsistency with its finding, in footnote 406, that the European Union's claim should not be understood to refer to "information on the underlying facts". The European Union contends that it is clear that the Panel did not fault China for failing to provide information on the underlying facts. The European Union also contends that the Panel is not bound to follow the terminology or legal reasoning advanced by the parties.

6.44 In our view, all of the elements identified in paragraph 7.457 properly pertain to the explanation of MOFCOM's price effects methodology, and have therefore been properly addressed by the Panel. To avoid any risk of inconsistency with footnote 406, though, we have made certain changes to the text of footnote 410 in the Final Report, and the text of paragraph 7.461 of the Final Report.

2. Paragraphs 7.462, 7.464 and 7.466

6.45 China claims that the European Union's claim should not be understood to include reference to the reasons why MOFCOM resorted to facts available, and the factual basis for its residual duty determination. According to China, the European Union's claim should be restricted to MOFCOM's failure to publish the calculations and underlying data for the residual duty. The European Union asks the Panel to reject China's argument, stating that all aspects of the European Union's claim were properly included in its request for establishment of a Panel.

6.46 We uphold China's request insofar as it applies to the reasons justifying MOFCOM's resort to facts available. We agree that such reasons do not form part of the data underlying MOFCOM's residual duty determination. However, we reject China's request in respect of the factual basis for MOFCOM's residual duty determination, since such factual basis does form part of the underlying data for MOFCOM's determination. We have amended paragraph 7.468 of the Final Report

accordingly. We do not consider that there is any need for additional changes to other paragraphs of the Final Report.

H. CONCLUSION AND RECOMMENDATIONS

6.47 In light of its comments on paragraphs 7.462, 7.464 and 7.466 (discussed above), China has also suggested a change to paragraph 8.1. As a result of the Panel's position on the proposed modification by China to paragraph 7.466, there is no need to change paragraph 8.1 in the manner requested by China.

VII. FINDINGS

7.1 This case concerns the imposition by China of anti-dumping duties on imports of certain x-ray security inspection equipment from the European Union. The European Union claims that the anti-dumping duties imposed by China, and the underlying investigation conducted by the Chinese authorities, are inconsistent with various procedural and substantive provisions of the Anti-Dumping Agreement. China denies the European Union's claims.

7.2 The European Union has advanced a number of procedural claims under Articles 6.5.1, 6.9 and 12.2.2 of the Anti-Dumping Agreement, and certain substantive claims under Article 3 of the Anti-Dumping Agreement. We shall begin by examining the European Union's substantive claims. Thereafter, we shall turn to the European Union's procedural claims. Before reviewing the European Union's claims, though, we recall a number of general principles regarding treaty interpretation, standard of review and burden of proof in WTO dispute settlement proceedings.

A. GENERAL PRINCIPLES REGARDING TREATY INTERPRETATION, THE APPLICABLE STANDARD OF REVIEW AND BURDEN OF PROOF

1. Treaty Interpretation

7.3 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules[16].

2. Standard of Review

7.4 Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. (emphasis added)

7.5 The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record

[16] Done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331 (1980); 8 International Legal Materials 679 (1969).

supported its factual findings; and (ii) how those factual findings supported the overall determination[17].

7.6 The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute[18]. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching"[19].

7.7 Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

3. Burden of Proof

7.8 The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim[20]. Therefore, as the complaining party, the European Union bears the burden of demonstrating that certain aspects of the anti-dumping measure at issue are inconsistent with the Anti-Dumping Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party[21]. Finally, it is generally for each party asserting a fact to provide proof thereof[22].

B. INTRODUCTION TO INJURY

7.9 The European Union claims that China acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement in making its findings regarding whether the dumped imports caused injury to the domestic industry. This section of the Report examines each of the claims in turn.

7.10 First, the Panel will consider the European Union's claim that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it was

[17] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[18] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[19] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[21] Appellate Body Report, *EC – Hormones*, para. 104.
[22] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

not an objective examination based on positive evidence. The Panel will examine the European Union's argument that MOFCOM conducted its price effects analysis without taking into account the "considerable differences between the products covered by the investigation"[23], in particular between "high-energy" (energy levels above 300 KeV) and "low-energy" (energy levels at or below 300 KeV) scanners.

7.11 Second, the Panel will consider the European Union's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The European Union argues that MOFCOM's examination of the impact of the dumped imports on the domestic industry was not based upon "positive evidence"; that MOFCOM did not consider "all relevant economic factors and indices" having a bearing on the state of the industry; and that MOFCOM did not properly evaluate the interaction between the "positive" and "negative" economic factors and indices and consider them in their proper context.

7.12 Third, the Panel will evaluate the European Union's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The Panel will consider the European Union's argument that the price effects methodology employed by China under Article 3.2 has a consequent impact upon the validity of MOFCOM's causation findings. The Panel will also evaluate the contention that MOFCOM did not provide a reasoned and adequate explanation in attributing injury to the dumped imports, particularly in circumstances where in the final year of the POI, the price of dumped imports was higher than that of the like domestic product. Finally, the Panel will examine the European Union's argument that MOFCOM did not adequately consider other causes of injury in its non-attribution analysis.

C. PRICE EFFECTS OF DUMPED IMPORTS: ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

1. Introduction

7.13 The European Union claims that MOFCOM's price effects findings did not constitute an objective examination based on positive evidence, contrary to the obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The basis for the European Union's claim is that MOFCOM's price effects methodology was flawed because it involved price comparisons, based on weighted average unit values, in circumstances where MOFCOM did not take into account the "considerable differences" among the products being compared, particularly between "high-energy" and "low-energy" scanners[24].

2. Relevant provisions

7.14 Article 3.1 of the Anti-Dumping Agreement provides:

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

7.15 Article 3.2 of the Anti-Dumping Agreement provides:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in

[23] European Union's first written submission, para. 167.
[24] European Union's first written submission, para. 167.

> absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. Main arguments of the parties

(a) European Union

(i) Comparability of the products included in the price effects analysis

7.16 The European Union asserts that MOFCOM established the existence of "large"[25] and "serious"[26] price undercutting using a flawed price comparison methodology, even though no price undercutting had been alleged by Nuctech. Furthermore, the methodology used by MOFCOM to determine price depression/suppression magnified the degree to which Nuctech's prices were depressed/suppressed far beyond the levels that Nuctech itself had alleged, on the basis of its own price data[27]. The European Union argues that the price analysis methodology applied by MOFCOM, namely a comparison of weighted average unit values for all products, was flawed because it failed to take into account manifest differences between the types of scanner at issue, particularly between the low-energy scanners exported by Smiths and the high-energy scanners that were the main focus of Nuctech's business. According to the European Union, Smiths explained repeatedly during the investigation that low-energy scanners and high-energy scanners have very different physical characteristics, end-uses, technological features, mechanical features, manufacturing processes and prices and do not compete with each other[28]. Accordingly, due to these differences, Smiths argued that high-energy scanners should be excluded from the product under investigation. The European Union does not pursue this product scope argument in these proceedings. Instead, the European Union contends that, in view of the manifest differences between low-energy and high-energy scanners, it was clearly inadequate for the Chinese authorities to examine the existence of price undercutting and price depression/suppression without taking these differences into account. The European Union acknowledges that Nuctech produced low-energy scanners during the POI, but contends that MOFCOM also failed to take into account the differences between the low-energy scanners produced by Smiths and Nuctech respectively.

7.17 In response to China's argument that there is "no hard and clear dividing line" between high- and low-energy scanners, but rather a "single continuum of scanners", the European Union argues that this is an unsupported assertion, to which no reference was made in the Final Determination. The European Union acknowledges that while there may be room for debate about whether the dividing line should be drawn precisely at 300 KeV or a somewhat higher level, there is wide and easily recognisable gap between high- and low-energy scanners. The European Union argues that the energy level of scanners used to scan large objects is always much higher than that used to scan small objects, and this is always reflected in very large disparities in price.

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[25] Final Determination, Section V.II.3, Exhibit EU-2, p. 23.

[26] Final Determination, Section V.II.3, Exhibit EU-2, p. 23.

[27] While the European Union refers to MOFCOM's finding as "price depression", China maintains that MOFCOM in fact made a finding of "price suppression": The Panel addresses this issue at paras. 7.52-7.54 of this Report. As explained there, the Panel will use the label "price suppression" when referring to MOFCOM's findings in this regard.

[28] See Smiths' Injury Brief, Exhibit EU-11, pp. 3-7.

(ii) Obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.18 The European Union submits that because MOFCOM used a broad definition of the product under investigation, the obligation to make an objective examination of positive evidence required MOFCOM to take into account the relevant differences between the various types of products covered by the investigation when conducting its price effects analysis. The European Union does not argue that MOFCOM should have used any particular methodology in order to do this. Rather, the European Union notes that MOFCOM failed to do so at all, as explained in the sections below on price undercutting and price depression/suppression.

Price undercutting

7.19 The European Union recalls that MOFCOM examined the existence of price undercutting by comparing the weighted average unit value of all imports of all the products covered by the investigation to the weighted average unit value of all domestic sales of all the like products made by Nuctech. The European Union accepts that a comparison of weighted average unit values may be an appropriate methodology for considering the existence of price undercutting where the products covered by the investigation are relatively homogeneous and sufficiently comparable. Where the relevant products are heterogeneous, though, the European Union contends that differences in average unit values may merely reflect changes or variations in product mix rather than genuine differences in pricing. In the circumstances of the present case, due to the considerable differences between low-energy and high-energy scanners, the European Union argues that it was manifestly inadequate for MOFCOM to examine the existence of price undercutting by comparing weighted average unit values for all the products under consideration. According to the European Union, the distorting effects of the methodology followed by MOFCOM were exacerbated by the fact that during the POI there were no exports of high-energy scanners from the European Union to China.

Price depression/suppression

7.20 At the outset, there is a dispute between the European Union and China about whether MOFCOM made a finding of price depression or suppression. The European Union maintains that both its professional translation of the relevant phrase in the Final Determination, and the content of the Final Determination, support its position that MOFCOM made a finding of price depression. The European Union notes that MOFCOM did not state that Nuctech was prevented from increasing its prices in order to reflect cost increases. Rather, MOFCOM found that the dumped imports forced Nuctech to lower its prices by more than the reduction in its unit cost of production. The European Union contends that it is implicit in MOFCOM's reasoning that Nuctech's prices would not have increased in the absence of the dumped imports, given the substantial reduction in Nuctech's unit production cost. Rather, Nuctech's prices would have decreased less. This supports the conclusion that MOFCOM made a finding of price depression rather than suppression.

7.21 The European Union submits MOFCOM's finding that prices of the domestic like product fell by as much as 72.68% during the POI is nullified by the same flawed methodology that MOFCOM applied in respect of price undercutting. In other words, changes in the average unit values found by MOFCOM were more likely to reflect changes in the product mix of the domestic industry over the POI than changes in the domestic industry's pricing policy.

(b) China

(i) Differences between low-energy and high-energy scanners, and amongst low-energy scanners

Continuum of scanners

7.22 China disputes that there is a clear-cut distinction between scanners with an energy level at or below 300 KeV ("low-energy") and scanners with an energy level above 300 KeV ("high-energy"). China argues that a scanner's energy level is not determinative of its physical characteristics, uses or prices. Rather, there exists a continuum of scanners, with gradual differences between adjoining models. Therefore, to the extent that certain claims raised by the European Union are based on an alleged distinction between low-energy and high-energy scanners, they should be rejected by the Panel because the distinction is factually incorrect. To support this argument, China provides examples of scanners with an energy level at or below 300 KeV that have the characteristics that Smiths described as belonging to high energy scanners, and vice versa[29].

MOFCOM's analysis

7.23 China submits that Smiths only raised the issue of alleged differences between "low-energy" and "high-energy" scanners to claim that such products were not "like", such that high-energy scanners should be excluded from the scope of MOFCOM's investigation. China asserts that Smiths never referred to such differences in the context of MOFCOM's price effects analysis. China contends that at no point did Smiths claim that MOFCOM should make separate price undercutting and price suppression analyses for "low-energy" and "high-energy" scanners. China submits that if, as claimed by the European Union, it was so essential to conduct a separate price analysis for "low-energy" and "high-energy" scanners, and even for different types of "low-energy" scanners, one would expect that the argument would at least have been raised by Smiths during the investigation. China asserts that this did not occur.

7.24 China submits that, in comparing Smiths' import prices of the subject product with Nuctech's domestic prices of the like product, MOFCOM properly compared the prices of like products. Furthermore, China submits that it was reasonable for MOFCOM to assess the effects of the prices of dumped imports by using the weighted average methodology. China notes that MOFCOM did not in any way manipulate data or figures since MOFCOM applied the same methodology for both the domestic and imported products and included all data relating to all models. China submits that, in this way, MOFCOM ensured an even-handed treatment of the information and data on the record. China asserts that MOFCOM was aware that prices may differ from model to model or even from transaction to transaction. Indeed, this is a common feature of all anti-dumping investigations worldwide and explains precisely why investigating authorities use averages. According to China, MOFCOM concluded that these price differences were not of a nature to overturn the conclusion that the price undercutting was "significant". In addition, China contends that an average comparison may work to the advantage of the exporter on some occasions, while work against it on others. China submits that as long as the method is applied even-handedly and in an objective manner, it cannot be considered biased.

7.25 China argues that MOFCOM requested complete pricing data relating to the subject product for the three years of the POI. However, Smiths provided only average figures for certain models for 2008 and no pricing data at all for 2006 and 2007. Therefore, China contends that it was in fact impossible for MOFCOM to perform a model-to-model comparison and that the use of the weighted average methodology was reasonable and appropriate in the circumstances. According to China, the requirement of "objectivity" in Article 3.1 is to be assessed in the light of the specific circumstances

[29] China's second written submission, paras. 204-238.

of the case, including the information and data available to the investigating authority. In order to conclude that an investigating authority has favoured a particular interested party, it is necessary that the investigating authority had options before it, and chose the option that favoured the interests of a particular party. Further, China argues that there was no need for MOFCOM to make findings pursuant to Article 6.8 of the Anti-Dumping Agreement because Article 3.2 does not prescribe the use of any specific methodology and that it was possible for MOFCOM to use a reasonable comparison methodology on the basis of the data submitted by the parties or gathered from public records.

(ii) Obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.26 China notes that Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not set out any specific methodology that investigating authorities must follow in order to examine the effects of dumped imports on prices in a domestic market. Furthermore, China submits that panels in previous cases have rejected the view that the methodological obligations included in Article 2 of the Anti-Dumping Agreement, relating to the dumping margin determination, apply to the price undercutting analysis of Article 3.2 of the Anti-Dumping Agreement. According to China, there is no obligation in the Anti-Dumping Agreement requiring an investigating authority during the price effects analysis to make adjustments similar to those applicable when making the comparison between normal value and export price under Article 2.4 of the Anti-Dumping Agreement. China notes that there are important differences between the determination of the margin of dumping under Article 2.4 and the price effects analysis under Article 3.2. First, Article 3.2 requires an investigating authority only "to consider", rather than to make a determination on, the effects of dumped imports on domestic prices and does not require any quantification of the degree of undercutting. Second, the price analysis is only one among various elements or factors examined by the investigating authority in determining whether injury is suffered by the domestic industry. As a result of these differences, when interpreting Articles 3.1 and 3.2, the requirement of "objective examination" should not be interpreted to impose obligations that do not flow from it. In *EC – Pipe Fittings,* the Panel held that the requirement in Article 3.1 to conduct an "objective examination" on the basis of "positive evidence" implies only that the examination must "conform to the dictates of the basic principles of good faith and fundamental fairness" and that the "investigating authority must therefore ensure an even-handed treatment of the information and data on the record of the investigation".

Price undercutting

7.27 China asks the Panel to reject the European Union's claim that "MOFCOM's finding of price undercutting was reached by following a manifestly inadequate methodology involving the use of weighted average unit values for all the products under investigation"[30]. Further, China disputes the European Union's argument that the inappropriateness of the methodology used by MOFCOM is evidenced by the fact that neither Nuctech nor Smiths had made any reference to the existence of price undercutting[31]. China submits that, contrary to the European Union's argument, Nuctech did claim that there was price undercutting[32]. China also argues that there is no evidence on the record excluding the possibility that either Smiths, its French affiliate or any other European exporter had exported high-energy scanners. Finally, China emphasises that the example provided by the European Union is purely hypothetical.

Price suppression

7.28 At the outset, China argues that MOFCOM in fact made a finding of price suppression, rather than price depression as stated in the European Union's translation of the Final Determination. China

[30] European Union's first written submission, para. 205.
[31] European Union's first written submission, paras. 205 and 211.
[32] China refers to Nuctech's Questionnaire Response, question 38 (4), Exhibit EU-8, p. 26.

argues that in the Final Determination, MOFCOM found "the rate of the decline of sales price was higher than the rate of production cost reduction by 19.01 percentage points, indicating that the sales price of domestic Like Products failed to remain at a reasonable level as a result of being [suppressed] by the import price of the Subject Product"[33]. Therefore, according to China, this supports the conclusion that MOFCOM found price suppression rather than price depression, because MOFCOM found that domestic prices were prevented from increasing to a profitable level due to the effects of the low price of the dumped imports. Although in the Final Determination MOFCOM found only price undercutting and price suppression, China argues that in fact a mixed picture of price depression and suppression can be found in this case. The price undercutting and rapid increases in import volume forced the domestic prices down to non-profitable levels and prevented the domestic industry from increasing prices to profitable levels.

7.29 China denies that there is any inherent bias in the methodology followed by MOFCOM to determine the existence of price suppression. China contends that MOFCOM used the same methodology throughout the POI, and the average price calculation method was applied even-handedly to both imports and domestic products. Further, China argues that price comparability does not arise as an issue when considering price suppression, because it involves a consideration of the prices and costs relating to the domestic product only and does not involve a comparison with the prices of the imported product. According to China, the fact that the product mix varies or may vary over time cannot have any impact on the assessment of price suppression. This is because price suppression depends on whether the prices of a certain product mix have been able to follow changes in costs for the same product mix.

4. Evaluation by the Panel

(a) Introduction

7.30 The European Union claims that MOFCOM's price effects findings were not based on an objective examination of positive evidence, contrary to the obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The basis of the European Union's claim is that MOFCOM's price effects methodology was flawed because it involved comparing the weighted average unit values for the entire range of products covered by the investigation, without taking into account the considerable differences among the products, particularly between "high-energy" and "low-energy" scanners. According to the European Union, the distorting effects of the methodology followed by MOFCOM were exacerbated by the fact that during the POI there were no exports of high-energy scanners from the European Union to China.

(b) General approach under Article 3.1 of the Anti-Dumping Agreement

7.31 In analysing the European Union's claim, it is well established that the Panel's role is not to conduct a *de novo* review of the evidence or simply defer to the conclusions of the investigating authority. Rather, the Panel must test whether the explanation for the conclusion reached by the investigating authority is reasoned and adequate in the light of other plausible explanations[34].

7.32 Further, in considering the European Union's claims under Article 3.1 of the Anti-Dumping Agreement, and in particular whether the quality of evidence relied upon by MOFCOM met the standard of positive evidence, we recall that in *US – Hot Rolled Steel*, the Appellate Body held:

> The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to

[33] Final Determination, Exhibit EU-2, pp. 23-24.
[34] See, for example, Appellate Body Report, *US – Tyres (China)*, para. 280.

> us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.[35]

The Appellate Body has also agreed that "positive evidence" refers to "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy"[36].

7.33 In examining whether MOFCOM conducted an objective examination of the evidence, we note that the Appellate Body has held that this requires an examination that conforms "to the dictates of the basic principles of good faith and fundamental fairness". Further, the investigation must occur in an "unbiased" and "even-handed" manner and must not favour a particular interested party over another[37].

(c) What methodology did MOFCOM use in its price effects analysis?

7.34 The European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement is based upon the argument that making *price comparisons* without ensuring comparability does not amount to an objective examination of positive evidence. Although not explicit in its Final Determination, based upon the explanations provided during consultations, the European Union understands that MOFCOM reached its finding of price undercutting by comparing annual weighted average unit prices of all dumped imports with the annual weighted average unit prices of all domestic sales by Nuctech[38]. In concluding that domestic prices were suppressed[39], MOFCOM also relied upon comparisons of annual weighted average unit prices[40]. In particular, as will be discussed below, MOFCOM compared domestic average unit values over the course of the POI in order to make an intermediate finding that the prices of the domestic industry had declined by the amount quantified by MOFCOM[41]. MOFCOM also relied upon its undercutting findings in concluding that the price suppression was an effect of subject imports[42].

7.35 In order to compare the price of subject imports with the price of the domestic like products, China explained:

> MOFCOM calculated the average unit price per year of the subject imports as a whole and compared them with the annual averages of the domestic like product. By putting both prices side by side it was obvious if one was higher or lower than the other.[43]

7.36 In response to Panel questioning, China clarified that in order to arrive at the annual average unit prices for Nuctech's sales, which were used in its undercutting and suppression analyses, MOFCOM did not request that Nuctech provide transaction specific data or data on a model-by-model basis. Although, on its own initiative, Nuctech provided domestic price data on a model-by-model basis for certain models, MOFCOM did not use this in its price effects analysis. Rather, MOFCOM divided the total domestic sales value of the domestic like product for each year of the

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[35] Appellate Body Report, *US – Hot Rolled Steel*, para. 192.
[36] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* paras. 164-165.
[37] Appellate Body Report, *US – Hot Rolled Steel,* paras. 193 and 196.
[38] European Union's first written submission, para. 190.
[39] The Panel notes that the parties disagree regarding whether MOFCOM found price suppression or depression. As explained at paras. 7.52-7.54 of this Report, the Panel will use the label "price suppression" when referring to MOFCOM's findings in this regard.
[40] European Union's first written submission, para. 213.
[41] See the European Union's response to Panel question 64 and para. 7.56 of this Report.
[42] See paras. 7.58-7.60 of this Report.
[43] China's response to Panel question 81, para. 50.

POI, as provided by Nuctech in its questionnaire response, by the quantity sold during the corresponding year[44]. China confirmed that MOFCOM did not know the uses or energy levels for the scanners that were included in these price effects calculations. According to China, MOFCOM did "not consider that differences in energy levels [were] relevant for the price effects analysis under Article 3.2 and it did therefore not take such differences into consideration"[45].

7.37 MOFCOM used customs value data to determine the price of subject imports. In order to calculate their annual average unit prices, China clarified that it did not take data for individual import shipments during a given year and then aggregate it in order to calculate an average unit value for that year. Rather, MOFCOM used the total customs value for the subject product for each year of the POI and divided it by the import quantity of the subject product during the corresponding year[46].

(d) What is the relevance of Smiths' failure to raise concerns regarding the price effects analysis during the course of the investigation?

7.38 China notes that during the course of the investigation, Smiths raised the issue of the alleged differences between "low-energy" and "high-energy" scanners in the context of MOFCOM's decision regarding the scope of products under investigation. China contends that Smiths did not ever refer to the alleged differences between the products in the context of the price analysis conducted by MOFCOM. China argues that if "it was so essential to make a price analysis separately for 'low-energy' and 'high-energy' scanners, one would expect that the argument would at least have been raised by Smiths during the investigation"[47]. According to China, the fact that the argument was not raised shows that there were no grounds for MOFCOM to consider the use of averages unreasonable.

7.39 China does not explicitly argue that Smiths' failure to raise the argument about the alleged differences between the products under investigation in the context of the price effects analysis prevents the Panel from making a finding on this issue. If this is what China intends to imply, in our view, China's suggestion is not well-founded. It is well established that a Member bringing a complaint before a panel under the DSU is not limited to those claims that were made during the domestic investigation. The Appellate Body held in *US – Lamb,* for instance, that:

> In arguing claims in dispute settlement, a WTO Member is not confined merely to rehearsing arguments that were made to the competent authorities by the interested parties during the domestic investigation, even if the WTO Member was itself an interested party in the investigation.[48]

7.40 China argues that the fact that Smiths did not raise the alleged differences in the product under consideration in the context of the price effects analysis gives an indication that it was not in fact essential for MOFCOM to take these differences into account. However, given that the Appellate Body has held that a Member's claim is not restricted to the arguments made during the course of the relevant investigation, in our view, the merits of the European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement are not affected by the fact that the argument was not raised during domestic proceedings.

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[44] China's response to Panel question 79, paras. 46 and 48 and China's response to Panel question 80, para. 49.

[45] China's response to Panel question 83, para. 53.

[46] China's response to Panel question 82, para. 51. China also notes that the import value and volume data received from customs was adjusted to exclude products other than the subject product. Further, the average prices obtained were subsequently adjusted to bring them to landed level by adding the amount of the duties payable upon importation.

[47] China's first written submission, para. 280.

[48] Appellate Body Report, *US – Lamb,* para. 113. See also, Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 131.

(e) Has the issue of price comparability under Articles 3.1 and 3.2 of the Anti-Dumping Agreement been considered by other panels or the Appellate Body?

7.41 The Appellate Body has observed that although Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not prescribe any particular methodology for examining the price effects of dumped imports, investigating authorities do not have unfettered discretion in this regard. Rather, regardless of the methodology chosen to examine price effects, the investigating authority must conduct an objective examination of positive evidence[49].

7.42 Most recently, both the panel and the Appellate Body in *China – GOES* had cause to consider whether an objective examination of positive evidence had occurred in circumstances where the investigating authority had conducted a price undercutting analysis without considering the need for adjustments to ensure price comparability. The panel concluded that when comparing subject import and domestic prices to establish the existence of price undercutting, an investigating authority must "ensure that the prices it is using for its comparison are properly comparable"[50]. Further, the panel held that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue"[51]. The Appellate Body agreed with the panel's conclusion and stated:

> [B]oth [parties] agreed that an investigating authority must ensure comparability between prices that are being compared. Indeed, although there is no explicit requirement in Article 3.2 ... we do not see how a failure to ensure price comparability could be consistent with the requirement under Article 3.1 … that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia,* the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue".[52]

7.43 Prior to the decision in *China – GOES,* two panels considered the extent to which Article 3.2 of the Anti-Dumping Agreement requires an investigating authority to make adjustments to account for differences in the products being considered in the price effects analysis. In *EC – Tube or Pipe Fittings,* the panel reasoned as follows:

> [I]n view of the stark contrast in the text, context, legal nature and rationale of the provisions in Article 2 of the Anti-Dumping Agreement relating to the calculation of the dumping margin and Article 3 relating to the injury analysis, we decline to transpose wholesale the more detailed methodological obligations of Article 2 concerning dumping into the provisions of Article 3 concerning injury analysis.
>
> Furthermore, because in the price undercutting analysis, the investigating authority is examining injury caused by dumped imports, to the extent a product competes with another product and affects domestic sales of that product, there might well be different bases for deciding whether or not to make an adjustment in the context of the dumping and price undercutting analyses. In a dumping determination, one focus of adjustments may be on differences in costs that a producer/exporter might reasonably be expected to reflect in his prices; by contrast, the focus in a price

[49] Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 113.
[50] Panel Report, *China – GOES*, para. 7.530.
[51] Panel Report, *China – GOES*, para. 7.530.
[52] Appellate Body Report, *China – GOES*, para. 200.

> undercutting analysis may be on differences between the imported and domestic like product that have a perceived importance to consumers.[53]

7.44 In a similar vein, in *EC – Fasteners (China)* the panel held:

> [T]here is no equivalent requirement under Article 3.2 to that of Article 2.4 of the AD Agreement with respect to "due allowance" for differences affecting price comparability. In our view, while it is clear that the general requirements of objective examination and positive evidence of Article 3.1 limit an investigating authority's discretion in the conduct of a price undercutting analysis, this does not mean that the requirements of Article 2.4 with respect to due allowance for differences affecting price comparability are applicable. Thus, for instance, adjustments in the context of price undercutting analysis may be a useful means of ensuring that the requirements of objective examination of positive evidence in Article 3.1 are satisfied, as might the use of carefully defined product categories for the collection of price information.[54]

(f) Did MOFCOM's price effects analysis constitute an objective examination of positive evidence?

(i) What were MOFCOM's obligations in relation to its price undercutting analysis?

<u>The obligation "to consider" price undercutting</u>

7.45 In its submissions before the Panel, China argued that the obligations in Article 3.2 of the Anti-Dumping Agreement must be read in the light of the requirement on an investigating authority only to "consider", rather than to make a determination on, whether there has been significant price undercutting by dumped imports, or whether the effect of such imports is otherwise to depress prices or prevent price increases[55]. In the Panel's view, the requirement to "consider" price effects does not require a definitive determination regarding the existence of price undercutting, price suppression or price depression. However, although an investigating authority may be required only to "consider" price effects, the consideration must still involve an objective examination of positive evidence. In this regard, we agree with the Appellate Body's statement in *China – GOES*:

> The notion of the word "consider", when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision. By the use of the word "consider", Article 3.2 … [does] not impose an obligation on an investigating authority to make a *definitive determination* on the volume of subject imports and the effect of such imports on domestic prices. Nonetheless, an authority's *consideration* of the volume of subject imports and their price effects pursuant to Article 3.2 … is also subject to the overarching principles, under Article 3.1 … that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 …
>
> Furthermore, while the *consideration* of a matter is to be distinguished from the definitive determination of that matter, this does not diminish the scope of *what* the investigating authority is required to consider. The fact that the authority is only required to *consider*, rather than to *make a final determination*, does not change the subject matter that requires consideration under Article 3.2 … which includes

[53] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.292-7.293.
[54] Panel Report, *EC – Fasteners (China)*, para. 7.328.
[55] See China's first written submission, paras. 291, 294 and 297.

> "whether the effect of" the subject imports is to depress prices or prevent price increases to a significant degree.[56]

7.46 Consequently, when assessing MOFCOM's obligations in relation to its price undercutting analysis, the obligation to "consider" rather than to make a determination on the existence of price undercutting does not alter the substance or the nature of the enquiry required under Article 3.2 of the Anti-Dumping Agreement.

> When conducting a price undercutting analysis, is it necessary to take into account differences in the products being compared?

7.47 In relation to price undercutting under Article 3.2 of the Anti-Dumping Agreement, the Panel notes that, by its very nature, this involves a comparison of prices, in particular the prices of dumped imports with the prices of the like domestic product. As the Appellate Body noted in *China – GOES*:

> [A]n investigating authority must consider "whether there has been a significant price undercutting *by the dumped or subsidized imports as compared with* the price of a like product of the importing Member". Thus, with regard to significant price undercutting, Article 3.2 … expressly establish[es] a link between the price of subject products and that of like domestic products, by requiring a comparison be made between the two.[57]

7.48 The Panel must decide whether, when conducting such a comparison of prices as part of an undercutting analysis, an investigating authority must take into account differences in the products being compared. In this regard, we note the Appellate Body's statement in *China – GOES*:

> [W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Article 3.1 … that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia,* the effect of subject imports on the prices of domestic like products…We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue".[58]

7.49 The Panel agrees with the Appellate Body that when a price comparison is made for the purposes of an undercutting analysis under Article 3.2 of the Anti-Dumping Agreement, it is necessary to ensure that the prices being considered are actually comparable. We note that Articles 3.1 through 3.5 of the Anti-Dumping Agreement detail an investigating authority's obligations when establishing whether dumped imports have caused injury to the domestic industry. The Appellate Body noted in *China – GOES* that the:

> [P]rovisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination … [P]ursuant to Article 3.5 … it must be demonstrated that dumped…imports are causing injury "through the effects of" dumping …"[a]s set forth in paragraphs 2 and 4". Thus, the inquiry set forth in Article 3.2 … and the examination required in Article 3.4 … are necessary in order to answer the ultimate question in Article 3.5 … as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Article 3.5 …. [T]he

[56] Appellate Body Report, *China – GOES*, paras. 130-131.
[57] Appellate Body Report, *China – GOES*, para. 136.
[58] Appellate Body Report, *China – GOES*, para. 200.

> interpretation of Article 3.2 … should be consistent with the role [it] play[s] in the overall framework of an injury determination under Article 3.[59]

7.50 The Panel considers that the Appellate Body's analysis of the relationship between the various provisions of Article 3 of the Anti-Dumping Agreement, culminating in the definitive causation analysis under Article 3.5, is relevant to this case. It is precisely because the price undercutting analysis under Article 3.2 ultimately must be used to assess whether dumped imports "through the effects of dumping, as set forth in paragraphs 2 and 4" are causing injury to the domestic industry, that it is necessary to ensure the prices that are the subject of an undercutting analysis are comparable. If two products being analysed in an undercutting analysis are not comparable, for example in the sense that they do not compete with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question. Further, if two products are compared at different levels of trade, without adjustment, the outcome of this comparison would not lead to an objective, unbiased analysis under Article 3.5 regarding the injury arising due to the difference in the prices of the products.

7.51 Consequently, in the Panel's view, when price comparisons are conducted as a part of a price undercutting analysis under Article 3.2 of the Anti-Dumping Agreement, it is necessary for an investigating authority to consider whether the prices are actually comparable. The Panel notes that Article 3.2 does not mandate a specific methodology by which to ensure price comparability. When the issue relates to a lack of comparability due to product differences, including due to differences in market perceptions of the products for example, an investigating authority has multiple options in determining how to proceed. For instance, an investigating authority could make use of "carefully defined product categories for the collection of price information"[60]. Alternatively, the European Union argued that when it conducted its own investigation of x-ray scanners, its investigating authority accounted for relevant differences by comparing the actual sales prices charged by the exporter, with the prices offered by the domestic producers that submitted bids in the same tendering procedure. According to the European Union, this ensured that the comparison of prices occurred between products with the same specifications, as detailed in the call for bids[61]. A further example of a way in which to account for differences in the products being compared would be to make relevant adjustments. The Panel does not suggest that the detailed provisions regarding adjustments found in Article 2.4 of the Anti-Dumping Agreement should necessarily be transposed wholly into Article 3.2. This is because there are other ways to ensure price comparability under Article 3.2, apart from making adjustments, as just outlined. Further, the kind of adjustments required in comparing prices for the purpose of establishing a dumping margin may be different to those required in order to ensure an objective examination of price undercutting in the context of the injury and causation analyses[62]. However, in many instances relevant adjustments will effectively ensure price comparability under Article 3.2.

(ii) What were MOFCOM's obligations in relation to its price suppression analysis?

<u>Did MOFCOM find price depression or price suppression</u>?

7.52 At the outset, the Panel notes that there is a disagreement between the parties regarding whether MOFCOM made a finding of price depression or price suppression. We recall that MOFCOM made the following finding in its Final Determination:

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

[60] See Panel Report, *EC – Fasteners (China)*, para. 7.328.

[61] European Union's response to Panel question 21, para. 126.

[62] See, for example, Panel Report, *EC – Tube or Pipe Fittings*, para. 7.293 and Panel Report, *EC – Fasteners (China)*, para. 7.328.

> Although the import price of the Subject Product was slightly higher than the price of domestic Like Products in 2008, it remained at a low level, while the sales price of domestic Like Products decreased by 46.75% from 2008 to 2007, almost down to the unit sales cost, leaving unit gross profit rate at a low level. Other evidence showed that the unit production cost of domestic Like Products decreased by 53.67% from 2006 to 2008 while the sales price of domestic Like Products decreased by 72.68% over the same period, i.e., the rate of the decline of sales price was higher than the rate of production cost reduction by 19.01 percentage points, indicating that the sales price of domestic Like Products failed to remain at a reasonable level as a result of being [depressed/suppressed] by the import price of the Subject Product.[63]

7.53 In the Panel's view, it is not necessary to decide whether MOFCOM's finding is best characterised as one of "price suppression" or "price depression". This is because the European Union's challenge does not centre on whether the facts as found by MOFCOM, namely that domestic prices decreased by more than the cost of production, can amount to a finding of price suppression. Rather, the European Union requests that the Panel examine the way in which MOFCOM *compared prices* in reaching its conclusion. The European Union acknowledges that its claim does not depend on the "label" assigned by China to its findings[64].

7.54 Therefore, if MOFCOM, through China, maintains that it made a finding of price suppression, the Panel is prepared to proceed on the basis of this label. However, in doing so, the Panel makes no comment regarding whether the notion of price suppression can in fact extend to circumstances where "the rate of the decline of sales price was higher than the rate of production cost reduction … as a result of being suppressed by the import price"[65]. Rather, the Panel needs only to assess whether the price comparison methodology used by MOFCOM to arrive at this conclusion was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

Did MOFCOM compare prices in making its price suppression finding?

7.55 In response to the European Union's argument that MOFCOM did not take into account the differences between the scanners under investigation when conducting its price suppression analysis, China argues that price comparability cannot arise as an issue when considering price suppression. According to China, price suppression is "assessed on the basis of data pertaining to the domestic like product only and [does] not involve a comparison with the price of the imported product"[66]. Contrary to China's argument, in the Panel's view, in its price suppression analysis, MOFCOM relied on price comparisons in two contexts. First, even accepting MOFCOM's ultimate finding was one of price suppression, in reaching this finding MOFCOM made an intermediate finding that domestic prices had declined over the course of the POI. Second, in concluding that prices were suppressed due to the dumped imports, MOFCOM relied upon its price undercutting findings, which themselves relied upon a comparison between the dumped imports and the like domestic product.

- Decline in domestic prices

7.56 The Panel notes that in reaching its price suppression finding, by comparing the changes in domestic prices with the changes in domestic costs over the POI, MOFCOM first concluded and ultimately relied upon the fact that domestic prices decreased by 72.68% over the course of the POI. This intermediate step involved a comparison of prices of the domestic like product over time. While the European Union does not contest the way in which MOFCOM compared domestic prices and

[63] Final Determination, Exhibit EU-2, pp. 23-24.
[64] European Union's response to Panel question 64, para. 23.
[65] Final Determination, Exhibit EU-2, pp. 23-24
[66] China's response to Panel question 57, para. 9.

domestic costs, it argues that the intermediate finding of a decrease in prices was not based upon an objective examination of positive evidence because MOFCOM did not take any steps to ensure comparability before proceeding with the comparison of domestic prices over the POI[67].

7.57 The Panel agrees with the European Union that when comparing domestic prices over time, MOFCOM was obliged to ensure that the domestic prices being compared were actually comparable. In particular, when comparing the price of a basket of goods over time, it is necessary to ensure price comparability by considering, and if necessary taking into account, any changes in the proportion of the product types making up the basket each year. Without ensuring comparability in this context, it is possible that an observed decline in the average unit prices may actually be the result of a change in the product mix, for example due to an increased proportion of lower priced domestic products being sold in a particular year, rather than due to a genuine change in domestic prices[68].

- Reliance upon undercutting findings

7.58 China's argument that a price suppression analysis does not involve a comparison between domestic prices and the prices of the imported product is based on an interpretation of Article 3.2 of the Anti-Dumping Agreement that requires only a consideration of the existence of price suppression *per se* and does not involve a consideration of whether there is a causal relationship between any price suppression found to exist and the dumped imports[69].

7.59 Although China pursues this argument before the Panel, the Panel notes that in MOFCOM's findings, it did in fact draw a link between the dumped imports and the price suppression, and indeed relied upon its findings of price undercutting to conclude that domestic prices were suppressed. This is in line with the Appellate Body's conclusion in *China – GOES* that it is not sufficient under Article 3.2 of the Anti-Dumping Agreement to consider only the existence of price depression or suppression *per se*. Rather, in conducting a price suppression analysis, it is necessary to consider whether dumped imports have "explanatory force" for the occurrence of suppression of domestic prices[70]. In the circumstances of this case, MOFCOM stated:

> The import price of the Subject Product remained at a *low level, lower than the price of domestic Like Products* for most of the time during the POI *such that it had* an evident… *[suppressing] effect* on the price of domestic Like Products.[71]

7.60 Therefore, it appears to the Panel that in reaching its conclusion that domestic prices were suppressed, MOFCOM did indeed consider the role of subject imports in this regard. In the Panel's view, MOFCOM relied upon its undercutting findings, in particular that the import prices remained lower than domestic prices for most of the POI, in concluding that the imports had a suppressing effect on domestic prices. Therefore, to the extent MOFCOM considered the "explanatory force" of the dumped imports for the price suppression of domestic products by relying on its undercutting findings, then any inconsistencies in MOFCOM's price undercutting analysis, due to a failure to ensure price comparability, will also render MOFCOM's price suppression findings inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

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[67] European Union's response to Panel question 64, para. 24.

[68] See the European Union's example of how this may occur, at European Union's first written submission, para. 215.

[69] China's response to Panel question 58, paras. 15-21.

[70] Appellate Body Report, *China – GOES*, paras. 138, 141.

[71] Final Determination, Exhibit EU-2, p. 24 (emphasis added).

(iii) Did MOFCOM ensure price comparability in its price undercutting and price suppression analyses under Article 3.2?

Did MOFCOM take any steps to ensure price comparability?

7.61 The Panel recalls that MOFCOM's price effects analysis involved the comparison of prices in two different contexts. First, MOFCOM compared the prices of the dumped imports and the like domestic product for the purposes of its price undercutting finding, which it subsequently also relied upon for its price suppression finding. Second, MOFCOM also compared the prices of the like domestic product over the course of the POI in order to reach the intermediate conclusion, for the purpose of its price suppression analysis, that prices of the like domestic product had declined.

7.62 The record indicates that MOFCOM did not take any steps to ensure that the prices it was comparing for the purposes of its price undercutting and suppression analyses were in fact comparable. In particular, as indicated previously, in response to a Panel question regarding the method by which MOFCOM arrived at the annual average unit values used in its comparison, China clarified that MOFCOM did not ever request transaction specific or model-by-model data from Nuctech. Rather, MOFCOM divided the total domestic sales value of the domestic like product for each year of the POI by the quantity sold during the POI. Further, MOFCOM did not know the uses or energy levels of Nuctech's scanners that were sold during the POI and included in its price comparisons[72]. Therefore, based on the information that MOFCOM requested from Nuctech, it is clear that from the beginning of the investigation MOFCOM took the decision that any form of evaluation of the specifications or the prices of the products that it was including in its analysis was not necessary. In fact, MOFCOM did not examine any pricing data at all, but merely examined the total sales value of the domestic like product.

7.63 Similarly, in relation to the data on dumped imports, MOFCOM did not have transaction specific or model-by-model data. Rather, MOFCOM used the total customs value for the subject product for each year of the POI and divided it by the import quantity of the subject product[73].

