

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

(DS601)

**THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA**

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TABLE OF CONTENTS

I.	Introduction	1
II.	Claims Relating to the Injury and Causation Determinations	1
	A. Claims Relating to Articles 3.1 and 3.2 of the Anti-Dumping Agreement.....	1
	B. Claims Relating to Articles 3.1 and 3.3 of the Anti-Dumping Agreement.....	2
	C. Claims Relating to Articles 3.1 and 3.4 of the Anti-Dumping Agreement.....	3
	D. Claims Relating to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.....	4
III.	Claims Relating to the Definition of the Domestic Industry	5
IV.	Claims Relating to the Conduct of the Investigations	7
	A. Claims Relating to Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.....	7
	B. Claims Relating to Article 6.9 of the Anti-Dumping Agreement.....	9
V.	Claims Relating to the Public Notices and Explanation of Determinations	10
VI.	Conclusion	11

TABLE OF REPORTS

Short Title	Full Case Title and Citation
<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R, adopted 18 June 2014
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>EC – Countervailing Measures on DRAM Chips (Panel)</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EC – Tube or Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EU – Biodiesel (Indonesia) (Panel)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Indonesia</i> , WT/DS480/R, adopted 28 February 2018
<i>Russia – Commercial Vehicles (AB)</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/AB/R, adopted 9 April 2018
<i>Thailand – H-Beams (Panel)</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement).

II. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

A. Claims Relating to Articles 3.1 and 3.2 of the Anti-Dumping Agreement

2. Japan argues that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the AD Agreement, because it failed to ensure price comparability between subject imports and the domestic like product, ignored arguments by interested parties concerning divergent trends between subject imports and domestic prices, and failed to address the predominant overselling by subject imports.¹ In Japan's view, MOFCOM thereby failed to account for the explanatory force of subject imports for the purported depression of domestic like product prices.²

3. China argues that MOFCOM's price effects analysis, which it based on facts available, duly accounted for price comparability issues and did not require further adjustments.³

4. The United States offers the following comments on the interpretation of the AD Agreement.

5. Article 3.1 of the AD Agreement provides the following:

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.

6. In the context of a price depression analysis, Article 3.2 of the AD Agreement directs an authority to examine whether subject imports significantly depressed the prices of like domestic products. It does not impose specific obligations on how an authority must conduct a price depression analysis, nor prescribe a particular methodology or set of factors that must apply in any such analysis.⁴ However, Article 3.1 does provide that “[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of . . . the effect of the dumped imports on prices in the domestic market for like products.”

7. In addition, Articles 3.1 and 3.2 of the AD Agreement require the authority to ensure comparability between the domestic and subject imported products for which prices are being

¹ Japan's First Written Submission (FWS), paras. 65-204.

² Japan's FWS, paras. 205-217.

³ China's FWS, paras. 103-331 and 332-354.

⁴ *Thailand – H-Beams (Panel)*, para. 7.159; *EU – Biodiesel (Indonesia) (Panel)*, 7.137.

examined by making adjustments where required to reflect any material differences.⁵ The objective of such adjustments is to ensure that whatever price differentials arise from a comparison of domestic and imported goods result from price effects, and not merely from differences in the products or transactions being compared, absent the necessary adjustments to control and adjust for relevant differences in product characteristics.⁶

8. With the above considerations in mind, the question before the Panel regarding Japan's challenge to MOFCOM's price effects analysis, particularly with respect to price comparability issues, is whether a reasonable, unbiased authority, looking at the same evidentiary record, could have reached the same conclusions as MOFCOM.

9. With respect to China's claim that Japan did not establish a *prima facie* case,⁷ the United States notes Japan's catalogue of numerous areas in which it argues that it could not discern the relevant information, or MOFCOM simply did not provide it.⁸ In making its findings, the Panel should consider whether MOFCOM should benefit from its own failure to provide notice or explanation of relevant information by using those failures to argue that the complainant did not meet its burden of proof. Such an outcome would not appear appropriate under these important provisions that require an authority to disclose, in sufficient detail, the facts, law, and reasons that led to the imposition of anti-dumping or countervailing duties.