7.64 According to China, "MOFCOM … concluded that these price differences [between] models were not of a nature to overturn the conclusion that the price undercutting was 'significant'"[74]. However, without any data before it regarding the actual prices of the dumped imports and the like domestic product, as sold in China during the POI, it would have been impossible for MOFCOM to have reached this conclusion. Indeed, the conclusion is not reflected anywhere in MOFCOM's Final Determination.

7.65 China submits that MOFCOM examined the arguments raised by Smiths regarding the alleged differences between the "low-energy" and "high-energy" scanners when considering the product scope of the investigation[75]. In considering the product scope, MOFCOM concluded that the domestic products were "like" the subject imports. Therefore, China argues that in its price effects analysis MOFCOM compared the prices of "like" products, which was sufficient to ensure price comparability[76]. The Panel is not convinced by this argument. The consequence of defining the product under consideration very broadly, is that the "like" domestic product will also be very broad. However, a number of panels have clarified that where a broad basket of goods under consideration

[72] China's response to Panel question 79, para. 46; China's response to Panel question 80, para. 49; and China's response to Panel question 83, para. 53.

[73] As indicated at paras. 7.93-7.95 of this Report, the Panel does not consider that Smiths' failure to provide the information requested of it justifies the methodology used by MOFCOM for its price effects analyses.

[74] China's first written submission, para. 312 and China's second written submission, para. 250.

[75] See, for example, China's first written submission, para. 325.

[76] China's first written submission, paras. 305-309.

and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration[77]. In the circumstances of this case, the fact that the domestic product was found under Article 2.6 of the Anti-Dumping Agreement to be "like" the product under consideration, does not necessarily mean that a Smiths product used for scanning hand baggage at airports is necessarily "like" a Nuctech product used for scanning rail carriages, trucks or marine cargo containers, for example[78].

7.66 Consequently, in the Panel's view, MOFCOM's conclusion in the context of considering the scope of the investigation, namely that the domestic product was "like" the product under consideration, does not mean that MOFCOM fulfilled its obligation to ensure price comparability when conducting its price effects analysis under Article 3.2 of the Anti-Dumping Agreement.

7.67 It is clear that from the start of the investigation, MOFCOM did not take any steps to consider or analyse whether the products it was comparing in its price undercutting and suppression analyses were actually comparable. This is contrary to the notion that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue"[79]. Without an examination of price comparability, MOFCOM did not ensure that its price undercutting and suppression analyses constituted an objective examination based on positive evidence.

Was there evidence before MOFCOM to put it on notice that price comparability should be assessed before conducting the price effects analysis?

7.68 In the Panel's view, price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence. However, in addition, in the circumstances of this case, there was a significant volume of evidence on the record to put MOFCOM on notice that price comparability was an issue and would need to be accounted for before undertaking price comparisons under Article 3.2 of the Anti-Dumping Agreement. This evidence is outlined in the sections below. In summary, based upon its review of the evidence before MOFCOM, the Panel concludes that it was clear that the dumped imports consisted only of "low-energy scanners", while there was no such limit on the energy levels of the domestic like product. Further, even accepting the existence of a "continuum" of scanners[80], there was evidence on the record to indicate that there were significant differences between the dumped imports and some of Nuctech's scanners, in terms of uses, physical characteristics and prices, for example. Further, MOFCOM's own findings indicated that "high-energy" and "low-energy" scanners have different uses and are perceived differently by consumers. In the light of this evidence, the Panel is of the view that MOFCOM clearly failed to conduct an objective examination of positive evidence by proceeding with its price effects analysis without even considering, let alone taking into account, these differences in the products being compared. The following paragraphs provide a more detailed account of the evidence that was before MOFCOM.

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[77] See, for example, the Panel's reasoning in *EC – Salmon (Norway)*, paras. 7.13-7.76.

[78] For examples of Smiths' products "ideally suitable for cabin baggage" and for "briefcases, handbags and other small items", see Application, Exhibit EU-3, pp. 132 and 138 of the pdf document. To see all products produced by Smiths Heimann GmbH, see Smiths' Questionnaire Response regarding energy levels of low-energy scanners not exceeding 300 KeV, Exhibit EU-42. For examples of Nuctech scanners used to scan trucks, see Smiths' Injury Brief, Exhibit EU-11, p. 4 and Nuctech's website description of "high-energy" scanners, Exhibit EU-21.

[79] Appellate Body Report, *China – GOES*, para. 200.

[80] See para. 7.77 for China's argument regarding the existence of a "continuum" scanners.

- The evidence on the record before MOFCOM indicated that all imports were "low-energy" scanners, whereas domestic products were not so limited

7.69 The evidence on the record supports the European Union's position that during the POI Smiths exported only "low-energy" scanners to China. For example, in its Injury Brief Smiths stated:

> Smiths did not export high-energy scanners to China during the POI … Smiths' high-energy scanners could not have injured and did not injure the domestic high-energy scanner industry because Smiths exported only low-energy scanners to China during the POI.[81]

7.70 Further, in its questionnaire response, Smiths listed all of the subject products produced by Smiths Heimann GmbH. All of the products were scanners with an energy level of 300 KeV or less[82]. Although China argues that this questionnaire response did not include information on the models exported to China in 2006 and 2007, the Panel is not convinced by this argument. We note that in its questionnaire response Smiths provided certain pricing information for 2008 only[83]. However, in other sections of the questionnaire, information for all years of the POI was provided[84]. In relation to the subject products produced by Smiths Heimann GmbH, the questionnaire stated "See the table below for all models of the Subject Product we produce", followed by the relevant table of information[85]. There is no indication at all that this information referred only to production in 2008. Further, at no stage in the investigation did either MOFCOM or Nuctech question Smiths' position that its German branch (Smiths Heimann GmbH) exported only "low-energy" scanners.

7.71 In relation to the possible export of "high-energy" scanners to China by the French affiliate of Smiths Heimann GmbH, namely Smiths Heimann SAS, Smiths stated in its questionnaire response:

> Smiths Heimann is the only company which manufactures and exports the Subject Product to China…Smiths Heimann has exported products to China through Smiths Detection (Asia Pacific) Pte Ltd. (Singapore). Other than these two companies, no other companies of Smiths Detection Group Limited have been involved in either production or sale of the Subject Products to China.[86]

Although China questions the relevance of this evidence in demonstrating that Smiths Heimann SAS did not export the subject product to China, on the basis that Smiths Heimann SAS is not included within "Smiths Detection Group Limited", the Panel notes a number of other statements by Smiths that support the position that Smiths Heimann SAS did not export to China, including:

> Only Smiths Heimann GmbH in German[y] and Smiths Detection (Asia Pacific) Pte Ltd. are involved in the production or sale of the Subject Product to China[87]; and
>
> Smiths Heimann SAS is an important production entity of Smiths Group in the EU, but it did not produce or export any Subject Products during the POI to China[88].

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[81] Smiths' Injury Brief, Exhibit EU-11, p. 7.

[82] In particular, all of the products were scanners with energy levels of 100 KeV, 140 KeV, 160 KeV or 300 KeV. Smiths' Questionnaire Response (Injury), Exhibit EU-7 (BCI), pp. 13-14 and Smiths' Questionnaire Response regarding energy levels of low-energy scanners not exceeding 300 KeV, Exhibit EU-42. See also, European Union's response to Panel question 29, para. 148.

[83] Smiths' Questionnaire Response (Injury), Exhibit EU-7 (BCI), p. 21.

[84] Smiths' Questionnaire Response (Injury), Exhibit EU-7 (BCI), see, for example, pp. 18, 19 and 22.

[85] Smiths' Questionnaire Response (Injury), Exhibit EU-7 (BCI), p. 13.

[86] Smiths' Questionnaire Response (Dumping), Exhibit EU-6 (BCI), p. 12.

[87] Smiths' Questionnaire Response (Dumping), Exhibit EU-6 (BCI), p. 19.

7.72 Further, the evidence before the Panel indicates that MOFCOM's investigation proceeded on the basis that there were no exports from Smiths Heimann SAS to China. In particular, MOFCOM did not ever request supplementary information from Smiths in relation to its statement that only Smiths Heimann GmbH exported to China. Further, MOFCOM did not ever apply facts available against Smiths Heimann SAS, on the basis that it was exporting to China but not cooperating. Finally, in response to a Panel question regarding the way in which MOFCOM used customs value data to determine the price of subject imports, China provided a confidential explanation which, in the Panel's view, confirms that MOFCOM was using customs value data only in relation to imports from Germany, and not from France or elsewhere[89]. Consequently, in the Panel's view, this confirms that the Smiths' export pricing data on which MOFCOM was relying related only to "low-energy" scanners.

7.73 With respect to whether there may have been other European companies, apart from those in the Smiths group, exporting high-energy scanners to China, even Nuctech stated in the Application that, to its knowledge "Smiths Heimann is the only one in the EU countries that exports the subject product to China"[90]. Further, in its questionnaire response, Nuctech reiterated this and stated "[a]s such, the export data from the EU to China is the export data from Smiths Heimann to China"[91].

7.74 Therefore, in the Panel's view, the evidence on the record, which MOFCOM did not question, was that the dumped imports consisted only of scanners with energy levels of 300 KeV or less.

7.75 In relation to the like domestic product, it is clear that it included both "low-energy" and "high-energy" scanners[92]. Regarding actual sales of the like domestic product during the POI, the Panel notes that before MOFCOM, Nuctech did not contest, in response to Smiths' arguments on product scope, that it sold both low- and high-energy scanners during the POI[93]. Consequently, the Panel considers that MOFCOM was on notice that Nuctech's sales were not limited to scanners with an energy level at or below 300 KeV.

7.76 Therefore, the situation confronting MOFCOM was that the dumped imports consisted only of "low-energy" scanners, while the domestic "like" product consisted of both "low-energy" and "high-energy" scanners.

- Regardless of whether or not there is a "continuum" of scanners, the evidence on the record indicated that there were significant differences between the scanners under investigation

7.77 The Panel recalls that the parties disagree regarding whether a clear cut-off line between "high-energy" and "low-energy" scanners exists. During the investigation, Smiths argued that there were considerable differences between scanners with an energy level at or below 300 KeV and scanners with an energy level above 300 KeV. Before the Panel, the European Union adopts these arguments but also acknowledges that there may be room for debate regarding whether the dividing

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[88] Smiths' Questionnaire Response (Injury), Exhibit EU-7 (BCI), p. 10.

[89] China's response to Panel question 82, see text within the second BCI brackets in para. 52.

[90] Application, Exhibit EU-3, p. 13.

[91] Nuctech's Questionnaire Response, Exhibit EU-8, p. 13.

[92] See, Nuctech's Questionnaire Response, Exhibit EU-8, pp. 9 and 38, where a non-exhaustive list of Nuctech products falling within the definition of the like product is provided, and includes model names for both "low" and "high-energy" scanners.

[93] The Panel also notes that China has never disputed this before the Panel. In fact, in noting that two "so-called low-energy scanners" represented more than 80% of Nuctech's sales of scanners during the POI, China stated that the "low-energy market sector represents a significant part of Nuctech's activities throughout the POI", but it did not argue that "low-energy" scanners accounted for *all* sales of the like domestic product during the POI (China's first written submission, para. 438).

line should be drawn precisely at 300 KeV. However, the European Union argues that it is clear that there is a wide and easily recognisable gap between "high" and "low-energy" scanners. In contrast, China argues that there is no clear-cut off line between scanners, but rather a "continuum" of scanners exists.

7.78 A review of China's second written submission reveals that there is some merit to China's argument that the 300 KeV energy level does not always create a sharp distinction between the physical characteristics, uses, technological features, mechanical features, manufacturing processes and prices of scanners and that examples of overlap regarding these characteristics across the 300 KeV energy level can be found[94].

7.79 Therefore, the Panel acknowledges that the 300 KeV energy level does not necessarily provide a precise means of distinguishing between different types of scanners. However, whether there is a precise cut-off point between two categories of scanners based on energy level, or whether there is a "continuum" of scanners, as argued by China, is not determinative of the issue before the Panel. It is clear that the product under consideration, and consequently the "like" domestic product, were defined very broadly. For example, the like product was defined broadly enough to include scanners for objects such as cargo containers, trucks and railway carriages, and scanners for smaller objects, such as parcels and baggage at airports[95]. Further, the evidence provided by China in its second written submission to demonstrate that using the 300 KeV energy level as the cut-off point for different types of scanners is not appropriate in fact demonstrates the wide range of physical characteristics of the scanners under consideration[96].

7.80 While the 300 KeV energy level may not necessarily provide a precise cut-off point between product types, and even accepting the existence of a "continuum" of scanners, in the Panel's view, there was evidence on the record before MOFCOM to suggest that there were clear differences in uses and physical characteristics between the Smiths' scanners exported to China and some of Nuctech's scanners. This evidence is outlined below.

- Differences in physical characteristics and uses between the dumped imports and some of Nuctech's scanners

7.81 Smiths made extensive submissions, in the context of contesting the scope of the product under consideration, to the effect that there are considerable differences between "low" and "high" energy scanners. Indeed, a comparison of Nuctech's scanners and the dumped Smiths' scanners on the Panel's record indicates that some of Nuctech's scanners exhibit very different physical characteristics and uses to the Smiths' scanners that were exported to China. For instance, the following represents a Nuctech scanner with an energy level of either 6MeV or 9 MeV. It is used to "penetrate and inspect fully-loaded railroad vehicles"[97].

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[94] See China's second written submission, paras. 204-238.

[95] See, for example, China's second written submission, paras. 218-220, outlining some of the different uses for which certain scanners produced by Smiths and Nuctech are designed. See also, technical data in Exhibits EU-20 and EU-21, describing the uses of different Nuctech scanners.

[96] See, for example, China's second written submission, para. 206, revealing that Nuctech and Smiths' scanners range in weight from at least 160 kg to 7,500 kg.

[97] Nuctech's website description of "high-energy" scanners, Exhibit EU-21. The image is a Nuctech RF Series scanner. Nuctech's Questionnaire Response, Exhibit EU-8, pp. 9 and 38 (Attachment 2), indicates that the RF Series was included in the domestic like product. Pictures and specifications of the RF scanner and other Nuctech scanners of a similar size can be found in Nuctech's Questionnaire Response and were therefore on the record before MOFCOM (Exhibit EU-8, see in particular, pp. 109-118 of the pdf document). Due to the poor quality of the photocopies of these images, the image from the website, submitted as Exhibit EU-21, is included in this Report in preference to that in the Questionnaire Response.

7.82 A further example of a Nuctech scanner with an energy level ranging from 1.5MeV to 6MeV that is used for "inspecting cars, cargo containers, empty containers, container trucks at seaports, border crossings, airports" is shown below[98]:

[98] Nuctech's website description of "high-energy" scanners, Exhibit EU-21. The image is of the Nuchtech FS Series scanner. Nuctech's Questionnaire Response, Exhibit EU-8, pp. 9 and 38 (Attachment 2), indicates that the FS3000 was included in the domestic like product. The same image (and specifications) of the FS3000 was before MOFCOM in Nuctech's Questionnaire Response, Exhibit EU-8, pp. 115-116 of the pdf document.

7.83 In its questionnaire response, Smiths GmbH provided the specifications of all the scanners it produced[99]. None of them look remotely like the Nuctech scanners shown above. An example of a Smiths scanner is shown below. As is evident from the image, it is used to scan hand luggage and other small items:

7.84 While China submits that "[i]t is only by juxtaposing the extremes of the spectrum that the EU is able to create the impression that completely different categories of scanner exist"[100], in the Panel's view, there was evidence on the record before MOFCOM to suggest that some of Nuctech's scanners were at a very different place on the spectrum to most of Smiths' exports to China.

7.85 With such differences in the physical characteristics and uses of the scanners exported by Smiths to China and some of the large scanners produced by Nuctech, it seems clear to us that MOFCOM was on notice of a need at least to consider comparability before conducting its price comparisons for the purposes of its undercutting analysis, and consequently its price suppression analysis, under Article 3.2 of the Anti-Dumping Agreement. Further, given that Nuctech's products included those ranging from small hand-luggage scanners to the large railway and container scanners shown above[101], MOFCOM was on notice of the need to consider the product mix of Nuctech's annual sales before comparing domestic prices over time for the purposes of its price suppression analysis. In the Panel's view, for MOFCOM to make an intermediate conclusion of a price decline in Nuctech's products, which included both low- and high-energy scanners, without in some way considering and ensuring comparability of the basket of Nuctech goods over the POI, does not constitute an objective examination because observed changes in the average unit values could be the result of changes in the product mix, rather than genuine changes in prices. The Panel notes that the methodology used by MOFCOM, namely collecting total sales value and dividing it by quantity sold, without examining uses or prices of the imports or the domestic products, makes it clear that MOFCOM did not account for the differences in the products being compared. Rather, MOFCOM simply included all sales in its average unit value calculations. In the Panel's view, this is not consistent with an objective examination of positive evidence for the purposes of the price undercutting and price suppression analyses under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

[99] Smiths' Questionnaire Response regarding energy levels of low-energy scanners not exceeding 300 KeV, Exhibit EU-42.

[100] China's second written submission, para. 199.

[101] See, for example, Nuctech's Questionnaire Response, Exhibit EU-8, pp. 97-118 of the pdf document.

- MOFCOM's own findings regarding "low-energy" and "high-energy" scanners support the position that price comparability needed to be considered

7.86 In addition to the information on the record regarding the very different physical characteristics and uses of the imported products and some of Nuctech's scanners, MOFCOM itself made certain observations, in the context of considering the scope of the product under investigation, which support the notion that MOFCOM should have considered comparability before proceeding with its price effects analysis. In particular, in its Final Determination, MOFCOM stated:

> Although X-Ray scanners of a high energy level are usually used to inspect large objects, while X-Ray scanners of a low energy level are used to inspect small objects, these are only variations adopted in accordance with different product designs and market elections.[102]

7.87 In its Dumping Disclosure to Smiths, MOFCOM made the same statement, referring to the different uses to which "high-energy" and "low-energy" scanners are put as "variations adopted in accordance with differences in product design and market choice"[103]. Similarly, in the Dumping Disclosure to the European Commission, MOFCOM stated:

> [F]irstly, from the physical characteristics, these two looked different, reflecting the morphological differences in integration, as the manufacturer chose different forms of product integration subject to different customer needs and product design … the difference of the ray source transmitter reflected high and low energy in product design, and the difference in the operating mechanism of the detection system was based on the energy level of detection and the choice of a more appropriate level of detection … Although the high-energy equipment was often used to detect large objects, while low-energy equipment was used to detect small objects, this was just a change based on product design and a different market.[104]

7.88 Therefore, even MOFCOM acknowledged that "high-energy" and "low-energy" scanners generally have different uses, are perceived differently by consumers and are in "a different market". Although MOFCOM stated that "high-energy x-ray scanners can also be used to inspect small objects"[105], MOFCOM's preceding statement indicates that this is the exception rather than the rule and generally does not reflect the "market elections" earlier referred to by MOFCOM[106]. Consequently, in the light of MOFCOM's acknowledgement, in the context of considering the scope of the product under investigation, that high-energy and low-energy scanners generally operate in different markets, in the Panel's view MOFCOM should have considered this when deciding upon its methodology for determining price effects under Article 3.2 of the Anti-Dumping Agreement. To be comparing the prices of Smiths' low energy scanners with the prices of a much broader mix of "like"

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[102] Final Determination, Exhibit EU-2, p. 13.

[103] MOFCOM's Dumping Disclosure to Smiths (BCI), Exhibit EU-17, p. 6.

[104] MOFCOM's Dumping Disclosure to the European Commission, Exhibit EU-18, p. 7 of the pdf document.

[105] Final Determination, Exhibit EU-2, p. 13.

[106] We note that in its second written submission, China provides evidence to indicate that there are two scanners with energy levels of 320 KeV and 6 MeV, for which the description of use includes to inspect air cargo and pallets at airports. According to China, the European Union considers that such uses are reserved for "low-energy" scanners (China's second written submission, paras. 219-220 and Exhibits CHN-10 and CHN-11). In the Panel's view, these examples do not alter the fact that MOFCOM found in general that "high-energy" scanners are used to inspect large objects and that "high" and "low-energy" scanners are perceived differently in the market. The Panel considers that MOFCOM should have taken this finding into account when deciding upon its price effects methodology.

Nuctech products, including products with different uses and which were not perceived by customers to be substitutable, does not constitute an objective examination of positive evidence for the purposes of the price undercutting (and consequently the price suppression) analysis under Articles 3.1 and 3.2 of the Anti-Dumping Agreement[107]. Further, to analyse the trends in the prices of Nuctech's products, which included both low- and high-energy scanners, without considering and taking into account changes in the product mix each year, does not constitute an objective examination of positive evidence for the purposes of the price suppression analysis.

- There was some evidence on the record before MOFCOM regarding significant differences in the prices of different models

7.89 In addition to MOFCOM's own conclusions, Nuctech's submissions in its Application also should perhaps have suggested to MOFCOM that price comparability needed to be considered in the context of its Article 3.2 analysis. In particular, in submitting its domestic prices over the POI, Nuctech stated that "[b]ecause the prices of different types of Subject Products vary significantly, the change in the average price cannot show a trend of price change"[108]. Consequently, Nuctech separated the trends in the prices for two of its models, which together accounted for more than 80% of its sales[109]. The two models which Nuctech chose for this purpose were both "low-energy" scanners, indicating that in Nuctech's view even an aggregation of prices of "low-energy" models can lead to distorted conclusions when considering pricing trends over time.

7.90 Smiths also made submissions regarding the price differences between "high" and "low-energy" scanners. In particular, Smiths stated in its Injury Brief that the price difference between its highest-priced low-energy scanner (a 300 KeV scanner) and lowest-priced high-energy scanner (a 2.5 MeV scanner) was approximately ten-fold[110]. Although before the Panel China submitted an example of two contracts relating to sales of Nuctech scanners in 2011, which demonstrated that a high-energy scanner had been sold at a lower price than a "low-energy" scanner[111], the Panel remains of the view that the submissions on the record before MOFCOM regarding the differences in prices across models, including between "low-energy" and "high-energy" models, should at least have prompted MOFCOM to examine, and if necessary take into account, such differences prior to conducting its price effects analysis under Article 3.2[112]. The Panel notes that the contracts submitted to it by China were not on the record before MOFCOM and, in any event, relate to sales outside the POI. These transactions could therefore not have provided any justification for a conclusion by MOFCOM that there was no need to ensure comparability before making the price comparisons it did in its price undercutting and suppression analyses.

- Other evidence

7.91 Finally, in addition to the aforementioned evidence before MOFCOM, there were also extensive submissions by Smiths to MOFCOM regarding the different uses, physical characteristics

[107] Where the "like" domestic product has the broad interpretation outlined by the Panel in *EC – Salmon (Norway)*, paras. 7.13-7.76 (see para. 7.65 of this Report).

[108] Application, Exhibit EU-3, pp. 29-30.

[109] Application, Exhibit EU-3, p. 29.

[110] Smiths' Injury Brief, Exhibit EU-11, pp. 6-7.

[111] Sales Contracts provided in Exhibits CHN-17 (BCI) and CHN-18 (BCI).

[112] China argues that Smiths' submission regarding the price differences between "high-energy" and "low-energy" scanners was merely an unsubstantiated assertion. However, the Panel is of the view that in the light of Nuctech's own submissions regarding the problems in using aggregated prices, and the fact that Smiths' submission was not contested before MOFCOM, Smiths' submission provides support for the conclusion that MOFCOM should at least have considered the pricing of different scanners when choosing its price effects methodology.

and technical features of "high-energy" and "low-energy" scanners[113]. The Panel does not consider that MOFCOM's examination of this evidence for the purpose of concluding that both "high-energy" and "low-energy" scanners could be included within the scope of the investigation was sufficient for the purposes of ensuring price comparability under Article 3.2 of the Anti-Dumping Agreement. MOFCOM's conclusions for the purposes of product scope were at a very high-level of generality. For instance, with respect to the functions and uses of the scanners, MOFCOM stated that there were no differences between the various scanners because "all X-Ray scanners were used to detect objects"[114]. In the Panel's view, the fact that all scanners were used to detect objects is clearly not determinative of whether the prices at issue were comparable for the purposes of the Article 3.2 price effects analysis.

Conclusion

7.92 The Panel concludes that MOFCOM did not take any steps to ensure price comparability before undertaking its price comparisons as part of its price effects analysis. This was even though there was evidence on the record before MOFCOM to indicate that there were significant differences in the uses, physical characteristics and prices of the products being compared and in circumstances where MOFCOM had itself concluded that "high-energy" and "low-energy" scanners are perceived differently by consumers.

(g) What is the relevance of China's argument that Smiths did not provide the data that would have allowed MOFCOM to conduct a model-to-model price comparison?

7.93 China argues that MOFCOM requested complete pricing data relating to the subject product for the three years of the POI. However, Smiths provided only average figures for certain models for 2008 and no pricing data at all for 2006 and 2007. Therefore, China contends that it was in fact impossible for MOFCOM to perform a model-to-model price effects analysis and that the use of the weighted average methodology was reasonable and appropriate in these circumstances.

7.94 The Panel recalls that MOFCOM did not request pricing data from Nuctech, whether on a transaction specific basis or on a model by model basis, but rather requested the total domestic sales value for use in calculating average unit values. Therefore, even if Smiths had provided all of the data requested of it, given that MOFCOM did not request equivalent data from Nuctech, it appears that MOFCOM was not intending to employ a model-to-model price analysis. Consequently, the Panel is not convinced that the reason MOFCOM chose the methodology it did was due to Smiths' failure to provide certain data. Rather, as indicated previously, the data requested of Nuctech indicates to the Panel that MOFCOM decided at the outset to use its average unit value methodology.

7.95 In any event, the Panel notes that under Article 6.8 and Annex II of the Anti-Dumping Agreement, there are explicit procedures for an investigating authority to follow when an interested party does not provide necessary information. Under specific circumstances, these procedures allow an investigating authority to fill factual gaps in the record with the best information available. The Panel notes that there is no evidence on the record that MOFCOM found Smiths had failed to provide necessary information within the meaning of Article 6.8 of the Anti-Dumping Agreement and had resorted to the facts available procedures under Annex II. In response to a Panel question, China confirms that MOFCOM did not make such a finding under Article 6.8 and did not apply facts available under Annex II[115]. Whether or not a resort to facts available under Article 6.8 and Annex II could ever justify the type of methodology employed by MOFCOM in this case, it is clear that in the absence of resorting to facts available, the flaws in MOFCOM's analysis cannot be cured by the

[113] See, for example, Smiths' Injury Brief, Exhibit EU-11, pp. 2-7.
[114] Final Determination, Exhibit EU-2, p. 13.
[115] China's response to Panel question 42, para. 33.

argument that Smiths did not provide the necessary information. In the Panel's view, MOFCOM's approach was not "reasonable and appropriate"[116], but was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and the lack of factual information before MOFCOM cannot justify this.

7.96 In the light of this conclusion, it is not necessary for the Panel to resolve the issue raised by the European Union regarding whether MOFCOM in fact had sufficient information before it to conduct a price effects analysis that took into account the alleged differences between the products under consideration.

(h) Conclusion

7.97 The Panel concludes that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to ensure that the prices it was comparing as a part of its price effects analysis were actually comparable. In particular, the Panel concludes that MOFCOM's price undercutting and price suppression analyses were inconsistent with Articles 3.1 and 3.2 because they were not based on an objective examination of positive evidence.

D. THE STATE OF THE DOMESTIC INDUSTRY: ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

1. Introduction

7.98 The European Union submits that MOFCOM did not base its injury finding on positive evidence. Further, the injury evaluation did not involve an assessment of all relevant economic factors. Finally, the injury analysis ignored the positive state of the domestic industry, instead finding material injury based on a limited number of negative factors, ignoring the overall development and interaction among the positive and negative factors. China asks the Panel to reject the European Union's claim.

2. Relevant provisions

7.99 Article 3.1 of the Anti-Dumping Agreement is set forth above. Article 3.4 of the Anti-Dumping Agreement provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

[116] China's response to Panel question 42, para. 34.

3. Main arguments of the parties

(a) European Union

(i) MOFCOM's failure to rely on positive evidence

7.100 The European Union submits that MOFCOM relied on flawed data, contrary to the Article 3.1 obligation to use positive evidence. This argument is based on discrepancies between the data relied on by MOFCOM, and the data submitted by Nuctech. Since the domestic industry was made up only of Nuctech, the European Union contends that the trends found by MOFCOM on the basis of its record evidence should coincide to a great extent with the trends resulting from the data submitted by Nuctech.

7.101 Although China argues that the data provided by Nuctech was adjusted pursuant to the verifications conducted by MOFCOM, the European Union argues that there is no evidence to support this. At no stage did MOFCOM alert interested parties to the fact that it had found discrepancies in Nuctech's data during verification and had subsequently modified the data.

7.102 In response to China's explanation regarding the adjustments to the data on cash flow, investments and return on investment, namely that the figures were adjusted to remove information relating to exports and other products, the European Union submits that this is difficult to reconcile with the specific questions addressed to Nuctech. The questions referred to domestic like product and not to other products. The European Union also questions the basis (e.g. quantities, turnover, etc.) upon which MOFCOM made the adjustments.

7.103 In addition to such alleged discrepancies between the information provided by Nuctech and the data reflected in MOFCOM's Final Determination, the European Union submits that there are other *indicia* making such data unreliable. In particular, the European Union refers to publicly available data regarding Nuctech's pre-tax profits and employment, which cannot be reconciled with MOFCOM's findings.

7.104 The European Union notes that MOFCOM addressed the alleged discrepancies between its Final Determination and the publicly available data by stating that the public figures "included the information and data on other products in addition to the Like Products, while the determinations of the instant case only would be based only on the information and data on Like Products"[117]. The European Union submits that MOFCOM's rationale is questionable, since scanners accounted for approximately 90% of Nuctech's products.

(ii) MOFCOM's failure to examine all Article 3.4 factors

7.105 The European Union submits that MOFCOM failed to examine the magnitude of the margin of dumping, notwithstanding the inclusion of this factor in Article 3.4 of the Anti-Dumping Agreement. According to the European Union, there is nothing in the Final Determination or on the record showing that MOFCOM evaluated or considered the relevance of this factor. Further, China has confirmed that MOFCOM does not have separate internal reports in which the factor may have been evaluated.

[117] Final Determination, Exhibit EU-2, p. 28.

(iii) MOFCOM's failure to take into account differences between low-energy and high-energy scanners

7.106 The European Union recalls its previous arguments regarding the differences between low-energy and high-energy scanners. The European Union considers that because the investigation covered products that belong to different markets and do not compete with each other, MOFCOM's use of weighted average values, in particular in the evaluation of the factors affecting prices and costs, was manifestly inadequate for considering the existence of material injury and did not constitute an objective examination.

7.107 In response to China's argument that it would be contrary to Article 3.4 of the Anti-Dumping Agreement to focus on specific segments of the domestic industry, rather than examining the industry as whole, the European Union clarifies it is not arguing that MOFCOM was required to conduct a separate examination per segment of all factors having a bearing on the state of the domestic industry. Rather, the European Union focuses its argument on injury factors relating to prices and costs. The European Union argues that in circumstances where the domestic industry makes two very different products, the combination of price and cost data for both products leads to data which is not representative of, and does not indicate much about, the state of the domestic industry as a whole.

(iv) MOFCOM's failure to make a proper evaluation of the overall development and interaction among injury factors taken together

<u>MOFCOM failed to provide a compelling explanation of whether and how the overwhelming majority of positive movements were outweighed by other factors that may have been moving in a negative direction</u>

7.108 The European Union submits that MOFCOM failed to provide a compelling explanation of how the overwhelming majority of positive injury factors were outweighed by negative injury factors.

7.109 The European Union asserts that most injury factors examined by MOFCOM were positive or showed a positive trend. The European Union notes in particular that consumption, output, production capacity, capacity utilisation, sales volume, sales revenue, domestic market share, productivity, and wages experienced a significant increase between 2006 and 2008.

7.110 Indeed, the European Union notes China agrees that, of the 16 factors considered by MOFCOM, only seven were negative. The European Union argues that MOFCOM disregarded the "trends" observed within factors over the POI. According to the European Union, a factor cannot be considered "negative" for the purpose of the injury analysis simply because there was a negative figure throughout the period or at the end of the period considered.

7.111 The European Union acknowledges that profits remained negative during the POI. However, the European Union contends that there was nevertheless a positive trend in the domestic industry's profits, indicating that the state of the industry moved positively between 2006 and 2008.

7.112 The European Union contends that certain other factors which MOFCOM considered to be "negative", namely the rate of return on investment, employment and cash flow, fluctuated up and down during the POI, generally showing a positive trend towards the end of the POI (with the exception of employment). In the European Union's view, these factors cannot correctly be characterised as "negative".

7.113 With respect to employment, the European Union argues that at a time when wages were increasing and Nuctech's productivity was booming, the fluctuating employment rate cannot be considered negative as such. Further, given that Nuctech was making huge investments in the low-

energy scanner market and expanding its production facilities, cash outflow is to be expected. However, the constant increase in the rate of return indicated that Nuctech's investment and cash flow were moving in a positive direction.

7.114 The European Union submits that only two factors were negative and showed a negative trend for the domestic industry over the whole POI: domestic sales prices and inventories.

7.115 According to the European Union, therefore, an overwhelming majority of the injury factors examined by MOFCOM were positive and showed a positive trend. Some were negative but showed a positive trend (profits), and others fluctuated showing a positive trend towards the end of the POI (rate of return and cash flow). One factor simply fluctuated up and down (employment), and others remained unclear although MOFCOM appears to have considered that they declined (investments and financing capacity). The only factors that were clearly negative and showed a negative trend for the domestic industry were the domestic sales price (showing constant decline throughout the POI) and inventories (showing an irregular increase throughout the POI).

7.116 According to the European Union, such positive movements in such a large number of factors required MOFCOM to provide a "compelling explanation" of whether and how, in the light of such apparent positive trends, the domestic industry was, or remained, injured. The European Union submits that MOFCOM did not provide the required "compelling explanation".

MOFCOM's contradictory observations and failure to examine all factors in their proper context

7.117 The European Union submits that MOFCOM's analysis of certain negative factors was inadequate for the purposes of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because MOFCOM made contradictory observations in a non-even-handed manner.

7.118 The European Union submits that in its Final Determination MOFCOM made contradictory observations with regard to sales revenue, pre-tax profits, rate of return of the domestic x-ray security inspection equipment industry, net cash outflow, the domestic industry's financing and investment capacity and the reduction in employment.

7.119 Aside from the alleged contradictory observations, the European Union submits that MOFCOM failed to examine the injury factors in their proper economic context. According to the European Union, an "evaluation" of a factor is not limited to a mere characterisation of its relevance or irrelevance. Rather, an "evaluation" also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors. In this regard, the European Union suggests that MOFCOM overlooked the issue of how and why domestic sales prices were decreasing, even in 2008 (by 46.7%), when the price of subject imports consistently increased throughout the period (including 2008, by 14%), and were actually higher than those of the domestic products in 2008[118].

7.120 The European Union submits that MOFCOM also failed to indicate what amount of profits or the domestic industry was "expected", or should normally have been able, to achieve in the expanding market. The European Union contends that, in a competitive market, such as the scanners market, growth and profits will depend on numerous factors, including the growth of other domestic and foreign competitors. MOFCOM did not provide any evidence showing that Nuctech should have been able to realise higher profits and growth than it actually did. The European Union also argues that MOFCOM failed to compare Nuctech's profits and growth to the profits and growth of other domestic and foreign producers, even though such evidence was on the record. The European Union

[118] Final Determination, Exhibit EU-2, pp. 23 and 24.

submits that MOFCOM failed to examine Nuctech's expected growth and profits in the light of the growth of other domestic producers, which may also have usurped part of Nuctech's "expected" growth.

MOFCOM failed to take account of all facts and arguments on the record relating to the state of the industry: start-up status and aggressive pricing

7.121 The European Union contends that MOFCOM failed to consider all facts and arguments on the record relating to the state of the domestic industry. The European Union argues that, in particular, MOFCOM failed to consider two relevant economic factors identified by Smiths that had a bearing on the state of the domestic industry: the start-up status of Nuctech in the low-energy scanners market, and Nuctech's aggressive pricing strategy. The European Union also submits that MOFCOM failed to take into account record evidence indicating that Nuctech was expanding both locally and overseas.

(b) China

(i) MOFCOM's failure to rely on positive evidence

7.122 China recalls that the burden of proof is on the European Union, which is required, in order to make a *prima facie* case, to show how and why the evidence relied upon by MOFCOM is not of an affirmative, objective and verifiable character. China claims that the European Union fails to discharge this burden. According to China, the alleged existence of discrepancies between, on the one hand, MOFCOM's findings as reflected in its Final Determination and, on the other hand, the figures reported by Nuctech in its Application and in the Injury Questionnaire Response, cannot by itself demonstrate that the "evidence" on which MOFCOM based itself is not "positive", namely is not of an affirmative, objective and verifiable character.

7.123 China contends that the findings made by MOFCOM regarding the various injury factors are based on the figures and data provided by Nuctech as adjusted where necessary after careful examination and scrutiny, in particular during the verification, in accordance with Article 6.6 of the Anti-Dumping Agreement. China notes that after verification, Nuctech provided revised data to MOFCOM, which excluded exports of the like product, and (domestic and export) sales of non-like products. China emphasises that the only relevant criterion to determine whether the data used is "positive" is whether such evidence is "of an affirmative, objective and verifiable character". China notes that the findings of the Appellate Body in *Thailand – H-Beams* clearly invalidate the European Union's position that data only becomes "positive evidence" if investigating authorities inform interested parties that the data has been modified pursuant to verifications. In fact, China contends that the European Union is confusing two different issues, namely whether investigating authorities inform interested parties of which data is used, on the one hand, and whether the investigating authorities base themselves on positive evidence, on the other. China also notes that MOFCOM expressly indicated in its Preliminary and Final Determinations that supplementary evidence and material was provided by Nuctech after verification.

7.124 China also submits that the additional argument made by the European Union that "there are other indicia making such data unreliable"[119] must equally be rejected. China asserts that MOFCOM specifically addressed the issue of differences between the figures provided by Nuctech and those reflected in other publicly available documents (such as the data disclosed by the parent company of the applicant in its annual reports as well as the information and data filed with the Administration for Industry and Commerce)[120]. In particular, MOFCOM noted that the figures "included the information

[119] European Union's first written submission, para. 255.
[120] European Union's first written submission, para. 255.

and data on other products in addition to the Like Products, while the determinations of the instant case [] would be based only on the information and data on Like Products"[121]. In response to the European Union's attempt to dispute MOFCOM's conclusion on this issue, on the basis that scanners account for approximately 90% of Nuctech's products over the POI, China argues that there is no evidence on the record to support the European Union's position. Although China considered that it was not for it to furnish any evidence on this point, in fact China provided the relevant figures regarding the proportion of Nuctech's products accounted for by scanners, as originally provided by Nuctech and verified by MOFCOM during the course of the investigation. According to China, these figures invalidate the European Union's allegation.

(ii) MOFCOM's failure to examine all Article 3.4 factors

7.125 China accepts that MOFCOM was required to examine all of the factors set forth in Article 3.4 of the Anti-Dumping Agreement. However, China contends that the Appellate Body in *EC – Tube or Pipe Fittings* clarified that there does not need to be an "explicit" evaluation of the factors, provided "a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated"[122].

7.126 China submits that MOFCOM examined the "magnitude of the margin of dumping" and found margins that exceeded the "*de minimis*" threshold of Article 5.8 of the Anti-Dumping Agreement. China asserts that this evaluation is set out clearly in the Final Determination, even though it is not in the part concerning the injury determination. China also submits that MOFCOM expressly examined the dumping margins of the exporting producers and arrived at the following results:

1. Smiths Heimann GmbH 33.5%
2. All Others 71.8%[123]

7.127 Accordingly, China contends that it flows from the foregoing that the magnitude of the margin of dumping had been examined and evaluated. China admits that MOFCOM did not expressly characterize such margins as being "significant" or "substantial", but claims that this is unnecessary where it follows from the decision to impose measures that the margins were greater than "*de minimis*".

(iii) MOFCOM's failure to take account of differences between low-energy and high-energy scanners

7.128 China asks the Panel to reject the European Union's arguments regarding the impact of alleged differences between low-energy and high-energy scanners on MOFCOM's injury analysis. China asserts that MOFCOM investigated the like product issue raised by Smiths, and found that both "types" of scanners were "almost the same"[124].

7.129 China argues that the European Union's claim lacks any factual basis. This is because China maintains that there is no clear-cut distinction between scanners based upon whether their energy level is above or below 300 KeV.

7.130 As a matter of law, China submits that the focus of the objective examination for the purpose of determining injury is the domestic industry as defined in accordance with Article 4.1 of the Anti-

[121] Final Determination, Exhibit EU-2, p. 28.
[122] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.
[123] Final Determination, Exhibit EU-2, p. 33.
[124] Final Determination, Exhibit EU-2, p. 12.

Dumping Agreement. China submits that MOFCOM was, therefore, required to determine the state of the domestic industry as a whole. Since MOFCOM concluded that the x-ray scanners domestically produced in China and the Subject Product were "like products", the injury determination had to be carried out with respect to the identified "like product" as defined above, i.e., in respect of domestic production of both low-energy and high-energy scanners. According to China, MOFCOM would have failed to act objectively if MOFCOM had focused its injury examination exclusively on "low-energy" scanners. Further, there is no requirement that an investigating authority carry out a separate analysis for allegedly different categories of the "like product". Therefore, by examining the domestic industry as a whole, MOFCOM carried out an objective examination as required by Article 3.1 of the Anti-Dumping Agreement.

(iv) Evaluation of the overall development and interaction among injury factors

MOFCOM's evaluation of the interaction between positive and negative injury factors

7.131 China submits that there is no factual basis for the European Union's argument that most injury factors examined by MOFCOM were positive and that the only factors that were clearly negative and showed a negative trend for the domestic industry were the domestic sales prices and inventories. According to China, MOFCOM's analysis reveals a negative assessment of a significant number of factors. In this regard, as a preliminary matter China notes the statement by the panel in *EC – Fasteners (China)* that "a 'negative factor' in the assessment of the condition of the domestic industry is not limited to a factor for which the information demonstrates an actual decline in performance[125]". According to China, a factor which remains at a low level may be seen as a negative factor and support a finding of injury.