B. Claims Relating to Articles 3.1 and 3.3 of the Anti-Dumping Agreement

10. Japan argues that MOFCOM breached Articles 3.1 and 3.3 of the AD Agreement because its finding that cumulation was appropriate in light of the conditions of competition was not based on positive evidence and did not involve an objective examination.⁹ Japan contends that there are important differences in the conditions of competition between subject imports from Japan and subject imports from certain other sources, such that it was possible that any injury to the domestic industry was exclusively caused by subject imports from sources other than Japan (in particular, Indonesia).¹⁰ Japan submits that cumulative assessment should not be applied to imports that are not in fact causing injury,¹¹ and argues that MOFCOM failed to foreclose the possibility that any injury to the domestic industry was caused only by subject imports from Indonesia and other sources, and not from Japan.¹²

11. China responds that MOFCOM's cumulation assessment was consistent with China's AD Agreement obligations, and language in prior reports such as *EC – Tube and Pipe Fittings*.¹³

12. The United States offers the following comments on the interpretation of Article 3.3 of the AD Agreement.

⁵ See, e.g., *China – GOES (AB)*, para. 200. See also, e.g., *China – Autos (Panel)*, para. 7.277.

⁶ See, e.g., *China – Autos (Panel)*, para. 7.256.

⁷ See, e.g., China FWS, paras. 183-223.

⁸ See, e.g., Japan's FWS at VI.H-I.

⁹ Japan's FWS, paras. 218-301.

¹⁰ Japan's FWS, para. 218, 240.

¹¹ Japan's FWS, para. 228 (citing *EC – Tube or Pipe Fittings (AB)*, para. 116).

¹² Japan's FWS, para. 301.

¹³ China's FWS, para. 356, 375, 382-396.

13. Under Article 3.3 of the AD Agreement, an investigating authority may cumulate imports if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. Given these specified textual prerequisites for cumulation, there is no basis to impose other, unmentioned prerequisites. The reasoning in prior reports similarly reflects that there is no basis in the text of Article 3.3 to impose a country-specific analysis of the potential negative effects of volumes and prices of dumped imports as a pre-condition for a cumulative assessment of the effects of all dumped imports.¹⁴

14. Further, with respect to the requirement that an investigating authority determine if a cumulative assessment is appropriate in light of the conditions of competition, the United States notes that, while “an investigating authority enjoys a certain degree of discretion in making that determination on the basis of the record before it...cumulation must be suitable or fitting in the particular circumstances of a given case...”.¹⁵ Thus, while the United States agrees that Members have discretion under Article 3.3 to develop appropriate criteria and analytical frameworks for assessing whether cumulation is appropriate in light of the conditions of competition among imports and between imports and the domestic like product, those criteria and analyses must bear a reasonable relationship to the inquiry into whether the various products compete in the domestic market of the importing Member.

C. Claims Relating to Articles 3.1 and 3.4 of the Anti-Dumping Agreement

15. Japan argues that MOFCOM’s analysis of impact was inconsistent with Articles 3.1 and 3.4 of the AD Agreement because MOFCOM’s analysis of the condition of the domestic industry did not involve an objective examination based on positive evidence since data used by MOFCOM for particular factors were conflicting.¹⁶ Further, MOFCOM failed to address inconsistencies in the data used and, without presenting any specific evidence or explanation, relied on certain data in its impact analysis, while ignoring other data.¹⁷

16. China argues that any differences in data for particular factors were not meaningful, but rather reflected the inclusion and exclusion of related company data.¹⁸ In its view, MOFCOM properly evaluated all factors having a bearing on the state of the domestic industry.¹⁹

17. Article 3.4 of the AD Agreement sets out an authority’s obligation to ascertain the impact of dumped imports on the domestic industry. The article provides that “[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry” and enumerates certain factors that an authority must include in its evaluation. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an “examination” of

¹⁴ See, e.g., *EC – Tube or Pipe Fittings (AB)*, para. 110.