7.132 Although China acknowledges that MOFCOM found positive developments with respect to certain factors (namely capacity, output, capacity utilisation, sales volume, market share, sales revenue, productivity and wages), China contends that factors that show positive developments do not preclude investigating authorities from making an affirmative determination of injury. According to China, MOFCOM provided a detailed and satisfactory explanation of both how the negative factors supported an affirmative injury determination and why the presence of several factors that showed positive trends could not overturn this conclusion. China argues that the examination carried out by MOFCOM shows an objective examination of positive evidence. MOFCOM's conclusions could reasonably have been reached by an objective decision-maker.

MOFCOM's allegedly contradictory observations and failure to examine all factors in their proper economic context

7.133 In relation to the European Union's assertion that MOFCOM made contradictory observations "in its evaluation of all factors and the state of the domestic industry"[126], China rejects this argument and contends that it is based on a distortion of MOFCOM's findings.

7.134 Further, China notes the European Union's argument that an "evaluation" of an injury factor also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined[127]. China understands the European Union to argue that MOFCOM should have provided a logical explanation of how the different factors relate to each other and the economic context.

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[125] Panel Report, *EC – Fasteners (China)*, para. 7.402.

[126] European Union's first written submission, para. 288.

[127] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314; Panel Report, *EC – Bed Linen (Article 21.5 - India)*, para. 6.162.

7.135 China submits that in conducting its injury analysis, MOFCOM properly considered how the factors related to each other and to the wider economic context. In particular, MOFCOM concluded that Nuctech was forced to lower its prices to a level that could not be compensated for by the cost savings resulting from increased economies of scale: "[t]he increase of capacity, output, sales volume and market share of the domestic industry did not bring the expected profits to the domestic industry. Domestic industry suffered consistent losses throughout the POI"[128]. In the absence of dumped products, Nuctech would not have been forced to reduce its prices to such a low level and could have compensated price decreases by cost savings. This would in turn have permitted Nuctech to return to profitability.

7.136 In response to the European Union's argument that the subject imports, which were increasing in price, could not have forced the domestic sales price to go down, China argues that in 2006 and 2007, the subject imports significantly undercut the domestic prices. Even in 2008, although subject import prices were slightly higher than domestic prices, they remained at a low level and continued to prevent Nuctech from becoming profitable. Further, the sales volume of subject imports increased by 88% and captured additional market share in a rapidly expanding market. China refutes the European Union's argument that Nuctech sacrificed profits in order to increase sales and its market share. According to China, this is based on the erroneous view that an industry would voluntarily expose itself to a situation of self-inflicted losses. Similarly, China notes that while in theory economies of scale and higher productivity rates may allow an industry to lower its prices, it is with a view to increasing profits and not to operating at a loss.

7.137 In relation to MOFCOM's analysis of profits, China underlines that MOFCOM found that the domestic like product sustained serious losses and although losses were less in 2008 than 2007, the domestic industry was not able to turn losses into profits and this constituted a negative factor. China also emphasises that the term "serious" is adequate to describe the reported pre-tax profit figures, which were -34.88%, -31% and -1.84% over the POI. Finally, in response to a Panel question, China notes MOFCOM found that Nuctech did not realize the profit that should have been obtained. According to China, there was no need for MOFCOM to calculate the "expected profit". The important point was that Nuctech expected to be profitable, but was not[129].

Whether MOFCOM took account of all facts and arguments on the record relating to the state of the industry: start-up status and aggressive pricing

7.138 China asks the Panel to reject the European Union's claim that "MOFCOM failed to consider all facts and arguments on the record relevant to or having to do with the state of the domestic industry" and thereby, "failed to make an objective assessment of the impact of the dumped imports on the Chinese industry as required by Articles 3.1 and 3.4 Anti-Dumping Agreement"[130].

7.139 China notes that the European Union's claim concerns MOFCOM's treatment of two economic factors, namely the start-up situation of Nuctech in the low-energy scanners market, and Nuctech's aggressive pricing[131]. China submits that these are not elements that may potentially describe the state of the industry, but rather elements that may potentially cause the injury, i.e., they explain, rather than describe, the injured state of the industry. According to China, therefore, these factors are clearly not "factors or indices having a bearing on the state of the domestic industry" within the meaning of Article 3.4 of the Anti-Dumping Agreement.

[128] Final Determination, Exhibit EU-2, p. 28.
[129] China's response to Panel question 56, para. 71.
[130] European Union's first written submission, para. 302.
[131] European Union's first written submission, para. 297.

7.140 Furthermore, even if those indices were considered as "factors" that may have a bearing on the state of the domestic industry, China contends that the European Union has failed to demonstrate that those factors were relevant in assessing the impact of the dumped imports on the state of the domestic industry. According to China, the arguments made by Smiths concerning the alleged start-up situation and pricing policy of Nuctech were pure allegations, unsubstantiated by relevant evidence. China contends that not every factor raised by an interested party needs to be examined by an investigating authority. In the absence of evidence that the considerations raised by Smiths were "relevant economic factors having a bearing on the state of the industry", MOFCOM was not required to examine them in its injury analysis.

4. Evaluation by the Panel

(a) Whether MOFCOM relied on positive evidence

7.141 The European Union argues that discrepancies between the data cited by MOFCOM in its Preliminary and Final Determinations and (i) data supplied by Nuctech in the Application and in response to the injury questionnaire; and (ii) data in publicly available documents, such in Nuctech's parent company annual reports and data filed with the Administration for Industry and Commerce, demonstrate that MOFCOM's determination was not based upon positive evidence.

(i) Do the alleged differences between the data relied upon by MOFCOM and the data supplied by Nuctech in the Application and in the injury questionnaire suggest that MOFCOM did not rely upon positive evidence?

7.142 The first element of the European Union's argument that MOFCOM did not base its injury determination on positive evidence arises from alleged discrepancies between the data relied upon by MOFCOM and the data supplied by Nuctech in its Application and in the injury questionnaire[132].

7.143 An examination of the record supports the European Union's assertion, which is uncontested by China, that there are indeed discrepancies between certain findings made by MOFCOM and the information supplied by Nuctech. For example, with respect to cash flow, MOFCOM found cash outflow throughout the POI, although with reduced outflow in 2008[133]. In contrast, in its Application, Nuctech indicated that the domestic like product experienced cash inflow in 2006 and 2007, and cash outflow in 2008[134]. Further, in its questionnaire response, Nuctech reported cash inflow for the domestic like product in 2006 and 2007 and a balanced net cash flow of 0 in 2008[135].

Did MOFCOM act inconsistently with Articles 3.1 and 3.4 by modifying data at verification without alerting interested parties to this?

7.144 In response to the European Union's submission, China explains that, in accordance with Article 6.6 of the Anti-Dumping Agreement, MOFCOM conducted an on-site verification to satisfy itself of the accuracy of the information provided by Nuctech. China's initial position was that, as a

[132] The European Union argues that there are discrepancies in MOFCOM's findings on cash flow, investments, return on investment, sales revenue and profits, when compared to the information supplied to MOFCOM by Nuctech. The European Union notes that there may be more examples, but due to the limited disclosure in the public record, it is not in a position to highlight specific contradictions with respect to any other injury factors. Nevertheless, the European Union argues that the examples it has provided are sufficient to undermine the credibility of the data relied upon by MOFCOM and therefore, sufficient for the Panel to find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement (European Union's first written submission, paras. 182, 252-253 and footnote 221).

[133] Final Determination, Exhibit EU-2, p. 26.

[134] Application, Exhibit EU-3, p. 39.

[135] Nuctech's Questionnaire Response, Exhibit EU-8, Attachment 21.

result of this verification, MOFCOM adjusted the information supplied by Nuctech[136]. However, during the second meeting with the Panel, China clarified that Nuctech, rather than MOFCOM, performed the necessary adjustments. In particular, during the verification, MOFCOM found that some of the figures provided by Nuctech in its initial questionnaire response incorrectly included exports of the domestic like product. Revised data and information was therefore provided by Nuctech after verification. MOFCOM relied upon this revised data. At various stages of its submissions, China also argues that MOFCOM excluded data relating to sales of products other than the like product[137]. However, in response to a Panel question, which highlighted that the data provided by Nuctech on cash-flow, investments, return on investments, sales revenue and profits included only the domestic like product[138], China refers only to the exclusion of data relating to export sales upon verification and does not press the point that data relating to non-like products was also excluded[139].

7.145 According to the European Union, China's explanation is untenable. The European Union complains that at no stage did MOFCOM alert interested parties, in a letter or in its determinations, to the fact that it had modified the data provided by Nuctech pursuant to an on-site verification. According to the European Union, if MOFCOM's conduct were found acceptable by the Panel, "investigating authorities could completely disregard the figures on the record available to all parties and on the basis of which the parties have based their defence"[140].

7.146 We note that in its Preliminary and Final Determinations, MOFCOM disclosed the injury data upon which it based its findings. We understand that the European Union's complaint is not that MOFCOM failed to disclose the data upon which it was relying, but rather that MOFCOM did not explain that it had modified the data supplied by Nuctech as a result of an on-site verification. In our view, this aspect of the European Union's argumentation appears to blur the lines between the requirement that an injury determination be based upon positive evidence and the requirements regarding disclosure of evidence and reasoning found elsewhere in the Anti-Dumping Agreement, such as in Articles 6 and 12. We would suggest that whether evidence is "positive", in the sense of being affirmative, objective and verifiable, is unrelated to whether an investigating authority has explained or disclosed the way in which it derived the data. In other words, in the reference to "positive evidence", Article 3.1 of the Anti-Dumping Agreement disciplines the substantive adequacy of the evidence relied upon by an investigating authority, rather than imposing procedural obligations in relation to the disclosure of the reasoning or method by which the investigating authority derived the evidence. We find some support for this approach in the Appellate Body's report in *Thailand – H-Beams*. The specific question before the Appellate Body in that case was whether the investigating authority was required to base its injury determination only upon non-confidential information, on the basis that this was the only evidence disclosed to, or discernible by, parties to the investigation. The Appellate Body made a number of general statements to indicate that the positive

[136] China's first written submission, paras. 345-346.

[137] China's first written submission, paras. 345-346 and China's comments on the European Union's response to Panel question 71, para. 85.

[138] In its question, the Panel noted that with respect to cash flow, Nuctech submitted in the Application that "cash flow of *domestic like product* was subject to a net inflow in 2006 and 2007, but which turned into a negative figure (outflow) in 2008" (emphasis added). Further in its questionnaire response, the table detailing cash flows in Attachment 21 is entitled "*Domestic Like Product* net cash flows". (emphasis added) (Application, Exhibit EU-3, p. 39 and Nuctech's Questionnaire Response, Exhibit EU-8, Attachment 21.) In relation to investments and return on investments, the table detailing these figures in Nuctech's questionnaire response is entitled "Return on Investment on *Domestic Like Product"* (emphasis added). (Nuctech's Questionnaire Response, Exhibit EU-8, Attachment 20.) In relation to the trends for sales revenue and profits, the relevant table in Nuctech's questionnaire response includes columns for the "domestic like product" and for "all products". (Nuctech's Questionnaire Response, Exhibit EU-8, Attachment 7.)

[139] China's response to Panel question 93, paras. 78-83.

[140] European Union's second written submission, para. 184.

evidence requirement in Article 3.1 is concerned with the *nature* of the evidence, rather than with procedural obligations:

> The focus of Article 3 is thus on *substantive* obligations that a Member must fulfil in making an injury determination…
>
> [T]he ordinary meaning of [positive evidence and objective examination] does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation…
>
> Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1.[141]

7.147 Therefore, in our view, the European Union's complaint that MOFCOM failed to inform interested parties that it had modified certain data supplied by Nuctech as a result of the on-site verification is an argument about the procedural obligations disciplining investigating authorities. It does not bear upon whether the evidence is "positive".

7.148 The European Union also argues that when collecting information regarding the state of the domestic industry, questionnaires should be drafted in a clear manner so that interested parties know whether information relating only to domestic performance, or both domestic and export performance, is being collected. According to the European Union, the questionnaire sent to Nuctech was vague in this respect[142]. The Panel agrees that when issuing questionnaires, it is certainly desirable that investigating authorities ensure that they are as clear and unambiguous as possible. However, the Panel can find no basis to conclude that any lack of clarity, resulting in modifications to the data upon verification, bears upon the determination of whether the modified data ultimately relied upon is "positive" or not.

Was the modified data relied upon by MOFCOM positive evidence?

7.149 Even though the Panel does not consider that MOFCOM's lack of disclosure in relation to the verification process, and its alleged lack of clarity in its questionnaire, creates an inconsistency with respect to Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the question remains whether the evidence relied upon by MOFCOM can be considered "positive". The Panel must determine whether the European Union has established a *prima facie* case that the evidence upon which MOFCOM relied in making its injury determination was not of an affirmative, objective and verifiable character and was not credible.

7.150 The European Union's case regarding the evidence relied upon by MOFCOM appears to be based on two main arguments. The first effectively amounts to a suggestion that MOFCOM cannot in fact have modified the data by excluding information relating to exports, while the second is an argument that if MOFCOM did modify the data in this way, the export information upon which it relied was not credible, such that the resulting modified data was not positive evidence.

- Did MOFCOM have the necessary information before it to modify the data in the manner alleged by China?

7.151 In relation to the first argument, the European Union contends that it is not clear from the public record that MOFCOM asked Nuctech for specific evidence regarding its profitability in the

[141] Appellate Body Report, *Thailand – H-Beams,* paras. 106, 107 and 110.
[142] European Union's comments on China's response to Panel question 93, para. 56.

export market, thereby allowing MOFCOM to modify the data to exclude that relating to exports. In making this argument, we surmise that the European Union is suggesting that MOFCOM did not have evidence before it relating to Nuctech's export performance, or at least that the "precise evidence provided directly by Nuctech to MOFCOM was lacking" from the public record[143].

7.152 An examination of the questionnaire lends some support to the European Union's position that MOFCOM did not ask Nuctech a direct question regarding the profitability of its exports. We note that the questionnaire did ask Nuctech to provide information on the volume, sales revenue and prices of its exports[144]. Apart from the question relating to sales revenue, it does not seem that the requested information would have been adequate to allow MOFCOM itself to adjust the aggregated data on cash flow, investments, return on investments and profits to take account of exports[145]. However, China's position is not that MOFCOM requested information on exports and then adjusted the aggregate figures itself using this information. Rather, China argues:

> [D]uring the verifications, MOFCOM found out that the figures provided in the initial reply to Question 20 of the Questionnaire Response of Nuctech incorrectly included exports of the domestic Like Product. Revised data and information were therefore provided by Nuctech after verification. MOFCOM used the revised data which were part of the record.[146]

7.153 Therefore, according to China, upon verification MOFCOM realised that certain data originally provided by Nuctech included information relating to the export of the like domestic product. China's explanation indicates that as a part of the verification process, Nuctech was alerted to this problem and it subsequently provided revised responses. This is corroborated by the existence on the Panel's record of Nuctech's revised questionnaire response to question 20[147]. It includes data on sales revenue and profits for the like domestic product, excluding that relating to exports.

7.154 In relation to MOFCOM's conclusion in the Final Determination that "the export of domestic X-ray security inspection equipment increased profits for the domestic industry", China argues that by comparing the original tables of data provided by Nuctech in response to the questionnaire, with the modified tables following verification, MOFCOM obtained the necessary information on profitability of Nuctech's exports of the like product[148]. The Panel considers this to be a plausible explanation of how MOFCOM was able to draw a conclusion regarding export profitability.

7.155 Consequently, in the Panel's view, the European Union has not successfully established that MOFCOM, together with Nuctech, did not or could not have adjusted aggregated data to exclude information relating to the export of the like domestic products. Further, the Panel is satisfied that MOFCOM had information before it to draw a conclusion about export profitability in the Final Determination.

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[143] European Union's response to Panel question 71, paras. 57-58 and European Union's second written submission, para. 326.

[144] Nuctech's questionnaire response, Exhibit EU-8, questions 24, 36, 37 and 50(6), pp. 18, 24-25 and 34.

[145] Where these are the variables the European Union highlights in arguing that there are discrepancies in the data relied upon by MOFCOM, when compared to that supplied to MOFCOM by Nuctech.

[146] China's opening statement at the second meeting with the Panel, para. 67.

[147] Nuctech's Revised Questionnaire Response, Exhibit CHN-21 (BCI).

[148] China's comments on the European Union's response to Panel question 71, para. 85.

- Was the information relied upon by MOFCOM in modifying the original information submitted by Nuctech credible?

7.156 The second prong to the European Union's argument relates to the credibility of the export data underlying the adjustments to the original data provided by Nuctech. In other words, even accepting that during the verification process Nuctech's data was adjusted to exclude the information relating to exports, the European Union argues that the export data relied upon in this process was not credible.

7.157 Essentially, the European Union argues that there was evidence on the record suggesting that exports of the like domestic product were having a negative effect on the state of the industry, whereas MOFCOM's findings suggest the opposite. Indeed, in the Final Determination, MOFCOM found:

> During the POI, domestic X-Ray security inspection equipment also had export trade in which some products were exported through contract manufacturing. Evidence showed that during the POI, the export of domestic X-Ray security inspection equipment increased profits for domestic industry, while serious losses in sales in the domestic market were the main reason for the difficulties suffered by the domestic industry. Thus, during the POI, the material injury to domestic X-Ray security inspection equipment industry was not caused by the export of domestic Like Products.[149]

7.158 Further, in the Application, Nuctech stated:

> The export volume of domestic like products continued to increase, and export profit conditions have been relatively good. Thus, the export performance of the domestic industry cannot have had a great effect on the overall injury suffered by the domestic industry. Therefore, the export performance of the domestic industry is not the reason for the injury to the domestic industry.[150]

7.159 The changes in certain variables following verification also demonstrate that Nuctech and MOFCOM were relying on data indicating that exports of the like domestic product were having a positive effect on the state of the domestic industry. For instance, in its Application, Nuctech stated that the domestic like product experienced cash inflow in 2006 and 2007, and cash outflow in 2008[151]. Further, in its questionnaire response, Nuctech reported cash inflow for the domestic like product in 2006 and 2007 and a balanced net cash flow of 0 in 2008[152]. By contrast, once having adjusted for exports, MOFCOM found cash outflow throughout the POI, although with reduced outflow in 2008[153].

7.160 The European Union's position is that there was evidence on the record to demonstrate that one of the reasons for Nuctech's *losses* was precisely its losses in the export markets. On this basis, the European Union argues that MOFCOM's figures to the contrary are not positive evidence. In particular, the European Union notes that in its rebuttal to the applicant's comments, Smiths argued:

> Numerous public documents filed by the Petitioner's listed parent company, Tsinghua Tongfang, have stated consistently that exports were the cause, not the cure, of its

[149] Final Determination, Exhibit EU-2, p. 32.
[150] Application, Exhibit EU-3, p. 43.
[151] Application, Exhibit EU-3, p. 39.
[152] Nuctech's Questionnaire Response, Exhibit EU-8, Attachment 21.
[153] Final Determination, Exhibit EU-2, p. 26.

> financial difficulties. For example, on page 41 of the annual report, Tsinghua Tongfang states that it experienced a 17% increase in outstanding cash receivable 'because of the expansion of its subsidiaries Nuctech and Taihao Technology, and because of *the long implementation cycles of overseas projects'*. Tsinghua Tongfang's 2009 filings again stated that 'the pressure faced by [its] security inspection business increased tremendously as *an impact of the worldwide financial crisis*'. It further stated that Petitioner 'rolled out leasing arrangements in response to the *declining purchasing power of overseas customers'*.[154]

7.161 The European Union also refers to an exhibit attached to Smiths' Injury Brief, in the form of a report in a Chinese magazine, Caijing, which stated that Tongfang's declined financial performance was due to the negative impact of the 2008 global economic crisis on Nuctech's "export-oriented security inspection business"[155].

7.162 For the reasons following, the Panel is not convinced that the evidence cited by the European Union is sufficient to establish a *prima facie* case that MOFCOM did not rely upon positive evidence:

- Increase in outstanding cash receivable due to "long implementation cycles of overseas projects"

7.163 In relation to this extract from a Tongfang annual report, China argues that the reference to "long implementation cycles of overseas projects" cannot be taken to mean that Nuctech's export performance was bad. It merely indicates that overseas projects take time to complete"[156]. The Panel agrees that the term "overseas projects" is somewhat ambiguous and may not necessarily be a reference to export performance. In any event, as argued by China, the report does not indicate whether the overseas projects are those of Nuctech or some other company within the Tongfang group[157].

- The pressure faced by [its] security inspection business increased tremendously as an impact of the worldwide financial crisis

7.164 The Panel notes that this statement is drawn from a filing made by Tongfang in 2009 and therefore, it is not clear whether the pressure increase occurred during the POI, or only after it. In any event, as China notes, the worldwide financial crisis began in mid-2008. China argues that as most export contracts are concluded months in advance, it is logical that the impact of the financial crisis would not be felt in 2008[158]. In the Panel's view, even if the impact of the financial crisis were felt by Nuctech in the second half of 2008, it is possible that the overall export performance over the course

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[154] European Union's opening statement at the first meeting with parties, para. 63 and Smiths' Rebuttal to Applicant's Comments, Exhibit EU-34, p. 6.

[155] European Union's response to Panel question 71, para. 59 and Smiths' Injury Brief, Exhibit EU-11, p. 62 of the pdf document.

[156] China's comments on the European Union's response to Panel question 71, para. 79.

[157] China's comments on the European Union's response to Panel question 71, para. 79. Given these concerns with the evidence relied upon by Smiths and the European Union, the Panel does not consider it necessary to resolve the translation issue raised by China in its comments on the European Union's response to Panel question 71, para. 78.

[158] China's opening statement at the second meeting with the Panel, para. 102.

of 2008 (and indeed over the POI) was positive and therefore consistent with the evidence relied upon by MOFCOM[159].

- The Applicant rolled out leasing arrangements in response to the declining purchasing power of overseas customers

7.165 The Panel agrees with China's argument that this statement does not represent direct evidence of "losses"[160] in the export market[161]. In fact, the extract indicates that Nuctech implemented a plan to prevent or react to negative developments in overseas markets. This strategy may well have been successful in maintaining a positive export performance and therefore, the Panel does not consider it to be very strong evidence that Nuctech was performing poorly in the export market. The Panel also notes that the statement is in an extract from a 2009 filing, and therefore it is not clear whether the developments it discusses occurred within the POI or not[162].

- Tongfang's declined financial performance was due to the negative impact of the 2008 global economic crisis on Nuctech's "export-oriented security inspection business"

7.166 Although the Panel considers this to be evidence that Nuctech's exports of the like domestic product suffered due to the 2008 global financial crisis, the Panel again notes that it is not clear that this downturn in exports would have been experienced during the POI[163].

Conclusion

7.167 In the Panel's view, the European Union has not presented adequate evidence to demonstrate that MOFCOM did not rely upon positive evidence in making its determination. In particular, the Panel is not convinced by the European Union's suggestion that the data originally provided by Nuctech in its questionnaire could not have been modified to exclude information relating to exports. Further, accepting that the data provided by Nuctech was modified at verification, the European Union has not established that the export data relied upon to do this was lacking in credibility.

(ii) Are the alleged differences between the data relied upon by MOFCOM and the data in publicly available documents indicia that MOFCOM's data is not "positive evidence"?

7.168 The European Union argues that discrepancies between the data relied upon by MOFCOM and the data found in Nuctech's parent company annual report as well as data filed with the Administration for Industry and Commerce are *indicia* that the data reflected in MOFCOM's Final Determination is unreliable[164].

7.169 China does not contest that there are discrepancies between the data cited by MOFCOM in its determinations and data in certain publicly available documents. Indeed, an examination of the evidence reveals that in a report prepared by Nuctech's parent company, Tongfang, the gross profit

[159] Given these concerns with the evidence relied upon by Smiths and the European Union, the Panel does not consider it necessary to resolve whether the European Union selectively quoted from the filing, as alleged by China in its comments on the European Union's response to Panel question 71, para. 82.

[160] European Union's opening statement at the first meeting with the Panel, para. 63.

[161] China's comments on the European Union's response to Panel question 71, para. 83.

[162] Given these concerns with the evidence relied upon by Smiths and the European Union, the Panel does not consider it necessary to resolve whether the European Union selectively quoted from the filing, as alleged by China in its comments on the European Union's response to Panel question 71, para. 83.

[163] See para. 7.164 of this Report.

[164] European Union's first written submission, para. 255.

margins for Nuctech were cited as 25.52% in 2006, 27.42% in 2007 and 25.86% in 2008[165]. The European Union contends that it is difficult to reconcile these figures with the negative pre-tax profits reported in MOFCOM's Final Determination. Further, in its reports to the Administration for Industry and Commerce, Nuctech reported increasing employment over the POI, whereas in its Final Determination, MOFCOM found fluctuating employment levels[166].

7.170 In the Final Determination, in response to comments from Smiths regarding the discrepancies between the data in the Preliminary Determination and the publicly available data disclosed by Nuctech's parent company, MOFCOM explained:

> Upon investigation, we found that the Petitioner also produced other products in addition to the Like Products in the instant case. Both the information and data disclosed by the parent company of the Petitioner in its annual reports as well as the information and data filed with the Administration for Industry and Commerce included the information and data on other products in addition to the Like Products, while the determinations of the instant case only would be based only on the information and data on Like Products.[167]

7.171 The European Union disputes the explanation provided by MOFCOM in the Final Determination. The European Union's position is that the like domestic product accounted for a major proportion of Nuctech's production, such that the differences between the data relied on by MOFCOM and that in publicly available documents should not have been so marked. In particular, in its written submissions, the European Union contends that scanners accounted for approximately 90% of Nuctech's production. The European Union explains that this figure represents Smiths' best estimate, based upon its market knowledge at the time[168]. The European Union also relies upon a number of statements on the record indicating that the domestic like product made up a "significantly high" proportion of Nuctech's production[169]. For example, the European Union quotes from a report of Nuctech's parent company, which provides "[t]he predecessor of Nuctech was Tsinghua Tongfang nuclear technology company which was founded in 1997, *specialized in … the large-container inspection system*"[170]. Further, in its Injury Brief, Smiths extracted a table from Tongfang's 2007 prospectus, which stated that Nuctech's "main products or core businesses" were "container inspection systems"[171].

7.172 The Panel notes that in its first written submission, the European Union also states that "until 2008 Nuctech produced only scanners"[172]. This seems to suggest that Nuctech's production consisted only of the like domestic product until 2008, because in the same paragraph of its first written submission, the European Union refers to scanners as "the subject products"[173]. However, in response to a Panel question on this point, the European Union clarifies that "it is not contested that

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[165] See Smiths' Injury Brief (Exhibit VI), Exhibit EU-11, p. 87 of the pdf document. Further, in Exhibit IV of Smiths' Injury Brief, the gross profit margin for Nuctech is reported to be 27% and the documents states that "[b]ased on the understanding of Nuctech's competitiveness and development strategy, we believe … its profit margins can remain at current levels (i.e., the gross margin of 26%) in the next three to five years"; Exhibit EU-11, pp. 75, 78 and 80.

[166] See Smiths' Injury Brief, Exhibit EU-11, extracting information from Nuctech's report to the Administration for Industry and Commerce at p. 11 (Table 2).

[167] Final Determination, Exhibit EU-2, p. 28.

[168] European Union's second written submission, para. 195.

[169] European Union's response to Panel question 18, para. 110.

[170] Smiths' Injury Brief, Exhibit EU-11, p. 75 of the pdf document, quoting from a report produced by Tongfang (emphasis added).

[171] Smiths' Injury Brief, Exhibit EU-11, pp. 16-17.

[172] European Union's first written submission, para. 255.

[173] European Union's first written submission, para. 255.

Nuctech made products other than the products concerned in 2007 or 2008"[174]. Further, the statement "should not be interpreted as a factual assertion indicating that Nuctech did not make products other than scanners until 2008"[175]. Indeed, the Panel notes that in Attachment 7 to its questionnaire response, Nuctech indicates that its total production and production of the "domestic like product" differed at least as early as 2007[176]. Consequently, in making its determination regarding whether the differences between the data relied upon by MOFCOM and that in certain public reports indicate that MOFCOM did not rely upon positive evidence, the Panel does not give any weight to the European Union's statement that "until 2008 Nuctech produced only scanners". If the European Union had originally intended to rely upon this statement to suggest that the data used by MOFCOM and that found in the public reports should have been the same at least up until 2008 (subject to the adjustment made by MOFCOM to account for exports), the Panel cannot rely upon it for this purpose, given the European Union's concession that Nuctech was producing goods other than the like product prior to 2008[177].

7.173 Despite China's argument that the European Union had merely asserted a fact without providing proof thereof, and consequently that it was not required to furnish evidence of the proportion of Nuctech's production accounted for by the like domestic product, China ultimately provided to the Panel the relevant confidential figures[178].

7.174 The Panel notes that MOFCOM assessed the injury to the domestic industry caused by subject imports by excluding data relating to exports. Once export revenue is excluded, the proportion of the domestic sales revenue accounted for by the like domestic product is nowhere near the 90% estimate advanced by the European Union[179].

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[174] European Union's response to Panel question 70, para. 55.

[175] European Union's response to Panel question 70, para. 54.

[176] Nuctech's questionnaire response, Exhibit EU-8, Attachment 7, p. 43.

[177] In its response to Panel question 70 at para. 55, the European Union notes that the statement at issue should be interpreted in the sense that "Nuctech only started making and selling scanners and other products based on technologies other than X-ray in 2008". However, the European Union does not explain the relevance of this to its argument that the differences in the data used by MOFCOM and found in the public reports indicate that MOFCOM did not rely on positive evidence.

The Panel notes that in refuting the argument that Nuctech produced only scanners until 2008, China refers to Nuctech's production of "x-ray liquid security inspection system[s]" (China's response to Panel question 91). According to the European Union, this submission further undermines the reliability of the data used by China, because it indicates that China incorrectly excluded such liquid inspection systems, which use x-ray technology, from the like domestic product (European Union's comments on China's response to Panel question 91, paras. 49 and 51). In making this argument, the European Union is effectively requesting the Panel to make a ruling on whether the x-ray liquid security inspection system at issue falls within the scope of the like domestic product. However, the scope the domestic like product was not otherwise raised before the Panel or included in the Panel request. Indeed, the Panel does not have arguments or evidence before it regarding whether this product falls within the scope of the investigation. For instance, the Panel notes that the subject product excludes "second generation X-Ray security inspection equipment using IDE technology" (Final Determination, Exhibit EU-2, p. 11). The Panel has no information before it regarding whether or not the liquid inspection system uses IDE technology, for example, and therefore could be a like domestic product. Therefore, the Panel is not in a position to make the finding that the European Union seeks in order to support its argument that MOFCOM did not rely upon positive evidence.

[178] China's opening statement at the second meeting with the Panel, para. 61 and Nuctech's modified questionnaire response, question 20, Exhibit CHN-21 (BCI), p. 4 of the pdf document.

[179] Nuctech's modified questionnaire response, question 20, Exhibit CHN-21 (BCI), p. 4 of the pdf document (see the fifth column of the table for the relevant figures).

We note that the European Union queries the reliability of the figures in the confidential table provided by China. The European Union questions how the sales figures, which are "constant between 2006 and 2007 and going up in 2008" can be reconciled with (i) MOFCOM's findings that sales revenue increased by 55% each year; and (ii) Nuctech's allegation in its questionnaire response that its sales revenue for the domestic like

7.175 Consequently, in the Panel's view, the European Union has not made out its case that the discrepancies between the data used by MOFCOM and the data in certain public sources indicate that MOFCOM did not rely on positive evidence. The European Union's submissions relied heavily on an assertion that 90% of Nuctech's production over the POI was accounted for by the like domestic product. Although it is not clear to the Panel that such an assertion was sufficient to establish a *prima facie* case regarding the lack of positive evidence, in any event the Panel is of the view that in presenting the figures in Nuctech's questionnaire response, as verified by MOFCOM, China has clearly rebutted any such *prima facie* case. Although there was some evidence on the record that Nuctech's "main products or core businesses" were "container inspection systems"[180], once export sales revenue was accounted for, the proportion of Nuctech's sales revenue arising from sales of the like domestic product was very significantly less than suggested by the European Union. In the Panel's view, the European Union has not successfully challenged the explanation provided by MOFCOM in the Final Determination for the differences between the data it relied upon and that found in certain public reports.

7.176 Therefore, the Panel concludes that the European Union has not established that the discrepancies in the data used by MOFCOM and that found in certain public reports indicate that MOFCOM did not rely on positive evidence.

(iii) Conclusion

7.177 In conclusion, the European Union has not established that MOFCOM failed to rely upon positive evidence in making its findings on the state of the domestic industry. Therefore, the European Union has not made out its case that in this regard China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

(b) Whether MOFCOM examined all factors listed in Article 3.4 of the Anti-Dumping Agreement

7.178 The European Union argues that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it did not examine all factors listed in Article 3.4, in particular it failed to examine the "magnitude of the margin of dumping".

7.179 We note that the Appellate Body and a number of panels have found that it is mandatory for an investigating authority to evaluate each of the 15 factors listed in Article 3.4 of the Anti-Dumping Agreement[181]. For instance, in *Thailand – H-Beams* the Appellate Body stated:

> The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities …". We agree with the Panel's analysis in

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product was lower in 2008 than 2006 (European Union's comments on China's response to Panel question 92, para. 53). In the Panel's view, the European Union's statement that the figures in the table indicate that sales revenue was "constant between 2006 and 2007 and going up in 2008" is misplaced. The sales revenue figures in the table represent the proportion of Nuctech's total sales revenue accounted for by domestic sales of the like product. Therefore, it is possible that the domestic sales revenue for the like product increased by 55% each year, while still maintaining a constant or slightly increasing proportion of Nuctech's total sales revenue. Similarly, the figures in the table do not indicate whether or not, in absolute terms, the domestic sales revenue for the like product was increasing or decreasing over the POI.

[180] Smiths' Injury Brief, Exhibit EU-11, pp. 16-17.

[181] Appellate Body Report, *Thailand – H-Beams*, para. 125; Panel Reports, *EC – Bed Linen (Article 21.5 - India)*, para. 6.161; *EC – Bed Linen*, para. 6.154, *Guatemala – Cement II*, para. 8.283.

> its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.[182]

7.180 Further, certain panels have reasoned that an "evaluation" of the factors in Article 3.4 of the Anti-Dumping Agreement requires a process of analysis and assessment. Where an investigating authority concludes that a particular factor listed in Article 3.4 is not relevant, this conclusion must be explained. According to the panel in *EC – Bed Linen (Article 21.5 - India)*:

> [A]n "evaluation" is a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist. As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor will not suffice.[183]

7.181 In the Panel's view, the text of Article 3.4 of the Anti-Dumping Agreement, namely that the examination "shall" include an evaluation of all relevant economic factors, including the 15 listed in the provision, clearly requires that each of the factors be evaluated. Therefore, the Panel agrees with the reasoning of previous panels and the Appellate Body in this regard.

7.182 In the circumstances of this case, MOFCOM did not refer to the "magnitude of the margin of dumping" in its Final Determination when conducting its injury analysis and in particular when conducting its "assessment of industry-related economic factors and indicators"[184]. However, in two sections of the Final Determination, namely in the sections entitled "Dumping and Dumping Margin" and "Final Conclusion upon Investigation", MOFCOM listed the margins of dumping for Smiths and "all others"[185]. China argues that this constituted an express examination by MOFCOM of the margin of dumping. Further, although MOFCOM did not explicitly characterise the margins as "substantial" or "significant", "it follows from the decision itself to impose measures that the margins were not considered to be *de minimis*"[186].

7.183 In the view of the Panel, the simple listing of the margins in the "Final Conclusion" and "Dumping" sections of the determination is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry[187]. In our view, an investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment. In our view, MOFCOM did not do this, but rather was silent on the relevance or irrelevance of the magnitude of the margin of dumping in relation to the impact of the dumped imports on the domestic industry.

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[182] Appellate Body Report, *Thailand – H-Beams*, para. 125 (footnote omitted).
[183] Panel Report, *EC – Bed Linen (Article 21.5 - India)*, para. 6.162.
[184] Final Determination, Exhibit EU-2, pp. 24-29.
[185] Final Determination, Exhibit EU-2, pp. 22 and 33.
[186] China's first written submission, para. 358.
[187] Final Determination, Exhibit EU-2, pp. 22 and 33.

7.184 We note China's reliance on the Appellate Body's conclusion in *EC – Tube or Pipe Fittings,* namely that a separate record of the evaluation of each injury factor listed in Article 3.4 is not necessary where there is sufficient evidence on the record that the factor has nevertheless been evaluated[188]. However, in our view, the reasoning in *EC – Tube or Pipe Fittings* does not advance China's position. It seems difficult to conclude that merely listing the margins of dumping constitutes an evaluation, in the sense of an analysis and an assessment, of the magnitude of the margin of dumping in terms of its relevance to the impact of the dumped imports on the domestic industry. Further, there is nothing implicit in the statement of the margins of dumping, or elsewhere in the Final Determination, to indicate that an evaluation of the factor occurred, although was not explicitly explained. China argues that the fact that it imposed anti-dumping duties indicates that it concluded that the dumping margins were not *de minimis* under Article 5.8 of the Anti-Dumping Agreement. However, in our view this is not a particularly convincing argument under Article 3.4. If the Panel were to accept China's reasoning, the implication would be that every time an investigating authority imposed anti-dumping duties, this would indicate that the authority had evaluated the "magnitude of the margin of dumping" by virtue of concluding that it was not *de minimis*, and would seem to render superfluous its inclusion in the Article 3.4 list.

7.185 Therefore, the Panel concludes that China has acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to have evaluated the "magnitude of the margin of dumping".

(c) Whether MOFCOM should have taken into account the differences between low-energy and high-energy scanners in its injury analysis

7.186 In its first written submission, the European Union argues that the "use of weighted average values in the injury factors is manifestly inadequate for considering the existence of material injury where the investigation covers different types of products with widely different prices that do not compete with each other and thus belong to distinct markets"[189]. The European Union then proceeds to give examples of aggregated injury factors, namely domestic sales revenue, prices, unit costs of production and the comparison between domestic industry prices and unit costs, that it claims were inadequate for assessing material injury due to the use of weighted average unit values[190]. In its second written submission, the European Union clarifies that it does not argue that MOFCOM was required to carry out a separate examination of all factors having a bearing on the state of the domestic industry per segment or sector and it does not argue that MOFCOM should have focused its injury examination exclusively on low-energy scanners[191]. Rather, the European Union "focuses its argument primarily on injury factors relating to prices and costs"[192]. According to the European Union, MOFCOM was not entitled to aggregate certain data, "in particular relating to prices and costs", as this was not consistent with an objective examination of the state of the industry[193].

7.187 We note that the Appellate Body and a number of panels have interpreted the meaning of the obligation to examine the impact of the dumped imports on the "domestic industry" under Article 3.4 of the Anti-Dumping Agreement. In *US – Hot Rolled Steel,* the Appellate Body noted that the term "domestic industry" is defined in Article 4.1 of the Anti-Dumping Agreement and refers to "domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". Therefore, the Appellate Body reasoned that the reference to the "domestic industry" in Article 3.4 indicates that the injury examination must focus on the totality of the "domestic industry" and not simply on one party,

[188] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.
[189] European Union's first written submission, para. 260.
[190] European Union's first written submission, paras. 261-264.
[191] European Union's second written submission, para. 205 and footnote 283.
[192] European Union's second written submission, para. 205.
[193] European Union's second written submission, para. 209.

sector or segment of it[194]. Having said this, the Appellate Body noted that in some circumstances it may be "highly pertinent", from an economic perspective, for an investigating authority to undertake an evaluation of particular parts, sectors or segments within a domestic industry in assessing the state of the industry as a whole[195]. However, any segmented analysis must be conducted in an "objective manner". According to the Appellate Body, this means that where one sector within the domestic industry is examined under Article 3.4, an investigating authority should also examine all other sectors making up the industry, as well as the industry as a whole[196]. A number of panels have employed the same reasoning as that found within the Appellate Body report[197]. We note that while the Appellate Body has commented that supplementing an assessment of the state of the entire domestic industry with a segmented analysis may be highly pertinent in some circumstances, the Appellate Body has never been required to consider whether a failure to conduct an analysis by sector may in some circumstances amount to acting inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.188 In the circumstances of this case, the Panel does not consider it necessary to resolve whether MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by making its injury findings on the basis of the industry as a whole and not conducting a segmented analysis based on any distinction between products produced by the domestic industry. In its second written submission, the European Union clarifies that the focus of its concerns under Article 3.4 relates to prices and costs. In particular, the European Union quotes from two sections of the Final Determination, which state that "[the price of domestic Like Products] dropped by 72.68% from 2006 to 2008 and was below or almost as low as unit sales cost" and "the sales price of domestic Like Products decreased by 46.75% from 2008 to 2007, almost down to the unit sales cost"[198]. An examination of the Final Determination reveals that both of these quotes are taken from sentences or sections of the Final Determination discussing the price comparison between the subject imports and the domestic product or the comparison of domestic prices over the POI . The first sentence is drawn from the following discussion in the Final Determination:

> [T]he import price of the Subject Product remained at low levels and was lower than the price of domestic like products for most of the time during the POI. This had obvious undercutting and [suppressing] effects on <u>the price of domestic Like Products, which dropped by 72.68% from 2006 to 2008 and was below or almost as low as unit sales cost.</u>[199] (emphasis added)

Similarly, the second discussion of the sales price of the domestic like product quoted by the European Union is drawn from a subsection of the injury determination entitled "the impact of the import price of the Subject Product on the price of domestic Like Products". The quote comes from the following sentence:

> Although the import price of the Subject Product was slightly higher than the price of domestic Like Products in 2008, it remained at a low level, <u>while the sales price of domestic Like Products decreased by 46.75% from 2008 to 2007, almost down to the unit sales cost.</u>[200] (emphasis added)

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[194] Appellate Body Report, *US – Hot Rolled Steel*, para. 190.
[195] Appellate Body Report, *US – Hot Rolled Steel*, para. 195.
[196] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
[197] Panel Reports, *US – Hot Rolled Steel*, paras. 7.189-7.191; *Mexico – Corn Syrup*, paras. 7.147 and 7.154 and *EC – Fasteners (China)*, para. 7.407-7.410.
[198] Final Determination, Exhibit EU-2, pp. 23 and 27.
[199] Final Determination, Exhibit EU-2, p. 27.
[200] Final Determination, Exhibit EU-2, p. 23.