¹⁵ *EC – Tube or Pipe Fittings (Panel)*, para. 7.241.

¹⁶ Japan’s FWS, paras. 327-343.

¹⁷ Japan’s FWS, paras. 344-360.

¹⁸ China’s FWS, paras. 438-457.

¹⁹ China’s FWS, paras. 458-505.

the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the “impact” of subject imports on a domestic industry, and not just the state of the industry.

18. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry’s performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry’s performance during the period of investigation.

19. The reasoning in prior reports supports this interpretation:

Articles 3.4 [of the AD Agreement] and 15.4 [of the SCM Agreement]...do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term “the effect of” under Articles 3.2 [of the AD Agreement] and 15.2 [of the SCM Agreement].²⁰

20. In other words, in examining the relationship between subject imports and the state of the domestic industry pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry’s performance trends. The “examination” contemplated by Article 3.4 should be based on a thorough evaluation of the state of the industry and should contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.²¹

21. However, the manner in which an authority chooses to articulate the “evaluation” of economic factors may vary. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out.²² The United States observes that the Panel must be able to discern that the authority’s examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. In making this assessment, the Panel must determine whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did here.

D. Claims Relating to Articles 3.1 and 3.5 of the Anti-Dumping Agreement

22. Japan argues that MOFCOM failed to conduct a proper non-attribution analysis with respect to certain other factors, including changes in the price of nickel, a key raw material to

²⁰ *China – GOES* (AB), para. 149.

²¹ *See, e.g., Thailand – H-Beams* (Panel), para. 7.236.

²² *EC – Tube or Pipe Fittings* (AB), para. 131. Indeed, in that dispute, an internal “note for the file” setting out the European Commission’s consideration of some of the injury factors listed in Article 3.4 was found to satisfy the requirements of Articles 3.1 and 3.4 of the AD Agreement. *Id.* at paras. 119 and 133.

produce certain grades of stainless-steel products, the need for domestic producers to comply with stricter environmental standards, global steel overcapacity, and intra-industry competition from domestic producers not included in the domestic industry definition.²³

23. China argues that MOFCOM properly examined and dismissed each of these factors.²⁴ The question for the Panel is whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did here.

24. The second sentence of Article 3.5 requires an authority to examine “all relevant evidence” before it both to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped imports were also causing injury. The third sentence of Article 3.5 requires an authority to examine “any known factors other than the dumped imports which at the same time are injuring the domestic industry” to ensure that “the injuries caused by these other factors must not be attributed to the dumped imports.” A non-attribution analysis is therefore necessary if (i) there are one or more known factors other than the dumped imports that (ii) are injuring the domestic industry (iii) at the same time.

25. The extent to which a factor other than imports is causing injury and becomes “known” to an authority may vary according to the nature of the alleged factor, and the manner in which the authority evaluates it in a given investigation.²⁵ While an authority is under no express requirement to “seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation,” an authority’s findings and analysis under Article 3.5 must comply with the “positive evidence” and “objective examination” requirements of Article 3.1.²⁶

III. CLAIMS RELATING TO THE DEFINITION OF THE DOMESTIC INDUSTRY

26. Japan argues that MOFCOM’s definition of the domestic industry was inconsistent with Article 4.1 and Article 3.1 of the AD Agreement because MOFCOM’s calculation of domestic production likely overestimated total domestic production and the portion of the domestic industry that was accounted for.²⁷ Specifically, Japan argues that MOFCOM erred in calculating domestic production on the basis of the sales volume of stainless steel slabs and production volumes of coil and plate, which MOFCOM purported to do to avoid double counting issues.²⁸ Japan contends that relying on the sales volume of stainless steel slabs did not avoid double counting, as a portion of these slabs were sold to producers that further processed them into coil or plate.²⁹ Moreover, inasmuch as most producers captively consume their slabs, Japan asserts that counting the external sales volume of stainless steel slabs favors producers that have larger

²³ Japan’s FWS, paras. 419-437.

²⁴ China FWS, paras. 566-582.

²⁵ See *China – GOES (Panel)*, at paras. 7.624-7.628.

²⁶ *EC – DRAMS (Panel)*, para. 7.272.

²⁷ Japan’s FWS, paras. 468-491.

²⁸ Japan’s FWS, para. 470.

²⁹ Japan’s FWS, paras. 469-476.

external sales volumes of stainless steel slabs.³⁰ In its view, MOFCOM thereby failed to representatively define the domestic industry.³¹

27. China argues that MOFCOM properly defined the domestic industry to account for a major proportion of total domestic production based on the sales volumes of billets, having regard to the risk of double counting billets based on production volumes.³²

28. The United States provides the following comments on the applicable legal obligations.

29. The United States agrees with Japan that Article 4.1 must be read in conjunction with Article 3.1. Article 4.1 of the AD Agreement provides that, with certain defined exceptions, “the term ‘domestic industry’ shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”

30. Article 4.1 establishes that the “domestic industry” can be defined as either (1) the “domestic producers as a whole of the like products,” i.e., all domestic producers, or (2) a subset of domestic producers “whose collective output of the products constitutes a major proportion of the total domestic production” of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a “major proportion” of the total domestic production of those products.

31. Although undefined in the AD Agreement, the term “major proportion” must be interpreted in the context of Article 3.1 of the AD Agreement. As noted, Article 3.1 of the AD Agreement provides the following:

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.

32. Thus, Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority’s injury determination. The first overarching obligation is that the injury determination be based on “positive evidence.” The second obligation is that the injury determination involves an “objective examination” of the volume of the dumped imports, their price effects, and their impact on the domestic industry. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority’s definition of the domestic industry.

³⁰ Japan’s FWS, paras. 469-476.

³¹ Japan’s FWS, para. 492.

³² China’s FWS, paras. 606-671.

33. The United States recalls that the plain language of Articles 3.1 and 4.1 of the AD Agreement should guide the Panel’s analysis. First, the Panel should consider whether the authority, consistent with Article 4.1 of the AD Agreement, defined the domestic industry as “domestic producers as a whole,” or instead defined the domestic industry as those producers whose production constitutes a “major proportion” of total domestic production of the like product. If the Panel determines that the authority’s definition of the domestic industry is composed of “domestic producers as a whole,” then the inquiry may end. If, however, the Panel concludes that the domestic industry is claimed to be composed of domestic producers that constitute a “major proportion” of total domestic production, then the inquiry does not end.

34. In this case, the Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority’s material injury analysis. For a material injury determination to be based on “positive evidence and involve an objective examination,” the authority must rely upon a properly defined domestic industry to perform the analysis. A proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis; an improper definition could risk introducing a distortion to the injury analysis.

35. Accordingly, the Panel is to evaluate whether the authority’s definition of the domestic industry introduces a distortion to the analysis and, in doing so, it should consider the existence of an inverse relationship between the proportion of producers included in the domestic industry and the absence of a risk of material distortion in the assessment of injury. The Panel’s analysis on risk of distortion should thus begin with consideration of the domestic production captured by MOFCOM’s definition of the domestic industry.

36. Even if MOFCOM’s definition were to meet the “major proportion” of domestic production standard of Article 4.1, the Panel should assess whether MOFCOM’s definition of the domestic industry was biased or designed to favor the interest of any group of interested parties in the investigation, inconsistent with Article 3.1 of the AD Agreement. In other words, the Panel must determine whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did here regarding the definition of the domestic industry.