7.189 Therefore, in the Panel's view, there is considerable overlap between the European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and its claim under Articles 3.1 and 3.4. Essentially, the European Union complains that the analysis of domestic prices and costs, in the context of the price effects analysis, should have been disaggregated under Article 3.4. However, the Panel's finding under Article 3.2, namely that MOFCOM erred in failing to take into account the differences between products in its analysis of price undercutting and price suppression, addresses the concerns regarding the aggregation of prices raised by the European Union under Article 3.4. The Panel does not consider it necessary to make a further finding of inconsistency, this time under Article 3.4, in relation to the same aspect of MOFCOM's reasoning. In the light of this, and the fact that the Panel has elsewhere found China to have acted inconsistently with Article 3.4, the Panel exercises judicial economy in relation to this section of the European Union's Article 3.4 claim.

(d) Evaluation of the overall development and interaction among injury factors

7.190 The European Union argues that MOFCOM failed to make a proper evaluation of the overall development and interaction among injury factors and thereby acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In making this argument, the European Union proceeds on the assumption that MOFCOM based its analysis on positive evidence and contends that the manner in which MOFCOM evaluated the evidence was not objective[201].

7.191 The European Union contests three different aspects of MOFCOM's examination of the injury factors, and claims that each gives rise to a violation of Articles 3.1 and 3.4[202]. First, the European Union argues that MOFCOM did not conduct an objective examination when considering the interaction between positive and negative injury factors; second, MOFCOM failed to examine all factors in their proper context and made contradictory observations; and third, MOFCOM failed to take into account all facts and arguments on the record relating to the state of the industry.

7.192 In relation to the third aspect of the European Union's argument, the Panel examines this as a part of its Article 3.5 analysis, for the reasons therein explained[203].

7.193 In the Panel's view, there are considerable overlaps between the first and second aspects of the European Union's argument. Therefore, the Panel considers it appropriate to examine the two aspects of the argument together, in an integrated approach, reaching one overall conclusion regarding whether China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The second prong to the European Union's argument, namely that MOFCOM failed to examine all factors in their proper context and made contradictory observations, is itself based on three allegations. The allegations are that MOFCOM made contradictory observations when describing certain injury factors, that MOFCOM did not indicate the basis on which it concluded that profits were below those "expected" and finally, that MOFCOM's finding regarding domestic prices does not support its injury finding. We evaluate the first two allegations as part of the integrated approach to this aspect of the European Union's case. However, with respect to the third allegation, we exercise judicial economy. This is because the third allegation is that MOFCOM "failed to evaluate the relevant data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to the other factors examined"[204]. To support this argument, the European Union focuses on MOFCOM's analysis of domestic prices. In particular, the European Union complains that MOFCOM "failed to address a very important point: how and why domestic sales prices were decreasing, even in 2008 … when the import prices of the Subject Products consistently increased throughout the period … and were higher than those of the domestic

[201] European Union's first written submission, para. 266, footnote 238.
[202] European Union's second written submission, paras. 238, 260 and 283.
[203] See paras. 7.253-7.263 of this Report.
[204] European Union's second written submission, para. 250.

products in 2008"[205]. However, the European Union makes the same argument in the context of its claim under Articles 3.1 and 3.5. The Panel does not consider it necessary to make multiple findings of inconsistency with respect to the same alleged weakness in MOFCOM's analysis. Therefore, we examine this argument once, under Articles 3.1 and 3.5[206].

(i) Did MOFCOM evaluate the interaction between positive and negative injury factors and consider their proper economic context?

7.194 The European Union's argument regarding MOFCOM's explanation for its injury determination consists of two main elements. First, the European Union queries the way in which MOFCOM treated individual injury factors. In particular, the European Union contends that MOFCOM incorrectly characterised certain factors as "negative" by ignoring positive trends exhibited by each of the factors at issue, making contradictory observations and failing to explain the basis for its assertions regarding certain injury indicia. Second, the European Union argues that MOFCOM failed to provide a compelling explanation regarding why the negative factors supported an affirmative injury determination in the light of several factors exhibiting positive trends.

7.195 At the outset, the Panel notes that a number of other panels have previously considered similar arguments. In particular, in *Thailand H – Beams,* the panel stated:

> While we do not consider that such positive trends in a number of factors during the [POI] would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the [POI].[207]

7.196 In *EC – Countervailing Measures on DRAM Chips,* a case considering the analogous provision under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the panel held that the investigating authority had examined all factors both individually and in an overall context and had provided a reasoned and adequate explanation to support its determination. Although a number of factors had grown in absolute terms during the POI, the panel placed considerable emphasis on the fact that the investigating authority had explained that the levels of growth were well below those necessary to remain competitive in the industry at issue. Therefore, while only 3 factors developed negatively over the POI, the investigating authority had taken into account the negative effects on other factors, which had in fact grown in absolute terms[208].

7.197 Finally, in *EC – Fasteners (China)*, the panel considered whether the investigating authority's characterisation of certain injury factors as "negative" was consistent with an objective examination of the evidence. The panel upheld a finding that a profit rate of 4.4% was "low", on the basis that the investigating authority had found that a profit margin of 5% could be expected in the industry in the absence of injurious dumping[209]. The panel also noted that factors exhibiting a positive trend may be considered "negative" when the increases are significantly less than the expansion in demand[210].

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[205] European Union's first written submission, para. 292.
[206] See paras. 7.241-7.248 of this Report.
[207] Panel Report, *Thailand – H-Beams*, para. 7.249.
[208] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.372.
[209] Panel Report, *EC – Fasteners (China)*, para. 7.399.
[210] Panel Report, *EC – Fasteners (China)*, para. 7.403.

Finally, the panel noted that a decline with respect to only one injury factor would not necessarily prevent a finding of injury. However, in such a case, "the nature of the product, industry and market, as well as the reasoning of the investigating authority, would be critical considerations for a reviewing panel"[211].

MOFCOM's treatment of individual injury factors

7.198 We commence our analysis by considering the European Union's argument that MOFCOM did not conduct an objective examination of individual injury factors, before turning to the argument that MOFCOM did not properly evaluate the interaction between positive and negative injury factors.

Profits

7.199 The European Union argues that industry profits should not have been treated as a "negative" factor because profits were increasing and Nuctech was growing well in excess of domestic demand[212]. For the same reason, the European Union contends that MOFCOM's description of industry losses as "serious" was not even-handed, particularly because Nuctech had almost broken-even by the end of the POI[213].

7.200 With respect to pre-tax profits, MOFCOM found that the industry experienced losses (-34.88%, -31% and -1.84%) throughout the POI. The Panel notes that in many circumstances, a reasonable and objective investigating authority may view three consecutive years of losses as "negative" and "serious". However, the Panel recalls that in reaching its conclusion, MOFCOM did not indicate on what basis it concluded that Nuctech did not realize "expected profits" or "the profits that should have been obtained"[214], which was an important element of its reasoning. In response to a Panel question on this point, China stated that "the relevant issue was that the domestic industry did not obtain a profit while the company expected to be profitable. There is no need to calculate or quantify the amount of such 'expected profits'"[215]. The Panel does not agree with China's position in this regard. In the Panel's view, an objective and even-handed examination of the expected level of profit, by which the industry's actual profit level was assessed, needs to be based on more than an assertion that the "company expected to be profitable". Some form of estimation, calculation or explanation regarding why profitability in the absence of subject imports was a reasonable expectation should have been provided as part of an objective examination[216].

7.201 Further, in the Panel's view, an even-handed examination of profits required an acknowledgement of the positive trend in which this factor was moving and an accompanying explanation regarding why, in the light of this and other positive factors, the industry should nevertheless be considered injured. In the Panel's view, focusing only on absolute levels, and ignoring trends, has the potential to give a partial picture of the state of an industry.

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[211] Panel Report, *EC – Fasteners (China)*, para. 7.401, footnote 814.

[212] European Union's first written submission paras. 269 and 273 and second written submission, paras. 224-225.

[213] European Union's first written submission, para. 289.

[214] In the European Union's translation of the Final Determination, Exhibit EU-2, p. 28, the phrase is "expected profits". However, according to China, the phrase at issue is better translated as "the profits that should have been obtained" (China's response to Panel question 56, para. 71).

[215] China's response to Panel question 56, para. 71.

[216] In assessing the state of the domestic industry, MOFCOM found that "the increase of capacity, output, sales volume and market share of the domestic industry did not bring the expected profits to the domestic industry". Consequently, the Panel is of the view that MOFCOM's analysis of profit was not restricted merely to the absolute levels of profit obtained by the domestic industry, but was also conducted by reference to expected profit levels.

7.202 However, the Panel is not convinced by the European Union's argument that including a discussion of both pre-tax profits and unit gross profit in its injury determination "created confusion" about the state of the domestic industry. Both parties agree that the two measurements of profit constitute different concepts[217]. Although the European Union argues that referring to two or more different concepts of profit shows "a lack of coherence and internally inconsistent reasoning"[218], the Panel is not convinced by this argument. Reading the Final Determination in the knowledge that the two concepts are different, does not lead to any contradictions in the findings of MOFCOM[219].

7.203 Finally, the European Union argues that two statements in the Final Determination regarding profits are inconsistent. In particular, the European Union asserts that the statement that pre-tax profits "[d]uring the POI … first declined and then increased" and the finding that pre-tax profit rates increased over the POI from -34.88%, -31% to -1.84% are inconsistent[220]. However, the Panel is not convinced that these findings are necessarily inconsistent. As China highlights, the first statement refers to absolute levels of pre-tax profits, while the second refers to pre-tax profit rates[221].

Net cash flow, rate of return and employment

7.204 With respect to each of these factors, the European Union argues that MOFCOM classified them as "negative", without considering their trends over the POI[222]. Given that there was cash outflow and a negative rate of return throughout the course of the POI, the Panel notes that this could reasonably support a conclusion that these factors contributed to a "negative" state of the industry. However, the Panel is of the view that an objective and impartial examination would have required an acknowledgement and analysis of the fluctuations in the factors over the POI, including the upward trend they both experienced in the final year. Similarly, with respect to employment levels, while an end-to-end comparison indicated a decline in employment over the POI, MOFCOM did not attempt to analyse its fluctuations. The Panel is of the view that this is not consistent with an unbiased examination.

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[217] In particular, China explains that "'gross profit' is the result of deducting from the net sales price the cost of manufacturing (consisting of raw material costs, labour costs and manufacturing overheads) and is equivalent to the 'gross margin' before the deduction of SGA and financial expenses. In contrast, pre-tax profits are net of such SGA and financial expenses" (China's first written submission, para. 411). In its second written submission (para. 242 and footnote 316) the European Union agrees with China that the two concepts are different.

[218] European Union's second written submission, para. 242.

[219] Indeed, the European Union's response to Panel question 28 reveals that the European Union understood that the differences in MOFCOM's findings regarding profit in 2008 were explained by the different concepts of profit used in the Final Determination.

[220] Final Determination, Exhibit EU-2, pp. 26 and 27 and European Union's first written submission, para. 289.

[221] China's response to Panel question 94, para. 84. The Panel notes that the pre-tax profit rates referred to by China included absolute profit levels as the numerator and sales revenue as the denominator. MOFCOM found that sales revenue increased by approximately 55% each year over the POI. In these circumstances, it is possible that absolute profit levels may have decreased between 2006 and 2007, but profit rates increased. A simple numerical example illustrates this point: if the absolute level of profit in 2006 is -34.88 and the absolute level of sales revenue is 100, then the pre-tax profit rate will be -34%. If in 2007, the absolute level of profit *decreases* to -40 (for example) and the absolute level of sales revenue increases to 155, then the pre-tax profit rate will *increase* to -26%. Therefore, the Panel does not consider that the statements referred to by the European Union are necessarily inconsistent.

[222] European Union's first written submission, paras. 270, 273 and 289; and second written submission, paras. 221-223, 226-227, 243-244 and 246.

Sales Revenue Growth

7.205 The European Union queries how MOFCOM could have found "severe" depression in sales revenue growth, in circumstances where sales revenue increased by more than 50% during each year of the POI and where sales volume and domestic output were growing well in excess of domestic demand. China explains that there is no contradiction in MOFCOM's findings in this regard, because in comparison to the growth in sales volume, sales revenue growth was much lower.

7.206 The Panel is not convinced by the European Union's argument that MOFCOM's findings were not even-handed in this regard. Although in its Final Determination MOFCOM found that sales revenue increased by approximately 55% each year of the POI, MOFOM's statement that there was "severe depression" in sales revenue growth was made in the context of discussing the fast growth in sales volume over the POI:

> The sales volume of domestic Like Products grew fast during the POI. However, the import price of the Subject Product remained at low levels and was lower than the price of domestic like products for most of the time during the POI. This had obvious undercutting and depressing effects on the price of domestic Like Products, which dropped by 72.68% from 2006 to 2008 and was below or almost as low as unit sales cost, resulting in severe depression of sales revenue growth.[223]

Although it would perhaps have been clearer for MOFCOM explicitly to state that the "severe depression" in sales revenue growth was in comparison to sales volume, in the Panel's view, the context in which the statement is found is sufficient for a reader to understand this. This is particularly so in the light of the following page of the Final Determination which provides "the growth rate of sales revenue of the domestic industry [was] significantly lower than the growth rate of their sales volume"[224]. In the Panel's view, when viewed in the context of the growth in sales volume, MOFCOM's finding that sales revenue was severely depressed did not lack even-handedness or objectivity.

Investment and financing capacity

7.207 The European Union argues MOFCOM's finding that the domestic industry "saw continued expansion" cannot be reconciled with the finding that the "investment and financial capacity of the Petitioner declined"[225].

7.208 The Panel notes that the terminology used to describe the industry's investment and financial capacity is not as clear as it could be. Further, the explanations provided by China during the course of the Panel proceedings have added to the confusion. In particular, in its first written submission China argues that the "continued expansion" refers to increases in output and sales volume by the domestic industry, suggesting that it is not a reference to investment levels[226]. However, in response to a Panel question, China states that "MOFCOM found continuous investment over the POI"[227]. If this is the case, the decline in "investment and financial capacity" perhaps refers to a decline in "investment … capacity", rather than a decline in investment. However, this is not entirely clear from the text of the Final Determination.

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[223] Final Determination, Exhibit EU-2, p. 27.
[224] Final Determination, Exhibit EU-2, p. 28.
[225] Final Determination, Exhibit EU-2, pp. 26-27.
[226] China's first written submission, paras. 415-416.
[227] China's response to Panel question 95.

7.209 The Panel does not consider that less than clear drafting in a determination is an indication of a lack of an objective examination. However, in the light of the contrasting explanations provided by China during the course of the panel proceedings, and the lack of clarity surrounding MOFCOM's findings on investment, the Panel is of the view that MOFCOM's finding in this regard was not reasoned and adequate. Consequently, the Panel will weigh this in the balance when making its overall assessment regarding whether MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in considering individual injury factors and in its evaluation of the interaction between positive and negative injury factors.

MOFCOM's examination of the interaction between positive and negative injury factors

7.210 The European Union argues that MOFCOM failed to provide a compelling explanation regarding why the negative injury factors supported an affirmative injury determination in the light of several factors exhibiting positive trends.

7.211 After listing 16 injury factors and stating the trend observed for each over the POI, MOFCOM provided the following explanations for why a number of the injury factors were positive:

> The above evidence shows that during the POI, the domestic X-Ray security inspection equipment industry was in a fast growth stage of development with increasing market demand. The apparent consumption of domestic X-Ray security inspection equipment increased by 10.72% from 2006 to 2007 and by 14.17% from 2007 to 2008. Driven by market demand, both industry capacity and output of domestic Like Products grew fast during the POI.
>
> …
>
> During the POI, thanks to the importance increasingly attached to public security in China, the apparent consumption of domestic X-Ray security equipment registered fast growth, and some economic factors and indicators, such as capacity, output, sales volume and market share, improved correspondingly.[228]

7.212 Therefore, MOFCOM explained that the x-ray security inspection industry was in a stage of fast growth, driven by increased consumer demand. Consequently, a number of the indicia of the state of the industry evolved positively.

7.213 Directly after each of these explanations, MOFCOM explained why the domestic industry was nevertheless injured:

> However, the import price of the Subject Product remained at low levels and was lower than the price of domestic like products for most of the time during the POI. This had obvious undercutting and depressing effects on the price of domestic Like Products, which dropped by 72.68% from 2006 to 2008 and was below or almost as low as unit sales cost, resulting in severe depression of sales revenue growth for the domestic X-Ray security inspection equipment industry. Unit gross profit for domestic Like Products was negative in 2006 and 2007 and low in 2008. Domestic Like Products suffered serious losses in pre-tax profits in 2006, which worsened in 2007 by an additional 38.03%; although the losses were reduced in 2008, domestic manufacturers were still unable to turn losses into profits. Pre-tax profit rates remained negative at -34.88%, -31% and -1.84% in 2006, 2007 and 2008, respectively. During the POI, the rate of return for the domestic X-Ray security

[228] Final Determination, Exhibit EU-2, pp. 27-28.

> inspection equipment industry also remained negative, with greatly increased year-end inventory, consistent net cash outflow, diminished investment and financing capacity, deteriorating production and operations, and a 25.08% reduction (despite an initial increase) of workforce from the beginning to the end of the POI, and industry growth was clearly depressed. Accordingly, MOFCOM found material injury to the domestic X-Ray security inspection equipment industry.
>
> …
>
> However, the price of domestic Like Products declined year by year as a result of the undercutting and depressing effect of the price of the Subject Product, causing the growth rate of the sales revenue of the domestic industry to be significantly lower than growth rate of their sales volume during the POI. Meanwhile, the sales volume of domestic Like Products was far lower than the output during the POI, resulting in significant inventory increase of domestic Like Products. The increase of capacity, output, sales volume and market share of the domestic industry did not bring the expected profits to the domestic industry. Domestic industry suffered consistent losses throughout the POI. [229]

7.214 The parties agree that MOFCOM found 9 of the 16 indicia of the state of the industry to be "positive". The European Union's complaint is that rather than explaining why the negative developments in the industry were such as to outweigh the positive developments, MOFCOM merely juxtaposed the positive and negative factors.

7.215 The Panel recalls that MOFCOM's treatment of certain individual injury factors did not reflect an objective examination of the evidence. In the Panel's view, this consequently affects MOFCOM's overall assessment of the state of the industry. In particular, aside from the question of whether MOFCOM examined and explained the interaction between the positive and negative injury factors, the fact that MOFCOM ignored the trends in certain injury factors and did not explain the basis for some of its conclusions, for instance the basis for "expected profits", undermines the overall assessment of the state of the industry. Further, the Panel notes that aside from listing all 16 injury factors and the trends observed in them over the course of the POI, MOFCOM did not otherwise refer to or explain the developments in capacity utilization, productivity and wages in the descriptive section of its analysis of the industry. In the Panel's view, a more balanced approach would have been explicitly to analyse each of the 16 factors in the description of the state of the industry and to weigh them in the assessment. In the light of these problems with MOFCOM's analysis of the state of the industry, the Panel does not consider it necessary to make a determination regarding whether MOFCOM was obliged to provide a more "compelling explanation" regarding the interaction between the positive and negative injury factors than the one that it did.

(ii) Conclusion

7.216 Our overall assessment of MOFCOM's evaluation of the relevant economic factors and indices leads to the conclusion that MOFCOM did not conduct an objective examination of the evidence. In particular, the Panel is concerned about MOFCOM's failure to acknowledge and analyse the trends observed in each injury factor and its failure to indicate the basis of its assertion that profits were below "expected" levels. The Panel also notes that there are some aspects of MOFCOM's finding that are not reasoned and adequate. Finally, an objective examination would have included and weighed each of the 16 injury indicia as a part of the analysis of the state of the industry. Therefore, the Panel concludes that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

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[229] Final Determination, Exhibit EU-2, pp. 27-28.

(e) Conclusion on the European Union's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.217 The European Union presented a number of different arguments to support its claim that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The European Union has not established that MOFCOM failed to rely upon positive evidence. However, the Panel concludes that China acted inconsistently with Articles 3.1 and 3.4 because MOFCOM failed to consider all relevant economic factors, in particular, the "magnitude of the margin of dumping". Further, MOFCOM's examination of the state of the industry, including the trends in individual injury factors, lacked objectivity and was not always reasoned and adequate. Finally, in the light of its findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the Panel exercises judicial economy regarding whether MOFCOM acted inconsistently with Article 3.4 by failing to take into account the differences between high-energy and low-energy scanners.

E. CAUSATION: ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

1. Introduction

7.218 The European Union submits that China violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to make an objective determination, on the basis of all relevant evidence before it, that the dumped imports were, through the effects of dumping, causing injury.

2. Relevant provisions

7.219 Article 3.1 of the Anti-Dumping Agreement is set forth above. Article 3.5 provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall 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. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3. Main arguments of the parties

(a) European Union

(i) The volume of subject imports

7.220 The European Union notes MOFCOM's conclusion that the large volume of subject imports, and their lower (dumped) price, caused material injury to the domestic x-ray security inspection equipment industry. The European Union recalls that MOFCOM found the volume of dumped imports rose continuously in comparison to total imports in China and rapidly in absolute terms, and that the growth rate of the volume of dumped imports exceeded the growth rate of apparent consumption. However, according to the European Union, the volume of subject imports was not "large" or "great" when viewed in the context of domestic consumption and domestic sales volume.

The European Union argues that a relatively small increase in subject imports in comparison to the much higher increase of domestic production cannot serve as a basis for attributing injury to the subject imports.

(ii) The absence of any imports of high-energy scanners

7.221 The European Union recalls its earlier argument that MOFCOM improperly relied on a comparison of weighted average unit values that failed to take into account differences between low-energy and high-energy scanners. The European Union submits that, absent a proper distinction between high-energy and low-energy scanners, MOFCOM improperly attributed to the imports of low-energy scanners the injury suffered by a domestic producer of both high-energy and low-energy scanners. The European Union argues that where two categories of a product do not compete with each other, the attribution of the effects found with respect to both categories where only one category was imported is inconsistent with Article 3.5 of the Anti-Dumping Agreement.

(iii) The price effects of subject imports

7.222 The European Union argues that dumping by subject imports did not prevent Nuctech from raising its prices, since subject imports – albeit dumped – were still priced higher than domestic products. In addition, the European Union contends that the absence of any correlation between subject import prices (going up by almost 10% over POI) and domestic prices (going down by 73% over the POI) meant that MOFCOM was required to provide a very compelling analysis of why causation was still present[230].

7.223 In response to China's contention that Nuctech was forced to maintain its prices at low levels in order to be able to compete with Smiths, the European Union argues that this is not what MOFCOM found. Rather, MOFCOM found that Nuctech increased its market share every year, beyond any increase in the market share of subject imports in relative terms. It also found that Nuctech increased its sales volume and sale revenue every year by more than 50%. The European Union argues that in circumstances where subject import prices were constantly increasing, MOFCOM's finding that such prices forced the domestic sales prices to maintain their downward trend does not meet the compelling, reasoned and adequate explanation required under Article 3.5 of the Anti-Dumping Agreement.

(iv) MOFCOM's consideration of other known factors: non-attribution

7.224 The European Union submits that MOFCOM's evaluation of known factors other than the allegedly dumped imports as possible causes of injury was inconsistent with Articles 3.1 and 3.5 Anti-Dumping Agreement.

7.225 The European Union contends that MOFCOM limited itself to collecting evidence with respect to a *pro-forma* list of other factors set forth in MOFCOM's Injury Questionnaire. In relation to certain causal factors that it did explicitly examine, namely Nuctech's export performance and "product quality and technology factors", the European Union argues that MOFCOM failed to consider several arguments made by Smiths.

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[230] The European Union refers to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 144-145, referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.238 ("While (...) a coincidence [between the increase in imports with a decline in the relevant injury factors] by itself cannot *prove* causation (...), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation is still present") (emphasis in original).

7.226 Further, the European Union submits that MOFCOM ignored other "known factors" that were raised by interested parties and that were relevant in the present case. The European Union refers in this regard to arguments raised by Smiths concerning the impact of the global financial crisis in 2008, Nuctech's start-up situation, Nuctech's aggressive pricing policy, Nuctech's aggressive business expansion, and the "fair" competition between Nuctech and other producers. According to the European Union, these other known factors adequately explained the reduction in sales price, the losses of pre-tax profit, the negative rate of return, the increased inventory, the workforce reduction, and the failure to recover huge investment. The European Union asserts that MOFCOM failed to examine these factors. According to the European Union, therefore, MOFCOM failed to separate and distinguish the injurious effects of other causal factors from those of the dumped imports, contrary to the non-attribution requirement of Article 3.5.

(v) Violations of Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement

7.227 Finally, the European Union submits that the abovementioned alleged violations of Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement further render MOFCOM's non-attribution determination inconsistent with Article 3.5 Anti-Dumping Agreement.

(b) China

(i) The volume of subject imports

7.228 China submits that the European Union's argument that MOFCOM's consideration of the volume of dumped imports as "large" or "great" was improper "when seen in the context of domestic consumption and domestic sales volume"[231], must be rejected. This is because it relates to the existence rather than the cause of injury. According to China, the examination and assessment of the "import volume" factor takes place in the context of the injury determination made pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement, rather than the assessment of causation under Article 3.5.

7.229 On substance, China contends that an unbiased and objective investigating authority could properly have described the volume of dumped imports as "large" or "great" on the basis of the record evidence. China notes that MOFCOM examined the trends in the volume of dumped imports over the POI first in absolute terms, then in relation to the total import volume in China, and finally in relation to domestic consumption. It is clear that the evidence before MOFCOM was such that an unbiased and objective authority could reach the conclusion that the volume of dumped imports was "large" and "great". China submits that there is no obligation under Articles 3.2 or 3.5 of the Anti-Dumping Agreement to consider the volume of dumped imports in absolute terms and relative to production and consumption. China argues that the use of the word "or" in Article 3.2 clearly shows that the examination of one or the other is sufficient. There is no requirement to compare the rate of increase of the dumped imports with the rate of increase of the sales of domestic like products.

(ii) The absence of any imports of high-energy scanners

7.230 China asks the Panel to reject the European Union's claim that MOFCOM wrongly attributed the observed effects on the domestic industry to the dumped imports since MOFCOM combined information relating to high-energy and low-energy scanners[232]. China submits that injury and causation must be assessed in relation to the "domestic industry" as a whole, as defined pursuant to Article 4.1 of the Anti-Dumping Agreement. According to China, there is no requirement to distinguish between different product "segments" or "sectors" of the domestic industry. In any event,

[231] European Union's first written submission, para. 344.
[232] European Union's first written submission, para. 346.

China argues that the factual premise on which the European Union bases its argument is incorrect, namely that there are "considerable differences"[233] between categories of scanners. China maintains that there is no clear-cut distinction between scanners with an energy level below 300 KeV and those with an energy level above 300 KeV.

(iii) The price effects of subject imports

7.231 Regarding the European Union's argument that MOFCOM did not provide a reasoned explanation of the impact of the prices of subject imports on the prices of the like domestic product, China notes that the European Union wrongfully claims that there was no price undercutting, although it is clear that MOFCOM found price undercutting in 2006 and 2007. Further, while there was no finding of price undercutting in 2008, MOFCOM did find price suppression throughout the POI. According to China, the European Union appears to ignore that the negative effect of import prices on domestic prices may take a form different from price undercutting, namely it may take the form of price depression or price suppression.

7.232 China also challenges the factual premise of the European Union's claim that "there was no correlation between import prices (going up) and domestic prices (going down)"[234]. China suggests that the European Union appears to consider that import prices and domestic prices should follow the same trends in order to have a correlation. However, according to China, the relevant point is not the trend followed by the import prices and the domestic prices as such, but the interaction between the subject import prices and the domestic prices. What investigating authorities need to consider is whether import prices "undercut" domestic prices or "depressed/suppressed" domestic prices. China submits that MOFCOM provided a reasoned explanation of the impact of the price of subject imports on the price of the domestic like product. MOFCOM clearly indicated the temporal correlation between, on the one hand, the rapidly increasing subject imports at very low (albeit slightly increasing) prices over the POI and, on the other hand, the domestic prices that sharply declined over the POI. China argues that the fact that there was no undercutting in 2008 does not mean that dumped imports did not have negative effects on domestic prices in the form of price suppression/depression. Further, China argues that what matters is the existence of a general coincidence between the overall trends in imports and the overall trends in the injury factors. According to China, MOFCOM established the existence of such a coincidence.

(iv) MOFCOM's consideration of other known factors: non-attribution

7.233 China rejects the European Union's assertion that "MOFCOM limited itself to collecting evidence with respect to a pro-forma list of other factors contained in its Injury Questionnaire"[235]. China notes the European Union's contention that MOFCOM failed to consider Smiths' arguments when assessing the effect of Nuctech's export performance and "product quality and technology factors". However, China submits that Smiths' arguments were properly and fully examined in the Final Determination.

7.234 China also notes the European Union's argument that MOFCOM failed to consider "factors such as the impact of the global crisis in 2008, Nuctech's aggressive business expansion, the fair competition between Nuctech and other producers"[236], and "the start-up situation of Nuctech and its aggressive pricing policy"[237]. China contends that before an authority is required to "examine" other factors, Article 3.5 requires that the factor at issue be "known" to the investigating authority, be a

[233] European Union's first written submission, para. 346.
[234] European Union's first written submission, para. 348.
[235] European Union's first written submission, para. 354.
[236] European Union's first written submission, para. 354.
[237] European Union's first written submission, para. 355.

factor other than the dumped imports, and be injuring the domestic industry at the same time as the dumped imports. Although in response to a Panel question China clarifies that it does not argue that the factors were not "known" to MOFCOM, it does submit that to the extent the factors referred to by the European Union were presented by Smiths without appropriate evidence, they cannot be regarded as constituting other known factors within the meaning of Article 3.5.

7.235 China submits that, in any event, it did not violate Article 3.5 of the Anti-Dumping Agreement with respect to the factors listed in the European Union's first written submission, since either they were examined by MOFCOM during the investigation, or there was no need to examine them because they rested on a factual assumption that had already been rejected by MOFCOM.

(v) Violations of Articles 3.1, 3.2 and 3.4 of the AD Agreement

7.236 China submits that there are no inconsistencies with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement, such that this purely consequential element of the European Union's claim under Article 3.5 should be dismissed.

4. Evaluation by the Panel

7.237 The European Union argues that MOFCOM attributed the injurious state of the domestic industry to subject imports on the basis of a flawed volume effects analysis and a flawed price effects analysis. Further, MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM disregarded the actual causes for any negative condition of the domestic industry.

7.238 The following sections of this report examine the European Union's claims in relation to MOFCOM's price effects, volume and non-attribution analyses respectively.

(a) MOFCOM's analysis of the prices of the subject imports

(i) Is MOFCOM's causation analysis inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement on the basis that MOFCOM did not consider the differences between the products under consideration in its price effects analysis?

7.239 The Panel has concluded that MOFCOM's price effects analysis suffers from serious shortcomings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement[238]. In particular, although there was evidence on the record to suggest that it should, MOFCOM failed to consider price comparability before undertaking its price effects analysis. Given that MOFCOM relied upon the price effects of subject imports in its causation analysis, the flaws in the price effects analysis also undermine MOFCOM's conclusion on the causal link between the subject imports and the injury suffered by the industry[239].

7.240 Consequently, the Panel concludes that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

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[238] See analysis at paras. 7.30-7.97 of this Report.

[239] Final Determination, Exhibit EU-2, pp. 30-31. See the final four paragraphs of VI(I) of MOFCOM's analysis, where MOFCOM links its finding of price undercutting and price suppression to the injury suffered by the domestic industry. MOFCOM concludes: "Accordingly, MOFCOM decided that the import of the Subject Product in large volume and at lower price materially injured domestic X-Ray security inspection equipment industry".

(ii) Did MOFCOM provide a reasoned and adequate explanation of the causal link between the prices of the dumped imports and the injury to the domestic industry?

7.241 The European Union argues that, even assuming MOFCOM's use of weighted average unit values to calculate price effects was correct, MOFCOM failed to provide a reasoned and adequate explanation regarding how the increasing prices of dumped imports forced domestic prices to decrease, consequently injuring the domestic industry.

7.242 We recall that MOFCOM found price undercutting in 2006 and 2007. Although the prices of the dumped imports were above the prices of the domestic like product in 2008, MOFCOM found price suppression in that year. MOFCOM explained that the import of the subject product in large volumes and at low prices had undercutting and suppressing effects on the prices of the like domestic product, consequently causing injury to the domestic industry[240].

7.243 The European Union complains that MOFCOM did not provide a reasoned and adequate explanation of how the dumped imports caused price depression/suppression in circumstances where, at least in 2008, the import prices were higher than the domestic prices. According to the European Union, MOFCOM should have explained why domestic prices could not have increased, at least up to the level of the prices of the dumped imports. In fact, the European Union argues that a *very compelling* explanation was required to explain this and to explain the absence of a temporal correlation between the trends in prices of the domestic product and imports.

7.244 In the Panel's view, MOFCOM's explanation of the causal mechanism by which the dumped imports caused injury to the domestic industry was not reasoned and adequate[241]. MOFCOM concluded that dumped imports were the only cause of injury over the POI. However, in relation to the situation in 2008 in particular, MOFCOM did not explain how dumped imports could be the *only* cause of injury to the domestic industry, in circumstances where the prices of the dumped imports were greater than the prices of the domestic like products. MOFCOM did not explain why, if nothing else was causing price suppression and consequent injury, Nuctech could not increase its prices, at least to the level of Smiths' prices.

7.245 In response to a Panel question, China explains that in 2008, the import volume of the subject products was increasing rapidly and Smiths was increasing its market share. As a result, "Nuctech was forced to maintain its prices at a low level in order to be able to compete with Smiths. If not, it would have lost even more sales to Smiths"[242]. However, we note that MOFCOM did not provide this explanation in its Final Determination. In addition, it is not clear what China means when it states that Nuctech "would have lost even more sales to Smiths", because Nuctech was in fact increasing its market share over the POI, rather than losing sales. In a similar vein, in its second written submission, China argues that "if imports are reaching the domestic market in substantial quantities at very low dumped prices (even if slightly increasing), the domestic industry will have no other choice than selling its own products at very low prices in order to *defend market share*"[243]. However, in this case, it appears that the extent to which Nuctech lowered its prices was in fact to *increase* its market share, rather than to maintain or defend it. In circumstances where MOFCOM found that the dumped imports were the only cause of price suppression and consequent injury to the domestic industry, MOFCOM's determination lacked a reasoned and adequate explanation regarding why Nuctech was

[240] Final Determination, Exhibit EU-2, pp. 30-31.

[241] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93, regarding the standard of review a panel must employ when examining the reasons of an investigating authority.

[242] China's response to Panel question 49, para. 61.

[243] China's second written submission, para. 344 (emphasis added).

forced to lower its prices below those of the dumped imports in 2008, to such an extent that its market share increased[244].

7.246 The Panel recalls that the parties disagree about whether there was a correlation between subject imports and domestic prices, and about the relevance of this for the causation analysis. China relies on the panel's decision in *US – Wheat Gluten,* which notes the relevance of a *general* coincidence between trends in injury factors and trends in imports to support a finding by an investigating authority of a causal connection between increased imports and serious injury. According to China, MOFCOM noted the correlation between the import of the subject product in large volumes and at low prices and the material injury to the domestic industry.

7.247 The Panel acknowledges that an overall correlation between dumped imports and injury to the domestic industry may support a finding of causation. However, such a coincidence analysis is not dispositive of the causation question; causation and correlation are two distinct concepts. In the circumstances of this case, even accepting China's position that the domestic industry experienced injury as the dumped imports entered the market at large volumes and low (albeit increasing) prices, in the Panel's view, the causation question is not resolved by such a general finding of coincidence. Rather, we consider that MOFCOM was required to conduct a more detailed analysis. In our view, MOFCOM's analysis was not adequate, due to its failure to explain why the prices of the domestic scanners could not rise at least to the level of the dumped imports in 2008, in circumstances where MOFCOM found no other causes of injury apart from the dumped imports.

7.248 Consequently, the Panel concludes that MOFCOM did not provide a reasoned and adequate explanation regarding how the dumped imports caused price suppression in the domestic industry, particularly in 2008 when the prices of the dumped imports were above those of the domestic industry. For this reason, the Panel is of the view that the MOFCOM did not conduct an objective examination of the evidence and concludes that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

(b) MOFCOM's analysis of the volume of the subject imports

7.249 The European Union argues that MOFCOM's characterisation of the import volume of subject imports as "large" or "great" in the context of its analysis under Article 3.5 of the Anti-Dumping Agreement was improper, partial and not even-handed. According to the European Union, this is because, although MOFCOM considered the volume of imports in absolute terms and in comparison to total imports and to total domestic consumption, it did not consider it in relation to total domestic production, which was exhibiting a "skyrocket trend"[245].

7.250 The Panel does not consider it necessary to determine whether MOFCOM's volume effects analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. This is because even if the Panel were to conclude in China's favour in this regard, given our findings regarding the flaws in MOFCOM analysis of the effect of import prices on the like domestic product under Articles 3.1 and 3.2 and consequently under Article 3.5, the Panel in any event would not be able to uphold MOFCOM's causation findings.

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[244] Given the relative prices of the dumped imports and the like domestic products in 2006 and 2007, the Panel is not convinced by the European Union's complaint that the lack of correlation between the movement in prices required a "very compelling explanation" (European Union's second written submission, para. 303). In the Panel's view, the fact that subject import prices were increasing in 2006 and 2007, while the domestic prices were decreasing, does not necessarily undermine a finding of price undercutting, in circumstances where the prices of the subject imports remained below the prices of the domestic like product.

[245] European Union's second written submission, para. 295.

7.251 Article 3.5 of the Anti-Dumping Agreement requires an investigating authority to demonstrate that the "dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury", where paragraph 2 sets out the requirements for analysing the volume and price effects of the dumped imports. In its causation determination, MOFCOM relies upon both the "great volumes" of subject imports, as well as their "low" prices to conclude that "these factors had evident undercutting and [suppressing] effects on the prices of domestic Like Products"[246]. MOFCOM also states that "the EU exported X-ray security inspection equipment to China in large volumes and at lower prices, causing serious effects on the production and operations of domestic security inspection equipment"[247]. Therefore, both the volume and the prices of subject imports were integral to MOFCOM's findings on price suppression and undercutting and also to its causation analysis. There is nothing in the Final Determination to indicate how these two factors interacted or operated independently to cause price effects in relation to the domestic like product or to cause injury to the domestic industry. Consequently, there is nothing in the Final Determination that would allow the Panel to conclude that either the price or the volume of dumped imports alone could sustain MOFCOM's findings on price effects under Article 3.2 or its consequent finding on causation under Article 3.5. In these circumstances, the Panel considers that MOFCOM's findings regarding the prices of subject imports were so central to its price effects and causation analyses that even if we were to find MOFCOM's volume effects analysis were consistent with Article 3.5, the flaws in MOFCOM's findings regarding the impact of the prices of subject imports on the prices of domestic products would in any event invalidate MOFCOM's overall causation finding[248]. Indeed, China does not argue that MOFCOM's causation analysis could be sustained on the basis of volume effects alone.

7.252 Consequently, the Panel does not consider it necessary to make a finding regarding whether MOFCOM's characterisation of the import volume as "large" or "great" was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement on the basis that it was not an objective examination of positive evidence.

(c) MOFCOM's examination of the relevance of other "known factors" causing injury to the domestic industry

(i) Should MOFCOM's consideration of Nuctech's alleged start-up situation, aggressive pricing policy and business expansion be considered under Article 3.4 or Article 3.5 of the Anti-Dumping Agreement?

7.253 The European Union argues that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to consider all facts and arguments on the record relevant to or having to do with the state of the domestic industry. In particular, the European Union contends that MOFCOM did not consider Nuctech's alleged start-up situation, aggressive pricing policy or business expansion. In the event the Panel considers that these factors have an *effect* on the state of the industry, rather than factors indicative of the state of the industry, the European Union argues in the alternative that MOFCOM did not consider these factors as a part of its causation analysis under Articles 3.1 and 3.5 of the Anti-Dumping Agreement[249].

7.254 In relation to whether the claim is best characterised as falling under Article 3.4 or 3.5 of the Anti-Dumping Agreement, the Panel notes that Article 3.4 requires an examination of "the impact of

[246] Final Determination, Exhibit EU-2, p. 30.
[247] Final Determination, Exhibit EU-2, p. 30.
[248] In this regard, we recall the Appellate Body's finding in *Japan – DRAMs (Korea)* that "there may be cases in which certain intermediate findings may be so central to the ultimate conclusion of an investigating authority that an error at an intermediate state of reasoning may invalidate the final conclusion" (paras. 131-135). See also, Panel Report, *China – GOES*, paras. 7.450-7.542 and Appellate Body Report, *China – GOES*, paras. 219-220.
[249] European Union's second written submission, footnote 334.

the dumped imports on the domestic industry" and an evaluation of all relevant factors and indices "having a bearing on the state of the industry". In *China – GOES,* the Appellate Body held that Article 3.4 requires "an *examination* of the explanatory force of subject imports for the state of the domestic industry". However, it does not require a *demonstration* that subject imports are causing injury to the domestic industry. Rather, the latter analysis occurs under Article 3.5, which also requires a non-attribution analysis relating to all factors causing injury to the domestic industry[250].

7.255 In the Panel's view, Nuctech's alleged start-up situation, business expansion and aggressive pricing strategy are best considered as potential causes of an industry's condition, rather than factors indicative of the state of the industry akin to those listed in Article 3.4 of the Anti-Dumping Agreement. This is evident even from the way in which the European Union describes these factors in its submissions. For example, in relation to Nuctech's alleged start-up situation, the European Union argues:

> Nuctech only recently started to catch up in the high-end market sector of low-energy scanners. To this purpose, Nuctech made huge investment which did pay off in terms of increased sales, production and domestic market share while at the same time losses, return of investment and cash flow gradually improved towards break-even.[251]

7.256 Therefore, by the European Union's own description, the alleged start-up situation had consequent effects on many of the indicators of the state of the industry listed in Article 3.4 of the Anti-Dumping Agreement.

7.257 Similarly, the European Union discusses the alleged business expansion of Nuctech in terms of its effect upon inventories:

> Nuctech's increased inventories did not reflect the state of an industry that could not sell, but an industry that was expanding and growing and that, *as a result,* needed to increase its stocks.[252]

7.258 Again, this seems to support our view that Nuctech's alleged business expansion was a factor having an effect upon certain indicia of the state of the industry found in Article 3.4 of the Anti-Dumping Agreement, rather than a factor which itself gave an indication of whether the industry was injured.

7.259 In relation to the alleged aggressive pricing policy pursued by Nuctech, the European Union argues that MOFCOM failed to consider this as an "other" factual indicator under Article 3.4 of the Anti-Dumping Agreement, rather than alleging that it fell within one of the listed factors in the provision. In particular, the European Union does not appear to contend that the pricing policy falls within "factors affecting domestic prices" listed in Article 3.4. In this regard, we agree with the panel's statement in *EC – Tube or Pipe Fittings* that:

> [T]his requirement [of an evaluation of "factors affecting domestic prices"] is inextricably linked to the requirements of Articles 3.1 and 3.2 to conduct an objective examination of the effects of dumped imports on prices in the domestic market for like products …We see no basis in the text of the Agreement for [the] argument that would require an analysis of factors affecting domestic prices beyond an Article 3.2 price analysis, and observe that certain of the factors potentially affecting price may

[250] Appellate Body Report, *China – GOES*, para. 150.
[251] European Union's first written submission, para. 297.
[252] European Union's first written submission, para. 301 (emphasis added).

> be more in the way of causal factors to be analysed under Article 3.5 rather than under Article 3.4.[253]

7.260 Consequently, in the Panel's view, any alleged pricing strategy pursued by Nuctech is better characterised as a possible cause of injury, rather than a factor indicative of the state of the industry. A pricing strategy may affect the level of price undercutting, suppression or depression or certain other factors listed in Article 3.4, such as sales, profits and market share. Indeed, the European Union's own submissions regarding the alleged pricing policy support this characterisation of the issue:

> [T]he only possibility for Nuctech to compete with Smiths was to adopt an aggressive pricing practice. And its strategy of maintaining low domestic prices was *proven successful since* Nuctech's market share increased.[254]

Further, in Smiths' submissions to MOFCOM, it stated:

> [C]ertain data in the Disclosure Letter strongly support the Company's previously-stated argument that Petitioner in recent years has increasingly been selling at low prices in the domestic market *to gain market share.*[255]
>
> *Thanks to its aggressive price strategy*, Petitioner's market share increased…These facts suggest that Petitioner cut prices to gain market share during the POI[256].

7.261 These statements support the Panel's view that the pricing strategy allegedly pursued by Nuctech may cause changes in certain factors listed in Article 3.4, but that it is not in itself indicative of whether the domestic industry is injured.

7.262 Therefore, the Panel concludes that the factors at issue are best characterised as having the potential to *affect* the state of the industry, rather than factors indicative of the state of the industry.

7.263 The Panel recalls that in *China – GOES* the Appellate Body found that Article 3.4 of the Anti-Dumping Agreement requires an examination of the impact of subject imports on the domestic industry, but that the obligation to conduct a non-attribution analysis of all factors causing injury to the domestic industry falls under Article 3.5 of the Anti-Dumping Agreement. Although in many circumstances it may not be possible to undertake a meaningful examination of the impact of subject imports on the domestic industry without conducting some form of non-attribution analysis, it is clear that the explicit obligation to conduct such an analysis falls under Article 3.5. Therefore, because the Panel considers that Nuctech's alleged start-up situation, aggressive pricing policy and business expansion are factors that may cause injury to the domestic industry, rather than being themselves indicia of injury, the Panel considers it most appropriate to examine MOFCOM's treatment of them under Article 3.5 rather than 3.4[257].

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[253] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.335.

[254] European Union's first written submission, para. 297 (emphasis added).

[255] Comments on the 'Disclosure Letter on the Basis of Which the Final Determination for the Anti-Dumping Investigation Against X-Ray Security Inspection Equipment Will be Made", Exhibit EU-16, p. 10 (emphasis added).

[256] Smiths' Rebuttals to Applicant's Comments, Exhibit EU-34, p. 9 (emphasis added).

[257] See para. 7.192 of this Report.

(ii) Did MOFCOM fail to examine the relevance of certain known factors raised by Smiths and was MOFCOM's examination of certain factors pro forma?

7.264 The European Union argues that in its causation determination, MOFCOM's non-attribution analysis was limited to collection of data for a list of *pro-forma* factors, which MOFCOM succinctly dismissed as not causes of injury. According to the European Union, MOFCOM failed to consider arguments made by Smiths, in particular in relation to the "effect of exports" and "product quality and technology factors". The European Union also argues that MOFCOM ignored five other "known factors" raised by interested parties, namely (i) the impact of the global financial crisis; (ii) fair competition between Nuctech and other producers; (iii) Nuctech's aggressive business expansion; (iv) Nuctech's aggressive pricing policy; and (v) Nuctech's start-up situation[258]. For the reasons explained below, the Panel will analyse the European Union's arguments about MOFCOM's consideration of the "effect of exports" together with the "impact of the global financial crisis" and its consideration of the "product quality and technology factors" together with "fair competition"[259].

7.265 In relation to the European Union's argument that MOFCOM ignored certain "known factors", we recall that in *EC – Tube or Pipe Fittings,* the Appellate Body stated:

> Critical to the effective operation of the non-attribution obligation, and indeed, the entire causality analysis, is the requirement of Article 3.5 to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry", for it is the "injuries" of those "known factors" that must not be attributed to dumped imports. In order for this obligation to be triggered, Article 3.5 requires that the factor at issue:
>
> (a) be "known" to the investigating authority;
>
> (b) be a factor "other than dumped imports"; and
>
> (c) be injuring the domestic industry at the same time as the dumped imports.[260]

7.266 In response to a Panel question, China clarifies that it does not contend that the five factors at issue were not "known" to MOFCOM[261]. In our view, it is also clear that the five factors were "other than dumped imports". However, China argues that before an investigating authority is required to conduct a non-attribution analysis in relation to a particular factor, there must be relevant evidence before it to demonstrate that the factor is causing injury to the domestic industry. In relation to a number of the five factors which are the subject of the European Union's claim, China argues that Smiths did not present such evidence to MOFCOM and therefore, MOFCOM was not obliged to conduct a non-attribution analysis for such factors.

7.267 As a general proposition, we agree with China that if there is no relevant evidence before an investigating authority to indicate that a factor is injuring the domestic industry, there is no requirement for the investigating authority to make a finding regarding whether the factor is indeed causing injury, and subsequently to proceed to conduct a non-attribution analysis. In our view, where an interested party has raised an "other factor", it would be preferable for an investigating authority to expressly state that the party has not presented evidence that the factor is injuring the domestic

[258] In evaluating the parties' arguments in relation to the final three factors, we also consider the relevant arguments made by the parties in the context of its claim under Article 3.4 of the Anti-Dumping Agreement, which are better considered in the context of the Article 3.5 causation claim.

[259] See paras. 7.268-7.269 and 7.272-7.275 of this Report.

[260] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

[261] China's response to Panel question 55, para. 70.

industry, rather than not mentioning the factor at all in its determination. However, where there is indeed no such evidence before the investigating authority, we agree that there can be no inconsistency with Article 3.1 and 3.5 in failing to conduct a non-attribution analysis.

The "impact of the global financial crisis in 2008" and the "effect of exports"

7.268 The European Union contends that MOFCOM did not examine Smiths' argument that "Nuctech's declined financial performance in 2008 was due to the negative impact of the global economic crisis", in particular because Nuctech is "an exporter focused on selling container scanners in the overseas market"[262].

7.269 The Panel agrees with China's contention that the argument raised by Smiths relates directly to the impact of Nuctech's export performance on the state of the domestic industry. The European Union submits that Smiths' argument is more properly characterised as the impact of the financial crisis on Nuctech in view of its business strategy, namely "*strongly focused on export markets* and high-energy scanners as opposed to selling low-energy scanners domestically"[263]. In our view, the European Union's submission highlights that Smiths' argument is essentially that the financial crisis had a negative impact on Nuctech's export performance, due to its export orientation, and consequently caused injury to the domestic industry. In fact, in the context of its argument that MOFCOM's investigation was not based upon positive evidence, the European Union relies upon a statement about the negative impact of the global economic crisis as evidence that Nuctech was making losses in the export market[264]. Therefore, the European Union's argument reduces to its argument that MOFCOM did not adequately address the effect of exports in its causation analysis.

7.270 In this regard, the European Union's contention is that MOFCOM reached its conclusion about the effect of exports without addressing Smith's arguments to the contrary and without supporting its statement with positive evidence. We recall that MOFCOM found:

> During the POI, domestic X-Ray security inspection equipment also had export trade in which some products were exported through contract manufacturing. Evidence showed that during the POI, the export of domestic X-Ray security inspection equipment increased profits for domestic industry, while serious losses in sales in the domestic market were the main reason for the difficulties suffered by the domestic industry. Thus, during the POI, the material injury to domestic X-Ray security inspection equipment industry was not caused by the export of domestic Like Products.[265]

7.271 As concluded previously, the European Union failed to demonstrate that MOFCOM's finding was not based on positive evidence[266]. Therefore, the remaining question is whether MOFCOM was required to address Smiths' arguments regarding Nuctech's export performance in any further detail that it did. We recall that Smiths' arguments regarding Nuctech's export performance were based upon statements drawn from the annual reports of Nuctech's parent company, Tsinghua Tongfang[267]. In its Final Determination, MOFCOM explained that it would not be taking the annual reports into account because they included information on products other than the like domestic product[268]. Further, the Panel has previously concluded that the specific extracts from the annual reports relied upon by Smiths did not provide direct evidence of Nuctech's export performance, such as to

[262] Smiths' Injury Brief, Exhibit EU-11, pp. 16-17.
[263] European Union's second written submission, para. 325.
[264] European Union's response to Panel question 71, para. 59.
[265] Final Determination, Exhibit EU-2, p. 32.
[266] See conclusion reached at para. 7.167 of this Report.
[267] See para. 7.160 of this Report.
[268] Final Determination, Exhibit EU-2, p. 28.

undermine MOFCOM's conclusion on this point[269]. In the light of this, the Panel is not convinced that MOFCOM needed to provide any further reasoning than it did regarding the export performance of Nuctech.

"Product quality and technology factors" and "fair competition"

7.272 The European Union argues that in addressing "product quality and technology factors", MOFCOM succinctly dismissed this as a cause of injury, without considering Smiths' arguments about the inferior quality of Nuctech's products in terms of product range, quality, track-record, user friendliness and service. Further, according to the European Union, Smiths presented evidence that the injury suffered by Nuctech arose as a result of "fair competition" from United States and European products. However, the European Union argues that MOFCOM did not address this factor at all. The Panel considers that the submissions and evidence relied upon by the European Union to support its arguments relating to these two factors overlap to a large extent. Therefore, the Panel will consider them together.

7.273 In relation to "product quality and technology factors", MOFCOM found:

> During the POI, the quality of domestic X-Ray security inspection equipment remained stable, and had world-leader technological level and manufacturing processing. Domestic industry owned completely independent intellectual property right for the core components of domestic Like Products. Thus, during the POI, the material injury to domestic X-Ray security inspection equipment industry was not caused by product quality or technology disadvantages.[270]

7.274 China argues that this finding "fully addressed" the issue and, in any event, MOFCOM was under no duty explicitly to address each and every argument raised by Smiths, no matter how tenuously evidenced[271].

7.275 In relation to both "product quality and technology factors" and "fair competition", the European Union notes that Smiths made extensive arguments to the effect that its products were superior to those offered by Chinese producers, in terms of quality, track record and user friendliness. Smiths also argued that in relation to many of the sales made by Smiths in the Chinese market, there were no domestic substitutes[272]. Specifically, in relation to "fair competition", Smiths argued:

> Chinese government procurement authorities responsible for aviation security prefer U.S. and EU products because there was simply no effective Chinese competitor in the high-end aviation market during the POI. In the high-end market, i.e., the aviation Low-energy Scanner market, competition does not take place on price but on quality, track record, user-friendliness, and service. The Company's products are superior to the domestic Chinese products in all of the above aspects. Thus, in the high-end aviation market, the Company could not have injured any domestic producer because China's government procurement authorities in that market sector prefer EU and U.S. products to domestic products for technical performance, and no domestic producer was even a full competitor to begin with.[273]

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[269] See paras. 7.162-7.167 of this Report.
[270] Final Determination, Exhibit EU-2, p. 32.
[271] China's first written submission, paras. 532-533.
[272] Smiths' Injury Brief, Exhibit EU-11, pp. 12-16.
[273] European Union's first written submission, para. 314, quoting from Smiths' Response to the Preliminary Determination, Exhibit EU-13, pp. 11 and 12-13.

7.276 Although not all of Smiths' arguments in this regard were supported by evidence, we note that some of its arguments, particularly those in relation to the non-existence of Chinese substitutes, did refer to supporting figures or documents. For example, Smiths cited to Chinese government procurement regulations, under which the procurement authority is required to give preference to domestic products unless "the products, projects or services to be procured cannot be obtained domestically, or cannot be obtained on reasonable commercial terms within the PRC"[274]. Further, Smiths provided figures regarding its own sales of security inspection equipment to aviation users in China, namely 400 units from 2004-2008, all purchased under the government procurement regulations[275].

7.277 In the light of these submissions, the Panel considers that MOFCOM's conclusion relating to Nuctech's intellectual property rights and its statement that the "quality of domestic X-Ray security inspection equipment remained stable, and had world-leader technological level and manufacturing processing" was not reasoned and adequate. Rather, MOFCOM should have addressed Smiths' argument that its extensive sales into the Chinese market under government procurement regulations indicated that there were no equivalent products that could be obtained domestically, or could be obtained on reasonable commercial terms.

7.278 The Panel notes that Smiths also referred to studies outlining the comparative advantage of Smiths' scanners purchased at certain Chinese airports and explaining the link between Smiths' high prices and the quality of its products[276]. Further, Smiths noted that during the POI, airports in China purchased ten different Smiths models, with energy levels at or below 300 KeV, whereas Nuctech had only four such models on offer[277]. According to Smiths, this demonstrated that Nuctech simply did not have the range of products necessary to win the bids. Although the English translations of the exhibits relied upon by Smiths to support these statements are not on the record before the Panel, we note that very brief one-sentence summaries of the content of the reports are provided in the list of exhibits at the end of the Injury Brief[278]. In our view, this provides some support for our previous conclusion that MOFCOM did not adequately address the submissions and arguments on the record before it, relating to the extent to which Nuctech products could match those of Smiths and producers from the United States[279].

7.279 We note that China relies on the panel report in *Thailand – H-Beams* to argue that it does not need to address every argument raised by Smiths, no matter how tenuously evidenced. However, in our view, the evidence presented by Smiths was such as to require a more reasoned and detailed response from MOFCOM. Further, in stating that Article 3.5 of the Anti-Dumping Agreement does not require "an express indication that the investigating authorities have examined all underlying or contributory causal elements which may comprise or influence a given causal factor", the panel in *Thailand – H-Beams* was explaining that an investigating authority's reasoning does not need to refer to the precise terminology used by parties to an investigation to describe a causal factor. Further, it does not need *expressly* to refer to all elements relevant to a particular causal factor, where it is evident that the elements at issue have been implicitly considered[280]. In the circumstances before us, we do not consider that this case advances China's position because we cannot find anything in the

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[274] Smiths' Injury Brief, Exhibit EU-11, p. 12, citing to Government Procurement Law, Article 10(1), effective 1 Jan. 2003. 《自主创新产品政府首购和订购 管理办法》, Art. 1, effective 27 Dec. 2007.

[275] Smiths' Injury Brief, Exhibit EU-11, pp. 12-13.

[276] Smiths' Injury Brief, Exhibit EU-11, p. 13, footnote 13.

[277] Smiths' Injury Brief, Exhibit EU-11, p. 15, footnote 20.

[278] Smiths' Injury Brief, Exhibit EU-11, List of Injury Brief Exhibits, pp. 60-62 of the pdf document.

[279] The Panel notes that according to the Application, there was also a very significant increase in imports from the United States over the POI (Application, Exhibit EU-3, p. 43).

[280] Panel Report, *Thailand – H-Beams*, para. 7.282.

Final Determination to suggest that MOFCOM implicitly considered the evidence presented by Smiths[281].

7.280 Consequently, the Panel concludes that whether labelled as "product quality and technology factors" or "fair competition", MOFCOM did not adequately engage with the evidence and arguments submitted by Smiths to the effect that Nuctech could not offer the same products as Smiths, or could not offer products of the same quality. Therefore, MOFCOM did not conduct an objective examination of the evidence, as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In the light of this conclusion, the Panel does not consider it necessary to address whether MOFCOM should have assessed other arguments made by Smiths in relation to "fair competition", namely that Nuctech lacked effective cost control measures.

Alleged aggressive business expansion

7.281 In its Injury Brief and in its rebuttal to the applicant's comments on the Preliminary Determination, Smiths provided evidence, drawn from Nuctech's annual reports, to support its argument that the increase in Nuctech's inventories was not caused by the dumped imports, but by Nuctech's aggressive business expansion. For example, Smiths noted:

> Moreover, Tsinghua Tongfang's 2008 Annual Report states on p. 40 that "companies with more inventory, including Nuctech … are increasingly expanding scale of business and increased amount of inventory." Tsinghua Tongfang's 2007 Annual Report states on page 111 that the cause of the 30.13% increase of Tsinghua Tongfang's group-wise 2007 year end inventory from its 2006 year end level inventory "was caused by the expansion of business scopes of our subsidiaries NUCTECH, Tongfang Environmental Co. Ltd, and Shenyang Tongfang Multimedia. Technology Co. Ltd." The same Annual Report states on page 41 that "the increased inventory is mainly due to the expanding business scope of NUCTECH, Tongfang Environmental, and Shenyang Multimedia.[282]

7.282 In its comments on the Preliminary Determination, the European Commission argued that the increase in inventory remained unexplained in the Determination. The European Commission submitted that the increase was more likely to be due to "other business reasons" rather than the

[281] China submits that MOFCOM considered and rejected, in the context of its like product analysis, an assertion by Smiths that the subject imports were superior to the domestic products in terms of quality and service, and were not substitutable for each other (China's opening statement at the second meeting with the Panel, paras. 110 and 115). However, the Panel is not convinced that MOFCOM's analysis in this regard involved a consideration of all the arguments and evidence submitted by Smiths in the context of non-attribution. The Panel notes that the conclusion reached by MOFCOM at page 16 of the Final Determination essentially replicates the conclusion reached by MOFCOM on the like product determination at the end of page 15. Therefore, the Panel is not convinced that MOFCOM's consideration of Smiths' assertion went beyond its consideration of the like product analysis, which was conducted at a high-level of generality and did not involve an examination of Smiths' non-attribution arguments and evidence (see pages 14-15 of the Final Determination). For example, the Panel cannot find any explicit or implicit consideration of the evidence and arguments relating to the Chinese government procurement regulations, requiring preference to be given to domestic products where available, and purchases of Smiths' products under such regulations, and the relevance of this to Smiths' submission relating to the range of domestic products available in comparison to imports. Therefore, the Panel remains of the view that in assessing "product quality and technology factors" and "fair competition" under Article 3.5, MOFCOM did not adequately engage with, and provide a reasoned and adequate explanation in relation to, the evidence and arguments submitted by Smiths.

[282] Smiths' Injury Brief, Exhibit EU-11, pp. 17-18. See also, Smiths' Rebuttals to Applicant's Comments on the Preliminary Determination, Exhibit EU-34, pp. 8-9.

dumped imports, such as outdated technology of the product in stock, withdrawn orders and the time lag between production and sale[283].

7.283 China argues that MOFCOM did not need to conduct a non-attribution analysis in relation to the alleged aggressive business expansion, because there was no relevant evidence before MOFCOM to indicate that this factor was causing injury to the domestic industry. China again argues that Smiths' reliance upon the annual reports of Nuctech is inapposite because the information in the annual reports encompasses a wider range of products than included in the like product definition.

7.284 The evidence submitted to MOFCOM by Smiths regarding other possible causes of the increase in Nuctech's inventories, apart from the dumped imports, are statements drawn from the annual reports of Nuctech's parent company. The Panel recalls that in the context of assessing whether MOFCOM's injury analysis under Article 3.4 of the Anti-Dumping Agreement was based on positive evidence, the Panel concluded that the differences in the data relied upon by MOFCOM and that found in the annual reports of Nuctech's parent company were adequately explained due to inclusion in the annual report of statistics regarding a broader range of products than the like domestic product[284].

7.285 The Panel is less convinced that it was reasonable for MOFCOM to disregard as completely irrelevant the statements in the annual report that Nuctech's business expansion caused increases in inventories. The extracts from the annual reports cited by Smiths state that in 2008 Nuctech was "increasingly expanding scale of business and increased amount of inventory" and that the expansion in the inventories between 2006 and 2007 "was caused by the expansion of business scopes of our subsidiaries Nuctech"[285]. While we have concluded that the differences in the *data* relied upon by MOFCOM and that found in the annual reports could reasonably be explained by the broader range of products covered by the annual report statistics, it is quite a different proposition for MOFCOM to have completely ignored *explicit statements regarding other causes of injury* to the domestic industry, leading to increased inventories. This is particularly the case in the light of MOFCOM's finding that Nuctech was expanding its capacity by approximately 50% each year, which was more than the annual increase in domestic demand. Given this finding, the Panel considers that an objective and unbiased investigating authority would have assessed whether the statements in the annual reports about Nuctech's business expansion and resulting increased inventories related to that portion of Nuctech's production made up by the like domestic product.

7.286 Consequently, by failing to take into consideration and to investigate the relevance of the statements by Nuctech's parent company regarding the cause of Nuctech's increase in inventories, the Panel finds that MOFCOM failed to make an objective examination of the evidence before it, as required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

Alleged aggressive pricing strategy

7.287 The European Union argues that there was evidence on the record indicating that the injury to the domestic industry was caused by a voluntary aggressive pricing policy pursued by Nuctech, but that MOFCOM did not address this causal factor in its Final Determination.

7.288 In particular, the European Union notes that Smiths referred to a study describing Nuctech's pricing policy with respect to high-energy scanners on the export market. Although it appears that Smiths did not include the study as an attachment to its Injury Brief, Smiths summarised the study as follows:

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[283] European Commission's Comments on the Preliminary Determination, Exhibit EU-35, p. 4.
[284] See conclusion reached at para. 7.175 of this Report.
[285] Smiths' Injury Brief, Exhibit EU-11, pp. 17-18.

> [D]escribing how NUCTECH set its pricing targets to maximize sales growth in the hope of rapidly expanding market penetration by lowering prices to gain scale in production and sales. According to this study, in its efforts to penetrate the international high-energy scanners markets, NUCTECH adopted a "high quality lower price" strategy, lowering its product prices by about 30% below those of like products of the competitors.[286]

7.289 Smiths also argued that the data in MOFCOM's Injury Disclosure supported the theory that Nuctech was lowering its prices in order to increase its market share. In particular, Smiths quoted the relevant pricing and market share data and highlighted that "the magnitude of [Nuctech's] increases in volume and market share are much higher than those enjoyed by Smiths … At the same time that prices of domestic products dropped, prices of Smiths' products increased"[287]. The European Union asks, "[w]hat more evidence was needed than the constant decrease in price reflected in MOFCOM's Final Determination? Why did domestic sale prices decrease every year when EU import prices constantly increased during the POI and were even above domestic sales prices in 2008"[288]? Finally, the European Union contends that given the high-quality of Smiths' products, the only possibility for Nuctech to be able to compete was to adopt an aggressive pricing policy.

7.290 China argues that there was no relevant evidence on the record to support Smiths' contention that Nuctech adopted an aggressive pricing policy. Therefore, MOFOM was not under an obligation to address this evidence.

7.291 The Panel notes that the evidence on the record relied upon by the European Union to support its argument is not direct evidence of the existence of an aggressive pricing policy on the domestic market. However, given the highly confidential nature of a company's pricing strategies, any evidence from a competitor regarding the existence of a particular pricing policy will necessarily be circumstantial. In the Panel's view, Smiths presented such circumstantial evidence to MOFCOM. In particular, Smiths referred to a study detailing the pricing strategy pursued by Nuctech in the high-energy export market. It also outlined how MOFCOM's injury findings, in particular the trends in Nuctech's pricing and its level relative to dumped import prices in 2008, were consistent with an aggressive pricing policy. In the Panel's view, in the light of this evidence, when assessing the causes of injury to the domestic industry, an objective and unbiased decision maker would have investigated the possibility of the existence of such a pricing policy. The fact that MOFCOM did not do so was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

Nuctech's alleged "start-up" situation

7.292 In its Injury Brief, Smiths made extensive allegations to the effect that Nuctech was in a "start-up" situation in relation to low-energy scanners and that this explained some of the injury suffered by Nuctech, including lack of profitability. China argues that Smiths did not furnish any evidence to support these allegations, and consequently, MOFCOM was not required to address the alleged "start-up" situation of Nuctech in its causation analysis.

7.293 In the Panel's view, many of the allegations regarding Nuctech's start-up situation were not supported by evidence, but rather were bare assertions. Further, in some instances the evidence cited by Smiths does not seem clearly to support the point for which it was relied on. For instance, Smiths relied upon Exhibit IV to the Injury Brief to support its claim that Nuctech was in the process of diversifying its business by developing products such as baggage inspection equipment and that it was making a strategic shift to strengthen its low-energy scanner sector. However, on this topic, the most

[286] Smiths' Injury Brief, Exhibit EU-11, p. 18, footnote 30.
[287] Smiths' Comments on Injury Disclosure, Exhibit EU-16, p. 10.
[288] European Union's second written submission, para. 279.

that can be gleaned from Exhibit IV is that Nuctech diversified from container inspection to other forms of inspection, such as baggage, fluids, radioactive materials and explosives. There is no indication in the evidence of the period of time over which this occurred[289].

7.294 The Panel's review of the evidence relied upon by the European Union and China indicates the following:

(a) Nuctech has historically focused on supplying large-scale container inspection systems[290];

(b) Nuctech has diversified from container inspection to baggage inspection, fluids security inspection, radioactive materials inspection and drugs/explosives inspection[291]. There is no precise indication in the relevant evidence regarding the period of time over which this occurred;

(c) Nuctech was selling low-energy scanners from as early as 2004 and was offering at least two low-energy models for sale in product brochures in mid-2003[292];

(d) The European Union and China agree that Nuctech offered between four to six models of low-energy scanners during the POI[293]. In contrast, Smiths states that it had 20 such models on offer[294];

(e) As at the end of 2007, Nuctech had sold 216 "small security inspection equipments" in foreign markets[295];

(f) Nuctech sold "close to 1,400 units of small-scale [security inspection] equipment" to Olympics-related users in 2008[296]; and

(g) MOFCOM found that over the POI Nuctech experienced increased productivity levels, reduced losses and increased rates of return. The European Union argues that these results are characteristic of a company in a start-up situation[297].

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[289] Smiths' Injury Brief, Exhibit EU-11 (Exhibit IV to the Injury Brief).

[290] Smiths' Injury Brief, Exhibit EU-11, p. 8 (and Exhibit IV to the Injury Brief, p. 1, which states that Nuctech's predecessor specialized in "large container inspection system").

[291] Smiths' Injury Brief, Exhibit EU-11 (and Exhibit IV to the Injury Brief, p. 8). In its Injury Brief, Smiths alleges that "Nuctech is making a strategic shift to strengthen its low-energy scanner sector to achieve its goal of developing into a full-range scanner producer participating in both the high-energy scanner and low-energy scanner markets globally". To support this allegation, Smiths relies upon Exhibit IV, p. 5, attached to its Injury Brief. However, it is difficult to find such a statement in Exhibit IV. The closest appears to be the statement about the "functional diversification" undertaken by Nuctech.

[292] See sales contract for model THSCAN CX100100T, dated 8 November 2004 (140 KeV), Exhibit CHN-8. See also, product brochures for THSCAN CX6550B and THSCAN CX100100T (both 140 KeV), dated 10 June 2003, Exhibit CHN-7, (China argues that the numbers 030610 at the bottom of the right hand corner of the brochures represents the date. The European Union has not contested this).

[293] China's second written submission, para. 307(d) and the European Union's second written submission, para. 272. See also, Smiths' Injury Brief, Exhibit EU-11, p. 15. According to Smiths, in addition to the four models of low-energy scanners offered by Nuctech during the POI, an additional two were newly developed but unavailable during the majority of the POI. In its submission, China states that 5 models of low-energy scanner were offered by Nuctech during the POI.

[294] Smiths' Injury Brief, Exhibit EU-11, p. 15.

[295] Smiths' Injury Brief, Exhibit EU-11 (Exhibit IV, pp. 5-6), pp. 77-78 of the pdf document.

[296] Smiths' Injury Brief, Exhibit EU-11, p. 10.

[297] European Union's second written submission, para. 276.

7.295 The question before us is whether Smiths submitted sufficient relevant evidence to MOFCOM regarding the existence of a start-up situation, such that MOFCOM should have examined this factor as a part of its causation analysis. The answer to this question partly depends on the definition of "start-up". The Panel observes that Article 2.2.1.1 of the Anti-Dumping Agreement refers to "start-up operations", but does not provide a definition. We also note that for the purposes of paragraph 4 of Annex IV to the SCM Agreement, which addresses calculation of total *ad valorem* subsidization, "a start-up period will not extend beyond the first year of production". This is a narrower concept of "start-up" period than suggested by the European Union[298].

7.296 In the Panel's view, MOFCOM was justified in reaching the conclusion that there was not relevant evidence before it to support Smiths' assertions that Nuctech was in a "start-up" situation. The evidence that was submitted demonstrated that Nuctech's production of low-energy scanners commenced at least three years prior to the beginning of the POI. Further, during the POI it appears that Nuctech was selling significant quantities of low-energy scanners. Although there may be room for debate regarding for how many years after production commences a company can be considered to be in a "start-up" phase, MOFCOM cannot be considered to have lacked objectivity or even-handedness for taking the view that there was no relevant evidence before it that Nuctech was in such a phase. Although the Panel considers it would have been preferable for MOFCOM to explicitly state this conclusion, the Panel does not consider that MOFCOM acted inconsistently with Articles 3.1 or 3.5 of the Anti-Dumping Agreement by failing to address Smiths' assertions in this regard.

(iii) Conclusion

7.297 The Panel finds that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to conduct an objective examination of the evidence on the record. In particular, MOFCOM failed to separate and distinguish the injurious effects of other causal factors from those of the dumped imports, contrary to the non-attribution requirement of Article 3.5. In this regard, MOFCOM failed to consider the evidence on the record regarding Nuctech's alleged aggressive business expansion, alleged aggressive pricing strategy and the "product quality and technology factors/fair competition".

(d) Consequential violations

7.298 The European Union argues that due to inconsistencies with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement, MOFCOM's causation analysis, including the non-attribution analysis, is necessarily inconsistent with Article 3.5 of the Anti-Dumping Agreement[299]. Given our findings that MOFCOM's price effects analysis and injury findings were flawed, consequently MOFCOM's causation analysis, which rests upon these findings, is inconsistent with Article 3.5 of the Anti-Dumping Agreement.

(e) Conclusion on the European Union's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.299 The European Union presented a number of arguments to support its claim that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in conducting its causation analysis. The Panel concludes that MOFCOM acted inconsistently with Articles 3.1 and 3.5 due to the failure to take into consideration the differences in the products under consideration in the price effects analysis and due to the failure to provide a reasoned and adequate explanation regarding how the prices of the dumped imports caused price suppression in the domestic industry, particularly

[298] In response to Panel question 72, para. 62, the European Union argues that "a start-up is a situation that may last in time between one and five years".

[299] European Union's first written submission, paras. 350 and 364.

in 2008. The Panel exercises judicial economy with respect to MOFCOM's analysis of the effect of the volume of subject imports. Finally, the Panel concludes that MOFCOM failed to consider certain "known factors", and failed to consider evidence relating to other factors that it did explicitly consider, in its non-attribution analysis.

7.300 Therefore, the Panel concludes that China has acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

F. CONCLUSION ON THE EUROPEAN UNION'S INJURY CLAIMS

7.301 The Panel finds that MOFCOM acted inconsistently with its obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. In particular, the Panel concludes that MOFCOM's price effects methodology was inconsistent with Articles 3.1 and 3.2 because MOFCOM did not ensure that the prices it was comparing for this purpose were actually comparable. Further, in its injury analysis, MOFCOM did not consider all injury factors listed Article 3.4 and did not conduct an objective examination of the state of the industry. Finally, MOFCOM acted inconsistently with Articles 3.1 and 3.5 because it relied on its flawed price effects findings; failed to provide a reasoned and adequate explanation of how dumped imports caused price suppression to the domestic industry; and, finally, did not fulfil its obligations in conducting its non-attribution analysis.

G. MOFCOM'S TREATMENT OF NON-CONFIDENTIAL SUMMARIES: ARTICLES 6.5.1, 6.2 AND 6.4

1. Introduction

7.302 The European Union claims that certain aspects of MOFCOM's treatment of non-confidential summaries prepared by Nuctech violated Article 6.5.1 of the Anti-Dumping Agreement. The European Union also makes additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement. China asks the Panel to reject the European Union's claims.

2. Provisions at issue

7.303 Articles 6.2 and 6.4 of the Anti-Dumping Agreement provide:

> 6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.
>
> 6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

7.304 Articles 6.5 and 6.5.1 provide:

> 6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because

> its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it. [Footnote omitted]
>
> > 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

3. Main arguments of the parties

(a) European Union

7.305 The European Union challenges two aspects of MOFCOM's treatment of non-confidential summaries. First, the European Union identifies a number of instances in which MOFCOM allegedly accepted non-confidential summaries provided by Nuctech that were not adequate to permit a reasonable understanding of the substance of the information submitted in confidence, contrary to the first two sentences of Article 6.5.1 of the Anti-Dumping Agreement. Second, the European Union claims that MOFCOM allowed the Public Security Bureau not to submit any non-confidential summaries of confidential information, even though the conditions for application of the "exceptional circumstances" mechanism provided for in the third and fourth sentences of Article 6.5.1 had not been fulfilled. The European Union also pursues dependent claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement.

(i) Adequacy of non-confidential summaries provided by Nuctech

7.306 The European Union claims that MOFCOM failed to require Nuctech to provide adequate non-confidential summaries of certain confidential information submitted in Nuctech's Application, and in Nuctech's replies to MOFCOM's questionnaire. Regarding Nuctech's Application[300], the European Union's claims concern the non-confidential summaries of certain model designations, and certain Exhibits. Regarding Nuctech's questionnaire response, the European Union's claims concern the non-confidential summaries of certain Attachments to Nuctech's questionnaire response, and of certain replies provided by Nuctech.

<u>Nuctech's Application</u>

Model designation

7.307 The European Union asserts that MOFCOM failed to require Nuctech to provide an adequate non-confidential summary of the characteristics of the two imported product models in respect of which Nuctech alleged dumping in its Application. In its Application, Nuctech referred to the relevant models as "Model 1" and "Model 2", and as the "main models of the Subject products"[301]. The European Union submits that the description of these models as "Model 1" and "Model 2" was

[300] The European Union's claims concern the public version of Nuctech's Application, set forth in Exhibit EU-3.

[301] Application, Exhibit EU-3, p. 24.

inadequate for the purpose of Article 6.5.1, given the breadth of the product under investigation, and the existence of different categories and types of subject products with largely diverging characteristics.

Exhibits 8, 9, 10, 11 and 14 of the Application

7.308 The European Union claims that MOFCOM failed to require Nuctech to provide adequate non-confidential summaries of Exhibits 8, 9, 10, 11 and 14 of the Application. These Exhibits concern evidence on normal value, evidence on export prices, evidence on price adjustments, explanations by the domestic industry regarding the volume and value of subject imports, and Nuctech's 2006-8 financial audit reports. The European Union claims that the "[s]ummaries of those Exhibits are essentially limited to saying that the Exhibit contains 'pieces of evidence' on the subject followed by a request for confidential treatment"[302] on the basis that disclosure of the underlying confidential information would cause "severe adverse effects" to the party disclosing the information. The European Union alleges that, to the extent that any summary of the underlying confidential information was provided, it was inadequate. According to the European Union, the summary should at least have mentioned the type of document used as evidence (e.g. study, invoice, price offer, sales ledger) and the number of such pieces of evidence.

Attachments to Nuctech's questionnaire response

7.309 The European Union challenges the non-confidential summaries of certain Attachments to Nuctech's questionnaire response. The European Union claims that the non-confidential summaries of Attachments 14 (sales volume/value), 16 (production volume), 17 (inventory), 18 (production costs) and 19 (pre-tax profit) do not provide for a reasonable understanding of the trends over the injury POI because they are made on a monthly, rather than annual, basis. According to the European Union, an index on an annual basis is necessary to understand the annual trend in the relevant injury factors.

Nuctech's replies to certain questions in MOFCOM's questionnaire

7.310 The European Union challenges the non-confidential summary of Nuctech's response to question 17, concerning the establishment of new plants, changes of location, expansions, acquisitions, mergers or terminations. Noting that the non-confidential version of Nuctech's response to question 17 simply says "[Confidential]", the European Union asserts that no non-confidential summary has been provided for Nuctech's response to this question.

7.311 The European Union makes a similar challenge regarding the non-confidential version of Nuctech's replies to questions 19, 19(1) and 19(2), regarding other potential uses for Nuctech's production equipment. The European Union contends that while it is clear that the Applicant replied affirmatively to question 19, the information required in support of its response, which was included in Attachment 6, has been redacted in full. The European Union also notes that the text of Nuctech's replies to questions 19(1) and (2) has been redacted in its entirety. Regarding China's assertion[303] that summarization was impossible, the European Union contends that there is no evidence on the record of a statement to that effect having been made by Nuctech, as required by Article 6.5.1 of the Anti-Dumping Agreement.

7.312 The European Union also asserts that Nuctech's replies to questions 32 and 38(5) (on the major factors influencing sales prices) were redacted, with part of the text replaced by the term "[Confidential]". The European Union contends that no non-confidential summary has been provided

[302] European Union's first written submission, para. 72.
[303] China's first written submission, para. 93.

for the information designated as confidential. Regarding China's argument[304] that summarization was impossible, the European Union contends that there is no evidence on the record of a statement to that effect having been made by Nuctech, as required by Article 6.5.1 ADA. The European Union makes the same assertion in respect of Nuctech's response to question 33.

7.313 The European Union also submits that no non-confidential summary was provided for Attachment 4 to Nuctech's questionnaire response. The European Union asserts that the text has been redacted in its entirety, and it has not been established by the Applicant that summarization was impossible. The European Union notes that China refers[305] to Nuctech's response to question 13 as the summary of Attachment 4, but contends that no such cross-reference can be found in Attachment 4. The European Union further notes that while Attachment 4 concerns imports of raw materials, the alleged summary deals with the consumption of raw materials from all sources (both domestic and imported).

(ii) Non-summarization in exceptional circumstances

7.314 The European Union notes that the third and fourth sentences of Article 6.5.1 of the Anti-Dumping Agreement allow authorities to waive the obligation on parties to provide a non-confidential summary of their confidential information in "exceptional circumstances" where summarisation of the confidential information is not possible. According to the European Union, in such exceptional circumstances the party seeking confidential treatment of the information submitted must be required to provide a statement of reasons why summarisation is not possible.

7.315 According to the European Union, MOFCOM failed to require the Public Security Bureau to provide a statement of reasons explaining the exceptional circumstances why certain confidential information provided by it could not be summarized. The European Union contends that MOFCOM merely accepted the Public Security Bureau's statement that "due to the nature of such information, we cannot provide a non-confidential summary of such information"[306]. The European Union submits that it is impossible to deduce from this statement what the exceptional circumstances were that meant that the confidential information was not susceptible of summary.

(iii) Additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement

7.316 The European Union states that, pursuant to Article 6.4 of the Anti-Dumping Agreement, interested parties must have access to all information used by the authorities in an anti-dumping investigation. The European Union asserts that the sole restriction relates to "confidential" information, the access to which is subject to the specific regime of Article 6.5 of the Anti-Dumping Agreement. The European Union contends that, even if interested parties do not have access to confidential information, they must still be granted access to the non-confidential summary thereof in accordance with Article 6.5.1. According to the European Union, failure to provide interested parties access to such non-confidential summaries constitutes a violation of Article 6.4. The European Union further submits that depriving interested parties of the right to access non-confidential summaries restricts the opportunity of interested parties to defend their interests, contrary to Article 6.2 of the Anti-Dumping Agreement.

[304] China's first written submission, para. 94.
[305] China's first written submission, paras. 95-97.
[306] Disclosure of hearings, Exhibit EU-27.

(b) China

(i) Adequacy of non-confidential summaries

7.317 China denies that the summaries provided by Nuctech were not sufficient to provide a reasonable understanding of the substance of the underlying confidential information. According to China, the sufficiency of the summary depends on the nature of the confidential information at issue, and on whether or not the summary allows interested parties an opportunity to respond and defend their interests[307].

Nuctech's Application

Model designation

7.318 China submits that disclosure of the precise characteristics of Models 1 and 2 would have disclosed the information for which confidential treatment had been requested. Furthermore, China submits that the summary provided was in any event "adequate" for the purpose of Article 6.5.1 of the Anti-Dumping Agreement. China notes in this regard that the panel in *EU – Footwear (China)* noted that the adequacy of a non-confidential summary has to take into account the context in which the information has been submitted. China contends that the relevant product models were used by Nuctech in its Application to provide information on normal value and export prices, in accordance with Article 5.2 (iii) of the Anti-Dumping Agreement. China submits that what an Application must contain pursuant to Articles 5.2(ii) and 5.2(iii) of the Anti-Dumping Agreement is a description of the subject product and "information" on the normal value and the export price with respect to the "product in question". China considers that, by identifying the two models as the "main models of the Subject products", the Applicant provided a non-confidential summary that was sufficient to permit a reasonable understanding that the information provided with respect to the normal value and export price were those of "the product in question", consistent with the above-mentioned requirements of Article 5.2.

Exhibits 8, 9, 10, 11 and 14 of the Application

7.319 China rejects the European Union's assertion that summaries of the relevant Exhibits are essentially limited to saying that the Exhibits contain "pieces of evidence". China submits that the Exhibits also clearly indicate on which issues evidence was provided: Exhibit 8 contains information on normal value; Exhibit 9 contains information on export price; Exhibit 10 contains information on price adjustments; Exhibit 11 contains information on the volume and value of the imported products; and Exhibit 14 indicates that it contains "the applicant's 2006, 2007, 2008 financial audit reports". Furthermore, China contends that adequate non-confidential summarization of the confidential information contained in those exhibits was provided in the body of the Application, as made clear from the Exhibits themselves which refer the reader to the "application text".