IV. CLAIMS RELATING TO THE CONDUCT OF THE INVESTIGATIONS

A. Claims Relating to Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

37. Japan claims that MOFCOM breached Article 6.5 of the AD Agreement by affording confidential treatment to the names of those domestic producers the Applicant identified as subject to exclusion from the domestic industry.³³ Japan contends that although the Applicant provided these company names to MOFCOM on a confidential basis to protect “trade secrets,” this explanation does not establish good cause for MOFCOM’s redaction of these names.³⁴ Japan also observes that MOFCOM’s treatment of these names was inconsistent throughout the course of the investigation, being redacted earlier in the investigation, but made public in the

³³ Japan’s FWS, para. 16, paras. 501-510.

³⁴ Japan’s FWS, para. 503.

Final Determination.³⁵ Japan also claims that MOFCOM failed to comply with the obligations of Article 6.5.1 of the AD Agreement, requiring a sufficient confidential summary (or a statement of reasons why such summarization was impossible) regarding the redacted domestic producer company names.³⁶

38. In response, China argues that MOFCOM’s treatment of certain information submitted was consistent with Articles 6.5 and 6.5.1 of the AD Agreement based on good cause and that a summary of the confidential information was ultimately provided.³⁷

39. The United States provides the following comments on the applicable legal obligations.

40. The chapeau of Article 6.5 of the AD Agreement provides:

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

41. Additionally, Article 6.5.1 of the AD Agreement states:

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.

42. Article 6 of the AD Agreement balances the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests.³⁸ The United States considers that Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information be summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Furthermore, footnote 17 of the

³⁵ Japan’s FWS, para. 507.

³⁶ Japan’s FWS, para. 16, paras. 511-514.

³⁷ China’s FWS, paras. 674-736.

³⁸ See, e.g., AD Agreement, Article 6.2, first sentence (“Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.”); AD Agreement, Article 6.9, second sentence (“Such disclosure should take place in sufficient time for the parties to defend their interests.”).

AD Agreement contemplates one mechanism by which authorities can balance these competing interests, which is through a narrowly-drawn protective order.³⁹

43. Based on the applicable Article 6 provisions, the United States observes that the Panel should first determine if the investigating authority appropriately designated information as confidential. The Panel should then determine whether the investigating authority ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority does not provide a way to effectively communicate pertinent information to interested parties to an investigation, such parties are unable to adequately defend their interests.

B. Claims Relating to Article 6.9 of the Anti-Dumping Agreement

44. Japan claims that MOFCOM breached Article 6.9 of the AD Agreement by failing to properly disclose the essential facts under its consideration that formed the basis for several of its decisions.⁴⁰ Specifically, Japan argues that MOFCOM failed to properly disclose the essential facts underlying its: (1) definition of the product under investigation; (2) determinations of injury and causation (including the essential facts related to its analysis of price effects); (3) use of cumulative assessment; (4) analysis of the state of the domestic industry; (5) essential facts relating to the alleged causation; and (6) definition of the domestic industry.⁴¹

45. Among the putative breaches of Article 6.9 that Japan identifies are MOFCOM's failures to disclose certain of its calculation methodologies. Specifically, Japan asserts that MOFCOM's failure to disclose its methodologies for calculating the domestic industry's market share, and for calculating the portion of total domestic production accounted for by supporting companies, breached Article 6.9.⁴²

46. In contrast, China disagrees with Japan's assertion that the elements would qualify as "essential facts" that MOFCOM had to disclose as part of its obligations under Article 6.9 of the AD Agreement.⁴³

47. As an interpretative matter, the United States agrees with the views expressed by Japan and China that Article 6.9 of the AD Agreement requires that the investigating authority disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties.⁴⁴

³⁹ AD Agreement, footnote 17 ("Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.").

⁴⁰ Japan's FWS, para. 17, paras. 519-607.

⁴¹ Japan's FWS, para. 531.

⁴² Japan's FWS, paras. 582, 584-588 (concerning disclosure of MOFCOM's market share calculation methodology); Japan's FWS at paras. 602, 607 (concerning disclosure of MOFCOM's proportion of national output calculation methodology).

⁴³ China's FWS, para. 754.

⁴⁴ Japan's FWS, para. 520; China's FWS, para. 738.