Attachments to Nuctech's questionnaire response

7.320 Regarding the quarterly indexes contained in the non-confidential summaries provided as Attachments 14 (sales volume/value), 16 (production volume), 17 (inventory), 18 (production costs) and 19 (pre-tax profit), China notes that Article 6.5.1 requires that the non-confidential summary be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. China asserts that because the underlying confidential information was provided on a quarterly basis, the provision of non-confidential summaries on the same quarterly basis correctly reflects the substance of the information that was provided in confidence. In addition, China contends

[307] China refers in this regard to Appellate Body Report, *EC – Fasteners (China)*, para. 542.

that even if the Panel were to consider that only annual trends would constitute an adequate summary of the data submitted in confidence, such annual trends were provided by Nuctech in other attachments to its questionnaire response.

Nuctech's replies to MOFCOM's questions

7.321 China submits that the European Union has failed to substantiate its claim regarding Nuctech's replies to specific questions in MOFCOM's questionnaire. China submits that the European Union merely identifies the information for which there is allegedly no adequate non-confidential summary, without explaining how and why China violated Article 6.5.1 of the Anti-Dumping Agreement with respect to such information. China asserts that, as a result of the European Union's failure to establish a *prima facie* case in respect of this claim, the claim should be rejected.

7.322 China also makes the following remarks in respect of the European Union's claim. China asserts that when the information concerned is provided in response to a "yes/no" question (e.g. questions 17, 19(1) and 19(2)), no summary is possible since this would otherwise disclose the confidential information, namely the yes/no response. China refers in this regard to the Appellate Body's finding in *EC – Fasteners (China)* that "[s]ummarization of information will not be possible where no alternative method of presenting that information can be developed that would not […] necessarily disclose the sensitive information"[308]. China makes the same observation in respect of Nuctech's replies to questions 32, 33 and 38(5)[309]. According to China, it is clear from the response to question 32 ("Major factors influencing the sales price are [confidential]") and question 38(5) ("The main factors influencing the sales price of the Domestic Like Product produced by our company are [Confidential]") that a summary was not possible since such summary would have disclosed the sensitive information at issue.

7.323 China asserts that Attachment 4 is part of Nuctech's response to question 13, which adequately summarises the confidential information as follows: "We use a large quantity of components and parts to produce the Domestic Like Product. The quantity of components and parts is decided completely based on production needs"[310]. China submits that Nuctech specifically provides that the confidential version contains "information on [its] procurement policy and method"[311], and then explicitly indicates that Attachment 4 contains the information on the importation by the Company which is confidential. China submits that the above-reported summary is sufficient to enable an interested party to understand the substance of the confidential information. China asserts that the same is true for question 38, to which Nuctech responded that "there was price undercutting with respect to the Domestic Like Product", and that the information on such "price undercutting" was included in Attachment 15. China submits that this is an adequate summary.

(ii) Non-summarization in exceptional circumstances

7.324 China asks the Panel to reject the European Union's claim that MOFCOM failed to require a statement of reasons explaining the exceptional circumstances why information provided by the Public Security Bureau could not be summarized. China submits that the Public Security Bureau explained the reasons why summarization of the confidential information was not possible on two

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

[309] China also states that, in fact, with regard to question 33, the English non-confidential version erroneously ticked the box "yes". In other words, China submits that there was a translation error, and that the original Chinese non-confidential version left the reply blank in order to protect confidentiality (English translation of Nuctech's questionnaire response, p. 22, (p. 19 of original Chinese version), Exhibit EU-8).

[310] Nuctech's Questionnaire Response, Exhibit EU-8, p. 11.

[311] Nuctech's Questionnaire Response, Exhibit EU-8, p. 11.

separate occasions. China contends that the Public Security Bureau provided an oral explanation, and the following written explanation:

> As the information here below involves confidential commercial information, the disclosure of which will cause material adverse effects on relevant interested party(ies), we hereby apply for confidential treatment of such information. In addition, due to the nature of such information, we cannot provide a non-confidential summary of such information.[312]

7.325 According to China, while the party submitting information in confidence must identify the exceptional circumstances and provide a statement explaining the reasons why summarization is not possible, nothing requires that such statement must be made public. China asserts that a description of the exceptional circumstances justifying non-summarization need not be made public if, as in the present case, they themselves were confidential. China contends in this regard that information on the number and types of security systems used in Chinese airports, and in the aviation sector in general, is confidential for reasons of public security.

7.326 China submits that MOFCOM was obliged to scrutinise the Public Security Bureau's statement before that statement could be placed in the Public Reading Room, as foreseen in Articles 11 and 12 of the Decree on "Rules on Information Access and Information Disclosure in Industry Injury Investigations" No. 19 2006[313]. China asserts that the fact that MOFCOM placed the document transmitted by the Public Security Bureau in the Public Reading Room demonstrates that MOFCOM scrutinized and accepted the explanation. China contends that, had MOFCOM not considered the explanation adequate, it would have notified the Public Security Bureau about its inappropriateness pursuant to Article 12 of the above-mentioned Decree, and would not have placed the document in the Public Reading Room.

(iii) Additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement

7.327 China notes that the European Union's claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement are purely consequential to its claim under Article 6.5.1. China submits that, since there is no violation of Article 6.5.1, the Panel should reject the European Union's dependent claims under Articles 6.2 and 6.4. China also submits that, even if there were a violation of Article 6.5.1, the European Union has failed to make a *prima facie* case that China violated Articles 6.2 and 6.4 of the Anti-Dumping Agreement. With respect to Article 6.4, China notes that since the scope of Articles 6.5.1 and 6.4 are different, a violation of Article 6.5.1 does not necessarily entail a violation of Article 6.4. China submits that the European Union did not establish the conditions of Article 6.4. Furthermore, China submits that the European Union failed to even identify the "information" concerned. Regarding Article 6.2, China also argues that the European Union has failed to demonstrate why the fact that no adequate non-confidential summary was provided for each item identified by the European Union deprived Smiths of a full opportunity to defend its interests.

4. Evaluation by the Panel

7.328 The European Union pursues claims under Article 6.5.1 concerning both the adequacy of certain non-confidential summaries provided by Nuctech, and MOFCOM's reliance on the exceptional circumstances mechanism. The European Union also raises dependent claims under Articles 6.2 and 6.4. We begin by examining the European Union's claims concerning the adequacy of certain non-confidential summaries provided by Nuctech.

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[312] Disclosure of hearings, Exhibit EU-27.
[313] China's response to Panel question 32, paras. 9-14.

(i) Adequacy of non-confidential summaries

7.329 The European Union challenges the non-confidential summaries of parts of Nuctech's Application, certain attachments to Nuctech's questionnaire response, and some of Nuctech's questionnaire responses. We begin by considering the European Union's claims regarding the non-confidential summaries of parts of Nuctech's Application.

Nuctech's Application

7.330 The European Union contends that MOFCOM failed to require Nuctech to properly summarize the confidential information concerning the two models in respect of which Nuctech alleged dumping in its Application. The European Union also challenges the non-confidential summaries of certain Exhibits of the Application.

Model designation

7.331 In its Application, Nuctech alleged dumping in respect of two models. The model names were treated as confidential, and therefore not revealed. Instead, Nuctech referred to "Model 1" and "Model 2". Nuctech indicated that "[Model 1] and [Model 2] are the main models of the Subject Products". The European Union claims that the designation of the relevant models as "Model 1" and "Model 2" failed to provide a reasonable understanding of the substance of the model information submitted in confidence, contrary to Article 6.5.1[314].

7.332 We accept the European Union's claim that simply designating the relevant models as "Model 1" and "Model 2" fails to provide any summary of the underlying confidential information. While such designation may provide a convenient label by which to refer to the models, it provides no insight into the substance of the confidential information regarding such matters as the characteristics of the models at issue. Regarding China's assertion that Smiths would have known which were the "main" models at issue, as only four models were exported by Smiths in significant quantities[315], we consider that an investigating authority's compliance with Article 6.5.1 should not depend on an interested party's ability to work out for itself, on the basis of different factors, what the substance of the underlying confidential information might be. We agree in this regard with the finding by the panel in *China – GOES* that Article 6.5.1 of the Anti-Dumping Agreement:

> [E]xplicitly require[s] the interested party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information.[316]

7.333 Thus, we do not consider that interested parties should have had to infer from Nuctech's use of the term "main" that the relevant models were, in fact, those most exported by Smiths. In any event, since four models were apparently exported in significant quantities[317], Smiths would still have been left in doubt regarding precisely which two models were at issue.

7.334 We note China's argument that Nuctech was not able to provide further details without compromising the confidentiality of the underlying information. However, we agree with the statement by the panel in *Mexico – Olive Oil* that "confidential information should usually be capable of being summarized"[318]. Furthermore, if the confidential information were not susceptible of

[314] The European Union does not challenge the treatment of the model names as confidential.
[315] See China's response to Panel question 30, para. 3.
[316] Panel Report, *China – GOES*, para. 7.202.
[317] China's response to Panel question 30, para. 3.
[318] Panel report, *Mexico – Olive Oil*, para. 7.90.

summary, then the Article 6.5.1 exceptional circumstances mechanism should have been invoked. There is no evidence before us, or argumentation by China, to suggest that this was the case.

7.335 We also note China's argument, based on the findings of the panel in *EU – Footwear (China)*, that our assessment of the adequacy of a non-confidential summary should take into account the fact that such summary relates to information submitted in an application. The relevant findings provide:

> Turning to China's claim under Article 6.5.1, we recall that Article 6.5.1 requires that interested parties submitting confidential information also supply non-confidential summaries of that information and that these summaries shall "permit a *reasonable understanding* of the *substance* of the information submitted in confidence" (emphasis added). The non-confidential version of the complaint provides average data on domestic prices in Brazil and export prices from China and Viet Nam. We recall that the information in question was presented in the context of the complaint seeking the initiation of an anti-dumping investigation, presumably in satisfaction of Article 5.2(iii), which requires a complainant to provide "information" on normal value and export price. In this context, we are of the view that the average prices provided suffice as a non-confidential summary of the specific prices reported in the annexes, sufficient to permit a reasonable understanding of the "substance" of the confidential information in question. We therefore reject China's claim that an adequate non-confidential summary of the domestic prices in Brazil and export prices from China and Viet Nam was not provided.[319]

7.336 We do not consider that this finding by the *EU – Footwear (China)* panel provides guidance for our evaluation of the issues arising in the present case. First, it is entirely unclear the extent, if any, to which the *EU – Footwear (China)* panel took into account the fact that the relevant information was provided in the context of an application in its interpretation of the requirements of Article 6.5.1. Although it may be that the panel considered that the summary need not be as detailed or informative in the context of an application, there is no express statement to this effect. Second, even if such context were taken into account by the panel, we note that, in that case, a non-confidential summary of specific price data had been provided. The panel found that such summary was adequate for the purpose of Article 6.5.1. In the present case, by contrast, there is no summary of any of the confidential model data. There is simply a designation of the models as "Model 1" and "Model 2". Thus, the factual circumstances of the present case are distinct from those of *EU – Footwear (China)*. In any event, the obligation set forth in the first sentence of Article 6.5.1 provides that the summary should provide a reasonable understanding of the substance of the underlying confidential information. This obligation is not qualified. The text of Article 6.5.1 does not suggest that, in the context of applications, the non-confidential summary need only provide a reasonable understanding of the application, or merely demonstrate that (consistent with Article 5.2(iii)) "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export" was provided by the applicant. Even in the context of an application, Article 6.5.1 requires that the non-confidential summary should provide a reasonable understanding of the substance of the confidential information. Nuctech's non-confidential model designation fails to do this.

Conclusion

7.337 For the above reasons, we uphold the European Union's claim regarding Nuctech's non-confidential summary of the confidential information pertaining to the models covered by its Application.

[319] Panel Report, *EU – Footwear (China)*, para. 7.730.

Exhibits 8, 9, 10, 11 and 14 of the Application

7.338 The European Union claims that Nuctech's non-confidential summaries of Exhibits 8, 9, 10, 11 and 14 of the Application did not meet the requirements of Article 6.5.1. The European Union claims that the summaries of these Exhibits, which contained evidence, did not indicate the type of evidence at issue (e.g. study, invoice, price offer, or sales ledger), or the number of such pieces of evidence. China contends that the Article 6.5.1 obligation to provide a summary of the "substance" of the information submitted in confidence relates only to the content of the information, rather than the type of evidence at issue. China contends that the content of the relevant information (as opposed to the type of evidence in which that information was contained) was summarized adequately in the main body of the Application. We begin by examining the European Union's claim in respect of Exhibits 8, 9, 10 and 11.

7.339 Exhibit 8 is entitled "Pieces of evidence for normal value". Exhibit 8 provides:

> These pieces of evidence have been provided by a third-party who requires a confidential treatment. Disclosing these documents would cause severe adverse effects to this third-party, please strictly ensure confidentiality. As regards the section related to normal value, please refer to the application text.

7.340 Exhibit 9 is identical to Exhibit 8, except reference is made to export price instead of normal value. Exhibit 10 is also identical to Exhibit 8, except reference is made to price and price transport fee adjustments instead of normal value. Exhibit 11 is entitled "Explanations by industry associations concerning the application for investigating the volume and value of imported products". The remainder of Exhibit 11 is essentially the same as Exhibit 8, except the last sentence reads "As regards the section related to imported products' volume and value, please refer to the application text".

7.341 We note China's argument that the confidential normal value, export price, price adjustment and import volume and value data contained in these Exhibits was summarized at various places in the Application. In our view, though, that data was not the only information contained in those Exhibits that was designated as confidential in the sense of Article 6.5.1. The identity of the source of the abovementioned data was also treated as confidential. In order to protect the identity of that source, so too was the evidence (containing the relevant data) provided by that source[320]. The Article 6.5.1 obligation to summarize the substance of confidential information applies to all information designated as confidential. In cases where multiple types of information are designated as confidential, the substance of each type of confidential information must be summarized. In the present case, MOFCOM only ensured that a summary of the substance of the confidential data contained in the relevant Exhibits was provided[321]. MOFCOM did not require Nuctech to provide any summary of the other two types of confidential information at issue. In particular, MOFCOM did not require Nuctech to provide any summary of the information pertaining to either the source from which the evidence was obtained[322], or the evidence[323] provided by that source, contrary to Article 6.5.1. In this regard, we note China's reliance on the New Shorter Oxford English Dictionary's definition of the term "substance" as "the theme or subject of an artwork, an argument, etc., esp. as opposed to form or

[320] We recall that Exhibits 8, 9, 10 and 11 each state that "[t]hese pieces of evidence have been provided by a third-party who requires a confidential treatment", and that "[d]isclosing these documents would cause severe adverse effects to this third-party".

[321] We base this statement on the fact that the European Union has not challenged Nuctech's non-confidential summaries of that data.

[322] Nuctech might have indicated, for example, whether the source was an end-user, a distributor, or a market analyst. We note that the European Union has not pursued any claim regarding the adequacy of the summarization of the confidential information regarding the source.

[323] Nuctech might have indicated, for example, whether the evidence took the form of sales invoices, ledger extracts, quotes or advertisements.

expression; the gist or essential meaning of an account, matter"[324]. We note, though, that the same dictionary further defines "substance" as "[t]he essential nature or part of a thing etc.", and "[t]hat of which a physical thing consists". In our view, the latter definition provides useful insight into the nature of the additional summaries that MOFCOM should have required Nuctech to provide regarding the evidence at issue.

7.342 Turning next to Exhibit 14, we note that this Exhibit is entitled "Financial audit reports of the applicant". The non-confidential version of Exhibit 14 provides that "The documents include the applicant's 2006, 2007, 2008 financial audit reports. Disclosing these documents would cause severe adverse effects to the applicant, please strictly ensure confidentiality". China contends that this constitutes an adequate non-confidential summary of the substance of the confidential information included in Exhibit 14, since interested parties are informed that Exhibit 14 contains "the applicant's 2006, 2007, 2008 financial audit reports". We are not persuaded by China's argument. Where the content of financial audit reports is designated as confidential, the non-confidential summary of such audit reports must provide a reasonable understanding of the substantive content of those reports. Simply indicating that the confidential information is comprised of financial audit reports fails to do this[325].

Conclusion

7.343 For the above reasons, we uphold the European Union's Article 6.5.1 claim against the non-confidential summaries of the confidential information contained in Exhibits 8, 9, 10, 11 and 14 of the Application.

Attachments to Nuctech's questionnaire response

7.344 The European Union challenges the non-confidential summaries of confidential information set forth in Attachments 14, 16, 17, 18 and 19 to Nuctech's questionnaire response on the basis that these attachments contain quarterly, rather than annual, trends. China defends these non-confidential summaries on the basis that the underlying confidential information was itself prepared on a quarterly basis.

7.345 The European Union has not challenged China's factual assertion that the underlying confidential information was prepared on a quarterly basis. As a matter of law, we consider that if the underlying confidential information was itself prepared on a quarterly basis, the preparation of non-confidential summaries on the same quarterly basis is not inconsistent with the Article 6.5.1 requirement to provide a reasonable understanding of the substance of the underlying confidential information.

7.346 We note the European Union's argument that MOFCOM's determination was based on an analysis of annual trends, so that interested parties could have received a non-confidential version of such annual analysis. The European Union's argument concerns the disclosure of information relied on by the investigating authority. This issue falls outside the scope of Article 6.5.1, which is concerned with the existence and adequacy of non-confidential summaries prepared by interested parties. The European Union's argument is therefore not relevant to the claims presently under examination.

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[324] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993) Vol. II, p. 3123, cited by China at para. 6 of its oral statement at the second substantive meeting.

[325] We acknowledge that, in practice, it may prove difficult to provide such substantive insight into financial audit reports. We note, though, that MOFCOM did not invoke the Article 6.5.1 exceptional circumstances mechanism in respect of Exhibit 14.

Conclusion

7.347 For the above reasons, we reject the European Union's Article 6.5.1 claim in respect of Attachments 14, 16, 17, 18 and 19 to Nuctech's questionnaire response.

Nuctech's replies to certain questions in MOFCOM's questionnaire

7.348 The European Union claims that MOFCOM failed to require Nuctech to provide adequate non-confidential summaries of Nuctech's replies to questions 17, 19, 19(1), 19(2), 32, 33 and 38(5) of MOFCOM's questionnaire, and Attachments 4 and 15 to those replies. China asserts that the European Union has failed to substantiate its claim, since it merely identifies the relevant summaries, without further explaining their deficiencies.

7.349 We disagree that the European Union has failed to substantiate its claim. As explained below, it is evident, when examining the non-confidential summaries identified by the European Union, that these replies do not contain any summary of any confidential information. In such circumstances, there was no need for the European Union to further explain the nature of the deficiency. In this regard, we begin with the European Union's claim concerning Nuctech's response to question 17, which seeks information regarding the establishment of new plants, changes of location, expansions, acquisitions, mergers or terminations. Question 17 reads:

> Were there any adjustments related to the production of the Domestic Like Product during the POI, e.g. the establishment of new plants, changes of location, expansions, acquisitions, mergers or terminations?
>
> ( ) No
>
> ( ) Yes. Please provide information on the time, reason, the specific adjustments and effects of such adjustments on the production capacity.[326]

7.350 The non-confidential version of Nuctech's response to question 17 simply says "[Confidential]". Everything else in Nuctech's response to question 17 has been redacted. This response fails to meet the requirements of Article 6.5.1, since it contains no summary of the substantive content of the relevant confidential information. Although China contends that a simple "yes" / "no" reply cannot be summarized, since such summarization would necessarily reveal confidential information, there is no evidence that MOFCOM applied the Article 6.5.1 exceptional circumstances mechanism in respect of this matter. For these reasons, China's argument fails. Furthermore, we do not agree that a reply of "yes" or "no" will necessarily reveal confidential information. This will depend on the specific question at issue. In our view, answering "yes" or "no" to a highly general question regarding possible mergers, expansions etc. would not reveal any confidential information. Furthermore, China's position is undermined by the fact that the "yes" box is ticked in Nuctech's replies to questions 19 and 33. Although China contends that the "yes" box was ticked in error in the English translation of the reply to question 33[327], China does not make this argument in respect of question 19. Furthermore, we note that the "yes" box is also ticked in the Chinese version of the reply to question 19[328], excluding the possibility of any translation error in respect of that question. This suggests that Nuctech did not consider that ticking the "yes" box would divulge confidential information.

[326] Nuctech's Questionnaire Response, Exhibit EU-8.
[327] China's first written submission, para. 93.
[328] Nuctech's Questionnaire Response, Exhibit EU-8, p. 13 of the Chinese version.

7.351 We make the same finding in respect of the non-confidential summaries in Nuctech's replies to questions 19, 19(1) and 19(2), regarding other potential uses for Nuctech's production equipment. The text of MOFCOM's questions is set forth below, with Nuctech's non-confidential response in bold:

> 19. Was the production equipment that your company used to produce the Domestic Like Product also used to produce other products during the POI?
>
> ( ) No
>
> (√) Yes. Please complete the table below with respect to the allocation of production capacity among various products (including the Domestic Like Product).
>
> Unit

Product Name / Year						
	Volume	Percentage (%)	Volume	Percentage (%)	Volume	Percentage (%)
2006						
2007						
2008						

> Note: If there is no data on the allocation of production capacity among various products (including the Domestic Like Product, please enter the actual production volume and the percentage that the production volume is of the actual total production volume generated by the same production equipment or facilities. Allocate the quantity of production amount accordingly.)
>
> **Please refer to Attachment 6 [Confidential] for information on the allocation of production capacity amount various products.**
>
> (1) Has the increase or utilization of your production capacity of Domestic Like Product been constrained during the POI?
>
> ( ) No
>
> ( ) Yes. Please specify the constraining elements.
>
> **[Confidential]**
>
> (2) Are there any plans to expand your production capacity of the Domestic Like Product either within or outside China?
>
> ( ) No
>
> ( ) Yes. Please explain in detail.
>
> **[Confidential]**[329]

[329] Nuctech's Questionnaire Response, Exhibit EU-8.

7.352 Even with the above-mentioned ticking of the "yes" box in reply to question 19, Nuctech's responses to questions 19, 19(1) and 19(2) contain no summary of any information whatsoever, and therefore fail to meet the requirements of Article 6.5.1. Nor is there any reference to the Article 6.5.1 exceptional circumstances mechanism. Furthermore, although Nuctech's response refers to Attachment 6, that document states:

> [As business secrets of the Petitioner are involved here, the disclosure of which will impose serious adverse impacts on the Petitioner, confidentiality is therefore requested].

7.353 Accordingly, Attachment 6 does not provide any summary of the confidential information contained in Nuctech's replies to questions 19, 19(1) and 19(2).

7.354 A similar picture emerges in respect of Nuctech's response to questions 32, 33 and 38(5). Question 32 concerns possible influences on the prices of domestic products and subject imports. The text of MOFCOM's question 32, with Nuctech's response in bold, is set forth below:

> 32. What are your views on the changes of the prices of the imported Subject Product and the prices of the Domestic Like Product during the POI? Please explain with specific data. What are the major factors influencing the prices?
>
> > **The prices of the imported Subject Product declined during the POI. Please refer to the Petition for the specific figures. The sales prices on the domestic market have been seriously constrained by the dumped Subject Product. As a result, it is impossible for the domestic industry to realize a reasonable profit. Please refer to Attachment 13 for information on the changes of sales prices of the Domestic Like Product. Major factors influencing the sales prices are [Confidential].**

7.355 Nuctech's response does not contain, or summarize, any confidential information. Although there is a reference to domestic price data contained in Attachment 13, the non-confidential version of Attachment 13 is the same as the abovementioned Attachment 6 ("[As business secrets of the Applicant are involved here, the disclosure of which will impose serious adverse impacts on the Applicant, confidentiality is therefore requested.]"), and therefore contains no summary of the relevant confidential information. While China contends that a summary of Nuctech's reply would have revealed confidential information, there is no evidence that MOFCOM invoked the Article 6.5.1 exceptional circumstances mechanism.

7.356 Question 33 concerns investment and finance. The text of question 33, and Nuctech's response in bold, provide:

> 33. During the POI, was there any influence on the investment or financing of the production of the Domestic Like Product caused by the imported Subject Product?
>
> ( ) No
>
> ( ) Yes. Please complete the following table and provide supporting evidence.

Projects	If yes, please enter √ , if no, please enter x	Explanation
Expansion plan was suspended, delayed or cancelled		
Investment plan was suspended, delayed or cancelled		
Loan application was rejected		
Credit rating fell		
Experienced difficulties in issuance of shares or debt		
Other		

Note: please specify the time of the specific changes and provide supporting evidence.

[Confidential]

7.357 The simple insertion of the word "[Confidential"] provides no summary of the relevant confidential information. Nor does Nuctech's response refer to the exceptional circumstances mechanism. Nor, as explained above, do we accept China's argument that ticking either "yes" or "no" in response to this highly general question would have revealed confidential information.

7.358 Question 38(5) concerns influences on domestic pricing. The text of question 38(5), and Nuctech's response in bold, provide:

> 38(5) What are the main factors influencing the sales price of the Domestic Like Product?
>
> **The main factors influencing the sales price of the Domestic Like Product produced by our company are [Confidential].**

7.359 Again, Nuctech's response contains no summary of any information. Nor is the Article 6.5.1 exceptional circumstances mechanism invoked.

7.360 Finally, regarding Attachments 4 and 15 to Nuctech's questionnaire response (concerning information on imports of inputs, and information regarding price undercutting respectively), we note that these documents contain the same text as the abovementioned Attachment 6 ("[As business secrets of the Petitioner are involved here, the disclosure of which will impose serious adverse impacts on the Petitioner, confidentiality is therefore requested]"). Accordingly, these Attachments fail to provide any summary of the confidential information contained therein. Nor does MOFCOM apply the Article 6.5.1 exceptional circumstances mechanism in respect of these Attachments.

7.361 China contends that the non-confidential summary for Attachment 4 is contained in the following statement made in reply to question 13: "[w]e use a large quantity of components and parts to produce the Domestic Like Product. The quantity of components and parts is decided completely based on production needs". We do not consider that this statement provides an adequate non-confidential summary of the confidential information in Attachment 4. According to Nuctech's reply to question 13, Attachment 4 contains "information on import[s] by our Company". However, the above-mentioned statement (set forth in Nuctech's reply to question 13) contains no reference to imports by Nuctech.

7.362 Concerning Attachment 15, China contends that the confidential information in that Attachment is adequately summarized in Nuctech's reply to question 38: "there was price undercutting with respect to the Domestic Like Product". We disagree, since that assertion provides

no insight into the substance of the information underlying the allegation of price undercutting that is set forth in Attachment 15.

7.363 Finally, we note China's argument that neither Smiths nor the European Commission complained about the alleged inadequacy of the non-confidential summaries of Nuctech's replies to questions 17, 19, 32, 33 and 38(5), or Attachments 4 and 15. China also argues that the adequacy of the summaries is demonstrated by the fact that the respondents prepared extensive comments on the basis of the summaries provided by Nuctech. We are not persuaded by these arguments. The consistency of a non-confidential summary with Article 6.5.1 should be assessed by reference to the content of that summary, rather than any propensity for respondents to prepare comments on the basis of their best estimate of the substance of the underlying confidential information. The fact that an interested party refrains from complaining, and instead manages to prepare some sort of comments on the basis of inadequate non-confidential summaries, should not render the investigating authority immune from subsequent action on the basis of Article 6.5.1 of the Anti-Dumping Agreement.

Conclusion

7.364 For the above reasons, we uphold the European Union's Article 6.5.1 claim that MOFCOM failed to require Nuctech to provide adequate non-confidential summaries of the confidential information contained in Nuctech's replies to questions 17, 19, 19(1), 19(2), 32, 33 and 38(5) of MOFCOM's questionnaire, and Attachments 4 and 15 to those replies.

(ii) Non-summarization in exceptional circumstances

7.365 The European Union raises a claim regarding the non-summarization of certain confidential information submitted to MOFCOM by the Public Security Bureau. This claim concerns the third and fourth sentences of Article 6.5.1, which allow investigating authorities to waive the obligation on parties to provide a non-confidential summary of their confidential information in "exceptional circumstances" where summarisation of the confidential information is not possible. The fourth sentence of Article 6.5.1 provides that, in such exceptional circumstances, "a statement of the reasons why summarization is not possible must be provided". We must determine whether or not MOFCOM properly required the Public Security Bureau to explain why the confidential information it submitted to MOFCOM could not be summarized.

7.366 According to China[330], the Public Security Bureau explained to MOFCOM that the relevant confidential information could not be summarized on two occasions: first, the Public Security Bureau indicated in a written statement that a non-confidential summary could not be provided because of the "nature" of the confidential information; second, the Public Security Bureau explained orally to MOFCOM that a summary could not be provided without risking to disclose highly sensitive security information. There is no evidence on the Panel's record that the Public Security Bureau ever provided any oral explanation to MOFCOM. Nor has China identified any reference to any such oral explanation in MOFCOM's preliminary or final determinations, or referred to any relevant evidence in MOFCOM's own investigation record. In these circumstances, we shall resolve the European Union's claim exclusively on the basis of the above-mentioned written statement provided by the Public Security Bureau. In particular, we shall determine whether or not that written statement properly explains the reasons why summarization of confidential information provided by the Public Security Bureau is not possible. That written statement provides as follows:

> [As the information herebelow involves confidential commercial information, the disclosure of which will cause material adverse effects on relevant interested party(ies), we hereby apply for confidential treatment of such information. In

[330] China's response to Panel question 32.

> addition, due to the nature of such information, we cannot provide a non-confidential summary of such information.][331]

7.367 According to China, the reference in the second sentence of the written statement to the "nature of such information" contains the statement of reason why summarization was not possible. China contends that the phrase "nature of such information" refers to the highly sensitive character of the information, "since it relates to the safety in air transport, as this flows from the name of the entity itself, namely the Chinese **Public Security Bureau of Civil Aviation** Administration"[332].

7.368 We note that Article 6.5.1 only allows non-summarization of confidential information in "exceptional" circumstances. In our view, a simple reference to the "nature" of confidential information does not adequately explain why, exceptionally, that information cannot be summarized. The "nature" of information could refer to a multitude of factors, not all of which would necessarily prevent summarization. China argues that because the relevant information was provided by an entity entitled the Public Security Bureau, the "nature" of that information should be understood as pertaining to air transport safety. We are not persuaded by this argument, since the first sentence of the above written statement provides that the relevant information is "commercial" in character. There is no reason why commercially sensitive information submitted by the Public Security Bureau should necessarily be understood to relate to air transport safety (as opposed, for example, to the terms on which the Public Security Bureau may have procured x-ray scanners). In any event, the mere fact that the information pertains to air transport safety would not necessarily preclude all possibility of summarization.

7.369 We note China's additional argument that MOFCOM was under no obligation to disclose the reasons why the relevant information could not be summarized because those reasons were themselves confidential. In our view, the requirements of Article 6.5.1 seek to ensure a degree of transparency in anti-dumping investigations. Our view is consistent with the finding by the panel in *EC – Fasteners (China)* that "the goal of maintaining transparency during the course of the investigation" "is one of the purposes of Article 6.5"[333]. That panel went on to state that "the investigating authorities must ensure that where an interested party asserts that a particular piece of confidential information is not susceptible of summary, the reasons for that assertion are appropriately explained"[334]. Although that panel was referring primarily to the need to explain the reasons justifying non-summarization *to the investigating authority*, the panel's reference to "maintaining transparency" makes no sense unless that panel also envisaged that such explanation would also be made available to interested parties. This is because there would be no transparency if the reasons were to remain with the investigating authority. Furthermore, since the object and purpose of Article 6.5.1 is to ensure transparency, we would expect that any restriction on transparency would be expressly provided for. While the third and fourth sentences of Article 6.5.1 expressly provide for non-summarization of confidential information in exceptional circumstances, they do not provide that the reasons making summarization impossible do not need to be disclosed. For these reasons, we reject China's argument that MOFCOM was under no obligation to disclose the reasons why the relevant information could not be summarized.

7.370 We also reject China's argument that the fact that the Administration's statement was placed in the public reading room indicates that MOFCOM properly scrutinized the reasons why the relevant confidential information could not be summarized. The mere fact that an authority is required to

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[331] Disclosure of hearings, Exhibit EU-27.

[332] China's oral statement at the second substantive meeting, para. 9 (emphasis original).

[333] Panel Report, *EC – Fasteners (China)*, para 7.515. The Appellate Body referred approvingly to this finding by the panel at para. 544 of its Report.

[334] Panel Report, *EC – Fasteners (China)*, para. 7.515.

perform a particular function under its domestic law does not demonstrate, for the purpose of WTO dispute settlement proceedings, that the authority did actually perform that function.

Conclusion

7.371 For the above reasons, we uphold the European Union's Article 6.5.1 claim that MOFCOM improperly invoked the exceptional circumstances mechanism by failing to require the Public Security Bureau to provide a statement of the reasons why summarization of the underlying confidential information was not possible.

(iii) Additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement

7.372 The European Union claims that a violation of either the second or third sentences of Article 6.5.1 necessarily results in a violation of Articles 6.2 and 6.4 of the Anti-Dumping Agreement. The European Union claims that a violation of Article 6.5.1 results in a violation of Article 6.4, and that a violation of Article 6.4 in turn results in a violation of Article 6.2[335].

7.373 As presented by the European Union, its claims under Articles 6.2 and 6.4 are entirely dependent on its claims under Article 6.5.1. We have upheld the majority of the European Union's Article 6.5.1 claims. When China brings its measure into conformity with Article 6.5.1, the logic underlying the European Union's presentation of dependent claims under Articles 6.2 and 6.4 suggests that China would at the same time bring its measure into conformity with those additional provisions, if the European Union's additional claims were upheld. The logic underlying the European Union's presentation of dependent claims would not require China to take any additional action to bring its measure into conformity with Articles 6.2 or 6.4 if the European Union's additional claims under those provisions were upheld. The Appellate Body found in *Canada – Wheat Exports and Grain Imports* that the practice of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"[336]. Even if we were to accept the European Union's claims that, in violating Article 6.5.1, MOFCOM also acted contrary to Articles 6.2 and 6.4, we consider that our findings under Article 6.5.1 are such as to allow the DSB to make sufficiently precise recommendations and rulings in order to ensure the effective resolution of this dispute[337]. Accordingly, there is no need for us to address those additional claims presented by the European Union.

Conclusion

7.374 We exercise judicial economy in relation to the European Union's additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement.

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[335] European Union's response to Panel question 7, para. 39: "To conclude, when information that was submitted to the authorities and that should have been made available is unduly withheld in violation of Article 6.5.1, this at the same time constitutes a violation of the right to access information pursuant to Article 6.4. Depriving interested parties of the right to access such information restricts their opportunity to defend their interests, contrary to the obligation under Article 6.2".

[336] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[337] See also Appellate Body Reports, *Brazil – Retreaded Tyres,* para. 257 and *Australia – Salmon*, para. 223.

H. DISCLOSURE OF ESSENTIAL FACTS: ARTICLES 6.9, 6.2 AND 6.4

1. Introduction

7.375 The European Union claims that MOFCOM failed to disclose certain essential facts to interested parties, contrary to Article 6.9 of the Anti-Dumping Agreement. The European Union also pursues additional claims under Articles 6.2 and 6.4. China asks us to reject the European Union's claims.

2. Relevant provisions

7.376 Article 6.9 of the Anti-Dumping Agreement provides:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.377 Articles 6.2 and 6.4 of the Anti-Dumping Agreement are set forth above[338].

3. Main arguments of the parties

(a) European Union

7.378 According to the European Union, Article 6.9 requires investigating authorities to disclose to interested parties the body of facts that are important in the analysis and decision making of the investigating authority for deciding whether to apply definitive measures and at what level. The European Union contends that MOFCOM failed, contrary to Article 6.9, to disclose: the underlying data and methodology used by MOFCOM in its price analysis, adjustments made by MOFCOM to the export price in respect of sales to an affiliated distributor, the data and adjustments applied by MOFCOM in determining Smiths' margin of dumping, and the facts available used by MOFCOM to establish the residual anti-dumping duty[339]. The European Union contends that although these issues were addressed in MOFCOM's Injury Disclosure[340] and/or Dumping Disclosure[341], such disclosures did not meet the requirements of Article 6.9.

(i) Underlying data and methodology for price effects analysis

7.379 The European Union submits that MOFCOM failed to disclose the underlying data and methodologies it followed in determining the existence of (i) price undercutting and (ii) price depression/suppression. The European Union contends that, because the underlying data and the methodologies for price undercutting and price depression/suppression constitute "essential facts" that form the basis for the decision whether to apply definitive measures within the meaning of Article 6.9 of the Anti-Dumping Agreement, China acted inconsistently with Article 6.9 ADA by not disclosing them prior to the final determination. The European Union submits that, because the investigation involved heterogeneous products, knowing these methodologies was of utmost importance for Smiths'

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[338] See para. 7.303.

[339] At para. 93 of its first written submission, the European Union also refers to MOFCOM's alleged failure to disclose essential facts regarding MOFCOM's determination of the causal link between injury and the dumped imports. However, the European Union did not make any arguments regarding this issue during any of its subsequent written or oral submissions to the Panel. Accordingly, we consider that the European Union has effectively abandoned this claim.

[340] Injury Disclosure, Exhibit EU-15.

[341] Dumping Disclosure, Exhibits EU-17 and EU-18.

defence. According to the European Union, it was therefore especially important to know, in this case, how subject import and domestic prices were being compared, and whether MOFCOM made adjustments to ensure price comparability.

7.380 The European Union acknowledges that actual price data may sometimes warrant confidential treatment in accordance with Article 6.5 of the Anti-Dumping Agreement. The European Union contends, though, that MOFCOM did not invoke confidentiality as a basis for not disclosing the relevant underlying data[342]. The European Union further contends that confidentiality can in any event not justify MOFCOM's failure to disclose the methodology used to determine the existence of the alleged price undercutting and price depression, since that methodology is not confidential.

7.381 Having regard to prior WTO case law, the European Union contends that Article 6.9 should be applied on the basis of a distinction between facts and (legal) reasoning. According to the European Union, anything that does not constitute (legal) reasoning constitutes fact. Furthermore, the European Union contends that the object and purpose of Article 6.9 – namely, to provide the interested parties with a possibility to effectively exercise their right of defence by commenting on the body of facts that are essential for the process of analysis and decision-making by the investigating authority – confirms that the "essential facts" include not only the end result (i.e. the existence of adverse price effects), but also the underlying data and the methodology employed by the investigating authority to get to that end result. The European Union contends that concluding otherwise would deprive interested parties of a means to challenge whether the underlying data and methodology in fact provide a basis for the conclusion drawn.

(ii) Affiliated distributor adjustment to export price

7.382 The European Union claims that China violated Article 6.9 because MOFCOM failed to disclose the underlying facts and criteria on the basis of which an adjustment was made to the export price for sales to an affiliated distributor. The European Union asserts that the Dumping Disclosure[343] merely contains what looks like a description of different steps in MOFCOM's decision making process, rather than identifying "essential facts" within the meaning of Article 6.9 Anti-Dumping Agreement. The European Union submits that MOFCOM did not disclose the underlying facts and criteria on the basis of which the adjustments to the export price were made, "like the specific amounts of adjustment items, including specific data on the adjusted proportions of expenses incurred by the affiliated distributor"[344].

(iii) Determination of the dumping margin for Smiths

7.383 The European Union claims that MOFCOM violated Article 6.9 by failing to disclose data on transactions and adjustments used in the calculation of Smiths' margin of dumping. The European Union alleges that the calculations relied upon by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The European Union contends that the calculations and underlying data are facts that are "essential" to the determination of the existence and level of dumping because, without this information, no affirmative determination could be made and no definitive duties could be imposed.

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[342] European Union's oral statement at the first substantive meeting, para. 27.

[343] The European Union refers in this regard to the Final Dumping Disclosure to Smiths, Exhibit EU-17.

[344] European Union's first written submission, para. 111.

7.384 The European Union acknowledges that MOFCOM disclosed[345] information about the methodology used to calculate the dumping margin, and includes a reference to the data used (namely an "evidentiary document submitted by the respondent Company"). However, the European Union submits that MOFCOM should also have explained how the figures were calculated on the basis of the information provided by Smiths, and the reasons for the discrepancy between MOFCOM's figures and those provided by Smiths.

(iv) Determination of the residual anti-dumping duty

7.385 The European Union contends that MOFCOM failed to disclose the essential facts under consideration regarding the calculation of the "all others" dumping rate (i.e. the rate applied to imports of x-ray scanners produced by European Union producers other than Smiths). The European Union submits that MOFCOM failed to explain how MOFCOM used the information available to arrive at a residual dumping margin that is more than twice the margin determined for Smiths.

(v) Additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement

7.386 The European Union submits that, by acting contrary to its obligations under Article 6.9, China also (i) failed to provide a timely opportunity for all interested parties to see all information that was relevant to defend their interests, as required by Article 6.4 Anti-Dumping Agreement, and (ii) deprived the interested parties of a full opportunity to defend their interests, contrary to Article 6.2 Anti-Dumping Agreement.

(b) China

7.387 China denies that MOFCOM failed to comply with its Article 6.9 obligation to disclose essential facts.

(i) Underlying data and methodology for price effects analysis

7.388 China denies the European Union's claim regarding MOFCOM's alleged failure to disclose the underlying data and the methodology used in its price analysis.

7.389 China submits that the methodology followed by MOFCOM to consider the price effects of the dumped imports does not constitute an "essential fact which forms the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9. First, China submits that the methodology is not a fact. Second, China submits that even if the methodology used by MOFCOM to analyse price effects were a fact, it is not an "essential" fact. China submits that while the methodology followed by an investigating authority to calculate a dumping margin might rightly be regarded as being central and essential, since it alone is determinative not only for the determination that dumping exists but also for its precise quantification and, ultimately, the level of the anti-dumping duty imposed, this is not so for the methodology followed in the price analysis unless the country of import applies the so-called "lesser duty" rule. Furthermore, China submits that Article 3.2 only requires the investigating authorities to "consider" whether there have been adverse price effects. China refers to the finding by the panel in *Thailand – H-Beams* that the textual term "consider" in Article 3.2 does not "require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped imports is 'significant'"[346]. China submits that, to the extent that Article 3.2 itself does not require that a "determination" or a "finding" of price effects be made, it

[345] The European Union refers in this regard to the Final Dumping Disclosure to Smiths, Exhibit EU-17.