48. Article 6.9 of the AD Agreement states:

[A]uthorities 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.

49. The meaning of “essential facts” in this context is informed by the description that these facts “form the basis for the decision whether to apply definitive measures” and by the requirement that they be disclosed “in sufficient time for the parties to defend their interests.” Without a full disclosure of the essential facts under consideration in the underlying dumping, injury, and causation determinations, it would not be possible for a party to identify whether an investigating authority’s determination contains errors or even whether the investigating authority actually did what it purported to do. Such failure to provide this information would result in an interested party being unable to defend its interests because it could not identify in the first instance the particular issues that are adverse to its interests.

50. The reasoning in prior reports supports this interpretation. For example, in *EC – Salmon (Norway)* the panel considered that: “the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.”⁴⁵

51. Nothing in the text of Article 6.9 of the AD Agreement suggests that the approach to specific issues such as market share to be applied by an investigating authority necessarily would constitute “essential facts”. Rather, based on the language of Article 6.9, it stands to reason that “only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority’s decision and to defend their interests would be essential facts under Article 6.9.”⁴⁶ A panel must assess, in the specific context of each investigation, whether a particular calculation or methodology constitutes an “essential fact” the disclosure of which is required under Article 6.9.

V. CLAIMS RELATING TO THE PUBLIC NOTICES AND EXPLANATION OF DETERMINATIONS

52. Japan claims that neither MOFCOM’s announcement of its final ruling, nor its Final Determination, articulated in sufficient detail its findings or the relevant information concerning material matters of fact and law, as required by AD Agreement Articles 12.2 and 12.2.2.⁴⁷ Japan submits that these matters include MOFCOM’s (1) definition of the product under investigation;

⁴⁵ *EC – Salmon (Norway)*, para. 7.805; see also, e.g., *China – GOES (AB)*, para. 240 (“[T]he ‘essential facts’ refer to those facts 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.”).

⁴⁶ *Russia – Commercial Vehicles (AB)*, para. 5.218.

⁴⁷ Japan’s FWS, para. 609.

(2) definition of the domestic industry; (3) use of cumulation; (4) analysis of price effects; and (5) analysis of the state of the domestic industry and causation.⁴⁸

53. China argues that not all of the issues that Japan has raised were material in the investigation and that MOFCOM complied with Articles 12.2 and 12.2.2 by disclosing its findings and conclusions.⁴⁹

54. Articles 12.2 and 12.2.2 of the AD Agreement require authorities to provide “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material” by the investigating authority,⁵⁰ and “all relevant information on the matters of fact and law” leading to the imposition of definitive measures.⁵¹ These provisions require an authority to disclose the facts, law, and reasons that led to the imposition of anti-dumping duties, so as to enable interested parties to, among other things, “pursue judicial review of a final determination.”⁵²

55. Based on the above discussion, the United States observes that the Panel, in evaluating Japan’s Article 12.2 and 12.2.2 claims, should assess whether MOFCOM has set forth its pertinent findings and conclusions, as well all relevant information on matters of fact and law leading to the imposition of definitive measures, “in sufficient detail.” The United States observes in this respect that certain of the analyses contained in MOFCOM’s Final Determination (as appended to Japan’s First Written Submission) appear to be very brief, and do not appear to adequately address contrary evidence.⁵³ The Panel will need to determine whether China could have satisfied its obligations under Articles 12.2 and 12.2.2 of the AD Agreement based on the content of such abbreviated and unsupported analyses.

VI. CONCLUSION

56. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of the relevant provisions of the AD Agreement.

⁴⁸ Japan’s FWS, para. 618.

⁴⁹ China FWS, paras. 903-980.

⁵⁰ AD Agreement, Article 12.2.

⁵¹ AD Agreement, Article 12.2.2.

⁵² *China – GOES (AB)*, paras. 240-241, 258.

⁵³ See Appendix JPN-5.b (MOFCOM’s final anti-dumping determination).