[346] Panel Report, *Thailand – H-Beams*, para. 7.161.

seems rather absurd to require that the investigating authority should disclose the methodology followed in its assessment of such price effects.

7.390 Third, China submits that even if the Panel were to conclude that the methodology used by MOFCOM is an "essential fact," it is not an essential fact "which forms the basis for the decision whether to apply definitive measures". China refers in this regard to the Appellate Body's finding in in *EC – Fasteners (China)* that "[t]he "essential facts" under Article 6.9, which form the basis for a final determination, are those that are material for the authority's decision"[347]. According to China, the methodology used in the price analysis is not an essential fact that forms the basis for the decision whether to apply definitive measures. What was material or essential for MOFCOM's decision to impose anti-dumping measures was that the dumped imports had effects on the domestic prices, in particular (i) that "the import price of the Subject Product was largely below the price of domestic Like Products in 2006 and 2007, which seriously undercut the price of domestic Like Products," and (ii) that "[a]lthough the import price of the Subject Product was slightly higher than the price of domestic Like Products in 2008, it remained at a low level while the sales price of domestic Like Products decreased by 46.75% from 2008 to 2007, almost down to the unit sales cost, leaving unit gross profit rate at a low level"[348].

7.391 Regarding the European Union's claim that MOFCOM failed to disclose the data underlying its price effects analysis, China contends that Article 6.9 does not apply to the "evidence" on the basis of which MOFCOM has reached its factual conclusions in its price analysis (i.e. the specific data from identified sources which were used by MOFCOM for its price analysis).

7.392 Furthermore, China asserts that MOFCOM fully complied with Article 6.9 by disclosing the trends in the domestic and subject import prices, rather than the actual price data. China asserts that disclosing the absolute figures of domestic prices would have been inconsistent with the duty of the investigating authorities not to disclose confidential information.

(ii) Affiliated distributor adjustment to export price

7.393 China denies the European Union's claim that China violated Article 6.9 by not disclosing the underlying facts and criteria on the basis of which the export price for sales to an affiliated distributor was adjusted. China asserts that MOFCOM addressed this issue in its Preliminary Determination, and that Smiths made comments on MOFCOM's analysis. China submits that MOFCOM then fully addressed Smiths' observations in its Dumping Disclosure[349]. According to China, the European Union's assertion that MOFCOM did not disclose the underlying facts and criteria on the basis of which the adjustments to the export price were made is therefore directly contradicted by the documents in the file.

(iii) Determination of the dumping margin for Smiths

7.394 China denies the European Union's claim that MOFCOM failed to disclose "essential facts" regarding the determination of Smiths' margin of dumping. As to the scope of the European Union's claim, China emphasises that the European Union has extended the scope of its claim before the Panel. China contends that the initial claim as put forward by the European Union in its First Written Submission related to an alleged lack of disclosure of the dumping margin calculation and calculations concerning the normal value and export price. However, in its Second Written Submission, the European Union started to claim a lack of disclosure of data on transactions and adjustments used in the calculation of normal value and export price. China submits that, since the

[347] Appellate Body Report, *EC – Fasteners (China)*, para. 483.
[348] Final Determination, Exhibit EU-2, p. 23.
[349] China refers in this regard to the Final Dumping Disclosure to Smiths, Exhibit EU-17, p. 12.

European Union expressly stated that it will not make arguments as to the alleged lack of disclosure concerning the determination of normal value, this aspect of the claim should be rejected from the outset. On the substance, as to the dumping margin calculation, China points out that MOFCOM fully explained to Smiths how the comparison between the normal value and the export price was made. Indeed, MOFCOM provided a table containing, for each model of the Subject Product, data concerning the normal value, export price, quantity, CIF price and dumping margin. China also asserts that a more detailed explanation of MOFCOM's dumping methodology was set forth in MOFCOM's Preliminary Dumping Disclosure[350]. Regarding the actual calculations made by MOFCOM for the normal value and the export price, China contends that they do not constitute "essential facts". According to China, there was thus no obligation on MOFCOM to disclose an Excel sheet listing all the transaction data including the adjustment figures used in the calculation of the normal value and the export price. In any case, China contends that MOFCOM precisely identified the elements of the calculations, namely the data that were used for the determination of the normal value and the export price, which adjustments were made and the level of such adjustments. China notes that Article 6.9 does not prescribe the form that the disclosure should take such that, by identifying the data used for the determination of the normal value and the export price, which adjustments were made and the level of such adjustments, China fully complied with the requirement of Article 6.9 to disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measures".

(iv) Determination of the residual anti-dumping duty

7.395 China denies the European Union's claim that MOFCOM failed to disclose the "essential facts" under consideration regarding the calculation of the "all others" dumping rate. China contends that MOFCOM properly explained that it used "facts available" in respect of European Union companies that did not respond to the Application or the questionnaire[351]. China also contends that MOFCOM also explained that the residual duty was calculated on the basis of "the sales data of products of relevant models reported by the respondent Company"[352].

7.396 China further submits that the reason why the 71.8% duty calculated on the basis of the facts available is an appropriate residual duty is not a "fact" within the meaning of Article 6.9 of the Anti-Dumping Agreement. China notes in this regard that the panel in *Argentina – Poultry Anti-Dumping Duties* declined to consider as a "fact" the reasons why the investigating authority failed to use certain domestic and export sales price data reported by exporters[353].

(v) Additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement

7.397 China notes that the European Union has made dependent claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement. China submits that, since there is no violation of Article 6.9, the European Union's consequential claims of violation of Articles 6.4 and 6.2 must also fail. China further submits that, even if the Panel were to conclude that China had somehow violated Article 6.9, the European Union claims under Article 6.4 and 6.2 have to be rejected since the European Union has failed to demonstrate separate violations of those provisions.

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[350] MOFCOM's Preliminary Dumping Disclosure to Smiths, Exhibit CHN-2.

[351] China refers in this regard to the Final Dumping Disclosure to the European Commission, Exhibit EU-18.

[352] Preliminary Dumping Disclosure to the European Commission, Exhibit CHN-3.

[353] China refers to Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.225.

4. Evaluation by the Panel

7.398 The European Union claims that MOFCOM failed to disclose certain alleged "essential facts under consideration" that "form the basis for the decision whether to apply definitive measures", contrary to Article 6.9 of the Anti-Dumping Agreement. The alleged "essential facts" concern the underlying data and methodology for MOFCOM's analysis of the price effects of the dumped imports, adjustments made by MOFCOM to the export price, the data and adjustments applied by MOFCOM in determining Smiths' margin of dumping, and the facts available used by MOFCOM to establish the residual anti-dumping duty. China asks us to reject the European Union's claims.

7.399 The first sentence of Article 6.9 requires investigating authorities to disclose the "essential facts which form the basis for the decision whether to apply definitive measures". In interpreting this provision, we are guided by the recent findings of the Appellate Body in *China – GOES*:

> Articles 6.9 and 12.8 do not require the disclosure of *all* the facts that are before an authority but, instead, those that are "essential"; a word that carries a connotation of significant, important, or salient. In considering which facts are "essential", the following question arises: essential for what purpose? The context provided by the latter part of Articles 6.9 and 12.8 clarifies that such facts are, first, those that "form the basis for the decision whether to apply definitive measures" and, second, those that ensure the ability of interested parties to defend their interests. Thus, we understand the "essential facts" to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.[354]

7.400 We agree with the Appellate Body's analysis of Article 6.9. We particularly note the Appellate Body's reference to the need for interested parties to be able to defend their interests. We observe in this regard that, although the European Union's claim is based on the first sentence of Article 6.9, there is also a second sentence in that provision. The second sentence of Article 6.9 provides that the disclosure of essential facts "should take place in sufficient time for the parties to defend their interests". Bearing in mind Article 31.1 of the Vienna Convention on the Law of Treaties, we consider that the second sentence of Article 6.9 provides context for interpreting the scope of the provision set forth in the first sentence of that provision. Accordingly, we consider it important to interpret the first sentence of Article 6.9 in a manner that allows interested parties to defend their interests.

(a) Underlying data and methodology for price effects analysis

7.401 The European Union claims that MOFCOM failed to disclose to interested parties the methodology and underlying data used for MOFCOM's analysis of the price effects of subject imports, contrary to Article 6.9. The European Union claims that the methodology and underlying data constitute "essential facts under consideration … which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9. China denies that MOFCOM's price effects methodology is either a "fact" or "essential". China also denies that MOFCOM was required to disclose the evidence on which its price effects analysis was based. China contends that MOFCOM

[354] Appellate Body Report, *China – GOES*, para. 240 (footnote omitted).

complied with Article 6.9 by disclosing the trends in subject import prices and domestic prices, and in domestic costs.

7.402 We recall that, in assessing the effect of dumped imports on price, MOFCOM found both price undercutting and price suppression. MOFCOM's finding of price undercutting was based on a comparison of the annual AUVs of the subject imports with the annual AUVs of the domestic like product. In respect of price suppression, MOFCOM found that the rate of decline in domestic prices was greater than the rate of decline in the unit cost of production. For the reasons set forth below, we consider that the AUVs determined by MOFCOM, and the price data[355] underlying those AUVs[356], should have been disclosed by MOFCOM as "essential facts under consideration which form the basis for the decision whether to apply definitive measures", pursuant to Article 6.9 of the Anti-Dumping Agreement.

7.403 The AUVs and underlying price data are factual in nature[357]. Furthermore, they were "under consideration" by MOFCOM. As to whether the AUVs and underlying price data are "essential", and "form the basis for the decision whether to apply definitive measures", we note that the parties appear to disagree on whether it is necessary to first determine that these facts are "essential", and then determine whether they "form the basis for the decision whether to apply definitive measures", or whether this analysis should be conducted more holistically (by considering that a fact is "essential" if it "form[s] the basis for" the final determination). In relying on the findings of the panel in *EC – Salmon*, we understand that the European Union advances a holistic approach. This is because that panel found that the "'essential facts under consideration which form the basis of the decision whether to apply definitive measures' are the body of facts *essential to the determinations that must be made by the investigating authority before it can decide whether to apply definitive measures*"[358]. By contrast, China appears to consider that one should first consider whether or not facts are "essential", and then consider whether or not the "essential facts" "form the basis of the decision whether to apply definitive measures"[359]. Given the structure of the first sentence of Article 6.9, and consistent with the approach taken by the *EC – Salmon (Norway)* panel, we consider that whether or not a fact is "essential" depends on the role of that fact in the decision-making process of the investigating authority: facts that "form the basis for the decision whether to apply definitive measures" are "essential". This approach is consistent with the abovementioned finding by the Appellate Body in *China – GOES* that "the 'essential facts' … refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures"[360].

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[355] The European Union's arguments refer only to price data (see, for example, para. 107 of the European Union's first written submission, and para. 78 of its second written submission), and make no mention of cost data. Accordingly, we restrict our findings to the price data underlying MOFCOM's price effects analysis. In doing so, we do not exclude the possibility that certain underlying cost data might also need to be disclosed under Article 6.9 of the Anti-Dumping Agreement.

[356] The underlying price data includes the Nuctech price data used by MOFCOM to determine the domestic annual AUVs, and the customs value data used by MOFCOM to determine the annual AUVs for the subject imports (see China's responses to Panel questions 78-82). We note that China considers that the European Union's claim relates to "the source or evidence on which the essential facts are based" (China's first written submission, para. 153). Our understanding of the European Union's claim is somewhat different. We understand the European Union's claim to concern the price data on which MOFCOM's findings of price effects were actually based, rather than the evidence or sources from which that data was taken.

[357] In making this finding, we do not accept the fact/reasoning distinction drawn by the European Union. In particular, we do not accept that anything that does not constitute reasoning necessarily constitutes a fact.

[358] Panel Report, *EC – Salmon (Norway)*, para. 7.807 (emphasis added).

[359] China's first written submission, para. 148.

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

7.404 We consider that the AUVs and underlying price data were essential to at least one of the determinations made by MOFCOM before it could decide whether to apply definitive measures, i.e. the determination that dumped imports had the effect of price undercutting and price suppression. The AUVs and underlying price data constituted the body of facts on which MOFCOM's determination of price effects was based. Since this body of facts was therefore required to understand the basis for MOFCOM's price effects analysis, we consider that it should have been disclosed by MOFCOM pursuant to Article 6.9.

7.405 China contends that the facts under consideration for the Article 3.2 price effects analysis are not "essential" within the meaning of Article 6.9 because Article 3.2 merely requires authorities to "consider", rather than make any findings or determinations on, the price effects of dumped imports. China's argument is based on the finding of the panel in *Thailand – H-Beams* that the textual term "consider" does not "require an explicit 'finding' or 'determination' by the investigating authority as to whether the increase in dumped imports is 'significant'"[361]. We note that China made the same argument before the Appellate Body in *China – GOES*, without success. In the context of a claim under Article 3.2 of the Anti-Dumping Agreement, the Appellate Body accepted that "the use of the word 'consider' [means that] Article[] 3.2 […] do[es] not impose an obligation on an investigating authority to make *a definitive determination* on the volume of subject imports and the effect of such imports on domestic prices"[362]. However, the Appellate Body made it clear that the Article 3.2 assessment is an integral part of the establishment of a causal link between the dumped imports and the injury to the domestic industry[363]. The Appellate Body also made it clear that the price effects analysis must in any event meet the requirements of Article 3.1 of the Anti-Dumping Agreement[364]. Thereafter, in the context of a claim under Article 6.9 of the Anti-Dumping Agreement, the Appellate Body found:

> [I]n the context of the second sentence of Article[] 3.2 …, we consider that the essential facts that investigating authorities need to disclose are those that are required to understand the basis for their price effects examination, leading to the decision whether or not to apply definitive measures, so that interested parties can defend their interests.[365]

7.406 Thus, even though an investigating authority is only required to "consider" the price effects of subject imports, the facts underlying that "consideration" nevertheless constitute "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement.

7.407 Before completing our analysis of the European Union's claim regarding the data underlying MOFCOM's price effects analysis, we must address China's argument that MOFCOM complied with Article 6.9 by disclosing the trends in both the domestic and subject import prices[366]. China refers in this regard to MOFCOM's finding that:

> [T]he import price of the Subject Product maintained growth, though in small amounts, while the price of domestic like products declined by the large margin with a 72.68% decrease in 2008 compared to 2006. The import price of the Subject Product was largely below that of domestic like products in 2006 and 2007, which seriously undercut the price of domestic like products, resulting in sales prices lower

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[361] Panel Report, *Thailand – H-Beams*, para. 7.161, cited by China at para. 146 of its first written submission, and at para. 89 of its second written submission.
[362] Appellate Body Report, *China – GOES*, para. 130 (emphasis original).
[363] Appellate Body Report, *China – GOES*, para. 128.
[364] Appellate Body Report, *China – GOES*, para. 130.
[365] Appellate Body Report, *China – GOES*, para. 242.
[366] China's first written submission, paras. 155-162.

> than per unit production costs of domestic like products and serious losses of pre-tax profits during that time period. Although the import price of the Subject Product was slightly higher than that of domestic like products in 2008, it remained at a low level, while the sales price of domestic like products dropped by 46.75% in 2008 against 2007, approaching the per unit cost thereof, leaving unit gross profit rate at a low level.[367]

7.408 China's argument that MOFCOM's disclosure of trend data satisfies the requirements of Article 6.9 is based on the following finding by the panel in *Korea – Certain Paper*:

> Regarding the conformity with Article 6.9 of the explanations provided in the mentioned report, we consider that the trends in prices may be seen as one essential fact that established the basis of the KTC's decision to apply the definitive anti-dumping duty at issue. We note that the report explains trends in the prices of dumped imports and those of the Korean industry in the POI. We do not agree with Indonesia's view that failure to include absolute figures for the Korean industry's prices rendered this disclosure inconsistent with the requirements of Article 6.9. We see no support in the text of Article 6.9, or elsewhere in the Agreement, for Indonesia's proposition. We therefore reject this aspect of Indonesia's claim too.[368]

7.409 For the following reasons, we are not persuaded by China's reliance on the findings of the *Korea – Certain Paper* panel to aver that MOFCOM's disclosure of price trends sufficed for the purpose of Article 6.9. First, the fact that trend data "may be seen as one essential fact" does not exclude the possibility that AUVs should be seen as another essential fact. Second, the complainant in *Korea – Certain Paper* had claimed that the investigating authority should have disclosed "absolute [price] figures". We do not understand the European Union to claim that MOFCOM should have disclosed absolute price data[369]. Rather, the European Union accepts that actual price data may be treated as confidential[370], but considers that ranges of price data could have been disclosed instead[371]. Third, we recall that the scope of the disclosure obligation set forth in the first sentence of Article 6.9 is determined in light of the objective, set forth in the second sentence, of ensuring that interested parties are able to properly defend their interests. In our view, by simply informing interested parties of the trends in subject import and domestic prices, MOFCOM provided little basis for interested parties to defend their interests. To properly and fully defend their interests, interested parties required disclosure of the entire body of facts essential to MOFCOM's analysis of the price effects of the dumped imports[372]. Finally, we note that a similar argument was rejected by the Appellate Body

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[367] MOFCOM's Preliminary Determination, Exhibit EU-12, pp. 15-16.

[368] Panel Report, *Korea – Certain Paper*, para. 7.328.

[369] European Union's response to Panel question 61, para. 15: "we do not submit that China was required under Article 6.9 [of the Anti-Dumping Agreement] to disclose absolute prices" (footnote omitted).

[370] European Union's first written submission, para. 107. In our view, the above finding of the *Korea – Certain Paper* panel was motivated by the fact that the absolute price data at issue had been designated as confidential. This would explain why the panel expressly noted that Indonesia had not challenged the investigating authority's decision to treat the relevant price data as confidential under Article 6.5 (Panel Report, *Korea – Certain Paper*, para. 7.327).

[371] Regarding the treatment of confidential information in the context of Article 6.9, we agree with the finding of the panel in *China – GOES* (para. 7.410) that "when information is both confidential but also part of the 'essential facts under consideration', the obligation to disclose the information is nevertheless binding". In doing so, we note that the panel's finding was upheld by the Appellate Body (Appellate Body Report, *China – GOES*, para. 247). Furthermore, although the price data underlying MOFCOM's price effects analysis might properly be treated as confidential, we doubt that the same is true of annual AUVs.

[372] To the extent that confidential information is at issue, we recall our agreement with the finding by the *China – GOES* panel (para. 7.410) that Article 6.9 requires the disclosure of non-confidential summaries of

in *China – GOES*. In that case, China argued that MOFCOM disclosed the essential facts regarding price depression by disclosing that average domestic prices had fallen by 30.25% over a given period. China also argued, with respect to price suppression, that MOFCOM disclosed that the price-cost differential dropped by 7% over one period, and by 75% over another period[373]. The Appellate Body found that such disclosure did not meet the requirements of Article 6.9. According to the Appellate Body, "the essential facts that MOFCOM should have disclosed … include the price comparisons between subject imports and the like domestic products"[374].

7.410 Turning next to the European Union's claim that MOFCOM should have disclosed the methodology applied by MOFCOM in its price effects analysis, we recall that the methodology applied by MOFCOM involved a comparison of the annual AUVs for the domestic product with the annual AUVs for the dumped imports. We have already found that MOFCOM should have disclosed those AUVs under Article 6.9. Had MOFCOM done so, it would have inevitably also disclosed that it would assess price effects on the basis of AUVs. In the particular circumstances of the price effects analysis undertaken by MOFCOM, therefore, the methodology employed by MOFCOM cannot meaningfully be distinguished from the AUVs on which the application of that methodology was based. In these circumstances, the issue of whether MOFCOM should also have disclosed its price effects methodology is moot, and need not be considered further by us.

Conclusion

7.411 For the above reasons, we uphold the European Union's claims that MOFCOM should have disclosed the AUVs and underlying price data that MOFCOM would use to analyse the price effects of the dumped imports. We do not rule on the European Union's claim that MOFCOM should also have disclosed its price effects methodology.

(b) Affiliated distributor adjustment to export price

7.412 The European Union claims that MOFCOM failed to disclose "the underlying facts and criteria on the basis of which the adjustments to the export price were made"[375, 376]. China asks the

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the essential, but confidential, facts. In doing so, we note that the panel's finding was upheld by the Appellate Body (Appellate Body Report, *China – GOES*, para. 247).

[373] Appellate Body Report, *China – GOES*, para. 246.

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

[375] European Union's first written submission, para. 111. The European Union indicated that this claim "focuses on the criteria followed by MOFCOM in deciding adjustments to export price" (European Union's oral statement at the second substantive meeting, para. 23). In its first written submission, the European Union also asserts that MOFCOM failed to disclose "the specific amounts of adjustment items, including specific data on the adjusted proportions of expenses incurred by the affiliated distributor". To the extent that the European Union's claim might also be understood to include MOFCOM's alleged failure to disclose the specific absolute amounts of adjustment made for given export transactions, that issue is addressed in the next sub-section of our report, concerning MOFCOM's disclosure in respect of the margin of dumping established for Smiths.

[376] In its first written submission, the European Union referred generally to MOFCOM's alleged failure to disclose "[t]he price adjustments that were made and the normal value and export price calculations" (European Union First Written Submission, para. 109). In its response to question 11, though, the European Union confirmed that its claim did not include adjustments made to normal value (European Union response to Panel question 11, para. 85). Furthermore, in its written submissions, the European Union only made detailed arguments regarding an adjustment that MOFCOM made to the export price to reflect expenses incurred by an affiliated distributor. In its oral statement at the second substantive meeting, the European Union confirmed that it was not asking the Panel to make findings regarding adjustments made by MOFCOM to normal value. Accordingly, we only make findings in respect of MOFCOM's alleged failure to disclose essential facts regarding the adjustment made by MOFCOM to the export price in respect of sales made to an affiliated distributor.

Panel to reject the European Union's claim. China contends that MOFCOM explained which adjustments were made, the amount thereof, and the reason for making them.

7.413 In its Dumping Disclosure to Smiths, MOFCOM indicated that as a result of information provided by Smiths, MOFCOM would make a downward adjustment to the export price in case of sales to affiliated distributors. While MOFCOM initially adjusted for direct and indirect sales expenses, and a rate of profit, MOFCOM explained that it ultimately determined to only adjust for the direct and indirect selling expenses reported by Smiths[377]. MOFCOM's Dumping Disclosure also contained a table that included "CIF Price" and "Export Price". The "Export Price" was [[*n*]]% lower than the "CIF Price", indicating the amount of adjustment made[378].

7.414 In our view, MOFCOM's Dumping Disclosure was sufficient to disclose to Smiths (i) that an adjustment was being made in respect of sales through its affiliated distributor, (ii) that the adjustment was made to reflect the direct and indirect selling expenses reported by Smiths, and (iii) that the amount of the adjustment was [[*n*]]%. In these circumstances, we see no factual basis for the European Union's claim that MOFCOM failed to disclose the underlying facts and criteria on the basis of which the adjustments to the export price were made.

Conclusion

7.415 For the above reasons, we reject the European Union's claim that MOFCOM failed to disclose the underlying facts and criteria on the basis of which the affiliated distributor adjustment to export price was made.

(c) Determination of the dumping margin for Smiths

7.416 The European Union submits that MOFCOM violated Article 6.9 because MOFCOM failed to disclose the calculations it relied on to determine Smiths' margin of dumping, as well as the data and adjustments underlying those calculations. China contends that MOFCOM properly explained how the margin of dumping was calculated. As to the actual calculations made by MOFCOM for the normal value and the export price, China submits that such calculations do not constitute "essential facts" within the meaning of Article 6.9. Regarding the data on transactions and adjustments, China submits that even assuming that they are "essential facts", there is no specific form in which to disclose them. China explains that MOFCOM precisely identified the elements of the calculations, namely the data that were used for the determination of the normal value and the export price, which adjustments were made and the level of such adjustments, in such a way that, even in the absence of calculation sheets, it was easy for Smiths to make the calculation itself. According to China, it has fully complied with the Article 6.9 requirement[379].

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[377] Final Dumping Disclosure to Smiths, Exhibit EU-17, p. 12.

[378] Final Dumping Disclosure to Smiths, Exhibit EU-17, p. 13. Although the table did not specifically state that the difference between the Export Price and CIF Price corresponded to the affiliated distributor adjustment, no other export price adjustment was discussed in the sub-section entitled "Adjustment Items".

[379] China also argues (second written submission, para. 113 and opening statement at the second meeting, para. 17) that the European Union has extended the scope of its claim. According to China, the European Union's claim related only to (i) an alleged lack of disclosure of the dumping margin calculation and (ii) an alleged lack of disclosure of the actual calculations performed by MOFCOM to calculate normal value and export price. China's understanding was based on the European Union's response to Panel question 11, in which the European Union indicated that it would not make arguments with respect to an alleged lack of disclosure concerning "the determination of normal value". In China's view, this clarified that the European Union's claim did not concern an insufficient disclosure of the data used to calculate the normal value and the adjustments made thereto. The Panel notes, though, that at para. 117 of its first written submission, the European Union referred expressly to "the data underlying the authority's calculations" in the context of its

7.417 Without defining the entire scope of essential facts that should be disclosed in a given investigation, we consider that the transaction-specific price and adjustment data that are developed and used by the investigating authority for the purpose of establishing a margin of dumping constitute "essential facts" within the meaning of Article 6.9. Such data are salient to the establishment of the margin of dumping. Furthermore, the margin established cannot be understood without such data. In the present case, MOFCOM provided Smiths with a table setting out the quantity of sales, normal value, export price, CIF price and margin of dumping established for 10 models of scanner[380]. The table also provides the weighted average margin of dumping determined on the basis of such model/model data. In our view, the model/model overview contained in this table provides little, if any, basis for Smiths to defend its interests. To properly defend its interests, Smiths would have needed to fully understand the factual basis from which MOFCOM's model/model findings were derived. To do so, Smiths would have needed access to the transaction-specific price and adjustment data on which MOFCOM's model-specific findings of normal value and export price were based.

7.418 We note China's reliance on the report of the panel in *Argentina – Poultry Anti-Dumping Duties* to argue that only "the specific amounts determined as normal value and export price" constitute "essential facts"[381]. In our view, the *Argentina – Poultry Anti-Dumping Duties* panel was not addressing the specific issue of whether or not the data underlying the determinations of normal value and export price constituted "essential facts". That panel was rather considering whether or not a failure by the investigating authority to inform interested parties that certain normal value and export data reported by exporters was *not* going to be used in the final determination constituted a violation of Article 6.9. Accordingly, the *Argentina – Poultry Anti-Dumping Duties* panel report provides no guidance for resolving the specific issue presently before the Panel. We have considered whether the *Argentina – Poultry Anti-Dumping Duties* panel's finding that "the normal value and export price data" are essential facts relates only to the specific amounts determined as normal value and export price, to the exclusion of the underlying data. We have concluded that it does not. We note in this regard the panel's finding:

> While we accept that the normal value and export price data <u>ultimately used in the final determination</u> are essential facts which form the basis for the decision whether to apply definitive measures, the fact that certain normal value and export price data is not going to be used is not.[382]

7.419 In this excerpt, a distinction is drawn between "normal value and export price data" used in the final determination, and "normal value and export price data" that is not going to be used in the final determination. If the phrase "normal value and export price data" related to the specific amounts determined as normal value and export price, there would be no sense in drawing that distinction.

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claim concerning MOFCOM's disclosure of essential facts regarding Smiths' margin of dumping. In addition, question 11 was posed in respect of an argument made by China at para. 164 of its first written submission, which concerned a distinct part of the European Union's Article 6.9 claim (concerning MOFCOM's disclosure of the determination of normal value and export price). In any event, we do not understand that the European Union's reply to question 11 in any way reduced the scope of its claim in respect of the disclosure of essential facts regarding Smiths' margin of dumping, particularly since the European Union specifically stated that its reply to question 11 is "without prejudice" to its claim regarding "the calculation of the individual margin of dumping for the cooperating producer". Given the abovementioned para. 117 of its first written submission, we do not consider that the term "calculation" should be understood to refer only to MOFCOM's calculations, to the exclusion of the underlying data. Accordingly, we do not consider that the European Union's reply to question 11 should be understood to mean that the European Union has abandoned its Article 6.9 claim in respect of MOFCOM's failure to disclose the data underlying MOFCOM's determination of Smiths' margin of dumping.

[380] Final Dumping Disclosure to Smiths, Exhibit EU-17, p. 13.

[381] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.224.

[382] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.224 (emphasis original).

This is because the specific amounts determined as normal value and export price are necessarily used in the final determination: absent such specific amounts, no margin of dumping can be established. Accordingly, the phrase "normal value and export price data" must mean something other than the specific amounts determined as normal value and export price. In our view, the phrase can only be referring to a broader range of data that could be of potential use in the determination of those specific amounts. According to the *Argentina – Poultry Anti-Dumping Duties* panel, such data constitute "essential facts" when they are actually used to determine normal value and export price. This is consistent with our view that the data underlying the determinations of normal value and export price constitute "essential facts".

7.420 While we accept the European Union's assertion that MOFCOM should have disclosed the transaction-specific price and adjustment data on which its determination of the margin of dumping was based, we are not persuaded that MOFCOM was required by Article 6.9 to also disclose the actual calculation of Smiths' margin of dumping. Although disclosure of an excel sheet incorporating all of the relevant essential facts and calculations would undoubtedly be of value to interested parties, we do not consider that the actual mathematical determination by which an investigating authority calculates a respondent's margin of dumping constitutes a "fact … under consideration". The "facts … under consideration" are rather the factual elements that form the basis for that mathematical determination. The mathematical determination is part of the "consideration" of those facts.[383]

Conclusion

7.421 For the above reasons, we uphold the European Union's claim that MOFCOM violated Article 6.9 by failing to disclose the price and adjustment data underlying its determination of Smiths' margin of dumping. However, we reject the European Union's claim that MOFCOM violated Article 6.9 by failing to disclose its calculations of Smiths' margin of dumping.

(d) Determination of the residual anti-dumping duty

7.422 The European Union claims that MOFCOM acted inconsistently with Article 6.9 because MOFCOM did not provide interested parties with information about the essential facts under consideration for the calculation of the residual duty. In particular, the European Union contends that MOFCOM failed to disclose "the facts forming the basis for its decision to apply the facts available", and "the facts that led it to conclude that 71.8% is an appropriate residual rate"[384]. China asks us to reject the European Union's claim.

7.423 Concerning the first part of the European Union's claim, we note that MOFCOM stated in its Final Dumping Disclosure to the European Commission that:

> For other EU companies who failed to make any response or submit any answer sheet, subject to Article 21 of the "Anti-Dumping Regulations", the investigating authority decided to adopt the facts and the best available information to make the determination of dumping and dumping margin.[385]

7.424 In our view, this statement properly discloses that MOFCOM's decision to apply facts available was based on the failure of other European Union companies to respond to MOFCOM's questionnaire. We therefore reject the European Union's claim that MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available.

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[383] Furthermore, there is no certainty that the calculations would have been performed by the time essential facts are disclosed pursuant to Article 6.9.

[384] European Union's first written submission, para. 124.

[385] MOFCOM's Final Dumping Disclosure to the European Commission, Exhibit EU-18.

7.425 Regarding MOFCOM's disclosure of the essential facts that formed the basis for the imposition of a residual rate of 71.8%, we note that MOFCOM disclosed that the residual rate would be based on facts available originating from "the sales data of products of relevant models reported by the respondent Company"[386]. We do not consider that this statement reveals the totality of the "essential facts" that should have been disclosed under Article 6.9. Such limited disclosure does not reveal all salient facts, since it is not sufficiently detailed to allow interested parties to understand the factual basis for the imposition of a residual duty rate of 71.8%[387]. We have already identified some of the "essential facts" that should have been disclosed in respect of MOFCOM's determination of Smiths' margin of dumping. In our view, similar "essential facts" should also have been disclosed (albeit in a non-confidential form) in respect of MOFCOM's determination of the all others rate[388].

Conclusion

7.426 To conclude, we reject the European Union's claim that MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available. However, we uphold the European Union's claim that MOFCOM failed to disclose the essential facts that formed the basis for MOFCOM's determination that the residual duty should be 71.8%.

(e) Additional claims under Articles 6.2 and 6.4

7.427 The European Union claims that the abovementioned violations by MOFCOM of Article 6.9 also caused MOFCOM to violate Articles 6.2 and 6.4 of the Anti-Dumping Agreement[389].

7.428 As presented by the European Union, its claims under Articles 6.2 and 6.4 are entirely dependent on its claims under Article 6.9. We have upheld many of the European Union's Article 6.9 claims. When China brings its measure into conformity with Article 6.9, the logic underlying the European Union's presentation of dependent claims under Articles 6.2 and 6.4 suggests that China would at the same time bring its measure into conformity with those additional provisions, if the European Union's additional claims were upheld. The logic underlying the European Union's presentation of dependent claims would not require China to take any additional action to bring its measure into conformity with Articles 6.2 or 6.4, if the European Union's additional claims under those provisions were upheld. The Appellate Body found in *Canada – Wheat Exports and Grain Imports* that the practice of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"[390]. Even if we were to accept the European Union's claims that, in violating Article 6.9, MOFCOM also acted contrary to Articles 6.2 and 6.4, we consider that our findings under Article 6.9 are such as to allow the DSB to make sufficiently precise recommendations and rulings in order to ensure the effective resolution of this

[386] Preliminary Dumping Disclosure to the European Commission, Exhibit CHN-3.

[387] China asserts that the European Union is seeking disclosure of the "reason" why the 71.8% residual rate was appropriate. China contends that this "reason" is not an essential *fact* falling within the scope of Article 6.9. We do not agree. We understand the European Union's claim to concern the factual basis for the 71.8% residual rate. Although that factual basis may reveal whether or not the 71.8% rate was appropriate, that alone does not convert the factual basis into a "reason".

[388] To the extent that confidential information is at issue, we recall our agreement with the finding by the *China – GOES* panel (para. 7.410) that Article 6.9 requires the disclosure of non-confidential summaries of the essential, but confidential, facts. In doing so, we note that the panel's finding was upheld by the Appellate Body in *China – GOES* at para. 247.

[389] The European Union's claim in respect of Article 6.2 is based on both the abovementioned violations of Article 6.9, and the alleged consequential violation of 6.4 (European Union first written submission, para. 101: "the obligation set out in Article 6.2 is so broad that a finding of violation of Articles 6.9 and 6.4 necessarily entails a violation of Article 6.2").

[390] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

dispute[391]. Accordingly, there is no need for us to address those additional claims presented by the European Union.

Conclusion

7.429 We exercise judicial economy in respect of the European Union's additional claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement.

I. PUBLIC NOTICE: ARTICLE 12.2.2

1. Introduction

7.430 The European Union submits that China violated Article 12.2.2 of the Anti-Dumping Agreement because of alleged shortcomings in the content of MOFCOM's public notice of affirmative determination providing for the imposition of definitive anti-dumping duties[392]. China asks the Panel to reject the European Union's claim.

2. Relevant provisions

7.431 In relevant part, Article 12.2.2 of the Anti-Dumping Agreement provides:

> A public notice of conclusion … of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty … shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures …, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.432 Article 12.2.1, which is referred to in the above extract from Article 12.2.2, provides:

> A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
>
> (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
>
> (ii) a description of the product which is sufficient for customs purposes;
>
> (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment

[391] See also Appellate Body Reports, *Brazil – Retreaded Tyres,* para. 257 and *Australia – Salmon,* para. 223.

[392] MOFCOM's public notice is set forth in the published version of its Final Determination, Exhibit EU-2.

and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

7.433 Furthermore, the chapeau of Article 12.2 provides that each public notice "of any preliminary or final determination … shall set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".

3. Main arguments of the parties

(a) European Union

7.434 There are two elements to the European Union's claims under Article 12.2.2. First, the European Union claims that MOFCOM failed to include in its public notice (or any separate report[393]) certain relevant information on the matters of fact and law which led to the imposition of final measures, contrary to the first sentence of Article 12.2.2. Second, the European Union claims that MOFCOM failed to include in its public notice the reasons for rejecting relevant arguments or claims made by Smiths during the course of the investigation, contrary to the second sentence of Article 12.2.2.

(i) Relevant information on matters of fact and law which have led to the imposition of final measures: Article 12.2.2, first sentence

7.435 In support of its claims regarding MOFCOM's alleged failure to include in its public notice relevant information on matters of fact and law which have led to the imposition of final measures, the European Union relies on the finding by the panel in *EU – Footwear (China)* that Article 12.2.2 requires the investigating authority to "provid[e] sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood"[394]. The European Union submits that MOFCOM failed to include "relevant information" in its public notice (or any separate report) regarding the price effects of dumped imports, and the calculation of Smiths' dumping margin and the residual rate.

MOFCOM's price effects analysis

7.436 The European Union submits that MOFCOM's conclusion that the imports under investigation caused significant price undercutting and price depression/suppression is an essential component of its affirmative injury determination, which in turn is a prerequisite for China's imposition of definitive measures. The European Union asserts that MOFCOM failed to explain the methodology used to calculate those price effects.

[393] MOFCOM did not provide any separate report to interested parties. Accordingly, we need only consider the contents of MOFCOM's Final Disclosure. We therefore exclude any further reference to "separate report" when considering the parties' arguments concerning Article 12.2.2, and the requirements of that provision.

[394] China refers in this regard to Panel Report, *EU – Footwear (China)*, para 7.844.

The calculations and underlying data for Smiths' margin of dumping, and for the residual anti-dumping duty

7.437 The European Union claims that China acted inconsistently with Article 12.2.2 ADA by failing to include in the public notice the calculations and underlying data it used to determine (i) the margin of dumping for Smiths, and (ii) the residual duty. The European Union submits that the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. The European Union contends that the calculations themselves are "relevant" to the decision to apply definitive measures because they constitute the mathematical basis for arriving at the dumping margins imposed by an investigating authority, and because they led to the imposition of definitive measures, in the sense that definitive measures can only be applied when the calculations result in an affirmative margin of dumping.

(ii) Reasons for the rejection of relevant arguments made by Smiths: Article 12.2.2, second sentence

7.438 The European Union submits that Smiths made "relevant" arguments regarding the treatment of domestic sales to affiliated distributors, the credibility of certain injury data and other injury issues, and the existence of any causal link between dumped imports and injury to the domestic industry. The European Union submits that these arguments are "relevant" because they concern the mandatory elements of a final public notice referred to in Article 12.2.1(iii)-(v) of the Anti-Dumping Agreement. The European Union claims that MOFCOM rejected these arguments without providing any reasons in the public notice for doing so.

The treatment of domestic sales to affiliated distributors

7.439 The European Union claims that MOFCOM failed to include in its public notice the reasons for rejecting "relevant" arguments made by Smiths regarding the issue of whether or not certain domestic sales to affiliated companies were made in the ordinary course of trade (within the meaning of Article 2.1 of the Anti-Dumping Agreement). The European Union contends that Smiths addressed this issue in a series of comments on MOFCOM's Dumping Disclosure[395]. The European Union submits that MOFCOM's Final Determination simply acknowledges Smiths' arguments and evidence, and then rejects them without providing reasons for doing so[396].

The credibility of certain injury data, and other injury issues

7.440 The European Union submits that MOFCOM failed to include in its public notice the reasons for rejecting arguments made by Smiths regarding the credibility of certain data relied on by MOFCOM for its injury analysis[397]. The European Union contends that MOFCOM failed to explain in its public notice why it rejected these arguments.

[395] The European Union refers in this regard to Smiths' Comments on the Dumping Disclosure, Exhibit EU-19, pp. 2-4, and the corresponding text in the public version of the Comments, Exhibit EU-19, pp. 2-3.

[396] The European Union refers in this regard to MOFCOM's Final Determination, Exhibit EU-2, p. 17.

[397] The European Union refers in this regard to Smiths' Comments on the Injury Disclosure, Exhibit EU-16, pp. 9-10.

The determination of causal link

7.441 The European Union submits that Smiths included a number of arguments in its Injury Brief to the effect that dumped imports had not caused injury to the domestic industry. The European Union contends that Smiths asserted in its Injury Brief that:

> [A]ny injury to the domestic industry could not be attributed to the alleged dumped imports but to the lower range of models provided by the domestic industry in the high-end market of low-energy scanners (i.e. aviation) and the fact that the biggest costumer of that market (the Chinese government) preferred to purchase European Union and US scanners to protect public safety.[398]

7.442 The European Union also contends that Smiths addressed four relevant factors which were the cause of any alleged material injury: the global economic crisis, Nuctech's aggressive business expansion, Nuctech's aggressive pricing policy, and pressure from fair competition. The European Union further submits that Smiths repeated these arguments in its comments on MOFCOM's Injury Disclosure[399]. The European Union contends that MOFCOM failed to explain in its public notice why MOFCOM rejected these arguments made by Smiths.

(b) China

7.443 China asks the Panel to reject the various Article 12.2.2 claims raised by the European Union.

(i) Relevant information on matters of fact and law which have led to the imposition of final measures: Article 12.2.2, first sentence

MOFCOM's price effects analysis

7.444 China notes that Article 12.2.2 of the Anti-Dumping Agreement requires the inclusion in a public notice or separate report of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". China submits that the methodology used by MOFCOM to analyse the price effects of subject imports is not a "matter of fact".

7.445 China further submits that, even if the methodology were a "matter of fact", the methodology is not "relevant" within the meaning of Article 12.2.2 of the Anti-Dumping Agreement, since the explanation of such methodology is not necessary to discern and understand the reasons for concluding that anti-dumping measures must be imposed[400].

7.446 China also submits that the requirement to give public notice of "all relevant information on matters of fact and law" must be read in the light of the more particular obligations laid down in Article 12.2.1, which are incorporated by reference into Article 12.2.2. China notes that Article 12.2.1 (iv) requires, with respect to the determination of injury, that the public notice or separate report shall contain "the considerations relevant to the injury determinations as set out in Article 3". According to China, the obligation to provide an explanation under Article 12.2.1(iv) therefore relates only to the requirements specified in Article 3. China acknowledges that the analysis of the effects of the import prices on domestic prices pursuant to Article 3.2 is an element which must be taken into account in the injury determination, but notes that there is, however, no obligation to use a calculation methodology to consider what have been the effects of the import prices on domestic

[398] Smiths' Injury Brief, Exhibit EU-11, p. 15.

[399] The European Union refers in this regard to Smiths' Comments on the Injury Disclosure, Exhibit EU-16, p. 6.

[400] China refers in this regard to Panel Report, *EU – Footwear (China)*, para. 7.844.

prices. According to China, therefore, there is no basis for an obligation to disclose or explain any such calculation methodology.

7.447 Furthermore, China submits that MOFCOM in any event disclosed all relevant information on matters of fact and law concerning the calculation of price undercutting or price suppression.

The calculations and underlying data for Smiths' margin of dumping, and for the residual anti-dumping duty

7.448 China asks the Panel to reject the European Union's claim that China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by failing to include in the public notice the calculations and underlying data for Smiths' margin of dumping and the all others rate.

7.449 China contends that the panel in *EU – Footwear (China)* confirmed that confidential information cannot be included in the public notice under Article 12.2.2 of the Anti-Dumping Agreement[401]. China contends that the calculations and underlying data of the dumping margin determinations necessarily contain confidential information, and therefore fall outside the scope of Article 12.2.2 of the Anti-Dumping Agreement.

7.450 Furthermore, China denies that calculations employed by an investigating authority to determine dumping margins, the data underlying these calculations, or the methodology for the calculation of the residual duty, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2 of the Anti-Dumping Agreement. China asserts that the panel in *EU – Footwear (China)* rejected a very similar claim made with respect to the dumping margin calculation[402].

(ii) Reasons for the rejection of relevant arguments made by Smiths: Article 12.2.2, second sentence

7.451 China submits that there is nothing in the text of Article 12.2.2 to support the European Union's assertion that arguments concerning the mandatory factors set forth in Article 12.2.1 are necessarily "relevant" for the purpose of Article 12.2.2. According to China, the text of Article 12.2, which generally requires the publication of findings and conclusions on all issues of facts and law considered material by the investigating authorities, and which constitutes relevant context for the interpretation of Article 12.2.2[403], rather supports the view that the term "relevant" as used in Article 12.2.2, last sentence, means material for the investigating authorities, and thus necessarily involves a degree of subjectivity and discretion on the part of the investigating authorities.

The treatment of domestic sales to affiliated distributors

7.452 China asks the Panel to reject the European Union's claim that MOFCOM failed to provide reasons for the rejection of Smiths' argument that domestic sales to affiliated distributors were made in the ordinary course of trade. According to China, the Final Determination[404] explains clearly that MOFCOM rejected Smiths' claim about its relationship with its affiliated distributor for two reasons: (i) first because MOFCOM's verification established that "the pricing and sale processes, [and] the sales prices of Smith Heimann through affiliated distributors in the European Union During the POI were clearly affected by the affiliation relationship"; and (ii) second because "Smiths Heimann did not have sufficient evidence to prove that the price differences were merely sales

[401] China refers in this regard to Panel Report, *EU – Footwear (China)*, para. 7.870.
[402] China refers in this regard to Panel Report, *EU – Footwear (China)*, para. 7.894.
[403] China refers in this regard to Panel Report, *EU – Footwear (China)*, para. 7.844.
[404] China refers in this regard to Final Determination, Exhibit EU-2, p. 17.

expenses which it saved". China asserts that, for these reasons, MOFCOM concluded that "the affiliated sales price cannot represent fair market price and such transactions were not in the normal course of trade"[405].

The credibility of certain injury data, and other injury issues

7.453 China submits that Smiths' arguments regarding the credibility of the data submitted by Nuctech cannot be regarded as "relevant" within the meaning of Article 12.2.2, since they did not need to be resolved in order for MOFCOM to reach its final determination. China asserts that these arguments were in any event fully addressed by MOFCOM in its Final Determination[406].

The causal link

7.454 China asks the Panel to reject the European Union's claim that MOFCOM failed to provide reasons for rejecting relevant arguments concerning the causal link. China asserts that the European Union fails to substantiate its claim properly, since the European Union does not precisely identify the arguments regarding the existence of the causal link that were allegedly raised by Smiths during the investigation. *A fortiori*, China contends that the European Union failed to demonstrate why the arguments allegedly raised by Smiths would be "relevant".

4. Evaluation by the Panel

7.455 The European Union makes two types of claim under Article 12.2.2. First, in respect of the first sentence of Article 12.2.2, the European Union claims that MOFCOM failed to include in its public notice certain relevant information on the matters of fact and law which led to the imposition of final measures. Second, in respect of the second sentence of Article 12.2.2, the European Union claims that MOFCOM failed to include in its public notice the reasons for rejecting relevant arguments made by Smiths during the course of the investigation. China asks the Panel to reject the European Union's claims. We begin by evaluating the European Union's claims relating to the first sentence of Article 12.2.2.

(a) MOFCOM's alleged failure to include in its public notice relevant information on the matters of fact and law which led to the imposition of final measures: Article 12.2.2, first sentence

7.456 The European Union's claims in respect of the first sentence of Article 12.2.2 concern MOFCOM's alleged failure to include in its public notice relevant information regarding the price effects analysis, the margin of dumping established for Smiths, and the residual anti-dumping duty for all other European Union exporters/producers.

(i) MOFCOM's price effects analysis

7.457 In its first written submission, the European Union refers, in very general terms, to MOFCOM's alleged failure to publish "the relevant information on facts and law and reasons" which have led it to the conclusion that the imports under investigation caused significant price effects[407]. China asks the Panel to reject the European Union's claim, arguing that the European Union has failed

[405] China refers in this regard to Final Determination, Exhibit EU-2, p. 17.
[406] China refers in this regard to Final Determination, Exhibit EU-2, p. 28.
[407] European Union's first written submission, para. 149. In describing the European Union's claim in this way, we assume that the reference to "this conclusion" in the second sentence of that paragraph concerns the "conclusion that the imports under investigation caused significant price effects" alluded to in the first sentence thereof.

to point out precisely which "relevant information" had been omitted from the public notice[408]. In response to China's argument, the European Union states that the "relevant information" should be understood in light of the reference, in the previous paragraph of its first written submission (which refers to an alleged violation of Article 6.9 of the Anti-Dumping Agreement), to MOFCOM's alleged failure to include its price effects methodology in the public notice. The European Union states explicitly that "this information - the methodology - is relevant information on matters of fact and law and reasons which have led to the imposition of final measures"[409]. From this response, we understand that the "relevant information" targeted by the European Union's claim concerns the explanation of MOFCOM's price effects methodology[410]. Accordingly, we shall consider whether or not the obligation on MOFCOM to include in its public notice all "relevant information" on matters of fact or law and reasons that led to the imposition of final measures required MOFCOM to include an explanation of its price effects methodology in its public notice.

7.458 In interpreting the scope of the obligation set forth in the first sentence of Article 12.2.2, we note that the text of Article 12.2.2 refers to Article 12.2.1. Accordingly, the information described in Article 12.2.1 must be included in public notices issued pursuant to Article 12.2.2. We consider that it is also appropriate to have regard to the contextual guidance afforded by Article 12.2, which applies to public notices of both preliminary and final determinations. Article 12.2 provides that such public notices shall set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In considering the contextual guidance afforded by Article 12.2, we have regard to the followings findings made by the panels in *EU – Footwear (China)* and *EC – Tube or Pipe Fittings*:

> The chapeau of Article 12.2.2, Article 12.2, requires the publication of "findings and conclusions on all issues of fact and law considered material *by the investigating authorities*" (emphasis added). In our view, this is relevant context for a proper understanding of Article 12.2.2, and thus informs our understanding of what must be included in a public notice under that provision. China suggests that whether information and reasons for the acceptance or rejection of arguments must be provided in such a notice should be judged from the perspective of the interested parties. We do not agree. We consider that while an investigating authority must make innumerable decisions during the course of an anti-dumping investigation, with respect to procedural matters, investigating methods, factual considerations, and legal analysis, which may be of importance to individual interested parties, not all of these are "material" within the meaning of Article 12.2.2. In our view, what is "material" in this respect refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping duty. We note in this regard the views of the panel in *EC – Tube or Pipe Fittings*:

[408] China's first written submission, para. 231.

[409] European Union's response to Panel question 17, para. 108.

[410] In its second written submission, the European Union referred not only to the fact that MOFCOM's public notice allegedly did not "include the investigating authority's explanation of the methodology used in order to calculate the alleged price undercutting or price depression", but also to the alleged omission of "any information on the underlying facts" (European Union's second written submission, para. 109). While we are prepared to accept the European Union's initial assertion that its claim concerns the price effects methodology applied by MOFCOM, considerations of due process prevent us from accepting the inclusion of an additional element (relating to "information on the underlying facts") into the scope of the European Union's claim relatively late in the proceedings. Thus, to the extent that the phrase "information on the underlying facts" extends the scope of the European Union's claim beyond the explanation and description of MOFCOM's price effects methodology, we decline to make findings in respect thereof.

> Article 12.2 provides that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material" by the investigating authority. The ordinary meaning of the term of "material" is "important, essential, relevant".
>
> We understand a "material" issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. … contextual considerations also support this interpretation since, the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions.

We cannot conclude that every single decision of an investigating authority in the course of an investigation can be considered as having "led to" the imposition of the final measures, such that it must be described, together with the "information" relevant to the decision, in the published notice of the final determination. Not every question or issue which arises during an investigation, and which is resolved by the investigating authority, is necessarily considered material by the investigating authorities, and may be said to have "led to" the imposition of the anti-dumping duty, even though it may be of interest or significant to one or more interested parties. In our view, the notions of "material" and "relevant" in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process. Other provisions of the Dumping Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.[411]

7.459 We are in broad agreement with these findings. Consistent therewith, we consider that the first sentence of Article 12.2.2 requires an investigating authority to include in its public notice a description of its findings and conclusions on the issues of fact and law that it considered material[412] to its decision to impose final measures. That description must include "sufficient detail". While the sufficiency of the detail of the description may depend on the precise nature of the findings made by the investigating authority, it should in any event be sufficient to ensure that the investigating

[411] Panel Report, *EU – Footwear (China)*, para. 7.844, footnotes omitted.

[412] We note the finding by the Appellate Body in *China – GOES* (para. 265) that "the facts that an investigating authority may consider material to its determinations are circumscribed by the framework of the substantive provisions of the Anti-Dumping Agreement".

authority's reasons for concluding as it did can be discerned and understood by the public[413]. The ability of the public to understand the findings and conclusions of the investigating authority is important, for the concept of "public" is broad: it includes "interested parties" within the meaning of Article 6.11 of the Anti-Dumping Agreement and, for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures. Article 13 of the Anti-Dumping Agreement provides for judicial review of the final determinations referred to in Article 12.2.2. In our view, the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the abovementioned entities to assess the conformity of those findings and conclusions with domestic law, and avail themselves of the Article 13 judicial review mechanism where they consider it necessary. In a similar vein, we also consider that the level of detail should be sufficient to allow the relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures where it considers it necessary[414]. Our approach is consistent with the following findings recently made by the Appellate Body in *China – GOES*:

> Article[] 12.2.2 […] capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Article[] 12.2.2 … is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Article[] 12.2.2 … seek[s] to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* …[415]

7.460 Turning to the arguments of the European Union, we agree with the European Union that MOFCOM's findings that the dumped imports had the effect of price undercutting and price suppression are material to its decision to impose final measures. Accordingly, MOFCOM was required to include a description of the "relevant information" regarding those findings in its public notice, to ensure that the reasons for its findings could be discerned and understood[416]. MOFCOM's public notice contained the following description of its price effects findings:

> Evidence showed that during the POI the import price of the Subject Product sustained growth, although in small amounts, while the price of domestic Like Products declined by a large margin with a 72.68% decrease in 2008 compared to 2006. The import price of the Subject Product was largely below the price of domestic Like Products in 2006 and 2007, which seriously undercut the price of domestic Like Products, resulting in sales prices lower than per unit production costs of domestic Like Products and serious losses of pre-tax profits during that time period. Although the import price of the Subject Product was slightly higher than the price of domestic Like Products in 2008, it remained at a low level, while the sales

[413] Our interpretation is consistent with the finding by the Appellate Body in *China – GOES* (para. 256) that "[t]he inclusion of ["all relevant information"] should therefore give a reasoned account of the factual support for an authority's decision to impose final measures".

[414] Like the panel in *EU – Footwear (China)*, though, we consider that Article 12.2.2 does not replicate the transparency obligations set forth in Articles 6.1.2, 6.2, 6.4 and 6.9. Thus, there is not necessarily any need to include all of the Article 6.9 "essential facts" in the public notice.

[415] Appellate Body Report, *China – GOES*, para. 258.

[416] We recall that the Article 12.2.2 public notice must contain the information described in Article 12.2.1. We note in particular that Article 12.2.1(iv) refers to "considerations relevant to the injury determination as set out in Article 3". Such considerations must therefore be included in the Article 12.2.2 public notice.

> price of domestic Like Products decreased by 46.75% from 2008 to 2007, almost down to the unit sales cost, leaving unit gross profit rate at a low level. Other evidence showed that the unit production cost of domestic Like Products decreased by 53.67% from 2006 to 2008 while the sales price of domestic Like Products decreased by 72.68% over the same period, i.e. the rate of the decline of sales price was higher than the rate of production cost reduction by 19.01 percentage points, indicating that the sales price of domestic Like Products failed to remain at a reasonable level as a result of being depressed by the import price of the Subject Product. Accordingly, the import price of the Subject Product clearly had an undercutting and depressing effect on the prices of domestic Like Products.[417]

7.461 In our view, MOFCOM's description of its price effects findings does not meet the requirements of Article 12.2.2, since it provides no insight into how those findings were reached. In particular, there is no explanation of how MOFCOM assessed the relationship between domestic and subject import prices, and between domestic price and cost[418]. In our view, MOFCOM's public notice should have described MOFCOM's use of AUVs, and explained the factual basis for those AUVs and why the use of AUVs was appropriate. We consider that these elements are relevant for understanding how MOFCOM arrived at its price effects findings, and for assessing the conformity of those findings with the relevant provisions of domestic law and the WTO Agreement.

(ii) The calculations and underlying data for Smiths' margin of dumping, and for the residual anti-dumping duty

7.462 The European Union claims that China acted inconsistently with Article 12.2.2 ADA by failing to make available the calculations and underlying data it used to determine (i) the margin of dumping for Smiths, and (ii) the residual duty for all other European exporters/producers[419]. According to the European Union, such data and calculations constitute "relevant information" on the matters of fact and law and reasons which led to the imposition of definitive measures[420].

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[417] Final Determination, Exhibit EU-2, pp. 23-24.

[418] We note that in *China – GOES*, the Appellate Body found that MOFCOM should have included in its public notice "those facts underlying the existence of price undercutting that would have allowed for an understanding of this element of MOFCOM's finding of significant price depression and suppression" (Appellate Body report, *China – GOES*, para. 262). We further note the Appellate Body's finding that "[w]hen confidential information is part of the relevant information on the matters of fact within the meaning of Article[] 12.2.2. […], the disclosure obligation under [this] provision[] should be met by disclosing non-confidential summaries of that information" (para. 259).

[419] European Union's first written submission, para. 162.

[420] The Panel considered carefully whether or not this claim falls within its terms of reference, as set forth in the European Union's request for establishment of a panel (WT/DS425/2). Concerning Article 12.2.2, the European Union's request for the establishment of a panel claims that China acted inconsistently with its WTO obligations:

> [B]ecause neither in its public notice of the imposition of definitive measures, nor in a separate report, China set forth sufficiently detailed explanations for the definitive determinations on dumping and injury, together with references to the matters of fact and law which led to arguments being accepted or rejected. Specifically, China failed to provide: a) a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and normal value (Article 12.2.1(iii) of the *Anti-Dumping Agreement*); b) all the considerations relevant to the injury determination as set out in Article 3 of the *Antidumping Agreement* (Article 12.2.1(iv) of the *Anti-Dumping Agreement*); and c) the main reasons leading to the determination (Article 12.2.1(v) of the *Anti-Dumping Agreement).*

In light of comments made by both parties (see European Union's response to Panel question 63, and China's comments thereon), we consider that although the term "specifically" in the second sentence above suggests that the European Union's claims are concerned with the issues enumerated as a), b) and c) in that second sentence,

7.463 We agree with the European Union that the margin of dumping established for Smiths constitutes a matter of fact and/or reason that led to the imposition of definitive measures. Accordingly, MOFCOM was required to describe all "relevant information" pertaining to its establishment of that margin. Concerning the issue of whether or not MOFCOM should have included the calculations for Smiths' margin of dumping as "relevant information", we agree with the panel in *China – GOES* that the interpretation of Article 12.2.2 in the context of determinations of margins of dumping should be guided by Article 12.2.1(iii), which provides that public notices must include:

> [T]he margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2.

7.464 In particular, we agree with the following finding by the *China – GOES* panel that calculations need not be included in the Article 12.2.2 public notice:

> Although the requirement to give public notice of "all relevant information on matters of fact and law" may appear wide enough to encompass the data and calculations used to determine the dumping margins, this requirement must be read in the light of the more particular obligation spelt out in Article 12.2.1(iii), which is incorporated by reference into Article 12.2.2. In the Panel's view, it is significant that the text in Article 12.2.1(iii) sets out in detail the information regarding dumping margins that must be included in a public notice or separate report, but omits any reference to the calculations or data. While Article 12.2.2 provides that its disclosure obligations apply "in particular" to the factors in Article 12.2.1(iii) and to the reasons for acceptance or rejection of relevant arguments or claims, we acknowledge that this is not an exhaustive description of the "relevant information" that may be included in a public notice or separate report under Article 12.2.2. Nevertheless, some relevance must be attributed to the fact that the drafters of Article 12.2 specified with some particularity a list of the information required in the public notice or separate report and chose not to list the data and calculations used to arrive at a dumping margin, even though, on the United States' argument, this is "relevant information" that should be included in every public notice or separate report issued at the conclusion of an anti-dumping investigation. Therefore, on the text of Article 12.2.2, which by cross-reference includes the text of Article 12.2.1, it is difficult to conclude that there is an obligation to disclose the calculations and data underlying a dumping margin.[421]

7.465 Regarding the issue of whether or not MOFCOM should have included the data underlying its determination of Smiths' margin of dumping in the public notice, we recall that we have upheld the European Union's Article 6.9 claim regarding non-disclosure of that data. In our view, though, Article 12.2.2 does not require that all "essential facts" underlying the margin of dumping should be included in the public notice[422, 423]. The scope of Article 12.2.2 is more nuanced, and would not

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the earlier reference to MOFCOM's failure to include "sufficiently detailed explanations for the definitive determinations on dumping" in its public notice is sufficient to include its claim regarding the calculations and underlying data for Smiths' margin of dumping within our terms of reference.

[421] Panel Report, *China – GOES*, paras 7.333.

[422] Although Article 12.2.2 serves in part to allow interested parties to pursue judicial review of final determinations, there must be limits to the amount of information that need be included in a public notice. In our view, the contextual guidance afforded by Article 12.2.1 provides insight as to where such limits lie.

[423] The scope of the European Union's Article 12.2.2 claim appears to be the same as the scope of its Article 6.9 claim. At para. 157 of its first written submission, the European Union avers that, with respect to the lack of disclosure of MOFCOM's calculations, it is bringing claims under both provisions. Furthermore, at

require the inclusion of all underlying data. Without a more precise description by the European Union of the specific underlying data that, in its view, should have been reflected in the public notice, there is no basis for us to uphold the European Union's claim.

7.466 Regarding the European Union's claim that MOFCOM failed to include in its public notice the calculations and underlying data for the residual anti-dumping duty applied to all other European Union exporters/producers, we have already found that dumping margin calculations need not be included in Article 12.2.2 notices. Concerning the underlying data, the European Union argues more specifically that "MOFCOM was required to explain in the public notice why it resorted to facts available to determine the residual duty rate and which facts support this conclusion. It was further required to publish the relevant factual basis (at least in the form of a non-confidential summary) for its determination and the method it relied upon"[424].

7.467 We agree that MOFCOM was required to include all "relevant information" regarding residual rate in its notice. We note that MOFCOM's public notice contained only the following information regarding the residual rate:

> For other EU companies not responding to the petition or the Questionnaire, in accordance with Article 21 of the *Antidumping Regulations*, MOFCOM decided to use obtained facts and the best information obtainable to determine the normal value and the export price thereof.[425]

7.468 In our view, this information is not sufficient to meet the requirements of Article 12.2.2, since MOFCOM provides no information regarding the factual basis for its determination of the residual rate.

7.469 For all of the above reasons, we reject the European Union's claim that MOFCOM violated Article 12.2.2 by failing to include the calculations and underlying data for Smiths' margin of dumping. We also reject the European Union's claim regarding MOFCOM's failure to include its calculation of the residual rate in its public notice. However, we uphold the European Union's claim that MOFCOM violated Article 12.2.2 by failing to include "relevant information" regarding the factual basis for its determination of the residual rate.

(iii) Conclusion

7.470 In conclusion, we uphold the European Union's claim that MOFCOM violated the first sentence of Article 12.2.2 by failing to provide relevant information regarding its price effects analysis, and its determination of the residual rate. However, we reject the European Union's claim in respect of the calculations and underlying data for Smiths' margin of dumping, and the calculations for the residual rate.

(b) MOFCOM's alleged failure to provide reasons for the rejection of certain arguments made by Smiths: Article 12.2.2, second sentence

7.471 The European Union claims that MOFCOM violated the second sentence of Article 12.2.2 because it failed to explain in its public notice why MOFCOM rejected arguments made by Smiths concerning the treatment of domestic sales to affiliated distributors, the credibility of certain injury

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para. 161 of its first written submission, the European Union claims that, where the data underlying MOFCOM's calculations is not disclosed under Article 6.9, it should be included in the Article 12.2.2 public notice.

[424] European Union's second written submission, para. 128.

[425] Final Determination, Exhibit EU-2, p. 21.

data and other injury issues, and the existence of any causal link between dumped imports and injury to the domestic industry. China asks the Panel to reject the European Union's claim.

7.472 The second sentence of Article 12.2.2 requires the inclusion in the public notice of "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". In light of our interpretation of the first sentence of Article 12.2.2, we consider that "relevant" arguments or claims are those that relate to the issues of fact and law considered material by the investigating authority. Since this provision concerns the arguments and claims made by exporters and importers, whose interests will be adversely affected by an affirmative determination, it is particularly important that the "reasons" for rejecting or accepting such arguments should be set forth in sufficient detail to allow those exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement.

(i) The treatment of domestic sales to affiliated distributors

7.473 In its comments on MOFCOM's Dumping Disclosure, Smiths queried MOFCOM's determination that domestic sales to affiliated distributors were not made in the ordinary course of trade. In particular, Smiths queried MOFCOM's determination that such sales were affected by the affiliation relationship, and that Smiths had not provided sufficient information showing that the price differences relative to sales to non-affiliated distributors merely reflected sales expenses saved by Smiths:

> To support its claim that sales to both affiliated distributors and unaffiliated distributors in the EU should be taken into account in calculating normal value, Smiths submitted, in its Questionnaire Response, Comments on the Preliminary Determination, Supplementary Documents provided after the Preliminary Determination, data and explanations showing that affiliated distributors serve certain functions otherwise performed by Smiths' sales department and bear related expenses, causing Smiths' cost of sales to affiliated distributors to be lower than the cost of sales to unaffiliated distributors while still reflecting arm's length practice. In addition, during the onsite verification, Smiths presented original sales documents to and answered inquiries of the investigating officials. At the conclusion of the verification process Smiths provided documents requested by the officials.
>
> …
>
> We would also like to emphasize to your esteemed Bureau that Smiths' pricing practices with respect to affiliated distributors have been continuously confirmed by reputable public auditing firms to be consistent with fair market principles and reflective of the normal value of its products. Please refer to the audited reports of Smiths in the case record. Smiths thus maintains that the conclusory exclusion of affiliated transactions is unfair to Smiths and results in a distorted calculation of normal value.[426]

7.474 Regarding documentary evidence, Smiths contends:

> In the Supplementary Documents for the Anti-dumping Investigation against X-ray Security Inspection Equipment provided by Smiths on August 11, 2010, Smiths explained that deductions in sales prices to affiliated companies occurred only with

[426] Smiths' comments on MOFCOM's Final Dumping Disclosure, Exhibit EU-19, pp. 2-4. See also corresponding text in the public version of the Comments, Exhibit EU-19, pp. 2-3.

> respect to relevant sales expenses and profit rates of Smiths because sales to affiliated companies bear less risk, thus enabling Smith to save costs and expenses borne on sales to unaffiliated companies. Moreover, Smiths provided the Table of Calculation of Prices to Affiliated Companies in the EU (Appendix 2 of the Supplementary Documents), in which it further explained that the price differences in prices to affiliated companies are due to lower sales expenses resulting from lower risk. Smiths then presented extensive sales documents to the investigating officials during the onsite verification, answering their various questions as they examined the documents. Smiths provided copies of certain documents when the officials requested copies with respect to the above statements and documents. The Disclosure Letter, however effectively ruled all of these submissions to be "data not being used for calculating normal value." Therefore, under Article 12 MOFCOM must disclose the *reasons* why they are not used, or, in the wording of the Disclosure Letter, why they are considered "not sufficient" by MOFCOM. (footnote omitted, emphasis original)[427]

7.475 The European Union claims that MOFCOM failed to provide the reasons for rejecting these arguments in its public notice, contrary to the second sentence of Article 12.2.2.

7.476 China does not deny that MOFCOM was required to address this issue in its public notice, but claims that MOFCOM properly addressed Smiths' arguments in its Final Determination[428]. China relies on the finding by the panel in *EU – Footwear (China)* that Article 12.2.2 does not require that the authority is "required to respond in detail to the argument" of the interested parties. China contends that MOFCOM's explanations of the issues raised by Smiths were "amply sufficient". Since China does not deny that MOFCOM was required to address Smiths' arguments in its public notice, there is no need for us to determine whether or not Smiths' arguments are "relevant". Instead, we need only consider the adequacy of the explanation provided by MOFCOM for rejecting those arguments.

7.477 In its public notice of the Final Determination, MOFCOM provided the following information regarding its handling of Smiths' arguments:

> The Company stated in its Comments following the Preliminary Determination that although the sales prices to affiliated companies were lower than those to non-affiliated companies in the EU, the price difference consisted only of relevant sales expenses saved by the Company and that the sales prices to affiliated companies were not affected by the affiliation relationship and represented fair market price, and that such transactions were in the normal course of trade. Upon on-site verification and further verification, MOFCOM discovered that the pricing and sales processes, the sales prices of Smiths Heimann through affiliated distributors in the EU during the POI were clearly affected by the affiliation relationship, and that Smiths Heimann did not have sufficient evidence to prove that the price differences were merely sales expenses which it saved. Therefore, the affiliated sales price cannot represent fair market price and such transactions were not in the normal course of trade. MOFCOM decided to maintain its decision in the Preliminary Determination to exclude the transactions made by the Company through affiliated distributors in the EU during the POI from the normal value determination in its Final Determination.[429]

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[427] Smiths' comments on MOFCOM's Final Dumping Disclosure, Exhibit EU-19, pp. 2-4. See also corresponding text in the public version of the Comments, Exhibit EU-19, pp. 2-3.

[428] China's first written submission, para. 220.

[429] Final Determination, Exhibit EU-2, p. 17.

7.478 While this excerpt from the Final Determination shows that MOFCOM acknowledged the various arguments made by Smiths, we find that it does not amount to a sufficiently detailed explanation of the reasons for rejecting those arguments. The issue raised by Smiths was whether, *notwithstanding the relationship of affiliation*, the sales still reflected arm's length practice. MOFCOM did not address that issue in its Final Determination. In simply stating that the price of sales to affiliated distributors "were clearly affected by the affiliation relationship", MOFCOM fails to explain the reason why it rejects Smiths' argument that, *despite the affiliation* between Smiths and certain distributors, such sales "still reflect[] arm's length practice". Furthermore, in simply stating that Smiths "did not have sufficient evidence to prove that the price differences were merely sales expenses which it saved", MOFCOM fails to explain the reasons why the *documentary evidence provided by Smiths* was not sufficient to show that the lower sales prices to affiliated distributors reflected lower sales expenses resulting from lower risk[430]. Without such detailed explanation, Smiths had no means of understanding why its arguments were rejected, or of ascertaining whether or not MOFCOM's handling of this issue was consistent with the provisions of Chinese law and/or the WTO Agreement. Accordingly, we find that MOFCOM's failure to fully explain the reasons why it rejected this argument is inconsistent with Article 12.2.2 of the Anti-Dumping Agreement.

(ii) The credibility of certain injury data, and other issues

7.479 The European Union claims that MOFCOM's public notice omitted the reasons for rejecting certain arguments made by Smiths regarding the credibility of MOFCOM's injury data. The European Union also claims that MOFCOM failed to provide the reasons for rejecting certain additional arguments made by Smiths concerning MOFCOM's injury findings.

Credibility of MOFCOM's injury data

7.480 The European Union claims that MOFCOM failed to explain in its public notice the reasons for rejecting Smiths' arguments regarding the credibility of certain injury data relied on by MOFCOM. In particular, the European Union refers to Smiths' arguments that the profitability and employment data relied on by MOFCOM were inconsistent with data contained in public filings made by Nuctech to the State Administration for Industry & Commerce ("SAIC"), and public filings made by Nuctech's parent company.

7.481 China contends that Smiths' arguments are not "relevant", in the sense of being material to MOFCOM's decision to impose final duties. China also contends that in any event MOFCOM fully addressed Smiths' arguments in its Final Determination.

7.482 MOFCOM's Final Determination addressed this issue in the following terms:

> Smiths Heimann stated in its No-Injury Defense Opinions and Comments on the Preliminary Determination that some information and data on domestic industry in the Preliminary Determination, including production and operation situation and employee headcount, contradicted the information and data disclosed by the listed parent company of the Petitioner in its annual reports as well as the information and data filed with the Administration for Industry and Commerce. Smiths Heimann also stated in its Rebuttal of the Comments of the Petitioner on the Preliminary Determination that the listed parent company of the Petitioner cited in several public

[430] At para. 149 of its second written submission, China contends that Smiths acknowledged that the prices to affiliated distributors are lower not only because of savings on direct selling expenses, but mainly because of lower overhead expenses and profits. However, there is no explanation of this reasoning in MOFCOM's Final Determination. Nor is it clear that MOFCOM's reference to "sales expenses" should necessarily be understood to refer only to direct selling expenses.

> documents that exports were the cause of its financial difficulty rather than the reason for the overall soundness of its operations.
>
> Nuctech stated in its Comments on the Defense Opinions on the Preliminary Determination by the EC and Smiths Heimann GmbH that the subject of its Application, and hence the subject of this Investigation, was the injury situations of the Subject Product. The Petitioner had a sound performance in its overall operations because of its other products and exports. However, it had suffered material injury with respect to said products due to the effect of the dumping of the imported products.
>
> Upon investigation, we found that the Petitioner also produced other products in addition to the Like Products in the instant case. Both the information and data disclosed by the parent company of the Petitioner in its annual reports as well as the information and data filed with the Administration for Industry and Commerce included the information and data on other products in addition to the Like Products, while the determinations of the instant case only would be based only on the information and data on Like Products.[431]

7.483 Leaving aside the issue of whether or not Smiths' arguments regarding this matter are "relevant", we consider that in any event MOFCOM's Final Determination adequately explains why Smiths' arguments were rejected. The Final Determination explains that the data discrepancies identified by Smiths were a reflection of product coverage, in the sense that the data referred to by Smiths related to products that were not the subject of MOFCOM's investigation. In our view, MOFCOM's explanation was sufficient to allow Smiths to understand why its arguments were rejected, and to ascertain whether or not MOFCOM's handling of this issue was consistent with the provisions of Chinese law and/or the WTO Agreement.

Additional arguments made by Smiths

7.484 The European Union also claims that MOFCOM failed to address a number of additional arguments made by Smiths. In particular, at paragraph 151 of its first written submission, and in a footnote thereto, the European Union claims:

> In addition, Smiths also made a number of pertinent arguments concerning MOFCOM's injury analysis in view of China's obligations under Articles 3.4 ADA.[117]

[117] The substantive claims of the European Union under Article 3.4 are dealt with under Section 5 of the European Union's first written submission.

7.485 The European Union did not provide any more details of this aspect of its claim in its first written submission. Nor did the European Union identify the "pertinent arguments" with which this claim is concerned. This lack of detailed argumentation led China to assert that the European Union's claim should be rejected, for lack of proper identification of the Smiths arguments at issue[432]. In response to a question from the Panel asking the European Union to comment on China's reaction to its claim[433], the European Union notes that paragraph 151 of its first written submission refers to the Article 3.4 claims set forth in Section 5 of its submission. The European Union also contends that the

[431] Final Determination, Exhibit EU-2, p. 28.
[432] China's oral statement at the first substantive meeting, para. 17.
[433] European Union's response to Panel question 14, para. 94.

relevant comments by Smiths "are then identified in paragraphs 255, 280-281, 293, 297-302" of its first written submission.

7.486 In our view, the European Union has failed to establish a *prima facie* case of violation of Article 12.2.2 in respect of any additional arguments allegedly made by Smiths. The blanket reference in the European Union's first written submission to *substantive* injury arguments made in Section 5 of that submission is not sufficient to establish that MOFCOM failed in its *procedural* obligation to explain why certain arguments allegedly made by Smiths were rejected. To require the Panel to (i) sift through Section 5 of the European Union's first written submission to identify the relevant arguments made by Smiths, (ii) consider whether or not such arguments relate to matters that were material to MOFCOM's decision to impose final duties, and then (iii) leaf through the Final Determination to identify where MOFCOM may have addressed such arguments, would require the Panel to make the case on behalf of the European Union. Although, in response to a question from the Panel, the European Union identifies certain specific paragraphs of its first written submission, these references are not sufficient to identify the relevant arguments allegedly made by Smiths, explain how those arguments relate to matters that are material[434], or indicate the extent to which MOFCOM may or may not have provided reasons for rejecting those arguments in its Final Determination. Thus, even considering the additional references provided by the European Union, we remain of the view that the European Union has failed to establish the requisite *prima facie* case.

(iii) The causal link

7.487 The European Union claims that MOFCOM failed to explain why it rejected certain arguments made by Smiths regarding the causal link between dumped imports and injury to the domestic industry. At paragraph 154 of its first written submission, according to the European Union:

> Smiths listed several factors which the investigating authority should take into account in assessing the existence of the causal link.[121]

[121] [Injury Disclosure, Section (I)(C)(1), p. 6, (Exhibit EU-16),] pp. 5-7. See also paras. 312-314 below in this submission.

7.488 At paragraph 312 of its first written submission, the European Union contends that Smiths asserted in its Injury Brief that "any injury to the domestic industry could not be attributed to the alleged dumped imports but to the lower range of models provided by the domestic industry in the high-end market of low-energy scanners (i.e. aviation) and the fact that the biggest c[u]st[o]mer of that market (the Chinese government) preferred to purchase European Union and US scanners to protect public safety". Paragraph 312 of the European Union's first written submission also states that "Smiths addressed four relevant factors which were the cause of any alleged material injury": the global economic crisis, Nuctech's aggressive business expansion, Nuctech's aggressive pricing policy, and pressure from fair competition.

[434] At para. 143 of its first written submission, the European Union asserts that any comments or arguments that "concern the mandatory elements of a final public notice, as referred to in Article 12.2.1(iii)-(v)" are necessarily material, and should therefore be addressed in the public notice. We do not agree with the European Union's interpretation, since this would suggest that *any* arguments or comments concerning the establishment of the margin of dumping or the determination of injury should be addressed in the public notice. As explained above, we consider that the scope of the Article 12.2.2 obligations is narrrower. In any event, since the European Union has not identifed the relevant arguments at issue, there is no clear basis for establishing whether or not they relate to the mandatory elements set forth in Article 12.2.1.

7.489 China contends that the European Union failed to demonstrate that Smiths' arguments regarding these factors are "relevant" within the meaning of Article 12.2.2, such that MOFCOM should have explained in its public notice its reasons for rejecting them.

7.490 It is possible, by reading paragraph 154 of the European Union's first written submission in conjunction with paragraph 312 thereof, to identify which of Smiths' arguments are at issue in this claim. However, the European Union does not explain the extent to which such arguments are "relevant" to matters that were material to MOFCOM's decision to impose final duties. Nor does the European Union explain the extent to which such arguments may or may not have been addressed by MOFCOM in its Final Determination. Again, therefore, the European Union's presentation of its claim expects too much of the Panel, in the sense that we are effectively expected to make the European Union's case by first examining whether Smiths' arguments are relevant to material matters of fact or law, and then reviewing MOFCOM's Final Determination in order to determine the extent, if any, to which these arguments were addressed by MOFCOM. Although our evaluation of certain aspects of the European Union's Article 3.5 claim caused us to address issues that may well have a bearing on an assessment of claims made under Article 12.2.2, the onus remains on the European Union, as complainant, to establish its case. It is not for the Panel to review the European Union's Article 3.5 claim and determine for itself what aspects of that claim might support a finding of violation of Article 12.2.2. Accordingly, given the failure of the European Union to spell out the basis for its Article 12.2.2 claim in respect of arguments allegedly made by Smiths regarding causal link, we find that the European Union has failed to establish a *prima facie* for such claim.

(iv) Conclusion

7.491 For the above reasons, we uphold the European Union's claim that MOFCOM violated the second sentence of Article 12.2.2 by failing to explain in its public notice why it rejected Smiths' arguments regarding the treatment of domestic sales to affiliated distributors. We reject the European Union's claim regarding Smiths' arguments on the credibility of certain injury data, and its claim regarding additional arguments allegedly not adequately addressed in MOFCOM's public notice.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In the light of the findings set forth in this Report, the Panel concludes that China acted inconsistently with:

(a) Articles 3.1 and 3.2 of the Anti-Dumping Agreement, on the basis that China did not conduct an objective examination based on positive evidence of the effect of the dumped imports on prices in the domestic market for like products;

(b) Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis that China did not conduct an objective examination of the impact of the dumped imports on the domestic industry:

(i) by failing to evaluate the magnitude of the margin of dumping; and

(ii) in relation to its examination of certain individual injury factors.

(c) Articles 3.1 and 3.5 of the Anti-Dumping Agreement on the basis that China did not conduct an objective examination on the basis of positive evidence:

(i) of the causal relationship between dumped imports and the injury to the domestic industry in respect of MOFCOM's assessment of the prices of the dumped imports; and

(ii) in its non-attribution analysis, in particular in relation to MOFCOM's treatment of Smiths' arguments on product quality and technology factors, fair competition, Nuctech's alleged aggressive business expansion and alleged aggressive pricing policy.

(d) Article 3.5 of the Anti-Dumping Agreement as a consequence of the inconsistencies with Articles 3.1, 3.2 and 3.4.

(e) Article 6.5.1 of the Anti-Dumping Agreement on the basis that China did not require interested parties providing confidential information to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the following information submitted in confidence:

(i) information pertaining to the models covered in the Application; and

(ii) the information contained in Nuctech's replies to questions 17, 19, 19(1), 19(2), 32, 33 and 38(5) of MOFCOM's questionnaire and Attachments 4 and 15 to those replies;

(f) Article 6.5.1. of the Anti-Dumping Agreement on the basis that China did not require an interested party to explain why certain information submitted in confidence could not be summarized;

(g) Article 6.9 of the Anti-Dumping Agreement on the basis that China did not inform interested parties of the following essential facts under consideration forming the basis for the decision to apply definitive measures:

(i) the AUVs and underlying price data used to analyse the price effects of dumped imports;

(ii) the price and adjustment data underlying Smiths' margin of dumping; and

(iii) the facts that formed the basis for the determination that the residual duty rate should be 71.8%;

(h) Article 12.2.2 of the Anti-Dumping Agreement, first sentence, on the basis that MOFCOM's public notice was deficient in failing to provide relevant information regarding:

(i) its price effects analysis; and

(ii) the factual basis for the determination of the residual rate;

(i) Article 12.2.2 of the Anti-Dumping Agreement, second sentence, on the basis that MOFCOM's public notice was deficient in failing to explain why MOFCOM rejected Smiths' arguments regarding the treatment of domestic sales to affiliated distributors.

8.2 In the light of the findings set forth in this Report, the Panel concludes that the European Union has **not** established that China acted inconsistently with:

(a) Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to base its examination of the factors having a bearing on the state of the industry on positive evidence;

(b) Articles 3.1 and 3.5 of the Anti-Dumping Agreement in connection with MOFCOM's treatment in its non-attribution analysis of the effect of exports, the impact of the global financial crisis and Nuctech's alleged start-up situation;

(c) Article 6.5.1 of the Anti-Dumping Agreement in connection with the non-confidential summaries of the confidential information set forth in Attachments 14, 16, 17, 18 and 19 to Nuctech's questionnaire response;

(d) Article 6.9 of the Anti-Dumping Agreement in connection with informing interested parties of:

(i) the underlying facts and criteria on the basis of which the affiliated distributor adjustment to export price was made;

(ii) the calculations of Smiths' margin of dumping; and

(iii) the facts forming the basis of the decision to apply facts available in relation to the residual duty rate;

(e) Article 12.2.2 of the Anti-Dumping Agreement, first sentence, by failing to include in the public notice:

(i) the calculations and underlying data for Smiths' margin of dumping; and

(ii) the calculation of the residual duty rate;

(f) Article 12.2.2 of the Anti-Dumping Agreement, second sentence, in connection with:

(i) Smiths' arguments on the credibility of certain injury data; and

(ii) additional arguments allegedly made by Smiths concerning MOFCOM's injury and causation analysis;

8.3 In the light of the findings set forth in paragraphs 8.1and 8.2 of this Report, the Panel does not consider it necessary to make findings with respect to the European Union's claims under:

(a) Articles 3.1 and 3.4 of the Anti-Dumping Agreement in relation to whether MOFCOM should have taken into account the differences between "high-energy" and "low-energy" scanners;

(b) Articles 3.1 and 3.5 of the Anti-Dumping Agreement in relation to MOFCOM's analysis of the volume of dumped imports;

(c) Article 6.2 of the Anti-Dumping Agreement; and

(d) Article 6.4 of the Anti-Dumping Agreement.

B. RECOMMENDATION

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent China has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that it has nullified or impaired benefits accruing to the European Union under that Agreement.

8.5 Pursuant to Article 19.1 of the DSU, having found China acted inconsistently with certain provisions of the Anti-Dumping Agreement, we recommend China bring its measure into conformity with its obligations under that Agreement.

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